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VOTING IN SENATE COMMITTEES: UNKEPT RECORDS REFLECT VIOLATED RULES

In pursuing one of the many special interest bills that pass through Congress so quietly and so often, FAS became acutely aware of the games which Senate Committees play to avoid compliance with Senate rules and any record of non-compliance.

One rule requires that final committee passage of a **bill be attended by an actual majority of the Committee, rather than just an earlier established (and still working because not yet objected to) "quorum" majority. This rule exists because the Senate defers so regularly to its Committees that Committee passage usually means Senate passage. Moreover, under the rules, final Committee passage makes impossible later objection to any earlier Committee irregularities. This further justifies having a majority actually present at this decisive moment.**

However, the rule of "actual presence" is so widely violated that some Committee Chairmen do not seem to know that it exists. The violation occurs when Chairmen take voice votes (or say "without objection so ordered") on final Committee passage and then fail to record whether or not a majority of the Committee was actually present at the time. Instead, the Committees, in written up minutes, regularly list at the outset of the minutes as "in attendance" all Senators who may have appeared at one time or another during the mark-up session—which may have gone on for an entire day. This would seem an obvious subterfuge to beef up the appearance of attendance. It is in substantive violation of the Senate rule that Committees keep a "complete record" of all Committee action. Historically, the existence of such attendance records has been decisive in resolving points of order charging the absense of an actual majority.

Indeed, the very legality of voice votes for final Committee passage of bills could be challenged. According to the rules, bills may not be passed unless they have the "concurrence of a majority of the members of the Committee who are present." No voice vote can assure such concurrence since even votes that are without a single nay do not show that a majority of those present affirmatively concur in the bill. And if "concur" is not to be read as positive concurrence, but only as acquiescence, so that abstentions would count, then a similar indulgence would have to be given to bills on Committee roll call votes—and it is not. On roll call votes, abstentions are not counted for the purpose of proving majority concurrence.

As noted on page 6, we have examined the interesting question: could failure to keep records showing compliance with quorum rules, and non-compliance with these rules itself, ever be challenged in the Courts? We conclude that the Congress is not so immune to this possibility as most of its inhabitants believe. Many, if not all, of the pieces of such a challenge now are strewn around on the judicial landscape.

But our purpose is not to prove that this is theoretically possible, or to incite or suggest it in any particular case. Rather, we seek to reveal how far Congress has fallen from the standards which it, and the Courts, require of the rest of the Government. These rules are meant to be followed, not least of all because they are part of statutes within a Government of law.

Of course, the Senate is constantly "amending the rules" by unanimous consent and could not function

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Approved by the Federation Executive Committee, the above statement was reviewed and endorsed by the following specialist:
Former Senator Joseph Clark, author "Congress, the Sapless Branch."

SHOULD RECORDS OF COMMITTEE QUORUMS BE KEPT?

"No measure or recommendation shall be reported from any standing Committee of the Senate (including the Committee on Appropriations) unless a majority of the Committee were actually present."

—Section 133d of the Legislative Reorganization Act of 1946.

"Each (standing) committee shall keep a complete record of all committee action."

—Section 133b of the Legislative Reorganization Act of 1946.

QUESTION: When reporting out bills—as part of the "complete record of all Committee action,"—should or must Committees keep a record of those members who formed that required majority of the Committee actually present?

It seems, by any reasonable standard, that the answer must be "yes." The list of those members who formed the majority actually present is, after all, the record of the fact that the Committee is complying with Section 133d

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CONGRESSIONAL RULES AND THE COURTS, pages 6, 7

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otherwise. This has led its inhabitants to argue that a failure by any Senator to object to non-compliance with a rule is and ought to be considered an ad hoc "amendment" of the rule. Such reasoning makes the Senate a jungle in which every Senator must be constantly vigilant and ready to object because the rules provide him no protection. Worse, in this case, the failure of Committees to keep relevant records would make it impossible for his objections to be sustained. Under these circumstances, what is rule of law within the Senate?

