

Conference Committees Opened to Public

One of the last and most traditional vestiges of secrecy in Congress disappeared in 1975 when conference committees were opened to the public and press.

Under pressure from "government in the sunshine" advocates, both the Senate and House changed their rules to require that conferences called to iron out differences in each chamber's version of a bill be open to the public.

In a major extension of the movement toward open meetings, House Democrats in December 1977 endorsed a change in the House rules that would open all House-Senate conference committee meetings to the public except when the entire House specifically voted to close such a session.

Bob Carr, D-Mich., who sponsored the amendment, said it would expose the working of the Congress to the "maximum sunlight" and prevent "powerful conference committees from bargaining and making deals in secret."

The openness requirement was the most dramatic of many new pressures on conference committees in recent years. These sessions traditionally have been the quiet preserves of senior members of Congress who exercised great power over legislation as compromises were reached behind closed doors.

This power was being eroded in the 1970s as junior members demanded more participation in conferences and as the meetings were opened to the public. Some conferences had been opened voluntarily in the past, but most were not. Participants in the open conferences generally agreed that the meetings went smoothly even when large numbers of observers were present.

Proponents of the change said the open conferences held in 1974, including one on a controversial strip mine regulation bill, disproved the claim that public scrutiny would disrupt the conference process. "The open strip mine conference in no way inhibited the need for making changes and compromises in legislation," said David Cohen of Common Cause, the so-called citizens lobby group that pushed for the change.

But some members, aides and lobbyists felt that the openness might lead some conferees to make long speeches explaining their actions and others to hold out stubbornly on issues of particular interest to constituents.

Open conferences were an issue as far back as the first session of Congress in 1789. The first conference, on import and tonnage legislation, was held in open session. Non-conferees wandered in and out of the meeting room and the Senate finally had to adjourn for the day because its members, distracted by the conference action, were paying

little attention to regular business. The next open conference was not recorded until 1911.

In addition to complaints of secrecy and unaccountability, the conference system has been sharply criticized for the manner in which conferees are selected, their occasional reluctance to uphold the position of their chambers and the latitude they have to write final legislation.

Sen. George Norris, R-Neb. (1913-43), crusaded against conference committees during most of his political career, calling them the third house of Congress. "The members of the 'house'," he said in 1934, "are not elected by the people. The people have no voice as to who these members shall be. . . . No constituent has any definite knowledge as to how members of this conference committee vote, and there is no record to prove the attitude of any member of the conference committee." In 1934, when Norris helped redesign the Nebraska legislature, he eliminated the second house, making it the only state with a unicameral legislature and eliminating the need for conference committees.

Opening the Doors

Congress is unlikely to follow Norris' lead, but advocates of the public conference think openness is the answer to many of his criticisms. The push to open the conference committee was a logical outgrowth of the trend toward opening legislative markup sessions — where members work through the details of bills that will be presented to the full chamber for consideration. The House opened its committee bill-drafting sessions in 1973. The open meetings requirement created no major problems for House committees. The Senate applied a similar rule to its committees in late 1975.

Of the 12 open conferences held in 1974, the most important and controversial was on a bill to regulate strip mining. Conferees came from the House and Senate Interior and Insular Affairs Committees.

Explaining the decision to open the conference, Charles Conklin, special counsel on the House Interior Committee, pointed out that both committees had long held open markup sessions and that there had been several requests from the press and the public to open the conference. The motion to open the doors was made by Sen. Lee Metcalf, D-Mont. (House 1953-61; Senate 1961-78), and while there was a little discussion, Conklin said, the motion was easily approved.

The experiment apparently worked well. "I didn't let the presence of a crowd affect me at all in what I said or did," said John F. Seiberling, D-Ohio, a House conferee, "and I think that goes for the other members too."

Access to the conference "benefits both sides . . . [since] you have a better idea of what's happening on a day-to-day, hour-by-hour basis," said one mining industry source. John McCormick, a lobbyist for the Coalition Against Strip Mining, said "openness was an assurance that we weren't going to lose anything major," because members knew their positions would be reported in the press. In one case, McCormick said, his organization was



George Norris

Calling a Conference

Either chamber can request a conference once both have adopted differing versions of the same legislation. Generally, the chamber that approved the legislation first will disagree to the amendments made by the second body and request that a conference be convened. Sometimes, however, the second body will ask for a conference immediately after it has approved the legislation, assuming that the other chamber will not accept its changes.

