

Whither the Role of Conference Committees, Or Is It Wither?

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Introduction

Conference committees have long been known as “the third house of Congress.” In a bicameral legislature like the U.S. Congress, they are usually the principal forum for reconciling major bills passed in dissimilar form by the two houses. These bicameral units often write the final version of major measures that both chambers will vote upon. As one Senator said, conferences are “where the final touches are put on legislation which constitutes the laws of the country.”¹ A House member stated, “Let’s face it, the conference committee is where it all happens.”² Or as a congressional scholar put it, in “the legislative process, all roads lead to the conference committee.”³

Current developments suggest, however, that the “third house” characterization might require modification. It is not that conference committees are unimportant, it is that another method for adjusting and reconciling bicameral differences on significant legislation has taken on greater prominence in the contemporary Congress. This method is the exchange of amendments — or “messages” — between the houses, the so-called “ping pong” procedure. Some lawmakers even state that conferences are becoming a thing of the past. A member of the Senate noted, “Processing bills by exchanging messages [amendments] with the House is becoming the norm rather than the exception. Formal conferences are becoming rare.”⁴

If the conference committee is being somewhat eclipsed by the ping pong procedure as an important way to achieve bicameral reconciliation on consequential legislation, that would represent an important institutional change. This apparent development merits some attention and analysis. Accordingly, this paper’s purposes are fundamentally two-fold: to examine the reasons for the heightened salience of the ping pong approach and to consider several reasons for and the implications that seem to flow from using this procedure rather than convening conferences to resolve inter-chamber disagreements on major legislation.

To fulfill these two purposes, this paper is organized into six sections as follows. First, it will summarize the methods Congress employs to achieve inter-chamber agreement on legislation, including ping pong’s place in the bicameral resolution process. Second, it will briefly discuss how each chamber gets to conference, underscoring how the convening of conference committees in the Senate can be effectively blocked, even if a majority of Senators would agree to send the measure to conference. Third, it will examine why there seems to be more reliance in

*Institutional affiliation is provided for purposes of identification only. The views expressed in this paper are those of the author and are not presented as those of the Congressional Research Service or the Library of Congress.

¹ *Congressional Record*, vol. 146, Oct. 13, 2000, p. S10520.

² Janet Hook, “In Conference: New Hurdles, Hard Bargaining,” *Congressional Quarterly Weekly Report*, Sept. 6, 1986, p. 2082.

³ John Manley, *The Politics of Finance: The House Committee on Ways and Means* (Boston, Little, Brown, 1970), p. 239.

⁴ *Congressional Record*, vol. 154, Apr. 24, 2008, p. S3387.

recent years on the ping pong method in reconciling bicameral differences on significant legislation than on the conference committee route.

Important to underscore at the outset is that informal negotiations among key bicameral actors suffuse the lawmaking process. Unsurprisingly, confidential bargaining to achieve mutually acceptable agreements is part and parcel of both the conference committee and the amendment exchange procedure. Key bicameral actors typically craft policy compromises in closed session and then use the amendment exchange method to win House-Senate agreement on them. On Capitol Hill, private negotiating sessions and discussions among House and Senate members are a day-to-day occurrence; these confidential meetings influence lawmaking from the introduction of a bill to bicameral reconciliation.

Procedures usually are not isolated actions; they are employed in a policy, political, and legislative context. Hence, the fourth section of the paper provides a case example to illustrate in a concrete setting the factors that may trigger use of ping ponging over the convening of conference committees. The measure is the Honest Leadership and Open Government Act (S. 1). Fifth, the paper will discuss several reasons for, and implications of, ping ponging amendments back-and-forth between the chambers instead of forming conference committees to achieve bicameral agreement on legislation. Lastly, summary observations will be presented, including why the exchange of amendment pattern has seemingly evolved to become a more important feature of bicameral lawmaking activity.

Achieving “Bicameral Ignition” on Legislation

Under the Constitution, before measures can be sent to the White House for presidential consideration, they must pass the House and Senate with exactly the same bill number and legislative text. The issue, then, is how to unite what the Constitution divides when one chamber agrees to a measure at variance with a comparable bill adopted by the other house? Although the Constitution is silent on the matter, Congress has devised three basic methods or procedures to achieve “bicameral ignition.”

First, based on calculations from the 1993 through 2007, one house enacts unchanged the other’s bill. Most measures (anywhere from 63 to around 85 percent in a biennial Congress) are enacted into law when one chamber adopts verbatim the legislation received from the other body. One chamber’s deference to the other house’s bill has various explanations, ranging from the lack of controversy to political necessity because time is running out in a legislative session.

The other two methods specifically deal with reconciling bicameral differences when the two chambers pass different versions of the same bill. The House and Senate can message — or “ping pong” — amendments back-and-forth between them until substantive disagreements on a measure are worked out. With the ping pong — or exchange of amendments — approach, one chamber may adopt the other house’s amendments or further modify the other’s amendments until both finally agree to identical language for all the provisions of the legislation.⁵ The ping pong method of bicameral reconciliation is “frequently used in the closing days of a Congress to save time,” wrote a congressional journalist. “Bills may be sent back and forth on an hourly basis until there is a meeting of the minds, or one side backs down, or the two chambers give up in failure.”⁶ Roughly 11 to 24 percent of public laws enacted during recent biennial Congresses took the ping pong, or “amendments between the houses,” route.

⁵ There is a technical limit to the number of times measures can be shuffled between the chambers. The third-degree amendment prohibition — amendments to amendments to amendments are not in order — applies to amendments between the House and Senate. This parliamentary principle can be set aside if either chamber wants to do so.

⁶ Richard Cohen, *National Journal*, July 28, 2001, p. 2396.

Third, bicameral ignition may also occur when the House and Senate agree to establish a conference committee. Each chamber selects a number of conferees from the relevant committees of jurisdiction to reconcile the items in bicameral disagreement. Only a relatively small number of public laws passed by a Congress (anywhere from around 5 to 13 percent) reach the conference stage, but these are often the most complex, controversial, and consequential. On some occasions a combination of the two approaches — ping pong and a conference committee, or vice versa — will be employed to reconcile matters in bicameral disagreement. For example, the chambers may start out using the ping pong procedure but then convene a conference committee to reconcile outstanding disagreements.

It is quite common for House and Senate committee and party leaders, along with relevant staff, to conduct private, pre-conference negotiations prior to the formal convening of a conference. These might be characterized as “virtual” conferences. For example, meeting behind closed doors, “Senate and House leaders are taking the unusual step of negotiating a final bill to address the nation’s housing crisis even before the Senate adopts its own version, trying to short-circuit a legislative process that might otherwise drag well into the summer.”⁷ In these cases, sometimes the creation of a conference committee “will be more an indication that a deal is done than a forum to find one.”⁸

Ping Ponging in the Spotlight

Recently, legislative analysts and others have noted an increase in the use of the exchange of amendment procedure for bicameral reconciliation. Difficulties in creating conference committees for several major bills elevated the ping pong procedure to greater prominence in resolving inter-chamber differences on legislation. As former Senate Parliamentarian Robert Dove stated, “There’s no question that amendments between the houses has been used more [today] than it has in the past, but that’s because Senators blocking [legislation] from going to conference has happened more often.”⁹ A congressional scholar and former House staff director calculated the extent to which major bills were resolved by establishing conference committees or using the ping pong approach during equivalent periods of the GOP-controlled 109th Congress (2005-2007) and the Democratically-controlled 110th Congress (2007-2009). His study determined:

Of major bills approved by the House and Senate that required some action to resolve differences between the two versions, 11 out of 19 (58 percent) were settled by conferences in the current Congress compared with 18 out of 19 (95 percent) in the previous Congress.