Furthermore, it is not so easy for Senators to object to these violations as might appear if the matter were considered only from a parliamentary point of view. An objection costs a Senator politically—retribution from an injured Committee Chairman is reasonably certain to occur. Senators are therefore loath to invoke the rules in matters that are less than crucial to them. Indeed, they are often reluctant to ask even for selected Committee roll call votes lest they unnecessarily put a colleague on the spot. Certainly they are not eager to embarrass their own Committee with charges of impropriety and here is where the violations they know of occur. The Senate is, after all, a club.

Final Committee passage of legislation need not take long—if the issues have earlier been worked out a few minutes will suffice. If the Committee schedules in advance the times for which votes on final passage are planned, it can certainly get an actual majority of the Committee together to attend, and can pass a considerable number of bills in a short period of time. And if the Senate Committee cannot live with the rule of actual presence, the Senate should change the rule. We did not make it.

We therefore conclude that Senate Committees should require roll call votes on final passage of all measures or matters to the Senate floor. If the Committee is following the "actual presence" rule for a majority of the Committee, it is a simple (and not time consuming) process for the staff to record who voted aye and nay—on that same show of hands which is now used so often for a "voice vote". The problem is not therefore one of time.

Even if an actual majority is present, the Committees prefer to avoid roll call votes (a) so that Senators will not have to be committed to various pieces of legislation that may be politically touchy and (b) so that bills can be passed which many members of the Committee have not focused upon. In such Committees as Interior, Commerce, and Finance where there are many special interest bills, these are no mean advantages both for Chairmen and for those Senators who want to duck the issue in question. But why should bills be allowed to come before the Senate, with the full authority of a Committee behind them, when that full authority represents the desire of only one or a few Senators? The Committee is charged to examine the bill. Why not provide evidence that it has actually done so?

If such recorded votes are taken, the problem of recording the fact that an actual majority was present will be solved, since recorded votes must be reported to the Senate by a rule which—as far as we can tell—is being followed. But if such recorded votes are not to be taken in each case, then at least there is no excuse for a failure to record the names of the Senators whose presence fulfilled, at that moment of passage, the requirement for an actual majority. Without such records, we will never believe that Committee Chairmen are not often violating the rules to whisk through those bills to which they feel their colleagues will be too ill-informed, or too cowed, to object.

More generally, without such records, Congress will continue to live unstably in an environment in which stricter standards are applied by the Courts and public to other branches than itself. From this can come only trouble. □

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of a statute and with the Senate rules. (The Legislative Reorganization Act has been incorporated into the Senate rules.) It seems no more than common sense to keep such records to protect against later challenges. The above Senate rule requires keeping a "complete" record of all Committee action. In the case of other Government agencies, we do require that records be kept to show compliance with law.

There is, in this case, no problem about keeping the records. Committee staff take notes in markup sessions summarizing the discussion and noting in particular the final passage of various matters or recommendations to be put before the Senate. It is a simple matter for such staff to maintain, with each such vote, notes showing which Senators were "actually present" for each such final vote.

There is a most revealing precedent showing the crucial importance of such records; this precedent probably establishes in itself the point at issue.

In 1963, Senator William Proxmire raised a point of order that a bill (S. 1703) was not properly before the Senate because it had been reported out without a quorum being actually present. The Committee notes confirmed that this was so; although a majority of the Committee continued to be present in person and by proxy for the final vote, there was not a majority of the Committee "actually present" when the final vote took place. The Parliamentarian sustained the objection (see adjoining box for the dialogue).

Notes Were Critical

For purposes of this discussion, the most significant part of this exchange occurred when the presiding officer said:

> "The Chair must inquire of the Chairman of the Committee as to what the facts are. The Chair is not conversant with the facts, *and must depend on the Chairman of the Committee.* (italics added).

The Parliamentarian at that time was understandably reluctant to become a judge of the facts and was evidently prepared to rule for or against the objection depending upon the statement of the Chairman of the Committee. This is consistent with Congressional attitudes that deplore such demeaning of Members (and especially Chairmen of Committees) as might occur in a struggle over the facts. It seems highly likely that, had no records existed upon which to base Senator Ellender's response, and had he simply allowed that he did recall a majority being present, the objection would not have been sustained. Indeed, without records, it probably would not have been brought. This is despite the fact that Senator Proxmire, the objecting Senator, had himself been in the Committee at the time of the vote—failing to object at that time in part at least because he had not known of his right to do so.

