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CHAPTER THREE

THE RULES OF THE LEGISLATIVE GAME

Congressional politics often has the flavor of a game—albeit a very important game—as the contending factions vie for control over public policy. The game is characterized by bargaining, procedural maneuvers, and close votes. On many issues, the outcome is uncertain. When the interests and rights of large groups in society are at stake, the game is emotionally charged. And the game is made more compelling by the personalities of the players. Members of Congress, presidents, staff aides, lobbyists, and other participants in congressional politics are ambitious people with large egos. Many of the players hate to lose. Skilled players are masters of the rules; they are proficient in strategy and tactics and take pleasure in anticipating the moves of their opponents. Their knowledge of the rules and their aptitude for strategy do not guarantee success but can give them an advantage. Even for spectators, mastering the rules and strategy is essential to appreciating and enjoying the game.

Legislative Rules in Perspective

Perhaps the most remarkable feature of the legislative process is how much it is stacked against the enactment of new law. Typically, getting a major bill passed involves attracting majority support in successive stages—first in a subcommittee, then in the full committee, then on the floor, then in conference, and then on the floor again for the conference report. This must be done in both houses and usually requires the cooperation of the majority party leadership and, in the case of the House, the Rules Committee. Once congressional passage is acquired, presidential approval or the support of an extraordinary majority in both houses must be obtained. Success, then, depends on finding support from multiple groups and subgroups that are not likely to have identical policy preferences. And proponents of a new program or project usually must successfully pilot the necessary legislation through the process twice—once for an authorization bill to create the program and once for the related appropriations bill to fund the program.

Normally, the members of Congress and other players in this game take the rules as they are and adjust their strategies accordingly. But the players also seek to create rules that suit their political needs, which change over time. The existing rules are seldom reevaluated all at once, in their entirety. Rather, their weaknesses or biases are considered

individually and solutions are adopted piecemeal. New options, limitations, and contingencies have been added incrementally, making the rules more elaborate and altering the strategic context within which legislative factions must compete for majority support. Over the more than two centuries that Congress has been making law, a remarkably complex set of rules, further elaborated by precedents and informal practices, have evolved to shape the legislative process.

It would be a serious mistake to infer that the rules are so detailed and biased that they dictate policy outcomes. They are not. With a few exceptions, rules do not stipulate the issues to be considered by Congress. National and international events shape those issues, and much of the legislative struggle involves getting new issues on the congressional agenda. Moreover, rules do not determine the policy preferences of the players. Who gets elected is the most important factor in determining what policies will be favored by Congress, although interest groups, presidents, and others influence members' policy choices as well. And the rules do not determine which of the interest groups, local government officials, political commentators, and others exercise the most influence on policy decisions. Larger social forces are more important than the legislative rules in this regard. Generally, the rules are not so detailed and biased that they can compensate for a scarcity of support and votes.

Nevertheless, the rules of the legislative game do matter. Some rules restrict or expand the options available to members by placing certain bills in order on the floor at certain times or by regulating the amendments that may be offered. Other rules set the decision rule—require a majority or supermajority for certain kinds of motions or measures. And yet other rules specify which members have the right to make a motion or to speak at certain times. Members know that Congress's rules matter and often regret that the general public does not appreciate their importance. Robert Michel (R-Illinois), the House Republican leader from 1981 to 1994, once lamented the difficulty of attracting public attention to the plight of the minority party under House rules:

> Nothing is so boring to the layman as a litany of complaints over the more obscure provisions of House procedures. It is all "inside baseball." Even among the media, none but the brave seek to attend to the howls of dismay from Republicans [then the minority party] over such esoterica as the kinds of rules under which we are forced to debate. But what is more important to a democracy than the method by which its laws are created?
>
> We Republicans are all too aware that when we laboriously compile data to demonstrate the abuse of legislative power by the Democrats, we are met by reporters and the public with that familiar symptom best summarized in the acronym "MEGO"—my eyes glaze over. We can't help it if the battles of Capitol Hill are won or lost before the issues get to the floor by the placement of an amendment or the timing of a vote. We have a voice and a vote to fight the disgraceful manipulation of the rules by the Democrats, and we make use of both. All we need now is media attention, properly directed to those boring, but all-important, House procedures.[1]

Representative Michel was well aware that misconceptions about congressional rules abound. Some believe that "if there's a will, there's a way"—legislators' effort, not rules, determine outcomes. Others see congressional procedures as arcane and deeply biased

against action—"the outcome is rigged by the rules." Particular rules become critical factors in shaping policy choices only in combination with the preferences of the players. If all members of Congress support a particular bill, it doesn't matter whether only a simple majority or a supermajority is required to pass it. But as divisions emerge, the particular rules under which bins are crafted and brought to a vote may influence the outcome. The ability to offer an amendment at a crucial moment, to delay action until more support can be attracted, or to gain enactment with a simple majority rather than a supermajority can be critical to the final policy outcome.

Knowledge of the rules can be an important resource. Former House Speaker John McCormack (D-Massachusetts) once recommended to new members that they "learn the rules and understand the precedents and procedures of the House. The congressman who knows how the House operates will soon be recognized for his parliamentary skills—his prestige will rise among his colleagues, no matter what his party."[2] In both houses of Congress, the rules and precedents are sufficiently complex that most members do not master them. Instead, they rely on knowledgeable colleagues, the parliamentarians, and others to advise them. But a member who masters the rules is valuable to other members, is more likely to be consulted, and is more likely to be viewed as fit for a leadership position.

The rules governing the legislative process have two main sources: the Constitution and Congress itself. The Constitution sets a few basic but critically important rules (see Chapter 2). Congress is a source of rules in three ways. First, the rules adopted by the House and Senate supplement the constitutional requirements. Second, several statutes or laws passed by Congress set procedural requirements for the two houses of Congress (although most of these allow the House and Senate to supplement or supplant the statutory requirements with their own rules). And third, the two houses of Congress have a large body of procedural precedents, built up over their more-than-two-hundred-year history, that govern many aspects of congressional operations that are not addressed elsewhere. This chapter outlines the rules that are critical to understanding legislative politics.[3]

Beyond the Constitution: House and Senate Rules

The Constitution outlines the fundamental rules of the legislative game but leaves out important details. How legislation is to be prepared for a vote in the House and Senate is left undefined, as are the means for resolving differences between the House and Senate. The Constitution makes the vice president the presiding officer of the Senate and specifies that an elected Speaker shall preside over the House, but it does not mention the specific powers of these presiding officers. The Constitution also does not mention how the president is to decide what to recommend to Congress or the degree to which the president will rely on departments and agencies to speak for the executive branch. And means for resolving differences between Congress and the executive branch are not discussed.