Put another way, the current 110th Congress has been negotiating eight times as many bills as the 109th Congress outside the conference process. This is done by using the “pingpong” approach of bouncing amendments between the houses until a final agreement is achieved.¹⁰

⁷ Jeffrey H. Birnbaum, “Lawmakers Seek Shortcut In Negotiating House Bill,” *The Washington Post*, June 7, 2008, p. D1.

⁸ Gary Andres, “A Deal or No Deal,” *The Washington Times*, June 8, 2006, p. A19.

⁹ Emily Pierce and Jennifer Yachnin, “Tactical Skirmishes Intensified in 110th Congress,” *Roll Call*, Jan. 22, 2008, p. B-16.

¹⁰ Don Wolfensberger, “Have House-Senate Conferences Gone The Way of the Dodo?” *Roll Call*, Apr. 28, 2008, p. 8.

The current reality is that major bills often cannot reach the conference stage, leaving informal negotiations and “amendments between the houses” as the alternative methods for resolving bicameral differences on major legislation. The Senate, not the House, is the “fly in the ointment” in getting to conference.

Getting to Conference: House and Senate Procedure

House

Briefly, the two most-used methods for getting to conference are unanimous consent, with House Rule XXII available if an objection is made, and special rules from the Rules Committee.

A routine request is for a lawmaker to ask and receive unanimous consent to go to conference on a measure. “Mr. Speaker, I ask unanimous consent to take from the Speaker’s table the bill H.R. 1234 with the Senate amendments thereto, disagree to the amendments of the Senate, and ask for a conference with the Senate.” (Members request unanimous consent because Senate amendments at this stage of the proceedings are not “privileged” — meaning they cannot be called up “at practically any time for immediate consideration when no other business is pending.”)¹¹ If a lawmaker objects, the Member who requested unanimous consent could then invoke clause 1 of House Rule XXII. This rule permits legislation to reach conference by majority vote of the House if a member of the committee(s) of original jurisdiction, typically the chair, is authorized by his or her panel to offer the following motion.¹² “Mr. Speaker, by direction of the Committee on _____, I move to take from the Speaker’s table the bill H.R. 1234, with a Senate amendment thereto, disagree to the Senate amendment, and ask for [or agree to] a conference with the Senate.”

Second, the Rules Committee can report a special rule sending a measure to conference. This procedural resolution requires a majority vote of the House for adoption. The special rule would contain language such as: “That upon the adoption of this resolution it shall be in order to take from the Speaker’s table the bill (H.R. 1234), with the Senate amendment thereto, disagree to the Senate amendment and ask for a conference with the Senate.” Special rules are privileged, debated under the hour rule, and cannot be amended unless the “previous question” — a motion that, if agreed to, ends debate and requires a vote on the pending matter (the special rule) — is rejected. Rarely is the previous question motion defeated by vote of the House members.

Simply put, the House is an institution whose formal rules and precedents emphasize “majority rule.” Requests to go to conference are difficult to reject, because they are typically framed as “party-line” votes by majority party leaders. Seldom, for example, are special rules or Rule XXII motions turned down by the House.

¹¹ John V. Sullivan, *How Our Laws Are Made* (Washington, D.C.: G.P.O., 2007), p. 25. Precedents state that “motions in the House to dispose of the [Senate] amendment are not privileged and require unanimous consent or a special rule from the Committee on Rules, the only exception being a motion to ask or agree to a conference under rule XXII clause 1.” See Wm. Holmes Brown and Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* (Washington, D.C.: G.P.O., 2003), p. 841.

¹² More specifically, House Rule XXII, clause 1 states: “A motion to disagree to Senate amendments to a House proposition and to request or agree to a conference with the Senate, or a motion to insist on House amendments to a Senate proposition and to request or agree to a conference with the Senate, shall be privileged in the discretion of the Speaker if offered by direction of the primary committee and of all reporting committees that had initial referral of the proposition.”

A third way to get to conference is suspension of the rules, a motion that requires a two-thirds vote for approval. A Member will say, “Mr. Speaker, I move to suspend the rules and take from the Speaker’s table the bill H.R. 1234 with the Senate amendments thereto, disagree to the amendments of the Senate, and ask for a conference with the Senate.” The supermajority vote limits use of the suspension procedure as a method for getting to conference.

Senate

To get to conference in the Senate, it is generally the case that the majority leader or the majority floor manager will ask and receive unanimous consent when he/she makes this request: “Mr. President, I ask unanimous consent that the Senate insist on its amendments [or disagree to the House amendments to the Senate bill], request a conference with the House on the disagreeing votes thereon, and that the Chair be authorized to appoint conferees.” Notice that there are three distinguishable parts to this request: insist (or disagree), request, and authorize the appointment of conferees. If a lawmaker objects to the unanimous consent request, then the majority leader or floor manager would have to move each step separately, and each motion is subject to extended debate.

As former Senate Parliamentarian Dove noted: “The three steps are usually bundled into a unanimous consent agreement and done within seconds. But if some senators do not want a conference to occur and if they are determined, they can force three separate cloture votes to close debate and that takes time. It basically stops the whole process of going to conference.”¹³ And if cloture (closure of debate) as outlined in Rule XXII were invoked on each part, Senators keen on preventing a conference still could offer innumerable motions to instruct conferees (who are yet to be officially named by the Senate) — and each instruction motion is subject to a filibuster.¹⁴

The Senate’s Difficulty in Convening Conferences

A number of commonly-occurring factors explains why the Senate sometimes experiences delay or difficulty in getting to conference. For example, Senate (and House) leaders — who want or expect to go to conference — may delay the appointment of conferees, because there is a dispute over conferee selection: the number to be chosen and the party ratio. At issue in these cases might be concern over the representation of diverse views in conference. Limiting the size of the conference delegation could block certain lawmakers from serving on the conference committee. Conversely, increasing the number of conferees could ensure that certain Members would serve on the conference committee. Party leaders, too, may want to conduct informal pre-conference negotiations with the White House (or House) before the Senate officially names conferees. Delay in forming a conference may be a tactic to pressure the other body to concede on certain policies in bicameral disagreement. Or delay might be a form of “hostage politics:” the naming of conferees on a certain bill will not occur until the other body appoints conferees on a different measure in bicameral dispute.

¹³ Carl Hulse and Robert Pear, “Feeling Left Out on Major Bills, Democrats Turn to Stalling Others,” *New York Times*, May 3, 2004, p. A8.

¹⁴ For more information, see CRS Report RS20454, *Going to Conference in the Senate*, by Stanley Bach and Elizabeth Rybicki.

Three other overlapping reasons, however, largely account for the contemporary Senate's difficulty in convening conferences. Each merits additional discussion. They are the Senate's tradition of extended debate (the filibuster); the polarization that characterizes the modern Senate; and the exclusion of minority party conferees from participating in the bicameral bargaining process.