In short, the fact that the records were kept was decisive in this matter. And considering the Senate preference for avoidance of personal controversies, the records were decisive in avoiding the kind of exchange it wants to avoid.

The rule on actual presence has very long roots. Al-

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A PARLIAMENTARY HAPPENING

Mr. PROXMIRE. Mr. President, I make a point of order that the bill which is now under consideration is not properly before the Senate because, at the time the vote to report the bill was taken in committee, a quorum was not actually present. I have checked this with the clerk of the committee, and it is my understanding that only six Senators answered to their names.

It is true that there had been a quorum of the committee earlier in the day and that that quorum had been present during the discussion of the bill. The fact is that there was not a quorum physically present at the time the vote was taken, and for that reason I feel that the bill is not properly before the Senate.

The PRESIDING OFFICER. The Chair must inquire of the Chairman of the Committee as to what the facts are. The Chair is not conversant with the facts, and must depend on the Chairman of the Committee.

Mr. ELLENDER. Mr. President, if the Chair sustains the point of order of the Senator from Wisconsin, I should say 50 percent of the bills that come from committee would be in the same category as the one that is now before the Senate.

Ever since I became chairman of the committee, I have made it a rule to have a quorum present and, after a quorum is present, if any member of the committee desires to leave because of some other meeting, a proxy is left, and I am usually told how to vote that proxy.

In this case at the time of the actual voting to report the bill, I believe six members of the committee were present. The others had left proxies that were cast by me pursuant to instructions by Senators who were present at the meeting.

As I have said, committees have been proceeding in that manner for many years—in fact, ever since the act was put on the statute books in 1946. I am very hopeful that the Chair will rule with us.

* * *

The PRESIDING OFFICER. Will the chairman of the committee inform the Chair specifically whether a quorum was present at the time the vote was taken on S. 1703?

Mr. ELLENDER. At the time?

The PRESIDING OFFICER. At the time.

Mr. ELLENDER. By proxies, yes; but not actually.

* * *

Mr. ELLENDER. The records of the committee show that a quorum was present at the meeting.

The PRESIDING OFFICER. By proxy?

Mr. ELLENDER. A quorum was present at the time the meeting began, when the question of a quorum arose.

The PRESIDING OFFICER. Was a quorum present at the time the vote was taken of S. 1703?

Mr. ELLENDER. No.

The PRESIDING OFFICER. In view of the point of order that has been made, and the rule which necessitates that a ruling be made, the Chair rules that under section 133(d) of the Legislative Reorganization Act of 1946, which operates as a rule of the Senate, and provides that: "No measure or recommendation shall be reported from any such committee unless a majority of the committee were actually present," the Chair sustains the point of order.□

July 31, 1963, Congressional Record, p. 13791-94

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though Jefferson's Manual is not binding upon the Senate (as it is upon the House) it is to this day often bound into the Senate Manual on Standing Rules and considered a basic and authoritative source. Here is what he said:

"A Committee meet when and where they please, if the House has not ordered time and place for them (6 Grey, 370), *but they can only act when together, and not by separate consultation and consent—nothing being the report of the Committee but what has been agreed to in Committee actually assembled.*" (Italics added.)

A majority of the Committee constitutes a quorum for business. (Elsynge's Method of Passing Bills, 11)

—Jefferson's Manual, Section XXVI compiled when Thomas Jefferson was Vice President (and President of the Senate), 1797-1801 with references to his sources of parliamentary instruction.

Thus, Jefferson's Manual and its "actually assembled" requirement seems to be the source of the "actual presence" rule adopted in 1946.

Why Are Such Records Not Kept?

Senate practice seems to conform to the view that it is safer not to keep such records or to keep them secret. Discussions with the Counsels of most of the major Committees, and examination of sample Committee mark-up sessions minutes, reveal that such notes are either not taken or eliminated from the typed-up Committee minutes. These minutes normally list as "present" all Senators who were present at some time during the mark-up session—which may take all day and actually be in a separate morning and afternoon session. Thus a 15 member Committee may begin its minutes simply by noting as "present" 14 members when, for most of the day, nowhere near that number need have been present. It then proceeds to enumerate a large number of bills passed and other matters with a few paragraphs of summarized discussion for each.

