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## Lessons from the Procedural Politics of the "Comprehensive" National Energy Policy Act of 1992

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# LESSONS FROM THE PROCEDURAL POLITICS OF THE "COMPREHENSIVE" NATIONAL ENERGY POLICY ACT OF 1992

*Jim Rossi\**

The invasion of Kuwait by Saddam Hussein in the fall of 1990, the subsequent Persian Gulf Crisis, and the U.S.-led Operation Desert Storm provoked fears of oil price shocks and widespread calls for a new national energy policy in the winter of 1990-91. Energy issues had not so touched the public since the energy crisis of the 1970s, which prompted Congress to pass energy legislation based on President Carter's energy plan.<sup>1</sup> Reacting to the revived public awareness of the need for a federal solution, President Bush, in his 1991 State of the Union Address, announced his intention to propose a plan to promote "energy conservation and efficiency, increased development, and greater use of alternative fuels."<sup>2</sup> He promised to send to Congress a "detailed series of proposals."<sup>3</sup> Many expected that Bush's initiatives would signal a new direction for national energy policy, particularly in light of the Clean Air Act Amendments of 1990, which promoted major energy

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1. The Federal government first recognized the need for a national energy policy in the 1930s under the reformist administration of Franklin D. Roosevelt. See ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 325-43 (1966). National energy policy has been reviewed several times since then. In 1971 the Senate Energy and Natural Resources Committee, under the leadership of Senators Henry Jackson (D-Wash.) and Jennings Randolph (D-W. Va.) commenced the Senate's National Fuels and Energy Policy Study to address the creation of an integrated energy policy. The executive branch responded in 1974 with its own recommendations in "Project Independence," largely followed by Presidents Nixon and Ford. Carter's 1977 National Energy Plan placed a new emphasis on energy conservation and the substitution of indigenous coal for oil and natural gas. National energy policy initially met a major setback with President Reagan, who, over the strong objections of Congress, proposed abolishing the Department of Energy. Following the Senate's quick rejection of Reagan's proposal, the administration sought to decontrol oil prices, leading to decreases in energy prices over the 1980s and, concomitantly, little attention to energy issues. For a criticism of administration-led energy strategies, see Chandler L. Van Orman, *The National Energy Strategy—An Illusive Quest for Energy Security*, 13 *ENERGY L.J.* 251 (1992).

2. 137 CONG. REC. S1215 (daily ed. Jan. 29, 1991) (statement of President Bush).

3. *Id.*

initiatives including the use of transportation fuels other than gasoline.<sup>4</sup>

Following the brief Gulf War, the public's demand in energy policy began to fade quickly. Bush had to release his plan soon to gain any political capital from it, but the administration's proposal, when finally released in late February, was of little influence.<sup>5</sup>

By the time Bush's plan was simultaneously introduced as bills to both houses of Congress on March 6, other proposals in the Senate and the House of Representatives had already stolen the show. These legislative proposals comprised the most serious and comprehensive attempts at rethinking U.S. energy policy since Carter's National Energy Plan had come before Congress in 1977. Senator Bennett Johnston, the Louisiana Democrat who chaired the Senate Energy and Natural Resources Committee, had proposed his own comprehensive energy bill on February 5. His bill, S. 341, was characterized as a proposal "to reduce the Nation's dependence on imported oil, [and] to provide for the energy security of the Nation."<sup>6</sup> Representative Philip R. Sharp, an Indiana Democrat who chaired the House Energy and Commerce Committee's Subcommittee on Energy and Power, simultaneously introduced a package of five energy bills: H.R. 776, H.R. 777, H.R. 778, H.R. 779, and H.R. 780.<sup>7</sup>

Following nearly eighteen months of consideration, Congress passed the Comprehensive National Energy Policy Act of 1992 ("EPAct"),<sup>8</sup> based primarily on Sharp's House package. Although the EPAct was one of the most significant bills to come out of the 102d Congress, the EPAct is hardly "comprehensive." Congress took up the bill in an atmosphere of crisis, trading systematic and methodical deliberation for expediency. The core majority strongly supported the legislation, allowing special interests to influence its content without diluting its base of support. The result was the

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4. Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended at 42 U.S.C. §§ 7401-7626 (Supp. V 1993)).

5. See *infra* notes 17-19 and accompanying text.

6. 137 CONG. REC. S1505 (daily ed. Feb. 5, 1991). Senator Wallop cosponsored the bill. *Id.*

7. 137 CONG. REC. E382 (daily ed. Feb. 4, 1991). Presumably, Sharp's package was structured so as to allow members to select from proposals on a variety of issues and to avoid a presidential veto on the entire package.

8. Pub. L. No. 102-486, 106 Stat. 2776 (1992).

omission of many important energy and environmental issues from the finished product.

This Article examines the political and procedural history of the EPAct in order to arrive at some general lessons and recommendations regarding congressional formation of energy policy.<sup>9</sup> At least two commentators on the EPAct praise it as the “second generation” of federal energy policy, based in laws that achieve “their mandates more by consensus than coercion.”<sup>10</sup> The EPAct’s history, however, was far from smooth. Procedural obstacles, such as filibuster, inter-committee conflict, and inter-chamber conflict, led many to declare the EPAct dead on several occasions prior to its passage.<sup>11</sup>

While procedural tactics often brought the bills that would become the EPAct to the brink of disaster, the use of congressional procedure by supporters also held the EPAct together and kept its momentum strong despite the fading of energy issues from public attention. The EPAct’s history suggests that consensus on energy issues could not have been achieved absent procedural devices which: (1) kept the bill focused on narrow issues; (2) precluded amendments and protected certain provisions; and (3) bypassed many strongly held but isolated interests. This Article traces the history of the EPAct and discusses these procedural mechanisms and, in particular, how they formed consensus by narrowing the issues the EPAct addressed. This Article concludes by examining what the EPAct’s procedural history has to teach about developing more comprehensive, sustainable, and sound policies in future energy legislation.

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9. For a discussion of the EPAct’s substantive content, discussed only briefly in this Article, see GUIDE TO THE ENERGY POLICY ACT OF 1992 (Dan R. Williams & Larry Good eds., 1994); Bernard Black & Richard J. Pierce, *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 COLUM. L. REV. 1339 (1993); William Conway & Allen Stayman, *It Takes Energy*, ENVIRONMENTAL FORUM, July/Aug. 1993, at 12; and Jeffrey Watkins & Douglas Smith, *The Energy Policy Act of 1992—A Watershed for Competition in the Wholesale Power Market*, 10 YALE J. ON REG. 447 (1993).

10. Conway & Stayman, *supra* note 9, at 12.

11. See *ANWR Drilling Kills Energy Bill*, 1991 CONG. Q. ALMANAC 195, 195 (“Although many senators predicted that some version of the energy bill would return in 1992, the [filibuster] vote [on S. 1220] did reveal daunting divisions on energy policy and threatened the prospects for a major rewrite of federal energy policy.”).

## I. THE SENATE SIDE-STEPS THE PRESIDENT'S PLAN, BUT FILIBUSTER KEEPS IT FROM WALKING FAR

Senator Johnston's staff on the Energy and Natural Resources Committee had been considering various energy proposals for several years when President Bush announced in January 1991 that he would shortly propose energy legislation to Congress.<sup>12</sup> Johnston had previously directed his staff to prepare a comprehensive energy bill,<sup>13</sup> probably in hopes of pre-empting the administration's anticipated proposal. On February 5, 1991, within days of President Bush's address, Johnston, joined by Ranking Minority Member Malcolm Wallop from Wyoming, introduced S. 341 ("National Energy Security Act"), later amended and reported as S. 1220.<sup>14</sup>

Shortly thereafter, on February 18, Department of Energy ("DOE") Secretary James D. Watkins released a 214-page "National Energy Strategy."<sup>15</sup> The Bush administration had been coordinating its plan for over a year, but announcement of its release coincidentally corresponded with the peak of the Gulf crisis.<sup>16</sup> The final version of the administration's plan was introduced in Congress in March as S. 570 and H.R. 1301.<sup>17</sup> But the administration's proposals were inadequate and unpopular with key constituencies; free market advocates had stripped conservation provisions from the plan, and environmental groups attacked the plan, branding it "Drain America First."<sup>18</sup>

Upon introduction, Johnston's bill, S. 341, was immediately referred to his Energy and Natural Resources Committee, which

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12. 137 CONG. REC. S1215-17 (daily ed. Jan. 29, 1991) (statement of President Bush).

13. See Mike Mills, *Johnston Mixes Oil and Gas*, 49 CONG. Q. WKLY. REP. 365, 365 (1991). This task was simpler for Johnston's staff than one might normally anticipate. When Congress was considering the 1990 Clean Air Act Amendments, Johnston's committee had proceeded with consideration of several bills addressing oil drilling, renewable power, fuel efficiency, and conservation measures. These bills and their deliberative remnants served as a framework to structure the staff's task. See *id.*

14. See 137 CONG. REC. S1505 (daily ed. Feb. 5, 1991).

15. U.S. DEPARTMENT OF ENERGY, NATIONAL ENERGY STRATEGY: POWERFUL IDEAS FOR AMERICA 2 (1991).

16. The Gulf War began on the evening of January 16, 1991. See Carroll J. Doherty, *Congress Applauds President from Sidelines of War*, 49 CONG. Q. WKLY. REP. 176, 176 (1991).

17. 137 CONG. REC. S2771 (daily ed. Mar. 6, 1991) (S. 570, sponsored by Senators Johnston and Wallop); 137 CONG. REC. H1455 (daily ed. Mar. 6, 1991) (H.R. 1301, sponsored by Representatives Dingell, Lent, and Moorhead).

18. *Id.*

hastily proceeded to consider the bill in hearings commencing on February 26.<sup>19</sup> Two issues were a source of heated debate among witnesses before the committee: (1) provisions of the bill that would have allowed oil and natural gas drilling in the Arctic National Wildlife Refuge ("ANWR"); and (2) proposed amendments to strengthen gas mileage standards known as Corporate Average Fuel Economy ("CAFE").<sup>20</sup> On May 23, the committee ordered reported a substitute bill, S. 1220, in lieu of S. 341.<sup>21</sup> Despite committee members' attempts to strike ANWR drilling from the bill<sup>22</sup> and to strengthen CAFE standards,<sup>23</sup> the reported bill contained few modifications to the originally proposed ANWR provisions or to the original CAFE provision, which directed the Secretary of Transportation to set "maximum feasible" CAFE standards for 1996 and 2001 but did not specify numerical targets.<sup>24</sup>

Senate Bill 1120 met mixed reactions coming out of Johnston's committee. The Bush administration, a strong supporter of ANWR drilling and opponent of increased CAFE standards, praised the bill as the most comprehensive energy legislation that had come out of the committee in over ten years.<sup>25</sup> But environmental groups and many Democrats, extremely critical of the bill's ANWR drilling provisions and its weak CAFE standards, hoped that the bill would lose support and die on the Senate floor.<sup>26</sup>

Johnston had hoped to get the bill to the Senate floor in June, when the interest in energy policy generated by the Gulf War was still strong.<sup>27</sup> However, the inaction of key Senate leaders and growing opposition among individual Senators thwarted this possibility. Majority Leader George J. Mitchell of Maine opposed ANWR drilling and was a co-sponsor (with Democratic Senator Richard H. Bryan

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19. See 137 CONG. REC. D182 (daily ed. Feb. 26, 1991).

20. See Holly Idelson, *Johnston's Strategy: Move Fast to Keep Bill Lean and Alive*, 49 CONG. Q. WKLY. REP. 971, 971 (1991).

21. 137 CONG. REC. D654 (daily ed. May 23, 1991).

22. See James E. Satterfield, *A Tale of Sound and Fury: The Environmental Record of the 102d Congress*, 23 ENVTL. L. REP. 10015, 10017 (1993).

23. See *id.* Johnston had tried to increase the CAFE standards in his bill in order to reach a compromise with opponents of ANWR drilling. See Idelson, *supra* note 20, at 972.

24. See *ANWR Drilling Kills Energy Bill*, *supra* note 11, at 200.

25. See *id.* at 201 (noting that DOE's Deputy Secretary Henson Moore, who had been present at most of the committee sessions, characterized the legislation as "the best we've seen in 20 years.").