Senators and Extended Debate

The reality or threat of extended debate has long been part of the Senate. So why has it now come into relatively recent prominence as a blocking tactic with respect to the convening of conferences — thus focusing more emphasis on the ping pong method? Part of the answer is the rise of the “individualist” Senate. Congressional scholars state that Senators today take for “granted that they — and their colleagues — [will] regularly exploit the powers the Senate rules [give] them. [They are] increasingly outward directed, focusing on their links with interest groups, policy communities, and the media more than on their ties to one another.”¹⁵ Internal incentives to employ extended debate sparingly have given way to other incentives (requests by outside groups to engage in dilatory actions on certain measures, for example) that encourage lawmakers to push their own agendas even if the Senate's lawmaking activities might grind to a halt. Another part (discussed below) deals with the polarization — intense partisan and policy conflict — that characterizes Senate deliberations involving each party's priority issues.

Filibustering the Senate's three-part request to go to conference with the House is of recent vintage. The first major instance of this delaying action, so far as is known, occurred during the closing days of the 103rd Congress (1993-1995). It happened on a campaign finance reform proposal. With Congress slated to adjourn by October 7, 1994, critics of a campaign reform plan launched their precedent-establishing filibuster the week of September 19. The opponents objected to the routine motion to convene a conference on the campaign reform bill (S. 3) and the House amendments thereto. As a Senate proponent of S. 3 stated:

We attempted to move to conference just prior to the August [1994] recess, but that request was objected to by one of our colleagues. Under the rules of the Senate, the motion to disagree with the amendments of the House to a Senate bill, as well as a request for a conference and the appointment of conferees, are debatable motions. We have been unable to obtain unanimous consent on this issue¹⁶

On September 22, the Senate voted 96 to 2 vote to invoke cloture on the motion to *disagree* to the House amendments to S. 3. In a strategic move, campaign reform opponents opted to vote for cloture to “run out the clock.” Under Rule XXII, if cloture is invoked, 30 more hours of debate are permitted, a parliamentary right which is usually exercised infrequently. In this case, however, opponents of S. 3 “used every minute, talking straight through the night and through most of Sept. 23 before the Senate voted 93-0 to disagree with the House.”¹⁷ Seven days later the Senate failed (52 to 46) to invoke cloture on the motion to *request* a conference and the bill died. The Senate's majority leader (Democrat George Mitchell of Maine) declared: “In the 210 years in the history of the United States Senate, never — until last week — has there been a series of filibusters on taking a bill to conference.”¹⁸

¹⁵ Barbara Sinclair, “The New World of U.S. Senators,” in Lawrence C. Dodd and Bruce I. Oppenheimer, eds., *Congress Reconsidered*, 8th ed. (Washington, D.C.: CQ Press, 2005), p. 2.

¹⁶ *Congressional Record*, vol. 140, Sept. 21, 1994, p. 25031.

¹⁷ Beth Donovan, “Republicans Plan Filibusters, Imperiling Senate Schedule,” *Congressional Quarterly Weekly Report*, Sept. 24, 1994, p. 2655.

¹⁸ Ceci Connolly, “Legislation Goes Overboard as Legislators Eye Exits,” *Congressional Quarterly Weekly Report*, Oct. 1, 1994, p. 2755.

Polarization

Growing partisan tensions in the Senate are a major factor triggering dilatory activity that can prevent the convening of conference committees. In addition, the Senate is filled with lawmakers willing to exploit the chamber's procedural rules to accomplish their objectives. Mitchell's service as majority leader (1989 to 1995) occurred during a time when the Senate — long known for comity among its members and the willingness of senators to compromise and resolve policy differences — was becoming a more polarized and partisan institution. Various long- and short-term developments produced this result; they have been analyzed and discussed in numerous sources, but several merit mention.¹⁹

Heightened partisan feelings between Democrats and Republicans are due in large measure to a significant demographic development. A national resorting of the two parties' constituency bases has produced large policy differences between them. For instance, the South was once a Democratic bastion. Today, it is largely a Republican stronghold as conservative Democrats became conservative Republicans.²⁰ The outcome, as journalist David S. Broder wrote, is two Senate parties "more cohesive internally and further apart from each other philosophically."²¹ Or as a GOP senator put it: "Today, most Democrats are far left; most Republicans are to the right; and there are very few in between."²² Little surprise, therefore, that we see a large number of party-line votes (a majority of one party facing off against a majority of the other party) and an increase in party cohesion on those votes. "Both Republicans and Democrats are standing with their own party against the other on about 90 percent of the [contested] votes, a level of lockstep uniformity unimaginable only a generation or two ago."²³

Among other factors contributing to sharper partisanship in the Senate are the following:

- a 24/7 news cycle that focuses on party conflict and scandal;
- interest groups aligned with each party that expect lawmakers to toe-the-line on their preferred issues or face electoral recriminations;
- lawmakers' constant need to raise campaign funds from many of these same party-aligned groups that often closely monitor the votes of lawmakers;
- the influx of former House members into the Senate, many of whom bring a more confrontational governing style to the chamber;
- the reality of top party leaders being targeted by opposition Senators for electoral defeat;

¹⁹ See, for example, Ronald Brownstein, *The Second Civil War: How Extreme Partisanship Has Paralyzed Washington and Polarized America* (New York: The Penguin Press, 2007); Jon Bond and Richard Fleisher, eds., *Polarized Politics: Congress and the President in a Partisan Era* (Washington, D.C.: CQ Press, 2000); and Barbara Sinclair, "The New World of U.S. Senators," in Lawrence C. Dodd and Bruce I. Oppenheimer, eds., *Congress Reconsidered*, 8th ed. (Washington, D.C.: CQ Press, 2005), pp. 1-22.

²⁰ There are various explanations to account for the rise of the two-party South. Some emphasize the role of the civil rights movement in promoting the registration of black voters, which encouraged conservatives to leave the Democratic party and become Republicans. Others point to migration of prosperous retirees, many of them Republican, from northern states to the South. See Nelson W. Polsby, *How Congress Evolves: Social Bases of Institutional Change* (New York: Oxford University Press, 2004), pp. 80-108. Further, there are traditional and historical southern cultural characteristics that might have facilitated the region's drift toward the Republican party, such as its large number of white evangelicals, lack of strong unions, and deep-seated support of the military.

²¹ David S. Broder, "Don't Bet on Bipartisan Niceties," *The Washington Post*, Jan. 1, 2002, p. A19.

²² Kathy Kiely and Wendy Koch, "Committee Shaped by Party Ties," *USA Today*, Oct. 5, 1998, p. 2A.

²³ Brownstein, *The Second Civil War*, p. 14.

- the use of ethics as a partisan weapon; and
- today's often negative "take-no-prisoners" senatorial elections.

These many elements combine to make management of today's Senate difficult, especially on controversial issues and when the partisan divide is narrow.

Cooperation across party lines, in brief, is sometimes hard to come by for two basic reasons: the arsenal of parliamentary tools that any senator can employ to frustrate policymaking and a Senate which is increasingly partisan and whose members employ public relations (or "message") strategies — the war of words — to advance party-preferred objectives. The tone of partisan warfare that often surrounds debate on many important issues makes it difficult for either side to achieve compromises that can pass the Senate. Partisan polarization in the Senate, wrote a congressional scholar, "has made constructing the necessary deals considerably tougher; the two parties' notions of what constitutes good public policy have little overlap."²⁴

Exclusion of Minority Conferees From Bicameral Negotiations

A specific catalyst made Senate formation of conference committees during the early 2000s highly problematic: the exclusion of minority party members from conference committee participation. As a Senate committee chair told a group of his chamber's minority party conferees, "We don't expect you to sign [the conference report], so we don't expect you to be needed" in the bargaining sessions.²⁵ Four other examples underscore the exclusionary point.