The Actual Practice

In fact, bills are voted out of Committee in one of three ways. The most formal method is the roll-call vote. Here the vote must not only be recorded but reported:

"Whenever any (standing) committee by roll-call vote reports any measure or matter, the report of the Committee upon such measure or matter shall include a tabulation of the votes cast in favor of and the votes cast in opposition to such measure or matter by each member of the Committee." (Sec. 133d of the 1946 Legislative Reorganization Act.)

The problem is that, in most Committees, most matters are resolved by voice vote. (Indeed, the Committee on Rules and Administration explicitly notes what is also the general rule in other Committees, "voting in the Committee on any issue will normally be by voice vote." Neither Senate rules, nor the Legislative Reorganization Act seem to refer to these Committee voice votes.

The third method is sometimes referred to as a "voice vote" but is actually a statement of the Chairman of the Committee "without objection so ordered."

The Misuse of Voice and "Without Objection" Votes

There are, according to our investigation, two quite different ways in which the "actual presence" rule is violated.

In the first instance, an entire Committee, as a matter of general practice, may simply ignore the rule, or misunderstand it. At least one major Senate Committee (according to two well-qualified sources) follows instead only the rule that a quorum of a majority of the Committee be present to conduct Committee business, although its rules do state that a majority must be "actually present." Thus, the Committee Chairman will ask the staff whether a quorum is present, i.e. will ask if enough Senators have stopped in to say "present" to permit business to be conducted. He does not himself count precisely because he is not following the "actual presence" rule.

In the second instance, a Committee may be clear about the meaning of the rule; but keep no records of having followed it. Thus one Committee is quite explicit in its rules, saying that a quorum of the Committee must be "actually present to vote *at the time a measure or recommendation was ordered reported.*" But, asked about a specific bill, it noted that it had no records of who was present (which fact was confirmed at least in its official minutes). According to this Committee, the Chairman visually observes whether the required majority (8 Mem-

SENATE PRECEDENTS COMPILED BY PARLIAMENTARIAN

"The Chair has ruled that a report not authorized by the concurrence of more than one-half of a majority of the entire membership of the Committee, exclusive of proxies, cannot be received by the Senate upon objection.

The action of a Committee in ordering a bill to be reported to the Senate when a majority of the members of the Committee were not actually present is in contravention of an express rule of the Senate, and is therefore without authority and void.

The Presiding Officer further held that the bill had never legally left the committee and that it was still in the custody of the Committee.

A Committee in ordering a bill reported to the Senate must have a majority of its members present at the time the action was taken.

It is not in order, upon objection by a Senator, for the chairman of a Committee to submit a report which was ordered on a poll of the Committee.

A Committee report based upon a poll of its members is subject to a point of order as being in violation of the Legislative Reorganization Act of 1946, as amended.

On October 10, 1962, a nomination having been reported in the absence of a quorum actually present, a point of order was sustained and the nomination recommitted; under a like circumstance a bill met the same fate on July 31, 1963.

A report on a bill having been challenged on the ground that it was authorized by less than a quorum of the Committee, the bill, after debate, was recommitted."

—Senate Procedure, pg. 757-8
by Floyd M. Riddick

bers) is present. Here the Chairman cannot be challenged by any Senators who were not present. If he brings up the measure or matter when there are a few Senators present (and who sympathize with the passage of the matter), no one will challenge the fact that a majority of the Committee was present, since only the Members present have the information to do so.

How Serious is the Problem?

The problem is most serious in such Committees as Finance, Interior, and Commerce where a large number of highly questionable but not earthshaking bills are always pending. In these cases, the press of business being great, most Committee members are little aware of many bills. If the Chairman wants to whisk a bill through the Committee, there are always a sizeable number of Senators who will go along without necessarily having any clear knowledge of the bill. A voice vote, or "without objection so ordered" vote, permits these Senators to avoid taking sides. They need not offend the Chairman or senior member of the Committee who may be pushing a special interest bill. And they need not associate themselves with the bill either. The non-recorded vote is more than a convenience; it is a protective mechanism.