The details of legislative procedure have been filled in by the evolution of informal practices and the accumulation of recognized precedents. But in both houses of Congress a sizable number of formal rules have been established as well. Such rules both reflect and shape the distribution of power within Congress and between Congress and the president.

The framers of the Constitution anticipated the need for rules of procedure. The Constitution's Article 1, Section 5, provides that "each house may determine the rules of its proceedings." Each house has devised a complex set of standing rules. They concern the committee systems, procedures for amending and voting on legislation, ethics regulations for members and staff, and many other matters. It is important to keep three things in mind: each house has its own set of rules, each house may change its rules whenever it desires, and each house may waive its rules whenever it desires.

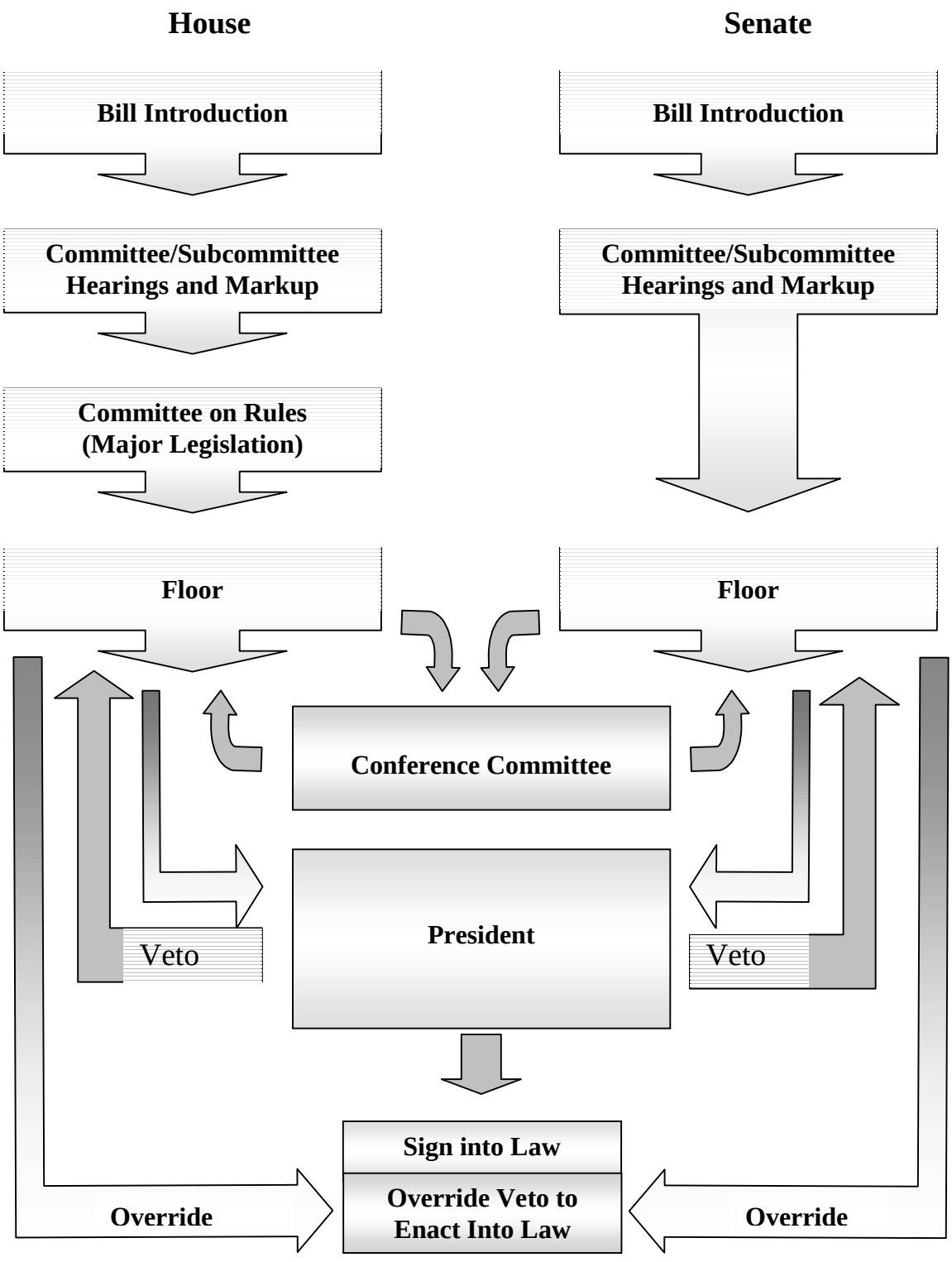
Formally, the House dissolves at the end of each two-year Congress and must reestablish its rules as one of its first items of business at the start of each new Congress. In nearly all cases, this is done with a few amendments sponsored by the majority party and approved on a party-line vote. The Senate, in contrast, considers itself to be a continuous body because at least two-thirds of its members continue to serve from one Congress to the next. For that reason, Senate's rules remain in effect from Congress to Congress unless the Senate votes to change them.

In addition to their own standing rules, the House and Senate are guided by statutes and precedents established by rulings of their presiding officers. When Congress chooses to include certain procedures in new statutes, such as the Congress Budget and Impoundment Control Act of 1974, these have the force of standing rules. Party rules govern such things as the selection of party leaders and committee appointments, and in some cases party rules dictate limits on the use of standing rules by party or committee leaders. Rulings of the presiding officers concern interpretations of statutory or standing rules.

The Standard Legislative Process

The standard legislative process in the modern Congress is outlined in Figure 3.1. It is called the standard process because it is patterned after the typical route legislation follows. The houses are free to alter it for certain legislation, and they have done so with greater frequency in the last decade or two. Even the standard process involves many options that are used regularly. The standard process involves multiple stages in each house, followed by steps for resolving House-Senate differences. The Constitution stipulates that after the House and Senate agree on legislation, the president must approve or veto it, and if it is vetoed, Congress may then attempt to override the veto. The standard process is like an obstacle course in which majorities must be created at several stages among different groups of legislators.

Figure 3.1. The Standard Legislative Process for a Major Bill.



Introduction of Legislation

The modern legislative process gives a member who is interested in enacting a new law three basic procedural options. First, she could introduce her own bill and work to gain passage in both houses. Second, she could seek to have her ideas incorporated into legislation drafted by a committee or by other members. And third, she could offer her proposal as an amendment to someone else's legislation. She might even pursue the three options simultaneously.

Legislation may be drafted by anyone—a member and his or her staff, a committee, lobbyists, executive branch officials, or any combination of insiders and outsiders—but it must be introduced by a member and while Congress is in session. In the House, a member simply places a copy of the draft legislation in a mahogany box, the "hopper," which is located at the front of the House chamber. In the Senate, members hand their draft legislation to a clerk or gain recognition to orally introduce it from the floor. In both houses, the chief sponsor of a measure may seek cosponsors. Legislation is designated as a bill, a joint resolution, a concurrent resolution, or a resolution and is numbered as it is introduced (see box on next page).