- In 2000, a minority party senator lamented: "I have been appointed to conference committees in the Senate in name only, where my name will be read by the [presiding officer] and only the conference of Republicans goes off and meets, adopts a conference report, signs it, and sends it back to the floor without even inviting me to attend a session."²⁶
- A year later another Senator stated: "After much talk of bipartisanship, the other side locked out the Democrats from the conference committee.... We were invited to the first meeting and told we would not be invited back, that the Republican majority was going to write the budget all on their own, which they have done."²⁷
- In 2003, a minority party senator said: "Once this [class action] bill leaves the Senate floor, Democrats have no bargaining power. We're not invited to any conferences."²⁸
- Two years later, another minority party lawmaker declaimed: "On issue after issue, we have had conferences where the minority was excluded so that the majority could ram through unpopular provisions as part of an un-amendable conference report."²⁹

²⁴ Barbara Sinclair, *Party Wars: Polarization and the Politics of National Policy Making* (Norman, OK.: University of Oklahoma Press, 2006), p. 227.

²⁵ Daniel J. Parks, "Bush Starts to Deal on Budget, Only Hardening Resolve of Some," *CQ Weekly*, April 28, 2001, p. 904.

²⁶ *Congressional Record*, vol. 146, May 16, 2000, p. S3991.

²⁷ *Congressional Record*, vol. 147, May 4, 2001, p. S4377.

²⁸ Mark Wegner and April Fulton, "Crashing the Party," *National Journal*, Nov. 8, 2003, p. 3421.

²⁹ *Congressional Record*, vol. 151, July 25, 2005, p. S8832.

Members of the House minority have also been excluded from participating in conference negotiations. In one case, the ranking member of the Committee on Ways and Means, along with several party colleagues, crashed a conference meeting held in the chairman's Capitol hideaway. Only majority party members were present except for two minority party senators sympathetic to the majority's policy goals.³⁰ Another ranking House minority committee member exclaimed that conferences "are simply conferences between a few well-connected people on the majority side of the aisle, with no real consultation with the minority."³¹

The House minority, unlike its counterpart in the Senate, has no effective way to block the formation of conference committees given the "majority rule" bias of its procedures. To be sure, the House minority can express its anger or frustration at being excluded from conference negotiations through various dilatory actions, such as forcing votes on repetitious motions to adjourn the House, or, as House Rule XXII, clause 7 states, offering numerous motions to instruct conferees "after a conference committee has been appointed for 20 calendar days or 10 legislative days."

Senators, as noted earlier, have formidable parliamentary means to protest their exclusion from conference negotiations. "We don't think a conference can truly be a conference if only one party is represented," stated a Senate minority leader. He added that until minority conferees are assured of being present at all conference meetings, "we are unable to provide consent to go to conference."³² Decisions to prevent the convening of conference committees by the minority leader were made on a case-by-case basis.

In lieu of convening a conference committee, the minority leader recommended that the Senate follow two other approaches to reach bicameral agreement on legislation. First, persuade the other chamber to pass Senate bills without making changes to them. Second, conduct pre-conference bargaining sessions with the other chamber and then either "confirm our agreements in a formal conference once the negotiations have been completed"³³ or approve them using the ping pong approach.

In sum, the convening of conference committees by unanimous consent is no longer the routine matter it once was. "Historically in the Senate," remarked a senator, "when we passed a bill, we automatically went to conference. That has changed." Now, advocates of getting to conference have to secure unanimous consent, "or we do not get to conference."³⁴ That was also the case before — obtaining unanimous consent — but winning approval of those requests today is often much harder to attain.

If the regular order is going to conference on major legislation, with majority and minority conferees as full participants, that pattern has generally not been the case in recent Congresses. Instead, there has been a noticeable shift away from convening formal conferences — largely because of disagreements in the Senate — toward House-Senate majority leadership-dominated "informal conferences." Once this House-Senate group settles their differences through informal

³⁰ Kate Schuler, "Democrats Crash Conference Meeting," *CQ Weekly*, Nov. 1, 2003, p. 2703.

³¹ *Congressional Record*, vol. 149, Nov. 5, 2003, p. H10395.

³² *Congressional Record*, vol. 150, Feb., 2004, p. S550. Upset at the exclusionary practice, a minority party Senator noted that if the majority party's conferees ignored the minority's viewpoints, floor consideration of the conference report could trigger the "procedural nuclear weapon" — the filibuster. See "GOP Leaders Take a Short Time-Out in Final Push on Omnibus Energy Bill," *CQ Today*, Oct. 2, 2003, p. 5.

³³ *Congressional Record*, vol. 150, Feb. 4, 2004, p. S551.

³⁴ Hulse and Pear, "Feeling Left Out on Major Bills, Democrats Turn to Stalling Others," p. A18.

negotiations, the ping pong approach has been employed to win bicameral approval of the leaders' work product. As a congressional correspondent wrote:

Once the penultimate stage in the life of any bill as a forum for House and Senate members to work out their differences, the conference committee has fallen on hard times, shoved aside in the last five years by partisanship and legislative expediency.

The preferred alternative revolves around informal meetings mainly among senior Democratic [or Republican] lawmakers, who gather to cut a final deal and then bat the finished product back and forth between the House and Senate until it is approved.³⁵

A look at why the back-and-forth process was utilized on a measure may provide a better understanding of ping pong's role in the contemporary bicameral lawmaking process.

A Case Example: Ethics and Lobbying Reform (S. 1)

The 110th Congress enacted a major ethics and lobbying reform measure (S. 1), which was signed into law (P.L. 110-81). The legislation was titled the Honest Leadership and Open Government Act. The Senate passed its version of S. 1 on January 18, 2007, by a 96 to 2 vote. Six days later S. 1 was received in the House and held at the desk. The House enacted a companion honest leadership bill (H. R. 2316) on May 24, 2007, by a 396 to 22 vote. That same day the House also agreed to the Lobbying Transparency Act (H.R. 2317). Subsequent to House passage of the legislation, a spokesperson for the Senate majority leader stated that the leader "intends to move as quickly as possible to not only appoint conferees, but to get the final bill done as well."³⁶ On June 28, 2007, the majority leader failed to receive unanimous consent so the Senate might convene a conference with the House. The Senate's minority leader also backed the convening of a conference committee on S. 1.³⁷

A number of senators, however, opposed the appointment of conferees. They were fearful that an earmark transparency provision adopted as part of S. 1, and which was agreed to by a 98 to 0 vote, would either be weakened in conference or not included at all in the conference report. These senators wanted a guarantee from the majority leader that the Senate's earmark language would not be changed by the conference committee. That guarantee was not forthcoming from the majority leader. It would "not say much about my leadership if we negotiated [earmark reform] out here on the floor of the Senate as to what was going to be in the conference committee. That is what the conferees are all about," said the majority leader.³⁸

³⁵ Carl Hulse, "In Conference: Process Undone By Partisanship," *New York Times*, Sept. 26, 2007, p. A1.

³⁶ Mark Wegner and Christian Bourge, "Senate Dems Preparing For Conference On Lobbying Bill," *National Journal's CongressDailyPM*, June 1, 2007, p. 8.