Once such a bill reaches the floor, however, it is usually ballyhooed and described as having been "unanimous." The Senate as a whole defers to its Committees and thus these bills are later passed without difficulty. As our example shows, a powerful Committee may come within an inch of passing a bill unanimously, even though opposed strenuously by the Administration.

DO VOICE VOTES SHOW MAJORITY CONCURRENCE?

"The vote of the Committee to report a measure or matter shall require the concurrence of a majority of the members of the committee who are present."

—Sec. 133d, Legislative Reorganization Act of 1946

Let us assume that a Committee has 17 members and a majority of nine are physically present to provide the number necessary to report out a bill. Let us assume that 4 members vote "aye" and 3 "nay" and 2 abstain, being unfamiliar with the bill. If the vote were by roll-call, it would not be reported out consistent with the above rule since less than a majority of the members present "concurred" in the bill.

A somewhat similar situation occurred in 1918. At that time, the relevant rule already read:

"nor shall any report be made to the Senate that is not authorized by the concurrence of more than one-half of a majority of such entire membership."

The Committee on Interstate Commerce had 17 members and reported out a bill with only seven members present and two proxies. It was commented upon that the seven members actually present did not constitute a majority of the 17 man Committee. However, the actual objection made and sustained was that the four members voting "aye" did not constitute a majority (5) of a majority (9) of the Committee (17) and thus it failed to have the concurrence of the required "more than one-half of a majority of such entire membership."

If the voice vote is by show of hands, one could tell (if one tried) whether this rule is being followed. But if the vote is actually by voice in the Committee, there is often no way to tell whether this "concurrence of a majority" rule is being followed. If the vote is "without objection so ordered," then there is similarly no way whatsoever to tell. There might be no more than one member who wanted the bill and many or all of those remaining silent might be abstaining on one ground or another.*

Rule Largely Ignored

Under current practices, quite obviously, no consideration whatsoever is being given to the above rule unless roll-call votes are taken. Thus, under current practices, many bills reach the floor with a presumption of support by the "concurrence of a majority", even on the presumption of "unanimous" support, when in fact they could not have shown majority support had a roll-call vote been taken. *In short, one can do by voice what would be impossible under a roll-call vote even though the quorum be actually present in both cases and the members voting the same way in both cases.* And this occurs in a large number of cases, those in which most Senators are abstaining for lack of familiarity with the bill.

There are two solutions to this problem. The first is to require only recorded votes as we recommended on page 2. The second is to adopt, in place of voice votes, recorded division votes. In a division vote, the "ayes" and the "nays" are separately counted but names are not recorded. If the totals are recorded, along with the number of members present, the records would then show whether the "ayes" were indeed a majority of the members present.□

NEW HOUSE RULES DELETE PROXY VOTING

On October 8, 1974, the House of Representatives approved the complete abolition of proxy voting: "No vote by any Member of any Committee or subcommittee with respect to any measure or matter may be cast by proxy." This rule will take effect on January 3, 1975. The House of Representatives had already been requiring of its Committees that an actual majority be present, not only for final passage of bills as required in the Senate, but for all other business. But now proxy votes cannot be added to that majority to determine the outcome of votes. The parliamentary practice in the House is to assume that this rule cannot be waived by unanimous consent, but only by an explicit change in the rule. Asked what would happen if no Congressman objected, a House parliamentarian volunteered that there could conceivably be problems in the Courts and mentioned the Yellin and Christoffel decisions (see pgs. 6, 7). In general, the House seems far less free wheeling than the Senate with regard to voting rules, and more conscious of potential legal problems.

* If a single member wanted to insist upon a roll call vote, he could do so under most interpretations of the rules (although it is sometimes said that 1/5 of the members present must request the roll call as in the Senate). But if the actual presence rule is not followed, he might well not be present to do so. And in the case where the quorum is composed of a minority of members interested in the bill and a majority of members ducking the issue no one would want to.

THE COURTS AND COMMITTEE RULES

Could the Courts require that Senate Committees follow their own rules? Most legal observers would say "no," but the answer is more complicated than that and more interesting—the Courts are getting closer to enforcing such requirements at the time.