26. See *id.*

27. See *id.*

of Nevada) of a bill to boost gas mileage mandates forty percent by 2001 (S. 279).<sup>28</sup> As director of the Senate's legislative schedule, Mitchell alone could have refused to commit to assist Johnston in getting the bill to the floor in June. The opposition of other Senators, however, gave Mitchell an excuse for remaining non-committal on the bill's consideration. In late June, several Democrats staged an assault on the bill from the Senate gallery, primarily protesting ANWR drilling.<sup>29</sup> Further, Montana Senator Max Baucus, the Chair of the Environment and Public Works Committee, with jurisdiction over several portions of the bill, opposed bringing it to the floor until his committee was granted referral, a referral Johnston had opposed.<sup>30</sup> These disagreements made Johnston pessimistic about the bill's chances of reaching the floor before the end of the summer recess.<sup>31</sup>

Delayed consideration of S. 1220 diminished the chances of its passage. On July 24, President Bush, aware that the sense of urgency regarding energy issues brought on by the Gulf War was dying off, appeared before a group of energy executives to praise S. 1220 and to urge that it go to the floor immediately after the August recess.<sup>32</sup> By the end of the summer recess, however, more than a handful of Democrats were complaining that the package, particularly ANWR drilling (which President Bush was now protecting with a veto threat), was advancing the interests of Bush and the oil industry, not the nation.<sup>33</sup> Democratic critics, lobbied heavily by environmental and consumer groups (and joined by unlikely allies in the electric utility industry, which opposed the bill's provisions to restructure the industry), staged a filibuster in the fall.<sup>34</sup> A Senate filibuster requires a bill's supporters to find sixty votes in order to end debate on a measure; this allows opposition Senators to influence significantly and sometimes kill a bill even if they do not otherwise have majority support for their position.<sup>35</sup>

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28. *See id.*

29. *See id.* at 201. The Senators included Baucus, Harkin, Lautenberg, Lieberman, Metzenbaum, Bradley, Bryan, and Wellstone. *Id.*

30. *See id.*

31. *See Rhetorical War Breaks Out*, 49 CONG. Q. WKLY. REP. 1825, 1825 (1991).

32. *See ANWR Drilling Kills Energy Bill*, *supra* note 11, at 202.

33. *See id.* at 207.

34. *See id.*

35. *See* CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 691-92 (1989). For the constitutionality of



Majority Leader Mitchell attempted to proceed by unanimous consent to consider the bill on October 30, but Baucus objected.<sup>36</sup> Anticipating a fight, Mitchell had already prepared a cloture motion,<sup>37</sup> and on October 31 the Senate began debate on the motion to proceed to consideration of S. 1220.<sup>38</sup>

Floor debate, dominated primarily by discussions of ANWR drilling, contained an exchange between Senators Johnston and Wirth regarding filibuster tactics which would unintentionally anticipate, and perhaps influence, the content of the bill's successor before the Senate.<sup>39</sup> Wirth, an opponent of ANWR drilling and advocate of stringent CAFE standards, wanted the sixteen-title bill sent back to the Energy and Natural Resources Committee with instructions to re-report it to the Senate as a fourteen-title bill, with ANWR and CAFE as separate bills.<sup>40</sup> When Johnston lambasted Wirth for threatening the bill with filibuster, Wirth invoked an incident from the previous year in which Johnston had successfully threatened filibuster of a CAFE standard bill:

It is very simple. The bill in front of us does not have 14 titles. It has 16. One title is on the Arctic Refuge and one title is on CAFE. That is where we are. I cannot remove the Arctic title of the bill with 41 votes. I am deprived of my ability to filibuster the Arctic. That is very simple. Those are the rules of the Senate.

I believe that the Senator from Colorado and others have a perfect right to use the filibuster just as the Chairman of the Energy Committee used the filibuster to help kill [a 1990] CAFE [standard bill] . . .<sup>41</sup>

Wirth, however, was unable to strong-arm Johnston and his coalition into withdrawing their motion for consideration and referring the bill back to the committee.<sup>42</sup> A cloture vote on the bill had been

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Senate filibuster rules, see Thomas Geoghegan, *In the Senate, the Dole Filibuster Busts the Designs of the Founding Fathers*, WASH. POST, Sept. 4, 1994, at C1.

36. See 137 CONG. REC. S15,542 (daily ed. Oct. 30, 1991).

37. See *id.* Cloture motions, if approved, cause various limits to come into effect: debate must end within 30 hours, no Senator may debate more than one hour at a time, only germane amendments may be offered, and the matter at issue becomes the pending question. Cloture is normally used to end filibusters. See TIEFER, *supra* note 35, at 692.

38. See *id.* at S15,600 (daily ed. Oct. 31, 1991).

39. See *infra* notes 72-74 and accompanying text.

40. See *id.* at S15,679-80.

41. *Id.* at S15,680.

42. See *id.* at S15,681. Of course, as Wirth observed, he could have offered a motion

scheduled for the next morning, and Johnston believed that he could secure the sixty votes necessary to invoke cloture.<sup>43</sup>

On the next morning, November 1, the Senate continued consideration of the motion to proceed.<sup>44</sup> Following an hour of debate, the presiding officer laid the pending cloture motion before the Senate for a vote.<sup>45</sup> The roll call was fifty yeas to forty-four nays.<sup>46</sup> The opponents of the bill had four votes more than they needed to filibuster. Most of the votes against cloture had come from opponents of ANWR drilling.<sup>47</sup> However, some groups opposed to restructuring the electric utility industry or in favor of raising CAFE standards also voted to block the bill.<sup>48</sup> A few brief statements followed the failed cloture vote, but the motion to proceed was withdrawn shortly thereafter.<sup>49</sup>

Had Mitchell supported the bill earlier, S. 1220 would probably have gone to the floor in June when momentum from the Gulf War might well have been sufficient to avoid filibuster. Alternatively, had the Senate leadership foreseen a successful filibuster during the motion to proceed, the bill's defeat could probably have been avoided. Johnston could have requested the presiding officer to refer the bill back to the Energy and Natural Resources Committee with instructions to strip the ANWR drilling and CAFE standard titles. This would have adequately addressed Wirth's concerns and avoided the filibuster. As consideration of the bill's successor before the Senate suggests,<sup>50</sup> such a measure would have virtually guaranteed passage.

The defeat of S. 1220 by filibuster, though, would prove important to securing final passage of the EPAct. S. 1220 became a "sacrificial lamb" early in the legislative process. It died, not on a filibuster of the substantive bill, but on a filibuster of a motion to

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to strike the ANWR title; if he had had 51 votes, this motion would have been successful. *See id.*

43. *See* Holly Idelson, *Johnston's Bill Headed to Floor Amid Democratic Disunity*, 49 CONG. Q. WKLY. REP. 3119, 3121 (1991).

44. *See* 137 CONG. REC. S15,733 (daily ed. Nov. 1, 1991).

45. *See id.* at S15,754.

46. 137 CONG. REC. S15,754-55 (daily ed. Nov. 1, 1991).

47. *See ANWR Drilling Kills Energy Bill*, *supra* note 11, at 208.

48. *See* Holly Idelson, *Senate Filibuster Deals Blow to Plan for New Policy*, 49 CONG. Q. WKLY. REP. 3191, 3191 (1991).

49. *See* 137 CONG. REC. S15,788 (daily ed. Nov. 1, 1991) (statement of Sen. Mitchell).

50. *See infra* part II.A.

proceed, allowing the Senate leadership to test the strength of the filibusterer's coalition without a full-blown legislative failure. Its death alone would not be sufficient to deter individual Senators from threatening filibuster, but from this time forward it would be more difficult politically for an individual Senator to bring a bill to the brink of disaster with a filibuster; the memory of S. 1220 would spur the Senate leadership into greater efforts at keeping members in line. Democrats, already primarily responsible for killing one energy bill, would hesitate before threatening filibuster on future bills.<sup>1</sup> Republicans, under growing criticism for their failure to back domestic regulatory programs, would also find filibuster politically costly. Thus, S. 1220's defeat would continue to lurk in the background as the Senate took up future legislative proposals, serving as a constant reminder of the political costs of filibuster.

## II. REGROUPING IN THE SENATE / WORKING BEHIND THE SCENES IN THE HOUSE

The defeat of S. 1220 was a blow to Johnston. The Bush administration, which supported the Johnston bill once it became clear that passage of the President's proposals was hopeless, urged another vote soon.<sup>51</sup> Johnston, however, was steadfast: the November 1 vote meant that S. 1220 had sunk.<sup>52</sup> The defeated cloture vote led to widespread skepticism that the 102d Congress would successfully pass *any* energy bill.<sup>53</sup>

But, even though the Bush proposals had died quickly and public support for a comprehensive energy strategy was waning, members of Congress and the administration knew that failure to pass a bill could be politically dangerous. The administration, facing increasing election-year criticism that it had no domestic program, desperately hoped for a bill to counter its critics.<sup>54</sup> Democrats in Congress, under attack for "gridlock" in the institution they

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51. See Idelson, *supra* note 48, at 3191.

52. See *id.*

53. See *id.* (noting that, although supporters of the filibuster claimed that they had created an opportunity for a successful energy bill to emerge, it was unclear whether they could revive the numbers or intensity on behalf of a new proposal).

54. For an insider's discussion of what happened to the domestic agenda during the Bush years, see CHARLES KOLB, *WHITE HOUSE DAZE: THE UNMAKING OF DOMESTIC POLICY IN THE BUSH YEARS* (1993).

controlled, wanted to prove that they could actually produce a comprehensive strategy, not just talk about one.<sup>55</sup> Thus, the focus shifted to alternative proposals in the Senate and House.

In January 1992, Johnston introduced a leaner energy bill, S. 2166, which retained the core of his earlier bill without ANWR or CAFE.<sup>56</sup> It is not altogether clear why Johnston killed S. 1220 and introduced a new bill; he could have simply stripped the controversial provisions from the earlier bill. Two explanations seem plausible. First, Johnston may have been disappointed that Democrats had killed S. 1220 and, with an election year nearing, he may have been determined to produce a bill from the bottom up, based upon consensus within the Democratic party—a bill for which Republicans could not claim credit. Second, Johnston may have offered S. 1220 as a “sacrificial lamb” to make opposition to alternative proposals by individual Senators more difficult politically. Whatever Johnston’s intentions, S. 2166 sailed through the Senate, passing in February.<sup>57</sup>

#### A. *The Senate Passes a New Bill Without ANWR or CAFE*

On January 29, 1992, Senator Johnston introduced S. 2166 without objection.<sup>58</sup> It was anticipated that debate would start quickly on the bill, which retained the core of S. 1220 without the ANWR or CAFE provisions.<sup>59</sup>

In order to avoid committee markup and the accompanying delay in consideration of and decline in enthusiasm for energy legislation, Johnston introduced the bill through a strategic, and rarely used, procedural device: Rule XIV, which allowed the bill to avoid referral to Energy and Natural Resources and other jurisdictional committees.<sup>60</sup> Usage of Rule XIV allowed the bill to move outside of the normal channels of committee referral. Under

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55. See Holly Idelson, *Lingering Controversies Stall Rewrite of Energy Bill*, 49 CONG. Q. WKLY. REP. 3274, 3274 (1991).

56. See *Johnston Offers Trimmed-Down Version of Energy Bill*, 50 CONG. Q. WKLY. REP. 248, 248 (1992).

57. See *infra* part II.A.

58. 138 CONG. REC. D35 (daily ed. Jan. 29, 1992).

59. See *Johnston Offers Trimmed-Down Version of Energy Bill*, *supra* note 56, at 248.

60. See *id.* Although the Congressional Record contains no discussion of the specific rule by which Johnston introduced the bill, the procedure followed in placing the bill on

Rule XIV, if objection is made to proceeding with the bill, the Chair does not refer the bill to jurisdictional committees, as would normally be the case, but places it on the Senate's Calendar.<sup>61</sup> Once a bill is on the Senate's Calendar, it still requires a motion to proceed before it comes to the Senate for consideration, providing opponents of a bill an opportunity to escalate an early fight against the bill.<sup>62</sup> Bypassing committee referral, however, prevents the political and jurisdictional fights which a refusal of referral might otherwise provoke, and avoids the possibility of a hostile committee holding a bill captive or gutting it. Rule XIV thus keeps a bill from being delayed for long, particularly if it is invoked with leadership support.<sup>63</sup>

Historically, Senators have used Rule XIV only sparingly, since it has been viewed as less legitimate than the normal path of committee referral.<sup>64</sup> In the 1950s and 1960s, liberal Senators used Rule XIV to avoid referral of civil rights bills to the Judiciary Committee, which was controlled by civil rights opponents like Chairman Eastland of Mississippi.<sup>65</sup> For example, Rule XIV was invoked to place the Civil Rights Bills of 1957 and 1964 on the Senate Calendar.<sup>66</sup> In recent years, the Rule XIV technique has also

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the Senate Calendar is unique to Rule XIV. Rule XIV is discussed in TIEFER, *supra* note 35, at 593.