³⁷ Mark Wegner, "McConnell: Still Time To Pass Lobby Bill Before Recess," *National Journal's CongressDailyPM*, July 20, 2007, p. 1. In remarks to reporters, the minority leader stated that it was important to pass S. 1 before the August recess even without a formal conference committee. "Either way, I think we ought to wrap the bill up. I'd rather have the Republicans at the table than not. But I do think it's time to act." See Kenneth Doyle, "McConnell OKs Plan to Pass Lobby Bill Without Convening Conference Committee," *Daily Report for Executives*, July 23, 2007, p. A-1.

³⁸ *Congressional Record*, vol. 153, June 28, 2007, pp. S8667-S8668. See Martin Kady, "Senate Republicans Block Conference on Lobbying Overhaul Legislation," *CQ Today*, June 27, 2007, p. 3.

The sponsor of the earmark reform provision also proposed that the Senate simply adopt the earmark changes as part of the Senate's rules. "Why can't we just accept that part here and go to conference with all of these other provisions in which you know our Members are interested?" He even asked the unanimous consent of the Senate to adopt two resolutions to accomplish that goal, but a senator objected to his request.³⁹ The majority leader, who opposed the idea, gave no public reason so far as is known as to why he did not favor adopting the senator's earmark reforms as part of the internal rules of the Senate.⁴⁰ However, other Senators indicated why the earmark reforms were not adopted as part of chamber rules. Changes were required, said a lawmaker, to "make the language workable."⁴¹

In the end, the Speaker and Senate majority leader decided to bypass the conference stage and negotiate informally with key lawmakers to produce a bicameral compromise that both chambers might pass by the August 2007 recess. They achieved their goal. Intensive private negotiations led to a rewrite of ethics and lobbying reform. When the Democratic leaders unveiled their ethics and lobbying package on July 30, it received generally positive responses from outside groups as well as many rank-and-file lawmakers in both chambers. The next day, and as a sign of wide support among House members for the leadership's package, the House amendment to S. 1 was taken up under a procedure (suspension of the rules) requiring a two-thirds vote for passage, permitting no amendments from the floor, and allowing for only 40 minutes of debate. Further, motions to recommit are not permitted when the House suspends its rules to pass legislation. The House overwhelmingly (411 to 8) agreed to the House amendment to S. 1.

S. 1, as amended by the House, was returned to the Senate for its review of the compromise package. Critics of the leadership's negotiated compromise strongly objected to the revised ethics and lobbying measure, especially because they believed it weakened the earmark changes which the Senate had adopted unanimously on January 18, 2007. Senate opponents of the leadership-crafted agreement recognized they confronted an uphill battle — eventually unsuccessful — to block or change the House amendment. Several procedural and political factors account for this result.

First, when the majority leader asked the presiding officer to lay S. 1 with the House amendment before the Senate, he immediately filed a cloture motion to close debate on the House amendment. Further, he then "filled the amendment tree" on the motion to concur in the House amendment to S. 1. His action prevented opponents of the package from attempting to alter the House amendment to their liking before the Senate voted on whether to agree to the cloture motion. Adoption of cloture would cut off the possibility of lengthy debate (i.e., a filibuster) on the motion to concur.

Worth noting is that most measures or matters typically require 60 votes (or three-fifths of the total membership) to invoke cloture. In this case, a two-thirds vote was required to close debate because Senate Rule XXII (cloture) stipulates that on a measure or motion to amend Senate rules, an "affirmative vote [to invoke cloture] shall be two-thirds of the Senators present and voting." Plainly, S. 1, as amended by the House, contained changes to Senate rules, such as new requirements regarding the transparency of earmarks. In the end, the Senate invoked cloture on the majority leader's motion to concur in the House amendment by an 80 to 17 vote.

³⁹ *Ibid.*, p. S8668.

⁴⁰ It was reported that Senate "aides and lawmakers for weeks have speculated that [the majority leader] either hopes to change [the earmark provisions contained in S. 1] during conference or to use them as a bargaining chip with Senate negotiators during the talks." John Stanton and Susan Davis, "Ethics Bill Will Return to Floor," *Roll Call*, July 19, 2007, p. 30.

⁴¹ *Congressional Record*, vol. 153, Aug. 2, 2007, p. S10714.

Second, the minority party was divided on the ethics and lobbying package. Many supported its passage, including the minority leader, despite misgivings about some of the provisions. As one minority senator was reported to say, it would be “hard to vote against a lot of good things [in the ethics and lobbying package] because there are some bad things there. We vote on imperfect legislation every day.”⁴²

Third, the political circumstances made it difficult for many lawmakers to vote against an ethics and lobbying reform package, especially with the August work period looming and the potential for constituents asking Members how they voted on what seemed like a “good government” initiative. (Recall that the “culture of corruption” was a theme used during the November 2006 elections.) In the judgment of one Senate minority staff aide, “There have been [corruption] investigations and questions involving some members, and the natural instinct is to do something — or anything, even if anything is bad — simply to look productive.” He further opined: “We’re looking at the path of least resistance versus good legislation, and typically in these situations, the former rather than the latter wins out.”⁴³

To conclude, both parties recognized that public dismay with the Congress over lobbying scandals, combined with the promises made by House and Senate majority party leaders to enact ethics and lobbying reforms, prompted enactment of S. 1. The inability to create a conference committee can be largely attributed to a relatively small number of Senators who were concerned that the earmark reforms they successfully championed would be dropped or diluted by the conferees. Thus, the exchange of amendment procedure was employed with each chamber’s party leader in charge of the informal negotiating process. Most party members in each chamber supported the final compromise, and S. 1 (the bill number symbolized its priority status) passed with large majorities in each house.

Bypassing the Conference Stage: Reasons and Implications

The recent tendency to bypass the conference stage underscores that House-Senate interrelationships change and adapt to the broader legislative-political environment of which they are a part. Compared to the 1950s or 1960s, today’s Congress is more open, partisan, workload-packed, and deadline-driven; there are many more interest groups that influence and monitor legislative proceedings; and individual lawmakers are not reluctant to utilize parliamentary tools to advance their objectives. Because these developments have sometimes made the convening of conference committees problematic, the exchange of amendment procedure — and the concomitant informal negotiations that accompany it — has become a more efficient method for resolving bicameral differences on major legislation.

Several of the reasons for the heightened importance of the ping pong approach, and the implications that flow from its use on major legislation, seem directly or indirectly related to at least six factors (setting aside the earlier discussion about the relative ease of blocking the appointment of conferees in the Senate). The six are (1) a further enhancement of the role of party leaders; (2) limits on the role of committees and their leaders; (3) a marginal role of the

⁴² Tory Newmyer, “Senate Moves on Ethics Bill,” *Roll Call*, Aug. 2, 2007, p. 24.

⁴³ Chris Frates and Josephine Hearn, “[A Senator] Pledges Ethics Fight,” *Politico*, Aug. 1, 2007, p. 12. Because the congressional Democratic leadership was worried that President Bush might “pocket veto” S. 1 during Congress’s August recess, they delayed sending the legislation to the White House until Congress returned and had an opportunity to override any veto by a two-thirds vote of each chamber. See John Stanton, “Leaders Holding Ethics Bill,” *Roll Call*, Aug. 13, 2007, p. 3.

minority party; (4) constraints on the deliberative process; (5) the avoidance of procedural/political issues; and (6) the lack of transparency.