Article I, Section 5 of the Constitution says that "Each House may determine the Rules of its Proceedings,".* The major test of this provision came in 1892 in United States v. Ballin (144 U.S. 1). In that century the House of Representatives was taking the view that a majority of the entire membership would actually have to vote to satisfy the constitutional requirement that a quorum be present to do business. But, in 1890, the Speaker ruled that members present in the chamber but not voting could be counted in determining the presence of a quorum.

In 1892, Ballin, Joseph & Co. challenged a statute reclassifying certain goods they wished to import on grounds that a quorum had not actually voted, the record showing 138 yea and 0 nay with 74 others present, but not voting. The Supreme Court upheld the House's method of determining a quorum and, in addition, said it must assume that the House journal would "speak the truth." It went on to say of the House of Representatives that:

> "It may not by its rules ignore constitutional restraints or violate fundamental rights and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute, and beyond the challenge of any other body or tribunal."

Rules Must Be Reasonable

In short, Ballin established that the House could decide how it wanted to fulfill the constitutional requirement that a majority be present to do business so long as it prescribed a method which was "reasonably certain to ascertain the fact." Moreover, the House could change its rules as it liked—so long as these did not ignore constitutional restraints or violate fundamental rights and were reasonable.

But did Congress have to follow its own rules once established and before being changed? This is quite a different question. Some cases show it does.

In 1949, the Supreme Court decided by a vote of five to four that a citation for perjury of a witness before a Congressional Committee was invalid because a quorum of the Committee was not "actually present" at the time of the alleged perjury. The House Committee on Education and Labor had had 25 members at that time—a quorum was thirteen. Fourteen members had been present when testimony began at 2:00 P.M. but evidence showed that as few as six had been present when one witness (Christoffel) testified at five P.M.

The overturning of this citation for perjury was especially remarkable because the Committee was doing no more than using the "working quorum" notion used on the House (and Senate) floor, in which a quorum once established is presumed to be in existence until a point of no quorum is made. Furthermore, the House had an explicit rule that "the rules of the House are hereby made the rules of its standing Committees so far as applicable."

Why could not the Committee do as the House itself did? True, the 1946 Legislative Reorganization Act had required that no measures be reported out of Committee unless a majority of the Committee were "actually present." But this presumably referred to the perjury citation, not to the perjury itself. In short, the Supreme Court took a very rigid view of the Committee's responsibility to follow its own rules if the Court did not, indeed, misconstrue the rules as well!

Court Required Records

Interestingly, the Court required of the Government that it show positively that a quorum was present when the witness falsified. Thus, the Committee had to do more than maintain an actual quorum continuously. *It had to keep a record of doing so.* In effect, unless the Committee transcript showed the various arrivals and departures of members, thus permitting a complete recording of attendance at each time, it would not be able to assure convictions on testimony that later proved perjurious. Moreover, Christoffel's perjury citation was reversed because the judge's charge to the jury permitted the jury to ignore oral testimony of observers indicating that the Committee quorum had in fact evaporated; this is a long step away from the Court in Ballin, relying only upon the Senate journal and saying that the Court could not look further.

The requirement that Committees follow their own rules was strengthened in 1963 in Yellin v. U.S. Yellin had asked the Committee Counsel for an executive session hearing to protect his reputation and it was denied. When he learned, subsequent to his testimony, that Committee rules provided for such a session upon his request, he appealed on grounds that the Committee had not followed its own rules. He was sustained by a vote of 5-4, the majority concluding its opinion by saying:

> "The Committee prepared the groundwork for prosecution in Yellin's case meticulously. It is not too exacting to require that the Committee be equally meticulous in obeying its own rules."