Although legislation is given a number, it may be known by several names. Each bill is required to have a formal title, which is often quite long. For example, the 1990 clean air legislation was formally titled "An act to amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes." But the bill is known by a more convenient, short title—the Clean Air Act Amendments of 1990. Most participants and observers simply called it the clean air bill. In addition, bills often come to be known informally by the names of their chief sponsors. The Pell Act, which provided grants to college students, was named after Senator Claiborne Pell (D-Rhode Island), who fought hard for student financial aid.

Because lobbyists and other outsiders cannot introduce legislation, they search for members who are willing to champion their causes and introduce legislation they have drafted. Although they would prefer to have influential members introduce their proposals, they also seek members who have the time and interest to give their legislation some priority. The right mix is often found in a majority party member of mid-level seniority who sits on the committee with jurisdiction over the bill. Usually, gaining the sponsorship of several members willing to work together on behalf of the legislation is advantageous. Better still is a group of cosponsors who are known as serious legislators and who represent a range of views and both parties. And, of course, sponsors are sought in both houses so that companion bills can be introduced at about the same time.

Members sometimes introduce measures "on request," as a courtesy to the president or someone else. When this is done, it is indicated next to the sponsors' names at the top of the first page of the legislation, signifying that the sponsor does not endorse the provisions of the bill. And legislation is often introduced by a committee chair on behalf of his or her committee, usually after the committee has drafted and approved the details. The chair is the formal sponsor, but the bill is recognized as a "committee bill."

Types of Legislation

There are four types of legislation. In each Congress, legislation of each type is generally numbered in the order it is introduced, although sometimes members request that specific numbers be reserved for their bills.

- ***Bills*** are designated H.R. (number) or S. (number). Public bills change public law. if enacted into law, public bills are published in a volume entitled Statutes at Large and given a public law number, such as P.L. I 11. Private bills address matters affecting individuals, such as an immigration case, and if enacted into law are not reported in Statutes at Large.
- ***Joint Resolutions*** are designated H.J. Res. (number) or S.J. Res. (number), most joint resolutions are the same as bills for all purposes—they change public law and if enacted into law are published in Statutes at Large and given a public law number. By tradition, certain kinds of legislation, such as special appropriations measures, are labeled joint resolutions. A special class of joint resolution is proposed constitutional amendments, which if passed by Congress do not go to the president but rather go directly to the states for ratification.
- ***Concurrent Resolutions*** are designated H. Con. Res. (number) or S. Con. Res. (number) and do not change public law. They concern matters affecting both houses, such as certain changes in congressional procedures, and so must be adopted by both houses. They sometimes are used to express the "sense of Congress" about certain issues or events.
- ***Resolutions*** are designated H. Res. (number) or S. Res. (number), resolutions do not change public law. They concern matters affecting only one house, such as most standing rules, and so are adopted only by that house. They sometimes are used to express the "sense of the House" or the "sense of the Senate" about certain issues or events.

Referral to Committee

After draft legislation is introduced, the House Speaker or the Senate's presiding officer refers it to the appropriate committees. In practice, the House and Senate parliamentarians inspect the content of proposed legislation and recommend referral to the committee or committees with the appropriate jurisdiction. Careful drafting of legislation may favorably influence the referral decision.

Legislation may be referred to more than one committee, an action called multiple referral, because committees sometimes share jurisdiction over certain kinds of legislation. Multiple referral has become quite common in the House. Since 1974, the Speaker of the House has been authorized to send legislation to committees jointly, sequentially, or by splitting it into parts. In the case of joint and sequential referral, the Speaker may set time limits for committee action. In recent Congresses, about one in ten

House measures has been multiply referred, with a higher proportion of important measures, closer to one in five, being so referred.[4]

Most referrals are routine, but occasionally referrals become controversial. Committee members care about referrals—staking a claim and winning a dispute over jurisdiction may expand a committee's jurisdiction and influence for years to come. Large, complex bills—such as major health care reform and telecommunications bills—often generate competition among committees with jurisdictions relevant to the legislation. Bills dealing with issues not anticipated by the existing rules governing committee jurisdictions are especially likely to stimulate competing jurisdictional claims. On some matters, the composition of the committee that receives a bill may affect the nature of the legislation it eventually reports to the floor, so bill sponsors and outside interests care about which committee receives the referral. On occasion, protracted negotiations among bill sponsors, committee leaders, and party leaders will precede introduction and referral of draft legislation.

Committee Action

Formally, committees have many options concerning how to process most of the legislation referred to them. They may approve the legislation and report it back to the parent house, with or without amendments; reject the measure outright; simply not consider it; or set it aside and write a new bill on the same subject. In practice, most proposed legislation does not survive committee consideration. Inaction at the committee stage dooms most legislation. In the 102d Congress (1991-1992), a fairly typical Congress, 4,245 bills and resolutions were introduced in the Senate and 7,184 were introduced in the House. But only 719 and 918 measures were reported by committees of the House and Senate, respectively—17 and 13 percent.[5] Many bills address the same subjects, others are not actively pushed by their sponsors, and yet others are opposed by committee majorities.

Committees may send a bill to a subcommittee for initial action or hold it for the full committee to consider. Although nearly all committees have subcommittees with well-understood jurisdictions, full committee chairs have substantial discretion in deciding whether to refer measures to subcommittees or hold them for full committee consideration. Full committee chairs can also control the scheduling of meetings to expedite or delay action on a bill or make it nearly impossible.

Committees and subcommittees may hold hearings to receive testimony on proposed legislation from members, administration officials, interest-group representatives, outside experts, and others. Hearings may address a general issue related to the legislation or the specifics of the legislation itself. Hearings are perhaps the most important formal information-gathering mechanism for Congress and its committees. Still, some hearings generate little but rhetoric and media coverage—members' questions turn into lengthy statements, celebrity witnesses offer scripted answers, and the television networks later replay a twenty-second exchange between an antagonistic committee member and an

acerbic witness. Other hearings are designed more to advertise a bill, raise issues, or draw public attention to a problem than to gather information.

If a committee or subcommittee intends to act on a bill, it normally conducts a "markup" on the legislation—a meeting at which the committee or subcommittee reviews the measure line-by-line and section-by-section and considers amendments. Committees may write their own legislation and have it introduced by their chair. When this approach is taken, the chair often proposes a "chair's mark" as the starting point for the markup. Once the markup by the full committee is complete, the measure may be reported to the floor if a majority of the committee votes to do so. Committees are free to report legislation with or without amendments or even without a recommendation that the legislation pass. But most important legislation is amended or written as a "clean" committee bill and then recommended to pass.