61. See TIEFER, *supra* note 35, at 593. Rule XIV provides that "every bill and joint resolution introduced on leave, and every bill and joint resolution of the House of Representatives which shall have received a first and second reading without being referred to a committee, shall, if objection is made to further proceeding thereon, be placed on the calendar." *Id.* at 593-94.

62. See *id.* at 565.

63. See *id.* at 594. Even a putative assertion of jurisdiction can delay placing a bill on the Senate's Calendar for consideration. An assertion of jurisdiction by one committee could trigger a similar assertion by another jurisdictional committee, leading to referral to the winner and the possibility of an appeal. Rule XVII, for example, provides:

Except as provided in paragraph 3, in any case in which a controversy arises as to the jurisdiction of any committee with respect to any proposed legislation, the question of jurisdiction shall be decided by the presiding officer, without debate, in favor of the committee which has jurisdiction over the subject matter which predominates in such proposed legislation; but such decision shall be subject to an appeal.

FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICE 1150 (1992).

64. See TIEFER, *supra* note 35, at 595 n.111.

65. See *id.* at 595.

66. *Id.* Usage of Rule XIV to move the 1957 bill reversed Senate precedent and settled that Rule XXV, which provided for mandatory reference of bills, did not supersede or annul the Rule XIV technique. See RIDDICK & FRUMIN, *supra* note 63, at 1157.

been used to move legislation addressing other issues, including some minor bills.<sup>67</sup>

Johnston's introduction of S. 2166 via Rule XIV was important in ensuring quick floor consideration of the bill. Even though Johnston's Energy and Natural Resources Committee clearly had jurisdiction over the bill, Johnston's use of Rule XIV avoided referral of S. 2166 to Baucus' Environment and Public Works Committee, which had sought referral of the earlier Senate bill, S. 1220.<sup>68</sup> Escaping Environment and Public Works was important because Baucus supported strong CAFE standards, which Johnston had not included in the streamlined bill. If Environment and Public Works proposed amendments on CAFE, their committees would have asserted jurisdiction over the bill and proposed amendments on other issues, such as ANWR drilling. Referral of the bill would have revived the very issues Johnston had avoided by removing CAFE and ANWR from S. 1220. Even without Baucus' previous request for referral, Johnston might well have invoked Rule XIV as a way of avoiding referral to his own committee and thus hastening the bill's consideration. It is not unprecedented for a committee chair to use Rule XIV as a way of quickly moving a favored bill.<sup>69</sup>

On January 31, two days after Johnston invoked Rule XIV, Majority Leader Mitchell moved to proceed to the bill without objection and then immediately proposed a cloture motion.<sup>70</sup> By unanimous consent, the Senate agreed to vote on the motion the morning of February 4 and to waive the mandatory live quorum required by Rule XXII.<sup>71</sup>

The bill, which reflected a compromise,<sup>72</sup> was essentially what Senator Wirth had asked for in filibustering S. 1220. As Senator Johnston stated:

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67. For instance, it was used to place a barge waterway fee bill on the Calendar instead of referring it to a hostile committee. See TIEFER, *supra* note 35, at 597 n.116 (citing T.R. REID, CONGRESSIONAL ODYSSEY: THE SAGA OF A SENATE BILL 92 (1980)).

68. See *supra* note 30 and accompanying text.

69. In 1982, Majority Leader Baker used Rule XIV to move several bills on behalf of Senator Thurmond, the Judiciary Committee's Chair. See TIEFER, *supra* note 35, at 597. Senator Robert Byrd responded to Baker's proposal by noting "there is no way—no way—that anybody on my side of the aisle can prevent the placing of the President's crime package and the bill which Mr. Thurmond introduced on insanity from going on the calendar." 128 CONG. REC. P23,364 (1982).

70. See 138 CONG. REC. S792 (daily ed. Jan. 31, 1992).

71. 138 CONG. REC. S792-93 (daily ed. Jan. 31, 1992).

72. See Holly Idelson, *Johnston Works to Clear Path for Revamped Energy Bill*, 50

S. 2166 is the successor bill to S. 1220, the comprehensive national energy policy bill. I am pleased to say, Mr. President, at long last it now appears that the Senate is not only on the threshold of taking up the bill, but is on the threshold of approving a comprehensive national energy policy.

Mr. President, S. 2166 is, in all respects, identical to S. 1220, in that we have eliminated completely the Arctic National Wildlife Refuge drilling provisions; we have eliminated completely the CAFE, or corporate average fuel economy provisions; we have eliminated the waste oil provisions; and we have eliminated the so-called WEPCO fix, dealing with the Clean Air Act.

There were initially 16 titles in this bill. We have eliminated 2 and parts of 2 others so that, in effect, we still have a 14 title bill, which is comprehensive, which is balanced, which will be effective.<sup>73</sup>

On February 4, following an hour of debate, the Senate agreed by a 90-5 vote to close debate on the motion to proceed to consider the bill.<sup>74</sup>

Before the cloture vote, Johnston invited Alaskan Senators to offer an amendment restoring the ANWR drilling provision, although he warned that such an amendment, if approved, could doom the bill.<sup>75</sup> The Alaska Senators, Murkowski and Stevens, both Republicans, wanted to ensure that the vote on their proposed amendment took place at a time and in a manner which allowed them fair consideration.<sup>76</sup> Murkowski had “stressed the need for a clean vote on the merits of opening the refuge, rather than a vote softened by parliamentary fuzz—for instance, on a motion to table the drilling proposal.”<sup>77</sup> Backed by Senator Dole and the Republican Caucus, Murkowski and Stevens threatened to delay action on the energy bill unless the entire Senate agreed to debate ANWR

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CONG. Q. WKLY. REP. 297, 297 (1992). “Johnston reportedly agreed to drop the Arctic drilling provision from his bill and keep it out. In exchange, the dissident Democrats agreed not to block the bill from the floor or try to append higher fuel efficiency mandates.” *Id.*

73. 138 CONG. REC. S822 (daily ed. Feb. 3, 1992).

74. *See* 138 CONG. REC. S860 (daily ed. Feb. 4, 1992).

75. *See* 138 CONG. REC. S823 (daily ed. Feb. 3, 1992).

76. *See* Holly Idelson, *Arctic Wildlife Refuge Redux*, 50 CONG. Q. WKLY. REP. 298, 298 (1992).

77. *Id.*

drilling for four hours and then take an immediate up or down vote on the matter.<sup>78</sup> Senator Baucus and five unnamed Democrats objected,<sup>79</sup> "leaving the Republicans in the politically chancy position of seemingly obstructing debate on an energy bill."<sup>80</sup> The Republicans, through Senator Dole, retreated and agreed to let debate on the bill proceed without a roll-call vote on ANWR.<sup>81</sup>

Senators proposed dozens of amendments to S. 2166. One of the biggest battles was fought over two offshore oil and gas drilling amendments sponsored by Senator Graham of Florida: one would have extended a moratorium on new drilling leases to Florida's coast and direct the federal government to buy back existing leases; the other would have rewritten leasing policy for all offshore areas, allowing cancellation of leases which seriously affect the environment.<sup>82</sup> Johnston proposed a substitute to Graham's first amendment which contained a temporary moratorium and lease buyback for the South Florida coast only; his substitute passed by a vote of 53-45.<sup>83</sup> Johnston killed Graham's second amendment with a motion to table which was barely approved by a 51-47 vote.<sup>84</sup> As the bill neared its final vote, the motion to table proved to be an effective mechanism for Johnston to dispose of several other amendments.<sup>85</sup>

On February 19, S. 2166 overwhelmingly passed the Senate by a 94-4 vote.<sup>86</sup> Only four Senators voted against the bill: Senator Graham, Minnesota Senators Durenberger and Wellstone, and New Hampshire Senator Robert C. Smith.<sup>87</sup> The final Senate bill won the endorsement of the administration, despite a pending veto threat over the bill's failure to address ANWR drilling.<sup>88</sup> The reaction of

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78. See 138 CONG. REC. S901 (daily ed. Feb. 4, 1992).

79. *Id.*

80. Idelson, *supra* note 76, at 298.

81. See 138 CONG. REC. S906 (daily ed. Feb. 4, 1992). Following retreat by the Republican Caucus, Murkowski and Stevens never formally proposed their amendment.

82. See Holly Idelson, *Senate Passes Energy Bill, 94-4; Arctic Refuge Issue Dropped*, 50 CONG. Q. WKLY. REP. 397, 398 (1992).

83. 138 CONG. REC. S1654 (daily ed. Feb. 19, 1992).

84. *Id.* at S1663.

85. See, e.g., Bryan amendment No. 1,644, to establish a voluntary program to encourage industrial energy; Biden amendment No. 1,649, to establish an independent Nuclear Safety Board, to investigate civilian nuclear safety issues; and Grassley amendment No. 1,650, to require the replacement of conventional fuels with alternative fuels. *Id.* at D113.

86. 138 CONG. REC. S1696 (daily ed. Feb. 19, 1992).

87. *Id.*

88. See Idelson, *supra* note 82, at 397-98.



many who voted for the bill, however, was tepid. For example, Senator Gore, who had successfully proposed an amendment to the bill to speed up phase-out of ozone-depleting chemicals,<sup>89</sup> called the bill "a well-intentioned anachronism."<sup>90</sup> Nonetheless, Gore voted for the bill.<sup>91</sup>

### B. The Birth of the House Bill

The birth of Representative Sharp's package (H.R. 776-80) in the House would prove significant in the development of the legislation that ultimately became the EAct. In the House, the Majority Leader holds tight reign over the agenda and determines the issues to which individual members may react.<sup>92</sup> By contrast, in the Senate the majority leadership must consult with the minority leadership.<sup>93</sup> Moreover, individual Senators can have a large impact upon the agenda, a bill's content, and a bill's fate through exercise of their veto power over unanimous consent, the lack of a general germaneness requirement (which allows liberal amendment), and the ability of a minority to kill a bill by filibuster.<sup>94</sup> Such mechanisms give individual Senators and small coalitions enormous claims to power.

While the Senate fought on the floor over the high-profile, controversial issues in S. 1220 that Johnston had rushed through his committee, the House moved at a more deliberate pace through numerous hearings and mark-ups on Representative Sharp's package (H.R. 776-80). This allowed committees to focus and deliberate in a participatory manner, holding open hearings over many key issues. Johnston's decision to kill S. 1220 gave the House even more time to work on its own proposals and reminded House members to cooperate more effectively than had the Senate. By late May, an alternative bill was on the House floor.<sup>95</sup>

Sharp's package was referred to the House Energy and Commerce Committee for immediate consideration upon its introduc-

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89. See Idelson, *supra* note 72, at 298.

90. Idelson, *supra* note 82, at 397.

91. See *id.*

92. See TIEFER, *supra* note 35, at 206-11.

93. *Id.* at 463-64.

94. See *id.*

95. See *infra* part III.

tion in February 1991.<sup>96</sup> Sharp's Energy and Power Subcommittee moved quickly through hearings on the Public Utilities Holding Company Act ("PUHCA"),<sup>97</sup> nuclear plant licensing,<sup>98</sup> the national strategic energy reserve,<sup>99</sup> energy efficiency,<sup>100</sup> natural gas,<sup>101</sup> petroleum rating,<sup>102</sup> pipeline regulation,<sup>103</sup> global warming,<sup>104</sup> coal research,<sup>105</sup> and electricity transmission.<sup>106</sup> In markup sessions, the subcommittee also addressed the disposal of high-level nuclear waste,<sup>107</sup> control of greenhouse gas emissions,<sup>108</sup> and the survival of the U.S. uranium enrichment program.<sup>109</sup>

The final bill approved by the subcommittee on October 31 (H.R. 776, which bundled the individual titles together) emphasized energy conservation and the development of non-petroleum sources.<sup>110</sup> The issue which had raised the most controversy in the subcommittee—and which would continue to raise controversy until the EPAct's final approval in October 1992—was a provision that authorized DOE to begin dump studies for a proposed high-level nuclear waste dump in Nevada, known as "Yucca Mountain," without obtaining state environmental permits for the work.<sup>111</sup> The subcommittee did not address ANWR,<sup>112</sup> and, like the previous version of H.R. 776, it was silent on CAFE standards.<sup>113</sup>

Following the subcommittee's approval, Representative Dingell, the powerful Chair of the Energy and Commerce Committee, put

96. 137 CONG. REC. H854 (daily ed. Feb. 4, 1991).