It should be noted that in both Christoffel and Yellin, the House itself approved the perjury and contempt citations respectively; nevertheless, the Court went behind those approvals to question Committee actions *prior even to the final Committee decision.* In this regard, the Court injected itself further into the maintenance of Committee rules than even Congressmen are permitted to do! The Legislative Reorganization Act of 1946 specifically pre-

* This clause seems to have been little debated in the Federal Convention of 1787 and changes in earlier drafts simply concerned stylistic variations such as "shall have authority to," or "shall have power to make rules for its own government," "settle its own rules of Proceedings" etc.

cludes Congressmen from raising a point of order about voting procedures earlier in Committee, so long as the final vote on reporting out the matter had been taken in accordance with that Act. In short, the Court went behind the vote of a House of Congress, and behind the vote of a Committee of that House as well, to question Committee proceedings themselves.

Of course, these were criminal cases involving individual rights. In a civil case involving individual rights—e.g. a statute making former President Nixon's papers Government property with or without compensation—the Court might be less meticulous. Maybe and maybe not; it may depend upon the individual judges.

For many statutes, such as most general tax laws, no ordinary citizen would have standing to bring a complaint. But would a Senator himself?

Illustrative Example: A Committee markup, held in public session, begins with a quorum but, subsequently, *with fewer than a majority* of members actually present reports out a bill. A Senator, asking for records of Committee attendance, with a view to objecting, finds they do not exist; the bill is passed. Subsequently, citizens sign depositions showing that a majority of the Committee was not actually present. The Senator goes to court asking that the statute be invalidated on the grounds that it was unlawfully reported out of Committee and that his right to object—which would clearly have been sustained as precedent shows—was denied him by a failure of the Committee to keep adequate records in accordance with the Senate rule that they keep a "complete record" of all such action.

Far-fetched? Maybe, but more and more of the pieces of such a complaint are in legal existence.

Senators Are Suing

In a number of recent cases, the courts have given a Senator standing to sue the Executive Branch in the courts on grounds that his vote was diminished by the failure of the Executive Branch to fulfill the requirements of a statute for which he had voted. Could he, by analogy, sue the Congress, seeking the invalidation of a statute on the ground that he had been deprived by unlawfully inadequate record-keeping of his right to object to unlawful procedure? In the first place, the right of a Senator to raise a point of order against a violation of the rules would seem to be as constitutionally vested as his right to vote.

Indeed, there is little difference between the two. If the rules are to be amended to permit what would otherwise be a violation of them, then this amendment is effected by a "unanimous consent" *vote*. Here his right to vote and his right to object are synonomous. If the rules are not to be followed, in the absence of an agreement to amend them suitably, then his right to object is not itself a vote. In fact, it is much more powerful than a single vote since, if his objection is well taken, it is invariably sustained by the Chair (which is only overturned by the Senate on exceedingly rare occasions.) Thus, the right to object can be the legal or political neutralizer to more than 50 other Senate votes in favor of a given bill.

The most recent case of such Senatorial standing to sue was Kennedy vs. Sampson, decided August 14, 1974, in the Circuit Court for the District of Columbia. The Court upheld Senator Kennedy's standing on "any of the traditional methods of evaluating standing" and quoted the Supreme Court in Sierra Club v. Morton (1972) that:

> "here the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy' Baker v. Carr, 369 U.S. 186, 204 as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' "

Our Senator would have at least the same "personal stake" in the outcome as had Senator Kennedy; but would the case be viewed as capable of judicial resolution? Would the Courts consider themselves competent to determine whether Congress had followed the rules of the Legislative Reorganization Act and would they consider themselves competent to invalidate the statute for such impropriety?

Powell Case Saw Limits on Comparable Powers

The case in which the House of Representatives sought to exclude Congressman Powell is eye-opening. Just as the Constitution says that each House "may determine" its own rules, it says in the same section that "Each House shall be the Judge of the qualifications of its own Members." But this did not stop the Supreme Court from overruling the House in its determination to exclude Powell. Here the Court went much further than a simple insistence that the House follow its own rules. It judged the relevant historical materials and announced that the House had only the right to judge the qualification of its own members with regard to membership requirements expressly stated in the Constitution.

In short, just as the Courts have required Congress to follow its own rules, in criminal contempt or perjury cases, it has sharply circumscribed elsewhere a comparable grant of power to Congress. Most recently, a court even declared a rule of Congress unconstitutional—this rule involved the membership permitted in the Periodical Press Gallery of the Senate, which was held to be a violation of the first amendment. Congress is not immune to the Courts, at least in this century.