In the House, a bill reported to the floor from a committee must be accompanied by a document called a committee report. Senate committees are not required to write these reports but usually do. Committee reports provide the committee's justification for the bill and are usually drafted by staff members as a routine matter. Committee reports may include a statement of minority views on the legislation. On occasion, committee reports are controversial because they provide further interpretations of the bill that might guide later actions on the part of executive agencies or the courts. And committee reports sometimes help other members, not on the committee, and their aides explain complicated legislation to constituents. In the House, the Ramsayer rule (named after the member who proposed it years ago) requires that committee reports specify all changes to existing law that the proposed legislation would make.

Circumventing Committees

Proponents of legislation opposed by a committee have a variety of means for gaining floor action on the legislation without having it reported from the committee. These mechanisms are different in the two houses. Circumventing committees is more difficult in the House.

Circumventing Committees in the House

In the House, the options are to move to suspend the rules, to employ a discharge petition, or to gain a discharge resolution from the Rules Committee. To successfully suspend the rule and pass a bill (one motion), a member must be recognized by the Speaker to make the motion to suspend, and then a two-thirds majority must approve the motion. Because the Speaker is usually supportive of committees dominated by members of his own party, this approach is seldom a feasible strategy. Also, a two-thirds majority is unlikely to be obtained for a measure opposed by a committee. In recent decades, committee leaders have used the suspension process to speed floor action or avoid amendments to committee bills.

The discharge procedure allows any member to introduce a motion to discharge a measure from a committee once the measure has been before the committee for thirty

legislative days (that is, days on which the House meets). After the motion is filed, a discharge petition is prepared and made available for members to sign. Once 218 members sign the petition, the motion to discharge becomes privileged business on the second and fourth Mondays of the month (except during the last six days of a session). If the discharge motion is adopted by majority vote, a motion to call up the bill for immediate consideration is in order.

Until 1993, the identity of members signing a discharge petition was not made public until the 218th signature was added. The secrecy of the signatories made it difficult to hold members accountable and undermined lobbyists' efforts to pressure members to sign. Still, both before and after the 1993 rule change, the discharge process has seldom produced House action on a bill. In fact, only nineteen bills have been discharged and passed by the House since 1931. Two factors may account for this. First, committees are probably more or less in line with the House majority most of the time. And second, members may prefer to discourage a practice that could be used to discharge legislation from their own committees.

The third approach involves the Rules Committee's authority to report a privileged resolution that, if adopted, brings a bill to the floor for immediate consideration. The majority party members of the Rules Committee are appointed by the Speaker, so the committee is unlikely to use this power without the support of the Speaker.[6] Again, the Speaker usually works to support the actions of committee majorities.

Circumventing Committees in the Senate

In the Senate, committees can be circumvented by introducing nongermane amendments to bills under consideration on the floor, by placing bills directly on the calendar for floor action, by moving to suspend the rules, and by employing the discharge procedure. Unlike the House, which requires that amendments offered to a bill be germane to the content of the bill, Senate rules are silent on the content of amendments offered to most bills. Consequently, a senator is free to offer his or her bill as an amendment to another measure pending before the Senate, thus circumventing a committee that is refusing to report the bill to the floor. There is no guarantee that a majority will support the amendment, of course, but the mechanism is very easy to employ.

Another approach is to object to the standard procedure of referring a bill to committee. Under Senate Rule 14, a single senator may object and have a bill placed on the calendar, thus avoiding delays that might be caused by an unfriendly committee. But this may alienate senators who otherwise might support the bill. Senators also may seek to suspend the rules, but this requires a two-thirds vote under Senate precedents, which makes it more difficult to use successfully than a nongermane amendment. Alternatively, a senator can move to discharge a committee, but such motions are debatable and thus can be filibustered.

Floor Scheduling

Legislation is listed, in the order it is reported from committee, on one of four calendars in the House and one of two calendars in the Senate. Each house has multiple mechanisms for scheduling legislation for floor consideration so that priority legislation will not get backlogged behind less important legislation. Moreover, for certain types of "privileged" legislation—such as budget and appropriations bills—the House allows committee leaders to call up the legislation directly on the floor. In both houses, the majority party leaders assume primary responsibility for scheduling, but the two houses have developed very different methods for setting the floor agenda.

Scheduling in the House

Minor legislation and major legislation are treated differently in the House. In recent years, minor bills have been called up most frequently by unanimous consent requests or by motions to suspend the rules. When legislation is called up by unanimous consent, there typically is no discussion. Under a motion to suspend the rules and pass a bill, debate is limited to no more than forty minutes and no amendments are allowed, and a two-thirds majority is required for approval. The Speaker must recognize a member who seeks to bring up a minor measure by one of these means, so his cooperation is essential. In the 103d Congress (1993-1994), 46 percent of legislation considered on the House floor was called up by unanimous consent, and another 15 percent was called up under suspension of the rules.[7]

Major or controversial legislation is more troublesome. Sponsors of a major or controversial bill usually cannot obtain unanimous or even two-thirds majority support, so they go to the Rules Committee to request a resolution known as a "special rule," or simply a "rule." The box on the next page shows a recent rule adopted by the House for a bill dealing with medical research programs at the National Institutes of Health. The rule provides for priority consideration of the measure by allowing the Speaker to move the House into the Committee of the Whole, where the bill may be amended (see the section on Floor Consideration beginning on page 66). The rule limits general debate on the bill to one hour and allows only those amendments to the committee version that are listed in an accompanying report from the Rules Committee. This rule also sets aside objections (waives points of order) that may be made to the provisions of the bill or to amendments that violate House rules.

Special rules are highly flexible tools for tailoring floor action to individual bills. Amendments may be limited or prohibited. The order of voting on amendments may be structured. For example, the House frequently adopts a special rule called a king-of-the-hill rule. First used in 1982, a king-of-the-hill rule provides for a sequence of votes on alternative amendments, usually full substitutes for the bill. The last amendment to receive a majority wins, even if it receives fewer votes than some other amendment. This rule allows members to vote for more than one version of the legislation, which gives them the freedom both to support a version that is easy to defend at home and to vote for the version preferred by their party's leaders. Even more important, the procedure advantages the version voted on last, which is usually the proposal favored by the majority party leadership.

Excerpts of a Special Rule in the House

The following is the text of a resolution from the House Committee on Rules (a special rule) that authorizes the Speaker to bring up a bill, that bars members from objecting to parts of the bill that might violate House rules, and limits amendments and debate on amendments to as specified in a report that accompanied the resolution.