Not all legislation goes to conference. Often on minor bills, the second house will make only minimal changes in the first chamber's version. The first house will then agree to those amendments, clearing the measure for the president's signature. But virtually no legislation of any consequence or controversy escapes the conference system. Approximately one-fourth of all the bills enacted into public law in the 95th Congress, including all regular appropriations bills, were products of conference committees.

able to change a member's stand on an issue by reporting his statements in conference to constituents, who in turn protested.

Openness Mandate

The experience of conferees on the strip mining bill and in other open conferences helped ease the way for the rules change in the House at the beginning of the 94th Congress and in the Senate in November 1975.

The week Congress convened, the Democratic Caucus approved by voice vote a proposal by Dante B. Fascell, Fla., to open all conferences except when either the House or Senate conferees voted in open session to close them. Each vote could apply to only one session of the conference; separate votes would be required to close it each day. This proposal was later accepted by the full House as part of its rules.

An open conferences resolution was offered successfully in the Senate Democratic caucus by Lawton Chiles, Fla., and in the Republican caucus by William V. Roth, Del. Both were advocates of "sunshine laws," opening the legislative process to the public. However, the Senate did not approve the "sunshine" changes until November.

The Limits of Sunshine

While its advocates said the open conference would make conferees accountable to their chambers and the public, some members questioned how openly conference decisions would be made.

"Sunshine laws kid the public," said Richard Bolling, D-Mo., a chief advocate of institutional reform in the House. "They imply a total openness and there never will be." Bolling said openness was healthy but cautioned that some compromises and accommodations would have to be made in secret if the legislation was to succeed. In those cases, he added, "if we have to meet in our wives' boudoirs — if they still have such things — we will."

"I don't think very frankly that a conference can be held in open session until such time as the necessary compromises can be made," agreed Rep. Lester L. Wolff, D-N.Y., who predicted that many open conferences simply

would be window-dressing for agreements already worked out among conferees. Fascell discounted such criticisms. "There's a limit to where you can go in seeking openness," he acknowledged, "but with the open conference you will know a lot more than you know now."

The prospect of open conferences drew mixed reactions from lobbyists. A chief lobbyist for the U.S. Chamber of Commerce said he did not object to sunshine but thought it could hinder passage of effective legislation. "Compromise could be a little more difficult to come by," he said. "If you put a flock of Ralph Naders, John Gardners or Sierra Clubbers in a conference room . . . it will make some conferees sweat." It was just that access, however, that Cohen of Common Cause thought would be beneficial. He said it would help public interest groups like his compete with industry and other special interest groups that were more entrenched in Congress.

A congressional liaison official in the White House said that "on the whole, the administration favors anything that will open public forums to public view" and thought that members would continue to vote their constituencies, adding that on the strip mining bill, nothing changed "even with all those environmentalists sitting around."

The official also pointed out that open conferences might cut down the number of non-germane and special interest amendments added to the legislation in the Senate. Many of those amendments are accepted on the floor with the clear understanding that they will be quietly dropped in conference. The member benefits, however, because he can tell his constituents that he had the amendment approved on the floor.

Selection and Seniority

The selection of conferees has often caused more controversy and criticism than the action they have taken.

The two chambers have different rules for selecting conferees, but in practice both follow similar procedures. Senate rules allow the chamber to elect conferees but the body has rarely done so. The common practice is for the presiding officer to appoint conferees on the recommendation of the chairman of the committee having jurisdiction over the legislation.

House rules grant the Speaker the right to appoint conferees, but he usually does so only after consultation with the appropriate committee chairman. In 1976, House Democrats adopted a rule stating that, to the extent feasible, the Speaker should appoint authors of principal amendments to conference committees.

Each chamber's delegation to a conference can range in size from three to more than 20 members; the Senate usually sends larger groups than the House. But whatever the size, a majority in each delegation must be from the majority party in the chamber. Each delegation votes as a unit on issues in dispute with the majority position in the delegation determining how the whole delegation will vote.

Few legislative committees have hard and fast rules guiding the chairman on his choice of conferees, although most chairmen consult with the ranking minority member in choosing conferees from the minority party. The lack of guidance has frequently led to complaints that a chairman has stacked the conference in favor of his own personal position rather than the will of the full chamber.