97. 137 CONG. REC. D513 (daily ed. May 1, 1991); 137 CONG. REC. D521 (daily ed. May 2, 1991).

98. See 137 CONG. REC. D550 (daily ed. May 8, 1991).

99. 137 CONG. REC. D607 (daily ed. May 16, 1991); 137 CONG. REC. D667 (daily ed. May 29, 1991).

100. See 137 CONG. REC. D667 (daily ed. May 29, 1991); 137 CONG. REC. D688 (daily ed. June 4, 1991).

101. 137 CONG. REC. D698 (daily ed. June 5, 1991).

102. 137 CONG. REC. D742 (daily ed. June 12, 1991).

103. 137 CONG. REC. D754 (daily ed. June 13, 1991).

104. 137 CONG. REC. D785 (daily ed. June 19, 1991).

105. 137 CONG. REC. D822 (daily ed. June 25, 1991).

106. 137 CONG. REC. D834 (daily ed. June 26, 1991).

107. Holly Idelson, *Panel Acts on Waste Dump, But Bill's Future Doubtful*, 49 CONG. Q. WKLY. REP. 2613, 2613 (1991).

108. *Id.*

109. 137 CONG. REC. D1270 (daily ed. Oct. 17, 1991).

110. See Andrew Taylor, *The Panel's Light Touch*, 49 CONG. Q. WKLY. REP. 3195, 3195 (1991).

111. See Idelson, *supra* note 107, at 2613.

112. See Taylor, *supra* note 110, at 3195.

113. *Id.*

the bill on hold pending Senate action on its original bill (S. 1220).<sup>114</sup> Following S. 1220's defeat, Dingell continued to hold up the House legislation while the Senate took up consideration of and quickly approved S. 2166.<sup>115</sup>

### C. House Bill Committee Markup

Aware that the Senate had just approved S. 2166, but unsatisfied with the Senate proposal's overall commitment to conservation, the House leadership requested that the various committees with jurisdiction over H.R. 776 complete their consideration of the bill by May 1, 1992.<sup>116</sup> On March 11, Dingell's Energy and Commerce Committee gave overwhelming approval to H.R. 776.<sup>117</sup> Following Energy and Commerce, the Committees on Science, Space, and Technology, Interior and Insular Affairs, Merchant Marines and Fisheries, and Ways and Means all approved substantial revisions or additions to the bill.<sup>118</sup> Among the provisions added to the bill were restrictions on new offshore oil and gas leasing, and tax incentives to encourage mass transportation and to aid independent oil and gas producers.<sup>119</sup> Setting the stage for an inter-committee dispute with Energy and Commerce, the Interior and Insular Affairs Committee, chaired by Representative Miller,<sup>120</sup> deleted a provision in H.R. 776 which would restrict re-licensing of nuclear plants.<sup>121</sup> Four other committees—Foreign Affairs, Government Operations, Judiciary, and Public Works—made relatively minor changes to H.R. 776.<sup>122</sup> Altogether, nine committees reviewed the legislation prior to the leadership's May 1 deadline.

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114. See *Energy Bill Surges Toward Enactment*, 1992 CONG. Q. ALMANAC 231, 235.

115. See *id.* Dingell was "awaiting the Senate outcome before moving forward." *Id.*

116. See Holly Idelson, *Action on Energy Bill*, 50 CONG. Q. WKLY. REP. 1153, 1153 (1992).

117. See Holly Idelson, *House Panel Nearly Unanimous in Approving Energy Bill*, 50 CONG. Q. WKLY. REP. 612, 612 (1992).

118. See Idelson, *supra* note 116, at 1153.

119. *Id.*

120. See Phil Kuntz, *Interior to Feel Firmer Touch After Udall's Gentle Hand*, 49 CONG. Q. WKLY. REP. 1051, 1051 (1991) (discussing Miller's "hard charging but pragmatic" style).

121. See Holly Idelson, *Environmentalists Get a Boost from Committees' Markups*, 50 CONG. Q. WKLY. REP. 941, 941 (1992).

122. See Holly Idelson, *Panels Race to Rework Comprehensive Bill*, 50 CONG. Q. WKLY. REP. 1152, 1152 (1992).

## III. THE HOUSE APPROVES ITS BILL

The House leadership had failed to establish detailed procedures for crafting a multicommittee bill before it met in 1991 to plan its strategy on the energy bill.<sup>123</sup> The different versions approved by each of the nine House committees with jurisdiction over the Bill presented a "thicket of jurisdictional conflicts."<sup>124</sup> First, committees that had equal jurisdiction had submitted competing versions of the same provisions.<sup>125</sup> Second, the same conflict occurred when one committee had legislated a provision while another committee had not, forcing leaders to choose whether to include the provision at all.<sup>126</sup> A third type of disagreement involved committees apparently overstepping their jurisdiction by amending portions of the bill not in their purview or adding non-germane provisions.<sup>127</sup> For example, the Ways and Means Committee approved a "green" tax package designed to encourage conservation and renewable energy and to give tax breaks to independent oil and gas producers. Approval of this amendment allowed the Senate Finance Committee to open a new round of review.<sup>128</sup>

Hoping to settle inter-committee disputes before the week of May 18, when the leadership intended to bring the bill to the floor, House Speaker Thomas S. Foley held a meeting with the committee chairs on May 12, urging them to resolve as many issues as possible.<sup>129</sup> Remaining issues, Foley warned, would be resolved by the Rules Committee, scheduled to meet May 19.<sup>130</sup> Committee chairs thus faced strong incentives to compromise, particularly

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123. See Holly Idelson, *House Leaders Urged to Forge Comprehensive Floor Bill*, 50 CONG. Q. WKLY. REP. 1244, 1244 (1992).

124. *Id.*

125. See *id.* For example, the Interior and Merchant Marine Committees approved rival offshore drilling provisions. *Id.*

126. See Idelson, *supra* note 123, at 1244. For example, Interior approved highly controversial provisions regarding the licensing of nuclear plants, while Energy and Commerce opted not to address this issue. See *id.*

127. See *id.*

128. See *id.* See also *infra* part IV.A.

129. See Holly Idelson, *Bill Almost Ready to Go to Floor*, 50 CONG. Q. WKLY. REP. 1337, 1337 (1992).

130. *Id.* Tiefer describes the functions of the Rules Committee as follows:

The Rules Committee performs its historic function of screening bills before granting the rule that admits them to the floor. More important, the Committee structures the floor consideration by the type of special rule it grants, and by

given the Rules Committee's awesome powers to deny a bill a special rule until a joint version is negotiated—effectively precluding floor consideration—and “to choose one committee bill or version and to kill the others’ bills by denying them special rules.”<sup>131</sup>

#### A. Inter-Committee Disputes and Complex Rules

Although some minor disputes had been settled by the time the Rules Committee convened its deliberations, “sizable disputes between rival committee chairmen as well as disputes over proposed amendments from individual members” remained.<sup>132</sup> All in all, members and committee chairs had offered over 140 amendments, although some of these were hedges against the uncertainty of the Rules Committee's final decision.<sup>133</sup> The committee heard more than five hours of testimony on May 19.<sup>134</sup>

The full House was scheduled to take up consideration of H.R. 776 on May 20.<sup>135</sup> By that date, however, Rules had not resolved all of the disputes raised by the various committee members and chairs.<sup>136</sup> In order to meet the leadership's schedule, it was necessary that the Rules Committee issue its special rule for H.R. 776 in two parts: the first (H.R. Res. 459), addressing the first seven titles of the bill and nuclear plant licensing, was issued on May 19<sup>137</sup> and adopted by voice vote on May 20;<sup>138</sup> the second (H.R. Res. 464), allowing the House to complete consideration of the final titles, was issued May 20<sup>139</sup> and adopted by voice vote on May 21,<sup>140</sup> after the House had debated the resolution for a full day.

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the particular provisions it writes into the special rule. Finally, the Committee settles jurisdiction disputes . . . .

TIEFER, *supra* note 35, at 263.

131. *See id.* at 274–75.

132. Holly Idelson, *Nuclear Industry Wins Points in House Policy Rewrite*, 50 CONG. Q. WKLY. REP. 1436, 1436 (1992).

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See* 138 CONG. REC. D595–96 (daily ed. May 19, 1992).

138. 138 CONG. REC. H3465 (daily ed. May 20, 1992).

139. *See id.* at D609.

140. *Id.* at H3708 (daily ed. May 21, 1992).

The special rules accompanying H.R. 776 were paradigmatic "complex" rules—rules that set up some detailed arrangement for debate, without being completely open or completely closed (i.e., allowing no amendments). Such rules had been integral to structuring consideration of the last major energy bill before Congress, Carter's energy program in 1977.<sup>141</sup> During consideration of that legislation, Representative Thomas P. "Tip" O'Neill, Speaker of the House, suggested modifications which fell under the jurisdiction of several different committees, and organized an ad hoc Energy Task Force to coordinate the various versions of the bill.<sup>142</sup> The Rules Committee, through its Chair, then provided a special complex rule:

[Representative] Bolling [Chair of the Rules Committee] announced, ". . . this is a very complicated rule on a very complicated subject which came to the Committee on Rules in a very complicated way." The rule limited the amendments to be offered to those specified in the bill, including 20 to be offered en bloc by the Ad Hoc Committee and approximately 12 others to be offered by individual House members . . . . Because of the tight design of the rule, opponents of the energy package were prevented from loading it down or delaying it with last-minute amendments. But they were given the opportunity to vote on controversial provisions, to substitute the language of the Republican program, and to recommit the bill with or without instructions.<sup>143</sup>

Complex rules can affect the outcome of legislation, according to Charles Tiefer, Deputy General Counsel for the U.S. House of Representatives: "Compared to the more limited proposals of the 94th Congress, which tied up the House floor for weeks and resulted in passage of several heavily amended pieces of legislation . . . the House was able to complete action on the 1977 legislation in five legislative days."<sup>144</sup>

The complex rules which accompanied H.R. 776 to the floor ensured it a success similar to the 1977 legislation. Debate was

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141. See TIEFER, *supra* note 35, at 271.

142. See *id.*

143. TIEFER, *supra* note 35, at 271-72, (citing Bruce I. Oppenheimer, *Policy Implications of Rules Committee Reforms*, in LEGISLATIVE REFORM 91, 101 (Leroy N. Rieselbach ed., 1978)).

144. *Id.* at 272 n.45, (citing Oppenheimer, *supra* note 143).

limited to five hours, with one hour equally divided between the Chair and the Ranking Minority Member of the Energy and Commerce Committee and the remaining time allocated in thirty-minute blocks to each of the other eight committees with jurisdiction.<sup>145</sup> The rules (1) ordered amendment in the form of a substitute bill consisting of the text print proposed by the Rules Committee as an original bill (for purposes of amendment) and (2) waived all points of order against the substitute bill.<sup>146</sup> The rules only allowed amendments printed in the Rules Committee's reports, in the order specified,<sup>147</sup> and permitted Dingell, the Chair of Energy and Commerce, to offer amendments en bloc consisting of the text of amendments in the reports accompanying the rules, even though en bloc amendments are not amenable to a demand for division.<sup>148</sup>

In proposing its own print of H.R. 776 and in issuing reports together with rules that limited amendments, the Rules Committee resolved many key issues. This committee was effectively able to add amendments to the Energy and Commerce Committee bill without floor votes. For example, the Rules Committee decided to include bans on offshore oil and gas drilling in certain areas added by the Interior and Merchant Marine Committees and then sealed the bans in place by refusing to allow a separate vote to strike or limit the bans.<sup>149</sup> The Rules Committee also approved—and refused to allow amendments to—the package of tax incentives proposed by Ways and Means.<sup>150</sup> The sweeping overhaul of the electric utility industry written by Energy and Commerce—far more radical in its changes than S. 2166, especially with respect to transmission access—was protected from amendment through the use of complex rules.<sup>151</sup>

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145. See H.R. Res. 459, 102d Cong., 2d Sess. (1992); 138 CONG. REC. H3462 (daily ed. May 20, 1992).