Resolved, That at any time after the adoption of this resolution the Speaker may, pursuant to clause 1(b) of rule 23, declare the House resolved into the Committee of the Whole House on the State of the Union for consideration of the bill (H.R. 4) to amend the Public Health Service Act . . . . Points of order against consideration of the bill shall be dispensed with. Points of order against consideration of the bill for failure to comply with clause 2(l)(6) of rule 11 are waived. General debate shall be confined to the bill and shall not exceed one hour equally divided and controlled by the chairman and ranking minority member of the Committee on Energy and Commerce. After general debate the bill shall be considered for amendment under the five-minute rule. It shall be in order to consider as an original bill for the purpose of amendment . . . the amendment in the nature of a substitute recommended by the Committee on Energy and Commerce now printed in the bill . . . No amendment to the committee amendment in the nature of a substitute shall be in order except those printed in the report of the Committee on Rules accompanying this resolution. Each amendment may be offered only in the order printed and by the named proponent or a designee, shall be considered as read, shall be debatable for the time specified in the report equally divided and controlled by the proponent and an opponent, shall not be subject to . . .

If the Rules Committee grants the rule and a majority of the House supports it, the way is paved for floor debate on the bill. In the 103d Congress, 28 percent of legislation considered on the floor was taken up under a special rule. Since the mid-1970s, the Rules Committee has been under the direction of the Speaker. In 1975, after years of struggle to get friendly, timely rules from a Rules Committee dominated by conservatives, the House Democratic Caucus granted the Speaker the power to appoint the committee's Democratic members, subject to its approval. Because the Democrats were the majority party and insisted on firm control of the rules, they reserved nine of the thirteen seats on the committee for their party (in the 102d Congress). Since the late 1970s, Rules Committee Democrats, often at the direction of the Speaker, have become much more creative in structuring the amendment process on the House floor.

Finally, five House committees (Appropriations, Budget, House Oversight, Rules, and Standards of Official Conduct) have direct access to the floor for certain kinds of legislation. Privileged measures—such as appropriations or tax bills—are considered critical to the House as an institution. When other legislation is not pending on the floor, a member authorized by one of these committees can move for immediate consideration a privileged measure. Special rules from the Rules Committee are the single biggest group

of privileged measures, which constituted 28 percent of all measures considered on the House floor in a recent Congress. Although privileged bills do not require a special rule from the Rules Committee, their sponsors often seek one anyway to limit or structure debate and amendments or to waive a House rule that might otherwise be used to raise a point of order against the bill.

Special Rules of the House

Since 1979, the House Rules Committee, in partnership with the majority party leadership, has proven remarkably creative in designing special rules to govern floor debate and amendments on major legislation. Different styles of special rules have gained informal names that are widely recognized by the members of the House. All of these creative special rules waive many standing rules of the House governing floor debate and amendments.

- *Restrictive Rules*. Three kinds of rules restricting amending activity were known before the 1980s—modified open, modified closed, and closed rules. Closed rules simply barred all amendments. Modified open rules allowed amendments except for a specific title or section of a bill. Modified closed rules barred amendments except for a specific title or section of a bill. Since the early 1980s, restrictions have come in so many combinations that these traditional categories do not capture their diversity. An example is provided in the box above.
- *King-of-the-Hill Rules*. Invented by Democrats in the early 1980s and sometimes called king-of-the-mountain rules, these rules provide that the House will vote on a series of alternative versions of a bill (substitutes) in a specified order and that the last version to receive a majority vote (no matter how large the majority on other versions) wins.
- *Queen-of-the-Hill Rules*. Invented by Republicans in 1995, these rules provide that the House will vote on a series of alternative versions of a bill in a specified order and that the version with the most votes wins. If two versions receive the same number of votes, the last one voted on wins.
- *Time-Limit Rules*. Invented by Republicans in 1995, these rules provide that all debate and amending activity will be completed within a specified period of time.

Scheduling in the Senate

Scheduling is one area, and certainly not the only one, in which the Senate is very different from the House. In some respects, floor scheduling is simple in the Senate. Bringing up a bill is a matter of making a motion to proceed to its consideration. This is done by the majority leader, and though the motion technically requires a majority vote, it usually is approved by unanimous consent. The Senate has no committee empowered to report special rules.

What appears bizarre to many newcomers to Senate politics is that the motion to proceed is debatable and may be subject to a filibuster (see the accompanying box). That is, senators may refuse to allow the majority leader's motion to come to a vote by conducting extended debate. In fact, they may not even have to conduct the filibuster, because just the threat of doing so is usually enough to keep legislation of only moderate importance off the floor. The reason is that the majority leader usually cannot afford to create a logjam of legislation awaiting floor consideration by subjecting one measure to extended debate. Under Senate Rule 22, breaking a filibuster is a time-consuming process that requires a three-fifths constitutional majority—if no seat is vacant, sixty senators—willing to invoke cloture. In 1994, a proposal to limit debate on motions to proceed was blocked by Republicans who threatened to filibuster the resolution providing for the change in the rules.

A good example of a bizarre filibuster was the one conducted by Senator Alfonse D'Amato (R-New York) in October 1992. D'Amato objected to the fact that a tax break for a Cortland, New York, typewriter manufacturer had been stricken from a bill in a conference committee, so he filibustered the entire bill. D'Amato held the floor for more than fifteen hours, sometimes with the assistance of Senators Patrick Moynihan (D-New York) and John Seymour (R-California). Under the Senate's rules, D'Amato could not sit down or excuse himself to go to the bathroom without yielding the floor. The quality of this extended "debate," which prevented the Senate from completing its business and adjourning for the year, degenerated as time wore on. At one point, D'Amato reported:

> The young lady who works for me in my Syracuse office, Marina Twomey—her parents. She married a young boy who I ran track against in high school—went to Andrew Jackson, met Larry, he went up to Syracuse on a track scholarship, competed. And he married this lovely girl, Marina, who came from Cortland. This is how I came to know Cortland. I visited her and her family.
>
> Fate and life and what not, circumstances as we talk, Marina is now one of the two people—the other you know for many years, Gretchen Ralph, who used to be the leader of the symphony, or the executive director—and a great community person. She and Marina Twomey run my Syracuse office. We talk about Cortland and knowing and having an affinity.[8]

By the time D'Amato gave up, the filibuster consumed a little more than eighty-six pages of the Congressional Record. This was not enough to break the record established by Strom Thurmond (R-South Carolina), who spoke for more than twenty-four hours against a civil rights bill in 1957.

The ever-present threat of a filibuster requires that scheduling be a matter of consultation and negotiation among the majority leader, the minority leader, bill sponsors, and other interested senators. These discussions, conducted in private, often yield bargains about how to proceed and may include compromises about substantive policy matters. The agreement, which may include limitations on debate and amendments, is then presented to the Senate. It requires unanimous approval to take

effect. The process contrasts sharply with the formal Rules Committee hearings and majority approval of special rules in the House.

Congressionally Speaking . . .