Members have also complained that reliance on the seniority system and the conservative bent of senior members combine to thwart the will of the full body.

In recent years, however, as the volume and complexity of legislation has grown, committee chairmen have begun to choose as conferees members of the subcommittee that originated the legislation. In addition to giving the delegation expertise, that practice has allowed junior members to attend conferences.

The Will of the House

Even more controversial than seniority is the question of whether the conferees, however they are appointed, are likely to uphold their chamber's position on key points in the conference. Precedent in both the House and Senate indicates that conferees are expected to support the legislative position of the chamber they represent. Obviously, conferees from one chamber must give way to conferees of the other or strike a compromise in order to reach a final agreement. But when concessions are made by conferees who did not support their chamber's decision on passage, arguments are likely to result.

A classic example in the House occurred in 1972, when a coalition of House Republicans and southern Democrats objected so strenuously to proposed conferees on a bill raising the hourly minimum wage that they blocked the bill from going to conference.

Generally regarded as more liberal than the rest of the House, the Education and Labor Committee had reported the bill in 1971. When the bill came to the floor in May 1972, after a long delay in the Rules Committee, the House on a 217-191 vote approved a more conservative substitute bill offered by John N. Erlenborn, R-Ill. Erlenborn's bill made the increase more gradual, deleted a proposed extension of coverage to additional workers, and added a controversial provision that would allow employers to hire youths under 18 at a sub-minimum wage.

Subsequently, the Senate passed a bill even more generous than the original House committee proposals.

When Education and Labor Chairman Carl D. Perkins, D-Ky., asked unanimous consent to send the bill to conference with the Senate, Erlenborn asked him for the names of members he had recommended to be conferees. Perkins said they would be 10 members from the General Labor Subcommittee which had originally considered the bill — six Democrats and four Republicans. Ten of the 11 Democratic members of the subcommittee had voted against the Erlenborn substitute.

Erlenborn objected to the unanimous consent request, thereby blocking it. He said it was unfair to send to the conference a delegation whose majority opposed the final House bill.

Certain that a second unanimous consent request would be objected to, Perkins offered a motion that the House disagree with the Senate version and request a conference to resolve the differences. Only a simple majority was needed to pass the motion. But Erlenborn again objected: "If we refuse to send the bill to conference at this time, then we may receive assurances in the future that when the bill does go to conference a majority of the managers on the part of the House will fight for the position the House had taken."

Perkins' motion was defeated, 190-198. Later the House killed the bill by voting 188-196 against a second Perkins motion to request a conference with the Senate. "All too often," Erlenborn said, summing up his opposition to the motion, "the House speaks its will by amending legislation . . . or adopting substitute bills and sending the legislation to the other body. All too often the other body



John N. Erlenborn



Carl D. Perkins

passes a bill very similar to that rejected by the House. And almost without exception the conference committee members appointed by the House accede more to the provisions of the other body than they try to protect the provisions which the House had adopted."

Instructions

In an effort to ensure that its conferees would uphold its position, the House in 1974 modified its rules on their selection. The new rules said that in making appointments to conferences, "the Speaker shall appoint no less than a majority of members who generally supported the House position as determined by the Speaker."

Either chamber may try to enforce its will by instructing its conferees on how to vote when they go to conference, but the conferees are not obligated to follow the instructions. Since the instructions are little more than guidelines, they are rarely used. In 1974 the House on three separate occasions instructed conferees on the elementary and secondary education amendments bill (HR 69 — PL 93-380) to insist on the House language limiting busing. The House conferees nevertheless agreed to a modification of the much weaker Senate version.

Many members of Congress have argued that conferees should not be bound. Wolff disagreed. "It is sometimes wise to tie the hands of the conferees" so the will of the House prevails, he said. "If a report comes to the floor of the House in violation of the instructions, the membership of the House could be required to vote to modify, annul or reaffirm the instructions previously given."

Erlenborn, on the other hand, said he thought that instructions were a wasted effort. He said that there must be considerable give and take in the conference, and that instructions could hamper that to the detriment of the legislation. But he supported the new rules guaranteeing a conference majority in favor of the bill as passed.