146. See H.R. Res. 459, 102d Cong., 2d Sess. (1992); 138 CONG. REC. H3462 (daily ed. May 20, 1992).

147. See 138 CONG. REC. D609 (daily ed. May 20, 1992).

148. See *id.*

149. See Idelson, *supra* note 132, at 1436.

150. See *id.* at 1437.

151. See *id.* at 1436.

*B. Miller Wins a Jurisdictional Battle Against Dingell but Loses the War Over Substance*

Perhaps the most controversial issues addressed by the Rules Committee, however, arose from a showdown between Dingell, Chair of the Energy and Commerce Committee, and Miller, Chair of the Interior and Insular Affairs Committee. Miller had drafted extensive proposals on nuclear licensing and radioactive waste that were viewed as an assault on the nuclear power industry, which had sought to streamline the licensing process.<sup>152</sup> Dingell responded to these provisions by claiming that Interior had overstepped its jurisdiction.<sup>153</sup> But, despite his power, Dingell lost this territorial battle. The bill sent to the floor by the Rules Committee contained the Interior Committee's provisions on licensing and reflected Interior's vote to excise a controversial provision which gave the federal government extra powers to study whether to build a nuclear waste dump at Yucca Mountain, although these provisions would be open to amendment before the full Senate.<sup>154</sup>

Even though the Rules Committee was able to substantially influence the content of the bill before the House, in many instances it did not have the last word on the bill's final substance. Representative Bob Clement of Tennessee offered an amendment which streamlined nuclear re-licensing procedures in a manner similar to Dingell's Energy and Commerce proposal. It passed 254 to 160.<sup>155</sup> Dingell offered an amendment exempting site characterization activities at Yucca Mountain from state or local permitting requirements, which passed by voice vote over the strenuous objections of the Nevada delegation.<sup>156</sup> Despite Miller's jurisdictional victory in the battle over nuclear power plant licensing and Yucca Mountain, Dingell won the war over the bill's substance.

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152. See Holly Idelson, *Miller vs. Dingell*, 50 CONG. REC. 1438, 1438 (1992).

153. See *id.*

154. See *id.*

155. 138 CONG. REC. H3653 (daily ed. May 20, 1992).

156. See 138 CONG. REC. H3716 (daily ed. May 21, 1992). Curiously, though, Dingell did not attempt to reinsert a related proposal he had placed in the bill during Energy and Commerce's markup. This related proposal would have singled out Nevada as the host state for a temporary radioactive dump site as well as the favorite for the permanent repository. See Idelson, *supra* note 132, at 1438.



*C. House Approval*

Other amendments approved before the full House included restrictions on state regulators' powers over gas production,<sup>157</sup> national efficiency standards for plumbing equipment,<sup>158</sup> and Dingell's en bloc amendments.<sup>159</sup> On the final day of floor debate, the House resolved a key difference with the Senate by agreeing 263 to 135 to remove a proposal that would have forced oil importers and refiners to help fill the Strategic Petroleum Reserve, the nation's oil stockpile.<sup>160</sup> The House rejected by a 198-211 vote an amendment proposed by Representatives Jim Jontz of Indiana and Thomas Ewing of Illinois to boost ethanol fuel use by 2006.<sup>161</sup>

Although Miller had lost to Dingell on the nuclear power plant re-licensing provisions and on Yucca Mountain, a last showdown over hydroelectric licensing remained. Miller and his supporters believed that the Federal Energy Regulatory Commission, which oversees hydroelectric licensing, could not be trusted to take into account local environmental concerns.<sup>162</sup> The Interior proposal, reflected in a floor amendment offered by Miller, restricted hydroelectric development and licensing.<sup>163</sup> Dingell attempted to block Miller's amendment by proposing in a substitute amendment a compromise which placed some new restrictions on hydroelectric projects, but fewer than Miller had proposed.<sup>164</sup> The House voted first on Dingell's substitute which was defeated by a vote of 195-221;<sup>165</sup> Miller's amendment passed 318-98, despite fierce administration opposition.<sup>166</sup> Miller also forced a compromise amendment, offered en bloc by Dingell, which strengthened environmental protections on coal development, but had fewer environmental safeguards than the original Interior proposal.<sup>167</sup>

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157. 138 CONG. REC. H3660 (daily ed. May 20, 1992).

158. *Id.* at H3602.

159. 138 CONG. REC. H3718 (daily ed. May 21, 1992); 138 CONG. REC. H3773 (daily ed. May 27, 1992).

160. *See* 138 CONG. REC. H3757 (daily ed. May 27, 1992).

161. *See* 138 CONG. REC. H3626 (daily ed. May 20, 1992).

162. *See* Holly Idelson, *House Gives Energy Bill Big Win; Lengthy Conference Expected*, 50 CONG. Q. WKLY. REP. 1530, 1532 (1992).

163. *See id.*

164. *See id.*

165. 138 CONG. REC. H3800 (daily ed. May 27, 1992).

166. *Id.*

167. *See* 138 CONG. REC. H3769 (daily ed. May 27, 1992).

The bill passed the House by an overwhelming 381-37 vote on May 27.<sup>168</sup> The lack of enthusiasm for H.R. 776 was eerily similar to the Senate's lukewarm praise for S. 2166 following its passage. Very few were thrilled with the final bill, which fell well short of environmentalist and energy producer wish lists, yet "virtually all factions found something to like in the bill."<sup>169</sup> Although the bill contained several provisions the administration had opposed,<sup>170</sup> President Bush by then was increasingly desperate for a legislative accomplishment on energy issues. DOE Secretary Watkins praised the bill as a step towards the "most comprehensive and balanced energy legislation . . . seen in twenty years."<sup>171</sup>

#### IV. FOLLOWING CERTAIN AMENDMENTS, THE SENATE APPROVES THE HOUSE BILL

After the House approved H.R. 776, it was predicted that the Senate would "take up the House energy bill, insert the provisions of its own energy legislation and send it back to the House to begin the conference process."<sup>172</sup> House passage of a bill parallel to a previously passed Senate bill, however, did not automatically clear the way for conference. Senator Bentsen, Chair of the Finance Committee, demanded an opportunity to mark up the House bill, which contained several tax provisions the Senate had not approved in S. 2166.<sup>173</sup> Amendments offered in Bentsen's committee, filibuster threats, and controversial non-germane amendments would threaten the bill until it finally passed through the Senate and became law in July.

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168. *Id.* at H3811-12.

169. Holly Idelson, *House Gives Energy Bill Big Win; Lengthy Conference Expected*, 50 CONG. Q. WKLY. REP. 1530, 1530 (1992).

170. *Id.* ("[T]he Bush administration still has qualms about several [of H.R. 776's] accomplishments . . .").

171. Idelson, *supra* note 169.

172. *Id.* at 1532.

173. See Holly Idelson, *Nevada Senators Vow to Block Energy Bill Unless Appeased*, 50 CONG. Q. WKLY. REP. 1698, 1698 (1992).

*A. Finance Markup*

Even before H.R. 776 got to the Finance Committee, Senators from Nevada triggered the first hold-up of the House Bill in the Senate. Senators Reid and Bryan were upset with a provision in the House bill that would allow the federal government to bypass state permitting laws in studying whether to build a nuclear waste dump at Yucca Mountain.<sup>174</sup> Senator Bentsen had initially scheduled the bill's markup in Finance for June 11, but Reid threatened to invoke a Senate Rule that requires unanimous consent for committees to meet more than two hours after the Senate had been in session.<sup>175</sup> In order to avoid any significant delay Reid's threat might have brought on, Bentsen postponed the Finance markup until June 16, which allowed Yucca Mountain and other looming controversies to build.<sup>176</sup>

Finance's markup was a step toward conference,<sup>177</sup> but a step back as well. Finance moved H.R. 776 forward by approving many tax measures that did not depart significantly from House proposals. For example, Finance proposed permanent relief for independent oil and gas drillers, similar to temporary provisions in the House bill;<sup>178</sup> these provisions easily survived an amendment to strike offered by Senator Bradley,<sup>179</sup> which was rejected six to fourteen in committee.<sup>180</sup> Senator Daschle won the committee's support for an amendment that broadened existing tax breaks for ethanol-based fuels.<sup>181</sup> Finance also approved by voice vote tax breaks for buyers of cars that run on clean-burning fuels, including both natural gas and electricity, broadening a provision in the House bill that favored natural gas over other alternative fuels.<sup>182</sup> Senator Breaux won Finance's support for an amendment that would give regulated

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174. *Id.* Although this language was not in the Senate bill, Johnston had argued for it in a separate bill (S. 1138), which the Energy and Natural Resources Committee had approved. *Id.*

175. See Idelson, *supra* note 173, at 1698.

176. See *id.*

177. See *infra* note 234.

178. See Holly Idelson, *Senate Committee Goes Along with House Tax Changes*, 50 CONG. Q. WKLY. REP. 1790, 1790 (1992).

179. See *id.* at 1791.

180. *Id.*

181. See *id.*

182. See Idelson, *supra* note 178, at 1791.

integrated natural gas companies some of the same advantages available to independent producers.<sup>183</sup>

While these amendments broadened House provisions, they did not depart significantly from the overall spirit of the House bill, for which there appeared to be wide-spread support in the Senate.<sup>184</sup> But Finance threatened the bill's future by approving a highly controversial coal tax proposed by Senator Rockefeller to help pay for health benefits for retired miners.<sup>185</sup> This highly partisan coal tax was opposed strongly by President Bush, who had vetoed an identical proposal added by Rockefeller to a previous tax bill; the tax also lacked a single Republican supporter on the Senate Finance Committee.<sup>186</sup>

### *B. Steering Clear of Filibuster*

Senator Wallop, who had helped to draft the bill, was so strongly opposed to the coal tax proposal that he threatened to filibuster the bill if the tax remained.<sup>187</sup> This development, coupled with the Nevada delegation's concern over Yucca Mountain, raised fears that the bill would sink as it neared a cloture vote on the motion to proceed scheduled by Senate Majority Leader Mitchell for July 22.<sup>188</sup>

Such fears led to "a week of furious and sometimes bizarre legislative maneuvering."<sup>189</sup> In an audacious move, designed to bypass Finance's proposals, including the Rockefeller coal tax provision, Johnston, who also chaired the Energy-Water Appropriations Subcommittee, attached the text of H.R. 776 and S. 2166, excepting the tax provisions adopted by Finance, to an energy and water spending bill during markup on July 21.<sup>190</sup> Johnston's tactic, although not unprecedented,<sup>191</sup> was derailed by Senator Byrd, Chair

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183. *See id.*

184. *See id.*

185. *See id.* at 1790.

186. *See id.*

187. *See Senate Energy Bill Backers to Try Again in Late July*, 50 CONG. Q. WKLY. REP. 2043, 2043 (1992).

188. *See id.*

189. Holly Idelson, *Bill to Set National Policy Remains Blocked Over Coal Tax Provision*, 50 CONG. Q. WKLY. REP. 2166, 2166 (1992).

190. *See id.* at 2167-68.

191. *See id.* at 2167. Johnston reminded the committee that the 1987 legislation that

of the full Appropriations Committee. Byrd, who is from West Virginia and was a strong supporter of Rockefeller's coal tax provision, canceled a full Appropriations Committee markup scheduled for July 22 and agreed to consider the spending bill only on the condition that the energy policy provisions were abandoned.<sup>192</sup> While Johnston's earlier invocation of Rule XIV had successfully avoided S. 2166's markup in committee, his resort to this mechanism—attaching the energy bill as a non-germane amendment to an appropriations bill—quickly failed.<sup>193</sup>

Pursuant to a unanimous consent agreement presented by Mitchell, a cloture vote on the motion to proceed to H.R. 776 was scheduled for July 23.<sup>194</sup> The Nevada delegation, through Bryan, was threatening to filibuster the motion to proceed<sup>195</sup> or, should consideration of the bill move forward, to weigh it down by offering more than 100 amendments.<sup>196</sup> But Johnston appeased the Nevada delegation by going to the Senate floor and publicly assuring them that he would work to keep the controversial Yucca Mountain provisions out of the bill that emerged from conference.<sup>197</sup>

Rockefeller's coal tax provision, adamantly opposed by the Republican leadership, remained the only obstacle to taking up consideration of the energy bill. But it would have been politically costly for Wallop, a primary author of the Senate bill, or the administration, touting the energy bill in an election year, to block consideration of the House bill on even this issue. Thus Wallop and the administration entered into negotiations with Rockefeller over the coal tax. On July 23, immediately preceding the

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had singled out Nevada for the high-level nuclear waste dump studies was at one point sent to the House on Johnston's appropriations bill. *See id.*

192. *See id.*

193. *See id.* The Rule XIV approach has some distinct advantages over offering a bill as a non-germane amendment. One argument is that it is more "legitimate," because it is "clearly provided for in the rules." TIEFER, *supra* note 35, at 596 (citing LEWIS FROMAN, *THE CONGRESSIONAL PROCESS: STRATEGIES, RULES, AND PROCEDURES* 137 (1967)).