The term filibuster is an anglicized version of the Dutch word for "free-booter." A "filibusterer" was a sixteenth- and seventeenth-century pirate. How it came to be the Senate term for talking a bill to death in the nineteenth century is not clear. Political lexicographer William Safire notes that one of the term's first appearances was in 1854, when the Kansas-Nebraska Act was filibustered.

The current Senate Rule 22 provides for cloture (closing of debate) with the approval of a three-fifths majority of all senators present. That is, if all senators are present, at least sixty senators must support a motion for cloture to stop a filibuster. An exception is made for measures changing the Senate rules, for which a vote of two-thirds of those senators present and voting is required.

The record number of cloture votes on a single bill was set in 1988, when Majority Leader Robert Byrd tried and failed eight times to stop a Republican filibuster against a Democratic campaign finance reform bill.

Floor Consideration

For most minor and routine legislation that reaches the House or Senate floor, floor consideration is brief, no amendments are offered, and the legislation is approved by voice vote or by unanimous consent. On major legislation, many members usually want to speak and offer amendments, creating a need for procedures that will maintain order and expedite action. The two houses have quite different floor procedures for major legislation.

Floor Action in the House

In the House, committee chairs write a letter to the Rules Committee chair, requesting a hearing and a special rule for major legislation they are about to report to the floor. Once a special rule for a measure is adopted, the House may resolve to convene "the Committee of the Whole House on the State of the Union" to conduct general debate and consider amendments. The Committee of the Whole, as it is usually abbreviated, consists of the full House meeting in the House chamber and operating under a special set of rules. For example, the quorum required to conduct business in the Committee of the Whole is smaller than it is for the House (100 versus 218), making it easier to conduct business while members are busy with other activities.

A chair appointed by the Speaker presides over the Committee of the Whole. The Committee of the Whole first conducts general debate on the bill and then moves to

debate and votes on amendments. Legislation is considered section by section. An amendment must be relevant—germane—to the section under consideration, a requirement that is interpreted very restrictively. For example, an amendment to limit abortions cannot be considered when a bill on water treatment plants is being debated. Amendments sponsored by the committee originating the legislation are considered first for each section and are considered under the five-minute rule. That is, members are allowed to speak for five minutes each on an amendment. The special rule providing for the consideration of the measure may—and often does—alter these standard procedures.

Voting on amendments in the Committee of the Whole can take one of three forms: voice vote, standing division vote, or recorded vote. On a voice vote, members yell out "yea" or "nay," and the presiding officer determines whether there were more yeas or nays. On a standing division vote, members voting "yea" stand and are counted, followed by those voting "nay." Since 1971, it has been possible to get a recorded vote, for which each individual member's position is officially and publicly recorded. Under the current rule, a recorded vote in the Committee of the Whole must be demanded by twenty-five members. Since 1973, recorded voting has been done by a computerized system. Members insert an identification card into a small voting box and push a "yea," "nay," or "present" button. This system is used for recording other voting in the House as well.

Legislation cannot be passed in the Committee of the Whole, so once debate and amending actions are complete, the measure, along with any approved amendments, is reported back to the House. Special rules usually provide that the "previous question" be ordered, preventing additional debate by the House. The amendments approved in the Committee of the Whole may then be subject to separate votes; if no one demands separate votes, however, the amendments are voted on as a group. Next, a motion to recommit the legislation to committee, which by custom is made by a minority party member, is in order. If the motion to recommit is defeated, as it nearly always is, or simply not offered, the House moves to a vote on final passage.

Floor Action in the Senate

The Senate lacks detailed rules or a well-structured process for debating and amending legislation on the floor. What happens after the motion to proceed is adopted depends on whether or not unanimous consent has been obtained to limit or structure debate and amendments. In the absence of a unanimous consent agreement providing otherwise, Senate rules do not limit debate or amendments for most legislation. Debate and amending activity may go on for days—the Senate has no five-minute rule or general germaneness rule for amendments. The floor schedule becomes very unpredictable. Normally, the Senate muddles through controversial legislation with one or more unanimous consent agreements that limit debate, organize the consideration of amendments, and lend some predictability to its proceedings.

One reason consent may not be acquired for a time limitation on debate is that some senators may want to have the option of filibustering. A filibuster, and sometimes just the threat of one, will force a compromise. If a compromise is not possible, cloture must be invoked, or the majority leader will be compelled to withdraw the measure from the floor.

Once cloture is invoked, thirty hours of debate are permitted (under the current rule), and germane amendments submitted before cloture was invoked can be considered. In fact, cloture is sometimes invoked to avoid the inclusion of nongermane amendments that may require embarrassing votes, complicate negotiations with the House, or risk a presidential veto.

The President of the Senate

Under the Constitution, the vice president serves as president of the Senate. The vice president retains an office in the Capitol, may preside over the Senate, and may cast a vote to break a tie. Because recent vice presidents have had a policy-making role in the administration and travel frequently, they have not used their Capitol office on a regular basis and have seldom presided over the Senate.

Eleven vice presidents never cast a vote in the Senate. In contrast, George Bush, when he was vice president between 1981 and 1989, cast seven votes, and Albert Gore, President Bill Clinton's vice president, cast two votes in 1993. The record belongs to John Adams, the first vice president, who cast twenty-nine tie-breaking votes during the eight-year presidency of George Washington.

The modern Senate does not use a committee of the whole. Floor voting can take one of three forms: voice vote, division vote, and roll-call vote. Voice and division votes are similar to those in the House, although the Senate very seldom uses division votes. The Senate does not have an electronic voting system, so recorded votes, which can be demanded by eleven senators, are conducted by a name-by-name call of the roll. The vote on final passage of a bill occurs as specified in the unanimous consent agreement or, in the absence of an agreement, whenever senators stop talking and offering amendments.

Resolving Differences Between the Houses

The two houses must approve identical bills before legislation can be sent to the president. This can be accomplished in several ways. One house can accept a measure passed by the other house. The houses may exchange amendments until they agree on them. Or they may agree to hold a conference to resolve matters in dispute and then send the bill back to each house for approval. For complex or controversial legislation, such a conference is the only practical approach. No more than one in five measures goes to conference, although nearly half of all measures receiving a House special rule goes to conference.

Members of conference committees, known as conferees, are appointed by the presiding officers of the two houses, usually according to the recommendations of standing committee leaders. Committee leaders take into account potential conference committee delegates' seniority, interest in the legislation, and other factors, and some

committees have established traditions concerning who shall serve on conference committees, which the leaders observe. Conference committees may be of any size. Except for the large conferences held for budget measures, the average conference has just a half dozen representatives and a similar number of senators.[9]

Congressionally Speaking . . .

An ***engrossed bill*** is the final version of a bill passed by one house, including any amendments that may have been approved, as certified by the clerk of the House or the secretary of the Senate.