Whether these factors are causes or effects of ping ponging, or both, merits brief mention. Because cause and effect are hard to disentangle, it is probably safe to say that the six factors reflect both ingredients to one degree or another. For example, the apparent increase in reliance on ping ponging might be viewed as either a cause or effect of enhanced party leadership influence. A *cause* because party leaders today play a larger role throughout all lawmaking stages, including bicameral negotiations. The preference of party leaders, in short, might be to utilize amendment exchange rather than conference committees so as to better ensure the achievement of party-preferred goals. An *effect* because difficulties in creating conference committees have provided central party leaders with more opportunities to step in and assume wider responsibility for reconciling bicameral differences on major legislation through the ping pong (and informal negotiating) method. Perhaps more useful than making judgments about cause and effect is to consider whether difficulties in forming conference committees helped to encourage these six developments.

Further Enhancement of the Role of Party Leaders

By any reasonable test, the four Capitol Hill party organizations play active roles in the lawmaking process. Their organizational elements (party caucuses or committees, for example) are active, party leaders are increasingly prominent, and party voting is at comparatively high levels. Given sharp conflicts between the two parties on key policy issues and narrow margins of party control, rank-and-file lawmakers generally recognize the need for strong leadership for their substantive and political agenda to succeed. The partisan polarization in Congress contributes to strengthened party leadership, especially in the House. Nevertheless, “majority party senators expect their leader to exploit majority status for partisan advantage.”⁴⁴

Regardless of the reasons that prevent the convening of conference committees, the exchange of amendments procedure highlights the powerful negotiating role of central party leaders. They are strategically positioned to fashion major bicameral leadership compromises, perhaps with little input from rank-and-file members, the committee(s) of original jurisdiction, or the minority party. In short, the ping pong approach on major legislation is illustrative of the centralization of party control that characterizes the contemporary House and, to a lesser extent, the Senate. In the Senate, majority party leaders recognize that the ping pong method avoids a potential series of probably impossible-to-break filibusters associated with the appointment of conferees.

Limits on the Role of Committees and Their Leaders

The drift toward centralized party authority, especially noteworthy in the House since the mid-1990s, has tightened leadership influence over committees and their chairs. Use of the ping pong procedure on the majority party’s priorities can mean that committee leaders and members exercise generally minimal influence over the compromises reached by each chamber’s top party leaders. As Representative John Dingell, D-Mich., the chair of the Energy and Commerce Committee in the 110th Congress, said about a major energy bill (H.R. 6):

H.R. 6 is not the product of a formal conference, but rather the result of amendments being passed between the House and Senate as a means of resolving the differences between their respective bills. I have noted in the past, and will continue to note, that I find this manner of legislating to be unsatisfactory and unwise. Given the difficulty experienced by the Senate in going to conference on this bill this year, however, this process is the best that we can hope for under the circumstances One of the reasons

⁴⁴ Sinclair, *Party Wars*, p. 192.

this [ping pong] process is inferior to that of a formal conference is the lack of a conference report and, thus, the lack of a written legislative history detailing why certain policies were adopted and others excluded.⁴⁵

In sum, unless committee leaders and members are invited to participate in the closed bicameral negotiations, they may have little or no say on the contents of the final leadership-produced compromise. “If we don’t go to conference, there’s no need for us to legislate on anything really,” exclaimed a House chair, underscoring how the ping pong approach has shifted power from House and Senate committees to House and Senate party leaders.

Marginal Role of the Minority Party

Just as there have been cases of minority party exclusion from conference committees, as mentioned earlier, the same holds true in the case of the amendment exchange method. Minority party members have been excluded from these bicameral negotiating sessions, unless their input is sought by the leaders in charge of the back-and-forth amendment procedure. Moreover, such participation is more likely to involve minority Senators than minority House members. The contributions of minority party Senators might be important in devising a product that can attract not only a majority but also the supermajority vote often required to enact legislation in that chamber.

The benefits of an inter-chamber bargaining process where all sides participate was underscored by a spokesperson for a House minority leader. Both parties’ views are considered, the process is likely to be perceived as fair because it comports with the regular order, and a stronger and more credible bicameral product is likely to be the outcome. As the spokesperson explained:

The conference process serves to allow Members to buy into a final bill. Sometimes there are tweaks and changes that have to be made, but it allows buy-in. Absent that kind of process, you’re really getting a majority-driven bill without bipartisan support.⁴⁶

Majority party lawmakers might reply that they understand the principle of minority rights, but contend that the other side often prefers obstructionism to cooperation so as to prevent the majority party from accomplishing its agenda. As a result, minority lawmakers may be excluded from participating in the processes for bicameral reconciliation. Ironically, because the Senate sometimes blocks the convening of conference committees, this may mean that Senators who normally would be chosen as conferees are likely to be excluded from the ping pong negotiations.

Constraints on the Deliberative Process

What constitutes good public policy is often unclear but it is more likely to be achieved through a deliberative, or reasoned, process where all major issues and views are debated and discussed. A conference process that involves lawmakers with specialized expertise from both parties and both chambers arguably provides for a wider range of interests and preferences to be considered and debated. The amendments (the bicameral compromises) that are ping ponged between the houses are usually crafted in private by a relatively small number of Members, largely from the majority party. To be sure, once these privately-negotiated House amendments or Senate amendments to legislation are taken up in each chamber, there is generally time for lawmakers to

⁴⁵ *Congressional Record*, vol. 153, Dec. 28, 2008, p. E2665.

⁴⁶ Emily Pierce and Jennifer Yachnin, “Tactical Skirmishes Intensified in 110th Congress,” *Roll Call*, Jan. 22, 2008, p. B-16.

debate and amend the bicameral accords. The deliberative process, however, could be constrained in the House by special rules from the Rules Committee or in the Senate by tree-filling: offering all the amendatory motions that can be pending at one time.

The two chambers and the two parties have their differences, but a rigorous and vigorous exchange of views in a conference setting might better — compared to the exchange of amendments method — expose weaknesses in the legislation, promote thorough analysis, generate bipartisan support, or encourage consideration of new ideas and perspectives. In the judgment of a senior House minority member, bypassing the conference stage increases the likelihood that you “get legislation that is not well thought out because it hasn’t been tugged and hauled [by] all sides.”⁴⁷ Needless to say, conference committees are not always models of inclusiveness and the wide-ranging examination of alternatives.

Avoidance of Political/Procedural Concerns

Sharp partisanship, particularly since the mid-1990s, has been resurgent on Capitol Hill for reasons highlighted in the previous discussion on polarization. Close elections, narrow margins of control in each chamber, and significant policy differences are among the factors that influence the political/procedural actions of House and Senate members and party leaders. House and Senate majority leaders, as a result, have an incentive to counter minority party actions aimed at forcing vulnerable majority party lawmakers to cast tough votes that might cause them electoral difficulties in the next election. The next two parts of this section highlight several formal House and Senate procedural rules governing conference committees that majority party leaders might want to avoid or circumvent because of political concerns.

House. After the House has agreed to go to conference but before the conferees are officially named by the Speaker, the chamber may adoption a *motion to instruct* their conferees (for example, to uphold the House’s position on a certain policy issue). A member of the minority party is granted priority to offer this motion and only one can be made at this stage. Instructions are non-binding on the soon-to-be named conferees, but they do serve various purposes. One of these is political. Instruction motions can be framed to force votes on “hot button” issues that could cause electoral problems for majority party members who hold closely-contested seats. Furthermore, if a conference cannot reach agreement within 20 calendar days and ten legislative days, then an unlimited number of motions to instruct are in order. Minority party members can offer repetitive motions to instruct so as to compel votes on their election-year and political priorities. (Party leaders sometimes avoid this issue by delaying the appointment of conferees until the pre-conference negotiations are near completion.)