194. *See* 138 CONG. REC. S10,099 (daily ed. July 22, 1992).

195. *See* Holly Idelson, *Bill to Set National Policy Remains Blocked Over Coal-Tax Provision*, 50 CONG. Q. WKLY. REP. 2166, 2167 (1992).

196. *See id.*

197. *See* Holly Idelson, *supra* note 189, at 2166-67. Although reported in the press, such an assurance by Johnston does not appear in the Congressional Record.

cloture vote, talks appeared very close,<sup>198</sup> but not close enough. The motion to limit cloture failed 58-33, two votes short.<sup>199</sup>

When the cloture vote failed, the administration attempted to pin the blame for derailing the energy bill on Rockefeller and the Democratic party.<sup>200</sup> The vote was an ironic turn-around from the vote which had killed S. 1220, filibustered primarily by environmentalists in the Democratic party. This time the anti-tax and pro-business interests in the Republican party, not green Democrats, stood in the way of consideration of an energy bill. Rockefeller defended his fight to secure miner benefits: "I will not yield. I will not yield," he said. "The only power I have on this as a single senator is—I will not yield."<sup>201</sup>

Aware of the political irony of filibustering the House bill, the Republicans continued to negotiate with Rockefeller over the coal tax provisions.<sup>202</sup> A cloture vote on the motion to proceed was rescheduled for July 28.<sup>203</sup> Confident that a deal had been set, the Senate invoked cloture ninety-three to four and full debate on the bill began.<sup>204</sup>

But following the cloture vote the deal on the Rockefeller coal tax provision began to unravel. The Senate sealed the deal in place by approving by voice vote an amendment offered by Rockefeller on July 29.<sup>205</sup> Rockefeller had led the Senate to the edge of disaster but had secured benefits for the retired miners. The anonymity of voice vote may have allowed Rockefeller to keep the administration from influencing individual Republican Senators. If the administration's supporters had requested roll-call on the amendments and held defectors accountable, perhaps Rockefeller's amendment and the bipartisan deal would not have survived.

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198. *See id.*

199. 138 CONG. REC. S10,210 (daily ed. July 23, 1992).

200. *See* Idelson, *supra* note 189, at 2167.

201. *Id.*

202. *See* Holly Idelson, *Bills to Cut Oil Dependence Finally Head to Conference*, 50 CONG. Q. WKLY. REP. 2261, 2262 (1992).

203. 138 CONG. REC. S10,358 (daily ed. July 27, 1992).

204. *See id.* at S10,436-37 (daily ed. July 28, 1992).

205. *See id.* at S10,787 (daily ed. July 29, 1992).

*C. Disposing of Non-Germane Amendments*

House rules require amendments to be “germane,” i.e., to pertain to the matter under consideration.<sup>206</sup> By contrast, the Senate’s rules do not generally require germaneness.<sup>207</sup> However, once cloture on a bill has been invoked or a bill is being considered under time limitations, the Senate leadership may impose a germaneness limitation.<sup>208</sup>

During floor consideration of H.R. 776 in the Senate, however, individual members offered many amendments which, at best, were only tangentially related to energy policy. At one point, Senator Wallop pleaded for his colleagues to stop “dabbling in the occult.”<sup>209</sup> Although the Senate’s rule against non-germane amendments would have been applicable had cloture been invoked on the *substantive* bill, cloture on a motion to proceed, absent additional unanimous consent limitations on amendments, is not sufficient to invoke a non-germaneness requirement in the Senate.<sup>210</sup> Even without a non-germaneness rule, however, the leadership proceeded to dispose of controversial, often non-germane, amendments with the actual or threatened use of procedural devices, such as the motion to table and the point of order.<sup>211</sup>

One of the few amendments actually addressing energy policy was introduced by Senator Bradley. His proposal would have removed those Senate Finance Committee provisions which proposed tax relief for independent oil and gas drillers and substituted a provision similar to those in the bill passed by the House.<sup>212</sup> Growing opposition from oil- and gas-producing states, however, led the Senate to kill Bradley’s amendment by a 63-32 vote on a motion to table from Bentsen.<sup>213</sup> Other amendments addressing energy policy were more successful, such as an amendment by Senator Pressler

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206. TIEFER, *supra* note 35, at 420–22.

207. *Id.* at 464.

208. *See id.* at 726. The non-germaneness rule on cloture is strictly kept. *See id.*

209. 138 CONG. REC. S10,787 (daily ed. July 29, 1992).

210. *See* TIEFER, *supra* note 35, at 728 (discussing germaneness of amendments once cloture has been invoked).

211. *See infra* notes 212–232 and accompanying text. Motions to table take precedence over most other matters under Senate rules and are decided without debate. They thus provide a fast, non-controversial way for Senate leaders to dispose of threatening amendments. *See* TIEFER, *supra* note 35, at 664.

212. *See* Idelson, *supra* note 202, at 2262.

213. *See* 138 CONG. REC. S10,760 (daily ed. July 29, 1992).

to improve federal pipeline safety inspections,<sup>214</sup> an amendment by Johnston to provide for a survey of rural electric cooperative least cost planning,<sup>215</sup> another Johnston amendment to extend authorization of the Uranium Mill Tailings Radiation Control Act,<sup>216</sup> and an amendment by Wallop for equitable tax credit treatment regarding payments into the Trans-Alaska Pipeline Liability Fund.<sup>217</sup> The Alaska delegation was able to obtain an amendment requiring the Secretary of Energy to study the impacts of ANWR development on the industry, the economy, and national security.<sup>218</sup>

A large number of amendments, however, strayed far from issues of energy policy. Because no non-germaneness requirement was in effect, no point of order against the non-germane amendments could be raised.

The most notable departure from energy policy was an amendment proposed during floor debate by Senator Specter to attach his health care proposal.<sup>219</sup> The amendment, had it survived, would have sent the bill on a substantial detour by opening up debate on the merits of various health care proposals. Hoping to narrow consideration of Specter's amendment, Senator Bentsen began the debate on it by successfully proposing that no amendments to it be allowed.<sup>220</sup>

Through an astute application of Senate budget procedure, Bentsen then proceeded to kill the amendment. Specter's proposed amendment, Bentsen noted, would have reduced federal revenues in excess of four billion dollars over five years.<sup>221</sup> This would have caused the current level of revenues to fall below the revenue floor of the most recent Budget Resolution.<sup>222</sup> Bentsen therefore raised a point of order objecting that Specter's amendment violated the Congressional Budget Act, which may be waived only upon the vote of sixty Senators.<sup>223</sup> Specter then moved to waive the Budget

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214. *Id.* at S10,778-80.

215. *Id.* at S10,787-88.

216. *Id.* at S10,781-82.

217. 138 CONG. REC. S10,862 (daily ed. July 30, 1992).

218. *Id.* at S10,796-97 (daily ed. July 29, 1992).

219. *See* Idelson, *supra* note 202, at 2263.

220. *See* 138 CONG. REC. S10,761 (daily ed. July 29, 1992).

221. *Id.* at S10,766.

222. Congressional Budget Act of 1974 § 311(a), 42 U.S.C. § 642(a) (1988 & Supp. V 1993) (prohibiting consideration of bills and amendments that would cause revenues to drop after a budget has already been set); *See* 138 CONG. REC. S10,766 (daily ed. July 29, 1992).

223. *See* 138 CONG. REC. S10,766-68 (daily ed. July 29, 1992).



Act, and the presiding officer ruled that this motion pre-empted Bentsen's point of order.<sup>224</sup> Specter's motion to waive the Budget Act then lost by a vote of 35-60, and the presiding officer sustained Bentsen's point of order.<sup>225</sup>

Other amendments departing from the bill's subject matter followed. Senator Dodd proposed an amendment addressing the structure of financial partnerships,<sup>226</sup> which he eventually withdrew.<sup>227</sup> An amendment proposed by Senators Graham and Symms would have let states issue tax-exempt bonds for high-speed rail projects regardless of state by state limitations on the amount of such bonds.<sup>228</sup> Following a failed motion to table the Graham/Symms amendment by Johnston,<sup>229</sup> the amendment was approved by voice vote.<sup>230</sup> Murkowski successfully proposed an amendment for a jobs survey reporting on significant construction, development and manufacturing projects,<sup>231</sup> and Senators D'Amato and Moynihan sponsored a successful amendment to prevent circumvention of anti-dumping and countervailing duty orders.<sup>232</sup>

H.R. 776 was approved by the Senate ninety-three to three on July 30, with provisions inserted from the Senate bill, the approved Finance Committee proposals, and approved floor amendments.<sup>233</sup> The Senate then sent the revised package back to the House.

## V. CONFERENCE AND FINAL PASSAGE

The House, by unanimous consent, disagreed with the Senate amendments and sent the House and Senate versions of H.R. 776 to conference.<sup>234</sup> Immediately upon passage in the Senate, Johnston,

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224. See 138 CONG. REC. S10,768-69 (daily eds. July 29, 1992 and July 30, 1992).

225. See 138 CONG. REC. S10,769 (daily ed. July 30, 1992).

226. See *id.* at S10,790-91.

227. *Id.* at S10,869.

228. Idelson, *supra* note 202, at 2263.

229. See 138 CONG. REC. S10,778 (daily ed. July 29, 1992).

230. *Id.* at S10,781.

231. See *id.* at S10,792-93.

232. See 138 CONG. REC. S10,864-67 (daily ed. July 30, 1992).

233. See *id.* at S10,876.

234. 138 CONG. REC. H8104 (daily ed. Aug. 12, 1992). Conference is the primary method of reconciling the differences between the chambers. Conference committees are composed of members of both houses, who smooth out legislation which, though approved in both the House and the Senate, was approved in different forms. See TIEFER, *supra* note 35, at 767-68.

anticipating House disagreement, had named thirty-one Senate conferees for the bill,<sup>235</sup> even though negotiations were not expected to commence until after the August recess.<sup>236</sup> On August 12, House Speaker Foley removed the final roadblock to conference by appointing 100 House negotiators.<sup>237</sup> Overall, nearly *one-fourth* of Congress participated in the conference negotiations.<sup>238</sup>

### A. Conference

Dingell had secured a central role going into conference: his Energy and Commerce Committee had conferees on all parts of the energy bill but the tax provisions, even though many issues were considered to be outside of the jurisdiction of the Energy and Commerce Committee.<sup>239</sup> Going into conference, the administration generally favored the Senate version of the bill, but DOE Secretary Watkins sent the Conference Committee a seventeen-page list of concerns, several of which it was anticipated could provoke veto of the final bill.<sup>240</sup> Conference would become a mechanism for further whittling down the bill to achieve consensus, as many controversial issues were dropped.

The Conference Committee, chaired by Johnston, held its first meeting on September 10.<sup>241</sup> The size of the committee forced legislators to stay focused on the important issues, encouraged them to deliberate carefully and efficiently, and allowed them to better resist isolated opposition.<sup>242</sup> Johnston presented a "break-neck" schedule, which called for completion of the conference report by the week of September 21 and bringing the final bill to the House and Senate floors by the last week in September.<sup>243</sup>

235. 138 CONG. REC. S10,876 (daily ed. July 30, 1992).

236. See Idelson, *supra* note 202, at 2261.

237. See *Energy Conferees*, 50 CONG. Q. WKLY. REP. 2448, 2448 (1992).

238. The opening conference session was so large it had to be held in the Cannon caucus room, "one of the few Hill locales large enough to accommodate all of the lawmakers . . . ." *Energy Bill Surges Toward Enactment*, *supra* note 114, at 246.