An ***enrolled bill*** is the final version of a bill as approved by both houses, printed on parchment, certified by either the clerk of the House or the secretary of the Senate (for the house that first passed it), and signed by the Speaker of the House and the president pro tempore of the Senate; it has a space for the signature of the president.

Agreements between House and Senate conferees are written up as conference reports, which must be approved by a majority of each house's conferees. Conference reports must be approved by majority votes in the House and Senate. In most recent Congresses, conference committees filed about 100 conference reports, sometimes fewer. That represented only about ten to fifteen percent of the bills and joint resolutions enacted into law during the Congress. Plainly, most legislation is routine and non-controversial and therefore does not require conference action. Only about 6 percent of all bills introduced were enacted into law.

House and Senate Rules Compared

The procedures of the House reflect a majoritarian impulse: A simple majority is allowed to take action expeditiously and can do so easily if it is led by the majority party leadership. The House carefully follows established rules and practices, which are quite lengthy. (House rules consume nearly seven hundred pages.) The House makes exceptions to its most important floor procedures by granting and adopting special rules by simple majority vote. Procedures dictating internal committee procedures are elaborate. Debate is carefully limited, and the timing and content of amendments are restricted.

The rules of the Senate are relatively brief (less than one hundred pages). They reflect an egalitarian, individualistic outlook. The right of individuals to debate at length and to offer amendments on any subject is generally protected. Only extraordinary majorities can limit debate or amendments. And for reasons of practicality, most scheduling is done by unanimous consent. The majority party usually must negotiate with minority party members to schedule floor action and to bring important measures to a vote.

Consequently, Senate decision making is more informal and less efficient than House decision making.

Summary of Differences in Rules and Practices Between the House and Senate	
House	**Senate**
Uses multiple referral frequently	Uses multiple referral infrequently
Uses special rules from the Rules Committee to schedule major legislation for floor consideration	Relies on unanimous consent and motions to proceed from the majority leader to schedule major legislation for floor consideration
Has a general rule limiting debate	Has no general rule limiting debate
Has a general rule barring nongermane amendments	Has no general rule barring nongermane amendments
Usually further restricts debate and amendments with special rules	Further restricts debate and amendments only by unanimous consent or by cloture
Does not allow filibusters	Allows filibusters for most legislation

In part, these differences are due to the different sizes of the houses. The large size of the House requires that its rules more explicitly and stringently limit participation on the floor. Scheduling floor action to suit the needs of individuals is out of the question. In contrast, Senate leaders manipulate the floor schedule through unanimous consent agreements to meet the requests of individual senators. The Senate's smaller size allows peer pressure to keep obstructionism in check. A senator who objects frequently to unanimous consent requests risks objections to consideration of his or her own bills.

The differences also reflect the unique history of each house. Whereas the House early on adopted means for a majority to easily impose its will, the Senate early on removed any means for a majority to force a vote on a matter. The result was that any proposal to amend the Senate rules that disadvantaged the minority could be blocked. The Senate is therefore forced to adapt to new circumstances without changing its formal rules, whereas the House can rapidly adopt new rules, and often does on party-line votes. The history of the House has yielded lengthy rules that limit participation and protect the majority. The Senate's history is filled with failed attempts to give greater structure to its proceedings and more power to the majority.[10]

Other factors may play a role in shaping congressional rules. For example, equal representation of the sovereign states is a fundamental feature of the Senate. The preservation of senators' individual rights is a means of preserving the power of the sovereign states they represent. A more majoritarian, House-like Senate would put the interests of a minority of states at a greater disadvantage relative to those of a majority of states. Senators who believe that their states would be frequently disadvantaged on important matters prefer a system that preserves individual and minority rights.

And finally, there are the consequences of decisions about rules made in the past. When the Senate decided in 1806 to drop from its rules a provision known as the previous question motion, which allowed members to move to stop debate and bring a matter to a vote, it became more difficult for the Senate to change its rules in the future. The result of eliminating the previous question motion was that senators could filibuster to prevent an issue, including a change in the rules, from coming to a vote. A small group of senators, with sufficient physical stamina, can talk a proposal to death. Rule 22, adopted in 1917, allowed an extraordinary majority to invoke cloture—that is, to force an end to debate. Since then, at least a fairly broad base of support has been required to bring a rules change to a vote. The result has been fewer changes and less complexity in Senate rules than in House rules.[11]

Authorizing and Appropriating

Under congressional rules, most federal government programs are subject to two types of legislation: authorization bills and appropriations bills. Theoretically, an authorization bill sets the program's organization, rules, and a spending ceiling, and an appropriations bill provides the money. House and Senate rules require that an authorization bill creating a federal program or agency be passed before an appropriations bill providing spending authority can be adopted. The authorization bill and the appropriations bill for each program or set of programs both follow the standard legislative process. For most programs, a new appropriations bill must be approved each year.

For example, suppose that proponents of a bill creating a new financial aid program for college students managed to get enacted into law. They would have taken the bill through the House Committee on Education and the Workforce and the Senate Committee on Health, Education, Labor, and Pensions. The bill would specify how the program was to be organized, how financial aid decisions were to be made, and how much—say $400 million—could be spent, at most, on the program in any one year. A separate appropriations bill, which would include spending authority for the new program, must be passed before the program could begin operations. The House and Senate appropriations committees might decide that only $250 million should be spent on the program. If the House and Senate went along with the lower figure, the program would be limited to a $250 million budget for the next year.

In the modern Congress, jurisdiction over authorization legislation is fragmented among many standing committees. Jurisdiction over appropriations is consolidated in one

appropriations committee in each house, although each of the appropriations committees has 13 subcommittees that do most of the work. And jurisdiction over taxes, the major source of federal revenue, falls to one tax-writing committee in each house, the House Committee on Ways and Means and the Senate Committee on Finance. Thus, power over fiscal policy is not only shared between the House, Senate, and president, it is shared among the various committees within House and Senate as well.

The system creates tensions between the congressional committees. Tax committees do not like to pass bills increasing taxes to cover spending other committees have authorized. Authorizing committees often dislike the handiwork of the appropriations committees. A small appropriation can defeat the purpose of the original authorization bill. In response, authorizing committees have pursued a number of tactics, such as including provisions for permanent appropriations for some programs (social security is one), to avoid the appropriations process.