Were a Court to hold that Congress must obey the statutory rules that it has itself passed, it would be acting on standards often applied to the Executive Branch in highly analogous situations. Executive Branch agencies often have authority to act in a quasi-legislative fashion by formulating regulations for themselves to follow and (sometimes after hearings) adopting them. But, having adopted them, they must follow them and not only in criminal cases directly involving individuals. Thus, on July 24, 1974, in U.S. vs. Nixon, the Supreme Court ruled that the Attorney General had by regulation conferred on the special prosecutor unique tenure and authority. It noted "while the regulation remains in effect, the Executive Branch is bound by it *and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.*" Is not the U.S. Government at least as bound by statutes incorporated into Congressional rules than was the Government bound by Justice Department regulations? □

S. 1134—HARD MINERAL MINING BILL PROVOKED FAS INTEREST IN SENATE VOTING

As FAS members will recall, the April, 1973 Public Interest Report analysed S. 1134, a bill drafted by the American Mining Congress to guarantee the investments of mining companies interested in mining of nodules on the ocean bottom. A distinguished collection of specialists endorsed the FAS conclusion that the bill was simply a "special interest bill drafted by special interest lawyers." At best a sell-out to a particular industry, it was, at worst, a way of unraveling U.S. hopes for international agreement at the Law of the Sea Conference. These specialists included Judge Philip C. Jessup, Professor Roger Revelle, Professor John J. Logue and Professor Warren S. Wooster. The Administration opposed the bill as well.

On August 15, to our astonishment we read in the Congressional Record a statement of Sen. Metcalf's that the Interior Committee had approved a revised S. 1134 "unanimously" a month before on July 15. Calls to the State Department revealed that it was similarly astonished; evidently both public and Executive Branch monitors of this legislation had been at the Caracas Law of the Sea Conference at the time, and had not been advised by backers of the bill of their intention to bring it out.

Less Than Real Unanimity

How could a bill so controversial—one opposed by the Administration—emerge with a unanimous vote? In the first place, the Committee report revealed that the vote was a "unanimous voice vote." Realizing, as was later confirmed, that this meant simply an absence of negative votes among whoever happened to be present at the July 15 markup, we wrote and asked who had been present. The Committee advised by letter of September 4:

> "The minutes of the Committee markup session of July 15 indicate that every member of the Committee except Senator Church was present for all or part of the meeting. There is no record as to which members were actually in the room at the time the voice vote on S. 1134 was taken."

In answer to a follow-up letter, the Committee advised that the bill had been taken up during the morning meeting and that all of the fourteen members in question:

> "were physically present during the morning meeting. It may be that one or more of them were in the Committee library at the time the vote was taken but all fourteen members actually voted."

The minutes contained this assertion: "Senator Metcalf explained the bill stating that hearings had been held on this legislation and that all the objection to its provisions had been considered very carefully from the points of view of all involved." (The Interior Committee is one of the few with public markups which permitted the minutes to be made available for reading.) There was no other substantive discussion or comment by anyone. The minutes noted that "there being no objection," the bill was ordered formally reported.

The bill is co-sponsored by Senators Metcalf, Bartlett, Bellmon, Bible, Fannin, Hansen, Jackson and Stevens—enough members to vote the bill out if all were present. Of five other Senators contacted directly or through their staff, we got a picture of how little focus there had been on the bill. One Senator could not recall if he had even been present. One Senator promptly wrote the Committee inquiring about the bill. One office thought their Senator would have objected to the bill had he been there, since he removed his name from the bill when he discovered a year earlier that it had been placed on the bill without authorization. In two other offices, aides responsible for Interior Committee business were confident that their Senators had not focused on the bill, or were unhappy with it. It was hardly a picture of unanimity of affirmative support.

But that is not all. Though passed on July 15, it was brought to the attention of the Senate only on the day before adjournment. The Senate leadership staff, noting the unanimous report, gave consideration to passing it by unanimous consent on the off-handed urging of a Senator that such uncontroversial bills be disposed of. Fortunately one such staffer had earlier been briefed on the character of the bill, and held it up.☐

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