The House might also take steps to recommit the conference report with instructions if the other body has not discharged its conferees by acting first and favorably on the conference report. A minority party Member is given priority by the Speaker to offer the motion to recommit the conference report with instructions, which might be drafted to require a vote on a single isolated issue that might cause political “heartburn” for the majority party. There are no motions to instruct with the ping pong method.

The ping pong method also disallows use of the motion to recommit with respect to House or Senate amendments to legislation. During the initial consideration of bills or joint resolutions, the minority leader, or his designee, is guaranteed the right to offer a motion to recommit by House Rule XIII, clause 6. The minority party’s right to offer the recommittal motion does not apply under Rule XIII “to a Senate bill or resolution for which the text of a House-passed measure has been substituted.” It further does not apply to amendments between the houses.

⁴⁷ Carl Hulse, “In Conference: Process Undone By Partisanship,” *New York Times*, Sept. 26, 2007, p. A23.

Motions to recommit measures during their initial floor consideration are of two types: simple (return a bill or joint resolution to committee) or with instructions (the minority party's policy alternative which the full House votes upon.) Recent Congresses have witnessed use of the motion to recommit with instructions to compel vulnerable majority party members to vote on minority-crafted alternatives that, if adopted, might undermine the core intent of the legislation and/or provoke political problems back home for majority party lawmakers. In the 110th Congress, for example, since "switching to the minority, Republicans have launched a coordinated effort to use recommitment motions to force Democrats to cast uncomfortable votes or make unwelcome changes to bills."⁴⁸ The "House amendments to Senate-passed bills" approach avoids potential procedural maneuvers associated with artfully worded recommitment motions and attendant political headaches for the majority leadership.

Another House rule that applies to conference reports but not to the exchange of amendment procedure involves *earmarks*. Earmarks, in brief, are provisions often included in appropriations bills and/or their accompanying committee reports that set aside specific funds for projects or programs in Members' districts. They are also included in other types of measures. Earmarks have been a source of controversy in recent years because of their increase in both number and cost, not to mention scandals associated with their use.

Under House rules, conference reports are not to be considered unless they and their accompanying joint explanatory statements include a list of congressional earmarks and their sponsors. This House rule (Rule XXI, clause 9) does not apply to amendments between the houses. Lamented one House member, the "point of order that I would have liked to have raised against the provisions that may include earmarks [do not] lie against the bill because it is not a conference report, because it's a House amendment to a Senate amendment."⁴⁹

Senate. The threat of a filibuster potentially influences nearly everything that the Senate does, including amendments between the chambers. These amendments are also subject to filibusters and non-relevant amendments, unless cloture is invoked or limits are placed on both the debate and amendment process by unanimous consent agreements. However, if the political circumstances are right and the House and Senate majority leadership is involved and committed, then the odds favor action rather than inaction with the ping pong method. There are, it seems, fewer procedural obstacles to overcome with the exchange of amendment procedure compared to convening conference committees. As a Senate parliamentary expert pointed out, "Notwithstanding these potential difficulties [filibusters and an uncontrolled amendment process], the use of amendments between the houses can ... be highly efficient" in achieving bicameral compromises.⁵⁰

New rules affecting conference reports — but not the exchange of amendment procedure — were adopted by the 110th Senate. One of the changes provided for enhanced enforcement of an existing Senate rule (Rule XXVIII), prohibiting the "airdropping" of items into conference reports. "Air drops" are measures or matters inserted into conference reports without first being

⁴⁸ Kathleen Hunter, "GOP Continues to Vex Democrats on Procedure," *CQ Today*, Nov. 7, 2007, p. 30. Under House Rule XIII, clause 6(c), the Rules Committee is not to report a special rule "that would prevent the motion to recommit a bill or joint resolution from being made," including one offered by the minority leader or his designee. However, the Rules Committee may report "special rules precluding a motion to recommit at subsequent stages; that is, during consideration of amendments between the Houses." See Wm. Holmes Brown and Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* (Washington, GPO, 2003), p. 813.

⁴⁹ *Congressional Record*, vol. 153, Dec. 6, 2007, p. H14257.

⁵⁰ Martin B. Gold, *Senate Procedure and Practice* (New York: Rowman & Littlefield Publishers, Inc., 2004), p. 121.

enacted by the House or Senate. These are considered violations of “*scope*,” a parliamentary principle which also applies to the House.

In brief, scope means that conferees are to consider only the matters in disagreement between the chambers, they are not to include new matter, nor are they to delete matter agreed to by both chambers. Under the previous Rule XXVIII, a scope point of order upheld by the presiding officer would effectively kill the conference report. Under the revised Senate rule, if a point of order is sustained against airdropped items, that does result in rejection of the conference report, *but* the offending material is deleted and the remaining matter can be returned to the House for its consideration using the exchange of amendment procedure.

For example, when a Rule XXVIII point of order was raised against a conference report for first time under the new procedure, it was sustained by the presiding officer. He then stated: “Under the rule, the Senate now considers the question of whether the Senate should recede from its amendment to the House bill and concur with a further amendment [the conference report minus the offending material].”⁵¹ The Senate agreed to the motion put by the presiding officer.

The Senate also created a brand new rule (Rule XLIV). A key feature of this rule is the public disclosure of *earmarks*. Before a conference report can be considered, sponsors of earmarks must be identified through lists, charts, or other means and made publicly available on a congressional Web site for at least 48 hours. The majority leader or appropriate committee chair must certify (in a statement on the Senate floor, for example) that these requirements have been met before it is in order to vote on a conference report.

Rule XLIV also permits a Senator to “raise a point of order against one or more provisions of a conference report if they constitute new directed spending provisions” which are “targeted to a specific State, locality, or Congressional district, other than through a statutory or administrative formula-driven or competitive award process.”⁵² Worth noting is that paragraph 8 of Rule XLIV applies to discretionary and mandatory spending and not to authorizations of appropriations. The point of discussing these two rule changes — the revisions to Rule XXVIII and the new Rule XLIV — is to underscore that amendments between the houses are not subject to their formal procedures and requirements.

Lack of Transparency

Private negotiations among a limited number of participants is a fundamental characteristic of bicameral negotiations on major bills. As for the amendment exchange method, transparency and open deliberations are minimized if combined with a special rule limiting amendments in the House and tree-filling in the Senate, which closes off amendment opportunities for Members. Unlike the joint explanatory statement accompanying a conference report, there is no required public “paper trail” or written record of the decisions made during the informally-negotiated amendment exchange procedure, except for whatever material is spread on the record during House and Senate floor debate. There are also no layover requirements for the exchange of amendment procedure, but there are for conference reports. Layover rules give Members an opportunity to read about the decisions made in a conference committee prior to floor action. Layover rules, however, may be waived by special rules from the House Rules Committee and the need for cloture provides Senators with the opportunity to read the amendments associated

⁵¹ *Congressional Record*, vol. 153, Nov. 7, 2007, p. S14043. There was an unsuccessful attempt to waive the ruling of the presiding officer by the required 60 votes of the Senate.

⁵² Senate Rule XLIV provides a detailed definition of what constitutes a “congressionally directed spending item.” It also establishes a procedure for waiving any or all points of order raised against a conference report under this Senate rule.

with the ping pong method. Still, the conference route seems to provide the potential for more openness and transparency compared to the ping pong method. Three reasons buttress this assessment.

