

CONGRESSIONAL COMPROMISE

*Amendments between the
House and the Senate*

Julio D. Nachtrieb
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Editors

Laws and Legislation

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LAWS AND LEGISLATION

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AMENDMENTS BETWEEN THE
HOUSE AND THE SENATE**



JULIO D. NACHTRIEB

AND

LIAM J. CADRIEL

EDITORS

Nova Science Publishers, Inc.
New York

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LIBRARY OF CONGRESS CATALOGING-IN-PUBLICATION DATA

Available Upon Request

ISBN : 978-1-60741-796-5

Published by Nova Science Publishers, Inc. ✚ New York

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PREFACE

The Constitution requires that the House and Senate approve the same bill or joint resolution in precisely the same form before it is presented to the President for his approval or veto. To this end, both houses must pass the same measure and then attempt to reach agreement about its provisions. Congress relies on two formal means of resolving differences on House and Senate versions of legislation: conference committee and amendment exchange. This book explores the procedural options for resolving differences through amendment exchange and identifies legislative options at each stage of the amendment exchange process, first for the Senate and then for the House.

This book consists of public documents which have been located, gathered, combined, reformatted, and enhanced with a subject index, selectively edited and bound to provide easy access.

Chapter 1 - The Constitution requires that the House and Senate approve the same bill or joint resolution in precisely the same form before it is presented to the President for his approval or veto. To this end, both houses must pass the same measure and then attempt to reach agreement about its provisions.

The House and Senate may be able to reach agreement by an exchange of amendments between the houses. Each house has one opportunity to amend the amendments from the other house, so there can be Senate amendments to House amendments to Senate amendments to a House bill. House amendments to Senate bills or amendments are privileged for consideration on the Senate floor; Senate amendments to House bills or amendments generally are not privileged for consideration on the House floor. In practice, the House often disposes of amendments between the houses under the terms of a special rule reported by the Rules Committee. The Senate sometimes disposes of House

amendments by unanimous consent, but the procedures associated with the exchange of amendments can become complicated.

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

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

On the House and Senate floors, conference reports are privileged and debatable, but they are not amendable. The Senate has a procedure to strike out portions of the conference agreement that are considered, under Senate rules, to be "out of scope material" or "new directed spending provisions." The House also has a special procedure for voting to reject conference report provisions that would not have been germane to the bill in the House. After agreeing to a conference report, the House or Senate can dispose of any remaining amendments in disagreement. Only when the House and Senate have reached agreement on all provisions of the bill can it be enrolled for presentation to the President.

Chapter 2 - A bill is subject to amendment as soon as the Senate begins to consider it. Committee amendments are considered first; then Senators can offer amendments to any part of the bill in any order. Senators may debate each amendment without limit unless the Senate (1) agrees to a motion to table (kill) the amendment, (2) agrees to a unanimous consent request to limit debate on the amendment, or (3) invokes cloture, limiting debate on the amendment or on the bill and all amendments to it.

There are several different types of amendments. A first degree amendment proposes to change the text of the bill; a second degree amendment proposes to change the text of a first degree amendment that the Senate is considering. Third degree amendments are not allowed. An amendment may propose to strike out language from a bill (or a first degree

amendment), to insert new language, or to replace language by striking out and inserting. In general, an amendment that proposes to replace the entire text of a bill is known as an amendment in the nature of a substitute; an amendment to replace the entire text of a first degree amendment is known as a substitute amendment. An amendment, especially in the second degree, that makes some lesser change is known as a perfecting amendment.

Depending on the kinds of amendments that Senators offer and the order in which they are recognized to offer their amendments, Senators can offer anywhere from three to 11 amendments before the Senate has to vote on any of them. “Amendment trees” are the graphic ways of depicting these possible situations.

The Senate only requires that amendments be germane when amendments are offered (1) to general appropriations bills and budget measures, (2) under cloture, or (3) under certain unanimous consent agreements and certain statutes. Otherwise, Senators can offer amendments on any subject to any bill. There are several general restrictions on the amending process. For example, it is not in order to propose an amendment that proposes only to amend language in a bill that already has been amended. However, it is possible to re-amend that language in the process of amending a larger portion of the bill. There also are special provisions in Senate rules to limit amendments to appropriations bills if those amendments propose unauthorized appropriations or changes in existing law. The Senate can, and sometimes does, choose not to enforce these restrictions.

The Senator who has offered an amendment may withdraw or modify it at any time until the Senate has taken some action on it, such as by amending it or by ordering a rollcall vote on it. Senators also may demand that certain amendments be divided into two or more parts. A rollcall vote on an amendment is ordered at the request of at least eleven Senators. The Senate’s amending process changes under cloture. For example, no amendment can be offered under cloture unless a Senator submitted it in writing before the cloture vote occurred.