All or Nothing

Once conferees report the final bill, it must be approved or rejected in its entirety by both sides. Exceptions are made only for non-germane Senate amendments which may be deleted in the House, and for certain other amendments which are reported in technical disagreement because they do not conform with House rules.

Unlike the Senate, the House has strict rules forbidding consideration of amendments not germane to the bill under consideration. The Senate for years has attached non-germane amendments to House-passed bills, and they

'Sunshine' Backers See New Secrecy Trend

A House Appropriations subcommittee vote to exclude the public from a meeting on a key 1980 money bill raised concern that the House's commitment to "sunshine" could be drifting behind a cloud.

The Appropriations Labor-HEW Subcommittee voted May 16, 1979, to close a markup of the fiscal 1980 Labor-HEW appropriations bill.

"We've held open markups for the past four or five years," a subcommittee aide said. "We had every intention of holding an open markup this year, until we were inundated with people. We closed it because there were so many people in the halls and in our offices that two policemen couldn't get order. . . . We couldn't work with all those people breathing down our necks."

Trend Detected

Some members of Congress and congressional watchdogs say they fear a trend away from the open meetings commitment of the early 1970s, beginning in 1973, when the House voted to open up its committee markup sessions to the public. The Senate adopted a similar rule in 1975. In addition, both chambers voted to open conference sessions to the public.

"I definitely detect a trend toward more closed meetings in the House," commented Rep. David R. Obey, D-Wis., a champion of House openness and a member of the Labor-HEW Appropriations Subcommittee. Obey voted against closing the May 16 session.

"It seems to be a case of creeping secrecy," commented Richard P. Conlon, staff director of the Democratic Study Group.

A CQ survey of the 13 Appropriations subcommittees indicated that two subcommittees in addition to

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—Senate Finance Committee aide

Labor-HEW had switched from open to closed markups in the past several years. They were State, Justice, Commerce, Judiciary and Agriculture.

Agriculture, according to staff aide Robert Foster, held only closed markups before 1977. The 1977 markup was partially open, he said, while the 1978 markup was entirely public.

The May 2, 1979, session was closed because the budget resolution was on the floor that same day, Foster explained. "We were concerned that we might enter into the floor discussions on the budget resolution," he said.

State, Justice, Commerce, Judiciary began closing markups two or three years ago, staff assistant John G. Osthaus said. "The members feel it facilitates their discussion of the issues and the amounts to be appropriated. When the markups were open, the members felt it was a madhouse, with people rushing in and out and

trying to command their attention. Now, the staff simply announces the results at the end of the markup."

Missing Listings

Secrecy has crept into other aspects of the Appropriations subcommittees' operations.

A number of subcommittee sessions have not been listed in advance or after the meeting in the *Congressional Record*, as House rules require. Subcommittee aides blame the omissions on administrative foul-ups.

A meeting of the Appropriations Energy and Water Development Subcommittee on May 9 to discuss fund-

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ing for controversial water projects was not listed in the *Record*. Nor was it on the official list of hearings and markups posted in the press galleries.

Staff assistant Hunter Spillan said a routine announcement of the meeting had been given to the full Appropriations Committee. As for it being closed, "our meetings generally are closed because one-third of our appropriations deal with weapons and weapons research," Spillan explained. "Every year, they forget we closed it last year."

Other Committees Affected

A spot check turned up some closed meetings other than Appropriations subcommittees.

The Senate Finance Committee, for example, in early 1979 held 11 closed sessions with public and administration witnesses to help develop trade agreement implementing legislation.

"There's a great deal of confusion and bad reporting when you have it opened and you haven't completed your press release," explained a Finance Committee aide. "I guess it's a way of keeping it pure and simple until the recommendations have been completed."

A House Ways and Means subcommittee held about 15 days of closed sessions for the same purpose. "They are sensitive hearings," a staffer said.

Obey, in an interview, blamed much of the push for secrecy on lobbyists.

"You have a number of members frustrated because things they have said or done in open markups have been garbled by trade association newsletters and lobby groups," he said. "Also, you have a feeling that the lobby groups in this country have become so single-minded and so intense that maybe it's better to operate behind closed doors. You sometimes wonder who is having more influence — the lobbyists or the members."

Obey said he sympathized with the problem, but disagreed with the closed-session solution. "If the members can't stand up to the pressures in the room, they shouldn't be in the room," he said.