First, conference committees produce two formal products that are publicly available: the conference report (the legal language) and the joint explanatory statement (an explanation of the conference report). Under House rules (Rule XIII, clause 7), the “joint explanatory statement shall be sufficiently detailed and explicit to inform the House [and Senate] of the effects of the report on the matters committed to conference.” Conference reports and joint explanatory statements are printed in the *Congressional Record*. Joint explanatory statements are not required by the exchange of amendments procedure. (However, there are examples of ping ponged measures where something akin to a joint explanatory statement is printed in the *Congressional Record*, as in the case of S. 1, the Honest Leadership and Open Government Act).⁵³

Second, House and Senate rules stipulate that meetings of conference committees shall be open to the public; these rules also identify the procedures for closing the public sessions. To emphasize their commitment to open conferences, the majority leaders of each chamber pledged that conferences in the 110th Congress would be open to public observation.⁵⁴ In Section 515 of the Honest Leadership and Open Government Act (P. L. 110-81), the Senate agreed to the following protocol: “conference committees should hold regular, formal meetings of all conferees that are open to the public.” If there is a presumption of openness for conference committees, there is nothing comparable for the private negotiating sessions associated with the ping pong method.

Third, transparency of conference proceedings can sometimes be an important strategic component of the lawmaking process. Televising conferences over C-SPAN (the Cable Satellite Public Affairs Network), which has occurred several times in recent years, could be part of the strategy for influencing conference decisionmaking by generating public opinion for or against particular issues.

In at least one instance, according to the House chair of a conference committee, the entire proceedings were open to public view. As the chair stated, this was the first tax conference in his memory that was held “entirely with the public permitted complete access, televised over the internal television [network] for the entire time of the conference. There were no separate conference meetings. All of the conference meetings were public.”⁵⁵ The chair of the Senate conferees agreed with this assessment. On tax conferences, he said, nearly “all of the toughest decisions come down to private negotiations between the two chairmen In this conference, however, all discussions were aired publicly.”⁵⁶ The rationale for complete openness was to blunt any allegations from opponents that untoward deals were being made in secret. There have been no instances of television coverage of the private negotiations associated with the ping pong method.

⁵³ *Congressional Record*, vol. 153, Aug. 2, 2007, pp. S10708-S10714.

⁵⁴ See Lynn Sweet, “New Congress, New Rules,” *The Hill*, Dec. 7, 2006, p. 27 and Erin Billings and Emily Pierce, “Reid Prepares for Senate Changeover,” *Roll Call*, Nov. 9, 2006, on-line edition.

⁵⁵ *Congressional Record*, vol. 150, Oct. 7, 2004, p. H8656.

⁵⁶ *Congressional Record*, vol. 150, Oct. 9, 2004, p. S10929.

Concluding Observations

The recent use of ping ponging on major bills is something that does seem significant. Volleying amendments between the houses on consequential legislation is outside what might be considered the “regular order” — the creation of a conference committee, the usual venue for reconciling bicameral differences on major measures. As a result, there are at least five issues associated with ping ponging that merit discussion.

First, the more prominent role of ping ponging may reflect the gradual institutionalization of a leadership-influenced bicameral bargaining process that has been evolving for several years. Bicameral bargaining is not a static process; it has undergone many changes over the years. The “old” conference style, where a limited number of conferees from a single committee in each chamber haggle over inter-chamber differences, no longer suffices as the prime method for reaching bicameral compromises. Today, party leaders exercise large influence in achieving and coordinating inter-chamber agreement on major bills, often resorting to the ping pong method for this purpose. The bicameral role of party leaders results from various developments, such as the need to mobilize support for party-preferred policies from a diverse array of engaged actors (interest groups, executive officials, non-conferee lawmakers, bloggers, and so on.)

Second, there is arguably little significant difference between convening “virtual” conferences, where bicameral compromises are worked out in private among key lawmakers, and employing the amendment exchange method where inter-chamber accords are also hammered out in closed meetings by a select number of House and Senate leaders. There are differences, however. The threat or reality of a filibuster in today’s Senate appears so severe that it has produced a changed bicameral dynamic for reconciling House-Senate differences on legislation. Further, there are numerous House and Senate rules and practices triggered by the conference method that can be avoided by the ping pong approach. These include such things as potential controversies involving conferee selection, the instruction of conferees, or scope violations.

Third, the bargaining dynamic associated with ping ponging may have its roots in Senate developments that have occurred over several decades. The thrust of these changes has led to a more individualistic and partisan Senate where lawmakers’ individual or partisan preferences sometimes take precedence over institutional requirements. Congressional scholars have examined how the Senate has changed over several decades, and these changes influence today’s conferee appointment process. A capsule summary might include the following developments.

During the 1970s, there was an increase in the number of filibusters and other delaying tactics as the chamber witnessed a heightened sense of influence on the part of each Senator. Many Senators, regardless of party, were more willing to employ their formidable parliamentary prerogatives to advance individual goals even if that meant blocking the Senate’s business or foiling the agenda-setting authority of the majority leader. Professor Richard F. Fenno, Jr. studied how the 1950s Senate evolved from a “communitarian” institution, where Members were expected to use filibusters sparingly and only for high-stakes national issues, to today’s “individualistic” Senate. He found that with “more openness, more media visibility, more candidate-centered elections,” more interest groups, more political obligations, and more staff, Members became independent entrepreneurs unwilling to submerge their personal and political objectives “to the norms of any collectivity.”⁵⁷

⁵⁷ Richard F. Fenno, Jr., “The Senate Through the Looking Glass: The Debate over Television,” *Legislative Studies Quarterly*, Aug. 1989, p. 316.

By the late 1980s and 1990s, the Senate seemed to become increasingly contentious, “with polarization along partisan and ideological lines that largely coincide.”⁵⁸ This pattern continued into the 2000s. Given any lawmaker’s ability to stall legislative action, and a narrowly-divided chamber’s oft-inability to invoke cloture, it became much more difficult for the Senate to convene conference committees. As a result, majority party leaders in both houses turned to amendment exchanges and informal negotiations to iron out bicameral differences. This negotiating pattern has persisted in recent years regardless of which party has been in charge of the Congress.

Fourth, bypassing the conference stage is not without its own complications. Things can quickly become procedurally complicated in the Senate, leading to complex parliamentary maneuvers. On a 2008 housing measure, for example, there were three motions for cloture; an unsuccessful motion to refer the House amendments to the Banking Committee; tree-filling by the majority leader; controversy over whether an amendment involving energy tax incentives was germane to the housing bill; multiple amendments offered to the House amendments; and other procedural twists and turns. In brief, consideration of House amendments in the Senate provides numerous opportunities for delay and produces complications that are procedurally and politically complex.

Lastly, the history of Congress is the history of change. Lawmaking processes adapt in big and little ways to new pressures, actors, and events. Yet one constant is that both chambers must pass a measure in absolutely identical fashion before it can be sent to the White House for presidential consideration. Recently, the exchange of amendments between the houses has taken on larger importance in reconciling House-Senate differences on major legislation. Whether this development is an anomaly, unique to recent Congresses, or reflects the wave of the future is not clear. Prediction is very hard, Yogi Berra is reputed to have said, especially about the future. One thing does seem certain, however. If there are continuing issues in convening conference committees, or circumstances warrant their calculated circumvention, institutional leaders seem certain to employ the ping pong method or devise other ways to resolve bicameral differences on legislation.

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⁵⁸ Barbara Sinclair, *Party Wars*, p. xvi.