This report will be updated as events warrant.

Chapter 3 - Most amendments that Representatives propose to legislation on the House floor are offered in Committee of the Whole. Measures considered under suspension of the rules are not amendable on the floor, and few amendments are proposed to bills and resolutions considered in the House, or in the House as in Committee of the Whole.

The House’s procedures recognize distinctions between first and second-degree amendments, between perfecting and substitute amendments, and

among amendments in the forms of motions to strike, to insert, and to strike out and insert. An amendment in the nature of a substitute proposes to replace the entire text of a bill or resolution. All amendments must be germane to the text they would amend, and they are subject to other general prohibitions such as that against proposing only to re-amend language that already has been fully amended. Additional restrictions apply to appropriations and tax amendments, and the budget process creates various other points of order that Members may make against certain amendments. In general, a Member must make a point of order against an amendment before debate on it begins, unless that point of order is waived by a special rule.

In Committee of the Whole, measures usually are considered for amendment one section or title at a time. Members must offer their amendments to appropriate parts of a bill when it has been read or designated. Each amendment is debated under the five-minute rule, providing five minutes for the Member offering the amendment and five minutes for a Members in opposition. After this first 10 minutes of debate, Members may obtain additional time for debate by offering pro forma amendments in the form of motions to strike the last word or the requisite number of words. Unless barred by the terms of a special rule reported by the House Committee on Rules, each amendment in Committee of the Whole may be amended by a perfecting amendment or a substitute amendment or both. A substitute for an amendment also is amendable. After the Committee of the Whole disposes of the last amendment to be offered to the bill, it rises and the House then votes again on all the amendments the Committee has approved. A recommittal motion usually offers a final opportunity to amend a bill or joint resolution before the House votes on passing it.

Chapter 4 - The House and Senate must agree to the same measure with the same legislative language before a bill can be presented to the President. To resolve differences between House and Senate versions of legislation, Congress might appoint a conference committee to negotiate a compromise that is then reported to each chamber for consideration. Alternatively, Congress might use the process of amendment exchange. In this process, each chamber acts on the legislation in turn, shuttling the measure back and forth, sometimes proposing alternatives in the form of amendments, until both chambers have agreed to the same text.

The difference between a conference committee and an amendment exchange is not necessarily in the way a policy compromise is reached, but in the formal parliamentary steps taken after the principal negotiators have agreed to a compromise. After each chamber has passed its version of the

legislation, or in some cases even before that stage, Senators, Representatives, and staff from the relevant committees of jurisdiction engage in policy discussions in an effort to craft compromise legislation that can pass both chambers. These informal meetings and conversations are sometimes referred to colloquially as “pre-conference,” although they need not be followed by the convening of a formal conference committee. The phrase is applied generally to final-stage efforts to prepare legislation for passage in both the House and the Senate.

The decision to use the amendment exchange route has procedural implications. Amendments between the houses are not subject to the same procedures as conference reports. For example, the potentially time-consuming steps for arranging a conference in the Senate and some of the limitations on the content of conference committee reports do not apply to amendment exchange. Furthermore, amendment exchange provides alternative opportunities to structure decisions, because the policy compromise can be voted on as separate amendments between the houses, instead of as a single legislative package. In addition, amendments between the houses are not considered under all of the same procedures as bills on initial consideration. As a result, a chamber might use this process to first consider what is effectively a new legislative proposal, or a new combination of legislative proposals, in the form of an amendment between the houses. In the Senate, House amendments are privileged, and therefore their consideration typically begins immediately after the majority leader asks the Presiding Officer to lay them before the Senate. In contrast, to begin consideration of a bill or resolution, the majority leader must either obtain unanimous consent or make a motion to proceed to the measure, which is debatable in most circumstances. Furthermore, in the House, consideration of Senate amendments is unlikely to include an opportunity for a member of the minority party to offer a motion to recommit, an opportunity that is generally assured on initial consideration of a bill or joint resolution.

In an amendment exchange, the formal actions the chambers generally take on amendments from the other chamber are 1) to concur, 2) to concur with an amendment, or 3) to disagree. There is a limit to the number of times each house can propose amendment(s) and send the measure back to the other house, but in both chambers the limitation can be waived. In the contemporary House,

Senate amendments are typically disposed of through a special rule reported by the Committee on Rules, a motion to suspend the rules, or by unanimous consent. In the Senate, consideration of House amendments has the

potential to become procedurally complex, particularly when the Senate must dispose of multiple House amendments. Because House amendments, unlike conference reports, are subject to amendment, the Senate majority leader might offer a motion to dispose of the House amendment and then “fill the tree” to temporarily prevent any Senator from proposing an alternative method of acting on the House amendment.