239. See *id.*

240. See Holly Idelson, *Conference Tackles Huge Bill, But Thorniest Issues Remain*, 50 CONG. Q. WKLY. REP. 2710, 2710 (1992).

241. *Id.*

242. Cf. David W. Orr, *U.S. Energy Policy and the Political Economy of Participation*, 41 JOURNAL OF POLITICS 1027, 1052-55 (1979) (explaining the analogous effects on policy formation from large-scale citizen participation).

243. See *id.*

At the first Conference Committee meeting, conferees tentatively approved a package to promote energy efficiency and electric vehicles.<sup>244</sup> While this package comprised a significant portion of the two bills and was very important from the perspective of environmental interests, these issues were “also among the easiest to resolve because both chambers had adopted similar language on most provisions.”<sup>245</sup> Hoping to solve a major point of disagreement between the House and Senate versions, Johnston made an opening concession by proposing provisions which would guarantee wholesale transmission access for electric generators.<sup>246</sup> Although Johnston’s concession was considered an improvement on the Senate bill, which previously had contained no transmission access provisions, it was criticized by many of the House conferees as too weak.<sup>247</sup> The conferees deferred action on this and many other controversial issues of disagreement.<sup>248</sup>

Nor did the conferee’s next meeting, on September 16, resolve most issues of disagreement. Following the second meeting, negotiations “were more noteworthy for what they left unresolved than for what they settled.”<sup>249</sup> Second-round agreements included a compromise version of the respective provisions promoting energy-efficient buildings.<sup>250</sup> Senate negotiators agreed to House proposals to set energy efficiency standards and simplify the federal ratemaking process for interstate oil-pipelines,<sup>251</sup> while House negotiators agreed to a Senate proposal which promoted energy efficiency standards for manufactured housing.<sup>252</sup> Negotiators agreed to a compromise package of coal research and development programs.<sup>253</sup> Conferees, however, did not resolve the transmission access disagreement, nor did they resolve other key disputes concerning alternative fuel fleets, natural gas production, and uranium enrichment.<sup>254</sup> At the

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244. *See id.*

245. Idelson, *supra* note 240, at 2711.

246. *See id.*

247. *See id.*

248. *See id.*

249. Holly Idelson, *Huge Conference Fails to Confront Policy Bill’s Major Conflicts*, 50 CONG. Q. WKLY. REP. 2802, 2802 (1992).

250. *See id.*

251. *Id.* at 2803.

252. *Id.* at 2802.

253. Idelson, *supra* note 249, at 2802.

254. *See id.* at 2803.

end of round two, a discouraged Johnston warned that the odds were no better than 50/50 that Congress could pass a bill in 1992.<sup>255</sup>

Throughout the next week conference talks continued, "yield[ing] no dramatic breakthroughs," but moving "just far enough to keep the bill (H.R. 776) afloat."<sup>256</sup> Election-year political pressures seemed to propel negotiations: Democrats, who now had a candidate for President, were well aware that President Bush could use a failed bill against them in the November election. By the same token, the administration did not want to stand in the way of passing legislation that it had originally pushed.<sup>257</sup>

Finally, following an eleven-hour negotiation session, the conferees approved a Conference Report to accompany H.R. 776 on October 1.<sup>258</sup> Negotiators were only able to reach consensus by abandoning disputed provisions regarding offshore oil and gas drilling and natural gas pipelines, leaving these issues for future Congresses.<sup>259</sup> At the last minute, conferees dropped entirely the title related to natural gas.<sup>260</sup> The House conferees were able to secure strong transmission access provisions, but only by making concessions on Public Utilities Holding Company Act reform which allowed utilities to purchase power from independent affiliates (subject to state approval) and agreeing to new provisions that would allow utility holding companies to build power plants overseas.<sup>261</sup> Although Johnston had promised the Nevada delegation that he would fight in conference to remove the language in H.R. 776 regarding pre-emption of Nevada's authority to issue environmental permits for activities at Yucca Mountain,<sup>262</sup> he quietly struck a deal with House negotiators Dingell, Sharp, and Miller to insert a provision that weakened the radiation disposal standards for the site.<sup>263</sup>

Tax provisions in the House and Senate bills, however, remained entangled in complex Conference Committee negotiations. The tax Conference Committee approved a package on October 4

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255. *See id.*

256. Holly Idelson, *Rifts Remain on National Policy as Huge Conference Races On*, 50 CONG. Q. WKLY. REP. 2927, 2927 (1992).

257. *See id.*

258. Holly Idelson, *Conferees at Last Find Harmony on National Energy Strategy*, 50 CONG. Q. WKLY. REP. 3030, 3032-33 (1992).

259. *See id.*

260. *Id.* at 3033.

261. *See id.*

262. *See supra* note 197 and accompanying text.

263. *See Idelson, supra* note 258, at 3033.

which included "green" tax incentives for mass transit, conservation, renewable energy, and non-gasoline automobiles and tax relief for independent oil and gas drillers.<sup>264</sup> Rockefeller's proposed coal tax was approved even though many conferees had attempted to use the new tax to withhold the bill from floor consideration.<sup>265</sup>

### B. Final Passage

By October 5, the Conference Report was finally cleared for floor consideration. Conference Committee reports are rarely rejected by Congress.<sup>266</sup> They must be adopted or rejected as a whole.<sup>267</sup> In this instance, the imminent end of the legislative session, coupled with election year pressure to produce a bill, made passage of the Conference Report accompanying H.R. 776 especially likely.

However, the bill's last journey through the House and Senate, though ultimately victorious, would hardly be a rubber-stamp formality. Floor consideration prior to final passage revisited provisions concerning Yucca Mountain; these provisions were so controversial that the bill was almost sidetracked by a variety of procedural devices. The large size of the Conference Committee, which caused many members of Congress to have a stake in the bill's passage, and the general tendency for technical maneuvers to fail unless they supported the status quo, made such procedural devices futile.

The House adopted, by a vote of 380-36, H.R. Res. 601, which waived all points of order against the Conference Report and its consideration and provided for two hours of debate.<sup>268</sup> H.R. Res. 601 survived despite the urging of Representative Vucanovich of Nevada that members vote "no" on the rule.<sup>269</sup> Vucanovich opposed the rule because it would preclude her from raising a point of order against Section 801, which contained Johnston's conference compromise on Yucca Mountain, as exceeding the scope of the Conference.<sup>270</sup>

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264. See Holly Idelson, *Bill's Taxes Are a Blessing to Some . . . and a 'Mugging' to Others*, 50 CONG. Q. WKLY. REP. 3144, 3145 (1992).

265. See *id.* at 3144.

266. TIEFER, *supra* note 35, at 817.

267. See *id.* at 818.

268. 138 CONG. REC. H11,374-85 (daily ed. Oct. 5, 1992).

269. See *id.* at H11,385.

270. See *id.* "Conferees cannot remove language both chambers agree on, or insert

Debate was relatively uneventful. It consisted primarily of staged colloquies and praise for the bill's achievements, although some members did rise in opposition.<sup>271</sup> Despite Vucanovich's loss on the rule bringing the bill to the floor, she had one remaining opportunity to amend the Conference Report: recommittal. Recommittal with instruction, although not binding on the Conference Committee, would have sent a strong message urging deletion of the Yucca Mountain provision.<sup>272</sup> Vucanovich made a motion to recommit the Conference Report to the committee with instructions, but her motion was rejected by a 323-102 vote.<sup>273</sup> Immediately following this vote, the House approved the Conference Report by a vote of 363-60.<sup>274</sup>

The Senate agreed to consider the Conference Report on October 5.<sup>275</sup> Anticipating a filibuster over Yucca Mountain, Majority Leader Mitchell immediately made a cloture motion without objection.<sup>276</sup>

When the Senate began debate on the cloture motion on October 8, Senator Reid of Nevada launched a final campaign against the energy bill. The Nevada delegation was livid about the Yucca Mountain provision agreed to in the Conference Committee.<sup>277</sup> If the House had not already acted on the Conference Report, the Nevada senators could have moved to recommit the report as "beyond the scope of the conference" with instructions, or raised a point of order to recommit; because the Senate was acting last, however, the Nevada Senators could not move to recommit the

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new provisions not in either chamber's version." TIEFER, *supra* note 35, at 812-13. Tiefer notes that, while in theory Congress limits the conferees' scope of authority to the "scope of the differences" between the House and Senate versions, in practice conferees have a vast amount of discretion. *Id.* at 811-12. Vucanovich, also a conferee, had lost a vote among House conferees to delete the provision. *See* Idelson, *supra* note 258, at 3033.

271. *See* 138 CONG. REC. H11,419 (daily ed. Oct. 5, 1992) (Vucanovich); *id.* at H11,420 (Representative DeFazio of Oregon, opposing bill on ground that it had "no unifying purpose"); *id.* at H11,421-22 (Representative Bilbray of Nevada, opposing the Yucca Mountain provision); *id.* at H11,498 (Representative Lewis of Florida, opposing deletion of coastal oil drilling provisions).

272. *See* TIEFER, *supra* note 35, at 819.

273. 138 CONG. REC. H11,449 (daily ed. Oct. 5, 1992).

274. *Id.* at H11,449-50.

275. *Id.* at S16,688-89.

276. *See id.* at S16,689.

277. *See* Idelson, *supra* note 258, at 3033.

Report.<sup>278</sup> Instead, they attempted to filibuster the bill.<sup>279</sup> Senator Reid stated:

Neither the House nor the Senate bills contained language requiring new Nuclear Waste Policy Act regulations. I want to be very clear on this point. Requiring the Nuclear Regulatory Commission to promulgate new regulations on high-level radioactive waste was never part of either bill. Why then have the energy conferees chosen to go beyond their charge?<sup>280</sup>

Senator Bryan added:

What was done to Nevada at the last minute, without the benefit of a hearing, no opportunity to be heard or expert testimony received, is to change this standard so that if a nuclear waste dump is ever located at Yucca Mountain, only those of us in Nevada will have a lower standard of health and protection from radiation than anyone else in the country.<sup>281</sup>

The individual power of the Nevada Senators to threaten filibuster, however, was no match for Johnston's momentum coming out of the Conference Committee. Despite spirited attempts to kill the bill, cloture was invoked by an 84-8 vote and the Senate approved the Conference Report.<sup>282</sup> The bill had passed both chambers of Congress, and the President signed the EPAct on October 24, 1992.<sup>283</sup>

## VI. LESSONS

Although the EPAct passed, and energy issues are not now at the top of the national agenda, Congressional procedure had a significant impact on the substance of the bill and thus on current energy policy.

The EPAct failed to deal with many important long-term energy issues, among them ANWR drilling and CAFE standards. Its

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278. See TIEFER, *supra* note 35, at 832-33.

279. Idelson, *supra* note 258, at 3033.

280. 138 CONG. REC. S17,556 (daily ed. Oct. 8, 1992).

281. *Id.* at S17,560.

282. *Id.* at S17,625.

283. President's Statement on Signing the Energy Policy Act of 1992, 1992-1993 PUB. PAPERS 1962 (Oct. 24, 1992).

emphasis on short-term conservation over supporting domestic production will at best cap rather than significantly reduce U.S. dependence on foreign oil. Even Bennett Johnston, the EPAct's chief architect in the Senate, recognized its limits; upon its passage, he remarked that "great policy shifts come slowly."<sup>284</sup> Energy issues are likely to re-emerge before the end of this century or in the early years of the next.<sup>285</sup>

We would be wise to learn from the political and procedural history of the EPAct. Indeed, the EPAct's history is rich with lessons about the politics and procedure of congressional energy policymaking.

### A. Place of Origin Matters

The first lesson to be learned from the EPAct's history is that it matters whether the House or the Senate has the first cut at an energy bill. For instance, Carter's 1977 energy bill sailed through the House, passing just three months after President Carter had presented it.<sup>286</sup> After the bill passed the House, however, interest groups began to mobilize; as a result, the legislation barely survived in the Senate.<sup>287</sup> In the Senate, individual members have a large say in setting the agenda, have no general germaneness restriction on amendments, and possess the ability to filibuster;<sup>288</sup> individual Senators thus can pursue their home state's interests by unilateral action, even though that action could ultimately weigh down or even defeat legislation.<sup>289</sup> A decision to split the Carter bill into six separate bills in the Senate may well have been its only savior.<sup>290</sup> The EPAct, by contrast, was able to avoid many of

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284. *Energy Bill Surges Toward Enactment*, *supra* note 114, at 231.