Variations in the Legislative Process

For most of the twentieth century, nearly all major and minor legislative measures have followed the path of the standard processes described in this chapter. The House and Senate were always free to modify their processes and have sometimes handled a bill in a special way. In the last three decades of the twentieth century, nonstandard approaches to preparing legislation for a vote have been employed with increasing frequency. By-passing committees, negotiating details in summits between congressional leaders and representatives of the president, having multiple committees consider bills, and drafting omnibus bills characterize the action on a large share of major legislation considered by recent Congresses. In fact, according to one survey of the processes used by the House and Senate on major legislation in the late 1980s and early 1990s, four out of five measures in the House and two out of three in the Senate were considered under some non-standard procedure.[12]

Unorthodox legislative procedures have been invented for many reasons. The sheer complexity of some new public policies and legislative measures forces action by many committees—and compels committee and party leaders to find new ways to piece together legislation, negotiating a bewildering array of technical provisions and working with the president to avoid a veto. The reforms of the 1970s—which strengthened the House Speaker's procedural options and reduced the power of full committee chairs—were discovered to have unanticipated uses. And perhaps most important, partisan maneuvering stimulated procedural innovations as first one party and then the other sought parliamentary advantages when pushing legislation.

Furthermore, both houses of Congress often create new rules in response to new challenges. In some cases the House and Senate have tailored their procedures to particular kinds of legislation or specific issues. In the last two decades, for example, Congress has created "fast-track" procedures for considering trade agreements negotiated by the executive branch with foreign governments. These procedures limit debate and bar

amendments to speed congressional approval and limit congressional second-guessing of executive branch decisions.

The Demise of the Senate Parliamentarian

The presiding officers of the House and Senate often rely on the parliamentarians for advice on how to rule on parliamentary procedure. The House and Senate parliamentarians and their assistants are staff appointed to provide advice on and off the floor. Recent parliamentarians have been lawyers and all have been expected to be nonpartisan.

In 2001, the Senate Parliamentarian Bob Dove was fired. Technically, the parliamentarian is hired and fired by the Secretary of the Senate, who is elected by the Senate but is always the handpicked choice of the majority leader. The precipitating cause of the firing was a procedural ruling by Dove that seemed reasonable but disadvantaged the Republicans on an important budget matter. An earlier decision by Dove that rankled some Republicans was still fresh in the mind of many.

Dove had served the Senate since 1966, when he became an assistant parliamentarian. The irony of his firing was that Democrats saw Dove as a Republican partisan. He became Parliamentarian in 1981 after the Republicans took majority control of the Senate but was replaced in 1986 when the Democrats regained the majority. He then served on the staff of Republican leader Robert Dole (R-KS) until the Republicans again gained a majority and he was reinstalled to the post. While parliamentarian, Dove frustrated Democrats on several occasions with rulings they thought reflected his partisan biases.

An even more important class of legislation that has inspired special procedures concerns fiscal policy: decisions about federal spending, taxing, and budget deficits and surpluses. The Congressional Budget and Impoundment Control Act of 1974, often known simply as the Budget Act of 1974, established a process to coordinate congressional decision making affecting fiscal policy. In the 1980s and early 1990s, skyrocketing federal deficits motivated Congress to set tight rules constraining fiscal choices and to adopt unique procedures for enforcing the new constraints.

In other cases, special procedures are invented for an individual bill. In the House, special rules governing floor debate have become more complex, as have the provisions of unanimous consent agreements in the Senate. Task forces, usually appointed by party leaders, have become an everyday part of decision making in the House. Inter-committee negotiations guided by party leaders sometimes occur after committees report but before legislation is taken to the floor. In these ways, the traditional committee-to-floor-to-conference process has become a less accurate description of the increasingly meandering route through Congress of major legislation.

Conclusion

Rules matter. Legislative rules, whether they arise from the Constitution or elsewhere, determine procedural advantages among the players, factions, and parties that compete for control over public policy. The rules are also the foundation of Congress's major organizational features, such as its leadership positions and committees, which help the institution manage a large and diverse workload and are generally designed to serve the political needs of its members.

The House and Senate have evolved quite different rules. Compared with Senate rules, House rules make it more difficult to circumvent committees, more strictly limit participation on the floor, and give the majority a greater ability to act when confronted with an obstructionist minority. The House is more majoritarian; the Senate is more egalitarian. The House is more committee-oriented; the Senate is more floor-oriented.

But the rules do not determine the political and policy objectives of Congress. Those objectives are primarily the product of the electoral processes through which people are selected to serve in Congress. Campaigns and elections connect members to their constituencies and lead many members to take a local, sometimes quite parochial, outlook in legislative politics. They also determine the basic partisan and ideological balance of the House and Senate. It is to congressional elections and policy alignments that we now turn.

NOTES

[1] Robert H. Michel, "The Minority Leader Replies," *Washington Post,* December 29,1987, p. A14.

[2] Quoted in the *Congressional Record,* March 9, 1976, p. 5909.

[3] For more detail on congressional rules of procedure, see Walter J. Oleszek, *Congressional Procedures and the Policy Process,* 4th ed. (Washington, D.C.: CQ Press, 1996), p. 136.

[4] Roger H. Davidson, Walter J. Oleszek, and Thomas Kephart, "One Bill, Many Committees: Multiple Referrals in the U.S. House of Representatives," *Legislative Studies Quarterly* 13 (February 1988), p. 8; Stanley Bach and Steven S. Smith, *Managing Uncertainty in the House of Representatives* (Washington, D.C.: Brookings Institution, 1988), p. 40.

[5] *Congressional Record,* Daily Digest, October 29,1992, p. D1335.

[6] If the Rules Committee fails to act, a resolution can be introduced by another member and a discharge petition can be used to force House action on it.

[7] Oleszek, *Congressional Procedures and the Policy Process,* p. 136.

[8] *Congressional Record,* October 5, 1992, p. S16894.

[9] Republicans have appointed much smaller conference delegations than did the Democrats when they were in the majority. See Steven S. Smith, *Call to Order: Floor Politics in the House and Senate* (Washington, D.C.: Brookings Institution, 1989), pp. 209-210.

[10] See Sarah A. Binder and Steven S. Smith, "Acquired Procedural Tendencies and Congressional Reform," in James A. Thurber and Roger H. Davidson, eds., *Remaking Congress* (Washington, D.C.: CQ Press, 1995), pp. 53-71; Sarah A. Binder, *Minority Rights, Majority Rule: Partisanship and the Development of Congress* (Cambridge: Cambridge University Press, 1997); and Sarah A. Binder and Steven S. Smith, *Politics or Principle: Filibustering in the United States Senate* (Washington, D.C.: Brookings Institution, 1997).

[11] There are other reasonable grounds for expecting the observed differences between the houses. For example, the six-year, staggered terms of senators may make senators somewhat less concerned about legislative efficiency and quick legislative victories. The two-year time horizon of the House puts greater pressure on its members to rapidly find policy majorities, pass legislation, and satisfy constituency demands. And senators, whose states contain a greater variety of interests than most districts, may be more insistent on their ability to pursue the particular mix of interests found in their individual states.

[12] Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress* (Washington, D.C.: CQ Press, 1997), p. 72.