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Chapter 1

RESOLVING LEGISLATIVE DIFFERENCES IN CONGRESS: CONFERENCE COMMITTEES AND AMENDMENTS BETWEEN THE HOUSES

Elizabeth Rybicki

SUMMARY

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

The House and Senate may be able to reach agreement by an exchange of amendments between the houses. Each house has one opportunity to amend the amendments from the other house, so there can be Senate amendments to House amendments to Senate amendments to a House bill. House amendments to Senate bills or amendments are privileged for consideration on the Senate floor; Senate amendments to House bills or amendments generally are not privileged for consideration on the House floor. In practice, the House often disposes of amendments between the houses under the terms of a special rule reported by the Rules Committee. The Senate sometimes disposes of House amendments by unanimous consent, but the procedures associated with the exchange of amendments can become complicated.

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

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INTRODUCTION

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

This report¹ summarizes the procedures the two houses of Congress use most frequently to resolve their legislative differences. It is based upon an interpretation of the rules and published precedents of the House and Senate, and an analysis of the application of these rules and precedents in recent

practice. It bears emphasizing that this report is not exhaustive nor is it in any way an official statement of House or Senate procedures. It may serve as a useful introduction or general guide, but it should not be considered an adequate substitute for a study of House and Senate rules and precedents themselves, or for consultations with the parliamentarians of the House and Senate on the meaning and possible application of the rules and precedents.

Readers may wish to study the provisions of the rules — especially House Rule XXII — and examine the applicable precedents as explained in *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, especially pp. 307-342 (on “Conferences Between the Houses”) and pp. 813-839 (on “Senate Bills; Amendments Between the Houses”), and in *Riddick’s Senate Procedure* (Senate Document No. 101-28), especially pp. 126-143 (on “Amendments Between Houses”) and pp. 449-493 (on “Conferences and Conference Reports”).

THE NEED FOR RESOLUTION

Before Congress can submit a bill or joint resolution to the President for his approval or disapproval, the Senate and the House of Representatives must agree on each and every provision of that measure.²

It is not enough for both houses to pass versions of the same measure that are comparable in purpose but that differ in certain technical or even minor details; the House and Senate must agree on identical legislative language. Nor is it enough for the two chambers to approve separate bills with exactly the same text; the House and Senate both must pass the same bill. In sum, both chambers of Congress must pass precisely the same measure in precisely the same form before it can become law.³

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

SELECTION OF THE MEASURE

Because both chambers must pass the same measure before it can become law, at some point during the legislative process the House must act on a Senate bill or the Senate must act on a House bill. Congress usually meets this

requirement without difficulty or controversy. In some cases, however, selecting the measure may require some parliamentary ingenuity and can have policy and political consequences.

After either house debates and passes a measure, it sends (or “messages”) that bill to the other chamber. If the second house passes the first house’s bill without any amendments, the legislative process is completed: both houses have passed the same measure in the same form.⁴ If the second house passes the bill with one or more amendments, both chambers have acted on the same measure; now they must resolve the differences between their respective versions of the text if the measure is to become law.

In most cases, either the House or the Senate can be the first chamber to act. However, the Constitution requires that all revenue measures originate in the House, and the House traditionally has insisted that this prerogative extends to appropriations as well as tax measures.⁵ Thus, the House normally acts first on such a measure, and, consequently, it is a House-numbered bill or joint resolution that Congress ultimately presents to the President for enacting appropriations or tax laws.

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

As these considerations imply, major legislative proposals frequently are introduced in both houses — either identical companion bills or bills that address the same subject in rather different ways. If so, the appropriate subcommittees and committees of the House and Senate may consider and report their own measures on the same subject at roughly the same time. Thus, when one house passes and sends a bill to the other, the second chamber may have its own bill on the same subject that has been (or is soon to be) reported from committee and available for floor consideration. In such cases, the second chamber often acts initially on its own bill, rather than the bill received from the other house.⁶

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

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

The House customarily debates, amends, and passes the House bill and, immediately thereafter, takes up the counterpart Senate bill. The floor manager then moves to "strike out all after the enacting clause" of the Senate bill (the opening lines of every bill — "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled") and replace the stricken text with the full text of the House bill as just passed. The House often agrees by unanimous consent to consider the Senate bill and approves the House substitute routinely. The Senate bill, as amended, then is passed by voice vote or without objection, and the House lays its own bill on the table (which disposes of it adversely).

In some cases, the special rule under which a House bill is considered also includes provisions for such action on the Senate bill. For instance, a special rule may state:

After the passage of H.R. 1, it shall be in order to take from the Speaker's table the bill S. 1 and to move to strike out all after the enacting clause of the said Senate bill and insert in lieu thereof the provisions contained in H.R. 1 as passed by the House.