285. As Republicans prepare to take the reins of the 104th Congress, Senator Frank Murkowski and Representative Don Young are poised to claim the Senate and House Natural Resource Committees. Since both are strong proponents of ANWR and unabashed anti-environmentalists, pro-ANWR drilling legislation is expected to come before the full Congress. See Hugh Dellios, *New Endangered Species: Laws Preserving Environment; Outlook Grim for Greens Under GOP*, CHI. TRIB., Nov. 20, 1994, at 14.

286. H.R. 8444, 95th Cong., 1st Sess. (1977); See *Carter Energy Plan Fails To Clear*, 1977 CONG. Q. ALMANAC 708, 708-10.

287. See *id.* at 728-45.

288. See TIEFER, *supra* note 35, at 464-65.

289. See, e.g., *supra* notes 192-193 and accompanying text.

290. See generally ERIC M. USLANER, *SHALE BARREL POLITICS: ENERGY AND LEGISLATIVE LEADERSHIP* 196 (1989).



the problems that plagued the Carter bill in the Senate and went through the Senate as a single bill rather than several measures.<sup>291</sup>

A different approach was taken with energy legislation under the Bush administration. The final bill that became the EAct was not based on the Bush administration's proposals—indeed it contained measures which Bush had previously threatened to veto<sup>292</sup>—but grew out of a history of committee deliberation. While in theory the Senate is regarded as the deliberative chamber, deliberation on the bill that ultimately became the EAct began in the House. The House, reaching to create consensus, carefully crafted many of H.R. 776's provisions in committee.<sup>293</sup> Further, the Senate—having already filibustered one bill, S. 1220, perhaps the “sacrificial lamb” of the energy policy debate—wanted to assure voters that Senators would not pose any barriers to reform, especially in an election year. The Senate had failed once and the political costs of failing again would be high. The political incentives for any one Senator to block and to significantly amend H.R. 776 were lower than usual; Senator Rockefeller's success using filibuster to secure the coal tax was the exception rather than the rule.

### B. Streamlining Devices

A second lesson is that complex rules in the House are important in bringing interest-group legislation, such as energy bills, to the floor. In 1977, complex, amendment-limiting rules were essential in preventing opponents of Carter's energy bill from loading it down with last minute amendments and in resolving inter-committee disputes.<sup>294</sup> The rules accompanying H.R. 776 also limited the number and subject matter of amendments, protected certain controversial provisions from amendments, and resolved many inter-committee disputes, particularly disputes between the Interior and Insular Affairs and the Energy and Commerce Committees.

Although floor amendments were much more common in the Senate, which did not adopt a resolution containing a “closed” rule, the leadership effectively achieved the same amendment-limiting

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291. See generally *supra* part II.

292. See *supra* note 33 and accompanying text.

293. See *supra* part II.B.–C.

294. See *supra* notes 142–144 and accompanying text.

result by employing procedural devices such as the motion to table.<sup>295</sup> The motion to table served a germaneness function when such a requirement did not apply. Historically backed by strong party loyalty in support of its offerer,<sup>296</sup> the motion to table provides a quick and non-controversial way for the leadership to dispose of threatening amendments; because motions to table take precedence over most other matters under Senate rules and are "decided without debate," this mechanism serves a streamlining function on the otherwise disorderly Senate floor.<sup>297</sup>

### *C. Technical Maneuvering*

Third, out-of-the-ordinary technical procedural maneuvers were important, although they do not succeed universally. For example, while Johnston's attempt to bypass committee consideration by invoking Rule XIV succeeded, his attempt to bypass the Finance Committee by attaching H.R. 776 to an energy/water appropriations bill was quickly derailed.<sup>298</sup> Similarly, Representative Vucanovich's motion to recommit the Conference Report with instructions was killed quickly.<sup>299</sup> If anything, such technical measures were most successful when used in favor of the status quo and to keep the bill on track. For example, Senator Bentsen, by raising a point of order that Specter's proposed health care amendment violated the 1974 Budget Act, killed an attempt to divert the bill.<sup>300</sup> Notably, many of these "tricky" measures were attempted late in the bill's history, suggesting a sort of desperation by their proponents as passage or failure of the bill seemed imminent. The mixed success of such measures would suggest that members and leadership who wish to influence the content and fate of future energy bills should stick to open and participatory legislative mechanisms.

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295. See generally *supra* part IV.C.

296. See TIEFER, *supra* note 35, at 664.

297. See *id.* at 666.

298. Compare *supra* part II.A. with *supra* part IV.B.

299. See *supra* notes 271-274 and accompanying text.

300. See *supra* notes 219-225 and accompanying text.

*D. Creating a Stake*

A fourth lesson from the EPAct is the importance of conference in creating a stake in the outcome of the bill. The Conference Committee had 131 members, nearly one-fourth of Congress.<sup>301</sup> Many of the members were drawn from committees that had jurisdiction over various sections of the bill and had assisted in its drafting.<sup>302</sup> These negotiators had a “stake” in the final outcome going into the Conference Committee and fought to keep the bill together.

Moreover, the sheer size of the committee increased the capacity of negotiators to engage in a more deliberative search for solutions that may have been overlooked by a smaller group and to withstand strongly held but isolated opposition, from inside as well as from outside the Conference.<sup>303</sup> While the inclusion of many rather than of a privileged few in final negotiations meant that conference would be drawn out—in the case of the EPAct, over three weeks—it also worked to broaden the bill’s support after conference. Conference members developed stakes in the bill and put aside their particular policy preferences in order to fight for the legislative solution they had helped to create. A similar strategy of inclusion worked in favor of passage of Carter’s 1977 energy bill. In 1977, the Speaker of the House appointed an ad hoc Energy Task Force to coordinate the activities of the many committees with jurisdiction over the bill.<sup>304</sup> Members who have served on such bodies are more loyal to the leadership of key roll call votes than members who have never held such positions; undoubtedly, this “strategy of inclusion” has a significant impact on a bill’s chances of passing.<sup>305</sup>

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301. See *supra* notes 235–238 and accompanying text.

302. See Idelson, *supra* note 240, at 2710.

303. Cf. Orr, *supra* note 242.

304. See BARBARA SINCLAIR, MAJORITY LEADERSHIP IN THE U.S. HOUSE 138–39 (1983). See also TIEFER, *supra* note 35, at 271.

305. TIEFER, *supra* note 35, at 271. This inclusive approach is also discussed in USLANER, *supra* note 290, at 197.

### E. The Importance of Filibuster

Fifth, even though the EPAct was based on the House bill, the Senate's filibuster mechanism was probably the single most influential procedural factor affecting the content and fate of the EPAct. S. 1220's defeat was attributable to a filibuster, as was protection of Rockefeller's coal tax in the Senate-approved version of H.R. 776.<sup>306</sup> Fear of a filibuster over Yucca Mountain haunted the various measures until the Conference Report's final passage. As long as each Senator retains a filibuster right, the possibility of filibuster is likely to continue to threaten comprehensive interest group legislation, including consideration of energy issues.<sup>307</sup>

The threat of filibuster on a motion to proceed could work to the advantage of a bill's opponent to the extent that it allows "a double filibuster on the motion to proceed and on the bill itself, with separate opportunities for precloture filibuster, separate opportunities to defeat the cloture vote, and separate clotured time limits on the vote."<sup>308</sup> On the other hand, filibusters on motions to proceed are prone to failure. Would-be offerers of amendments may want to let a bill come up so that they can amend it, rather than portray themselves as too obstructionist to even discuss a bill.<sup>309</sup> As Tiefer observes, many supporters of filibuster forgo it on a motion to proceed, as they are likely to fail and, if they do, there is no ready means for post-cloture filibuster on a motion to proceed.<sup>310</sup>

Despite these low chances for a bill's opponents to successfully filibuster on a motion to proceed, in consideration of the EPAct the two significant filibuster battles—on S. 1220<sup>311</sup> and H.R. 776<sup>312</sup>—were on motions to proceed, rather than on the substantive bills. There

306. See *supra* parts I, IV.B.

307. Senator Harkin, reacting to Republican usage of the filibuster to kill many Clinton administration proposals in the 103d Congress, has proposed a rule that would keep the 60-vote rule on an initial cloture motion but would gradually ratchet the number down for subsequent cloture votes, so that a simple majority could ultimately pass legislation. See Helen Dewar, *Harkin Targets a Senate Tradition; Iowan is Set to Launch Drive to Repeal the Filibuster Rule*, WASH. POST, Nov. 20, 1994, at A10.

308. TIEFER, *supra* note 35, at 758.

309. For example, following the successful filibuster on S. 1220, led primarily by Democrats, Republicans made "charges that they [the Democrats] would not even debate [a bill] in the Senate." Holly Idelson, *Lingering Controversies Stall Rewrite of Energy Bill*, 49 CONG. Q. WKLY. REP. 3274, 3275 (1991).

310. See TIEFER, *supra* note 35, at 758.

311. See *supra* part I.

312. See *supra* part IV.B.

may be a strategic reason for this anomaly. First, the Senate's rule against non-germaneness, normally applicable once cloture has been invoked, does not apply if cloture has been invoked on a motion to proceed.<sup>313</sup> Consequently, if the leadership anticipates filibuster on a substantive bill, they can move for cloture early and encourage filibuster on the motion to proceed in order to test the strength of the filibusterers' coalition, and if cloture is approved, the leadership still retains the flexibility to propose non-germane amendments to keep the filibusterers' coalition weak. Proponents of filibuster might not object to early filibuster despite its tendency to fail, because even if cloture is invoked on the motion to proceed, filibuster proponents also retain the flexibility to offer controversial, non-germane amendments that potentially dissolve support for a bill during its substantive consideration. Proponents of filibuster can signal on the motion to proceed that their threats are more than just talk, increasing their bargaining power with the leadership and a bill's supporters. In addition, as Tiefer observes, filibuster on a motion to proceed "allow[s] a swing group to give something to both sides" while not necessarily allowing a bill to go through.<sup>314</sup> Despite the strategic opportunities, in recent years the Senate, hoping to avoid redundant filibusters, has considered measures to make the motion to proceed non-debatable.<sup>315</sup>

There are, however, three ways in which congressional leaders can limit the ability of filibuster to influence the content and fate of energy legislation. First, filibuster can have positive strategic effects to the extent that, as with any legislation, a defeat in the Senate may encourage the House to act. For example, S. 1220 served as a "sacrificial lamb" in the legislative process; it became a reminder to the House to work more cooperatively than the Senate had done and a goad to the Senate to keep members in line on a new, streamlined bill. The problem with a strategy of "staged" filibuster, of course, is that it is manipulative and deceptive and thus cannot be used repeatedly. Most Senators seemed to believe that S. 1220 was "for real;" the more "sacrificial lambs" the lead-

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313. *See supra* note 208 and accompanying text.

314. TIEFER, *supra* note 35, at 758.

315. The 1984 Quayle task force on Senate reform, for example, recommended "providing for a two hour time limit on the motion to proceed." STAFF OF TEMPORARY SELECT COMMITTEE TO STUDY THE SENATE COMMITTEE SYSTEM, 98TH CONG., 2D SESS., REPORT TOGETHER WITH PROPOSED RESOLUTIONS 16 (Comm. Print 1984).

ership tries to push through, the less members will be affected by the leadership's failures. Second, encouraging filibuster on a motion to proceed could pre-empt filibuster threats by testing the strength of the filibusterers' coalition while retaining the flexibility to offer non-germane amendments to dilute opposition during debate on a bill. A third way to mitigate the negative influence of filibuster is to increase the participation in committee, particularly in conference committee, of Senate members from states with particularly strong interests in the bill. Members will be less likely to filibuster if they have a stake in the bill before the Senate.

It should be noted, though, that modifications to Senate rules during the 1980s allowed the Senate to avoid the post-cloture filibuster which had threatened Carter's bill. Post-cloture filibuster prolonged the Senate's consideration of Carter's energy program. Even though cloture on the Carter bill had passed seventy-seven to seventeen, two Senators opposed to natural gas deregulation called up over 500 amendments and demanded roll-call votes on each one.<sup>316</sup> An all-night session was followed by several more days of filibustering, which finally ended with a controversial ruling by the Majority Leader.<sup>317</sup> In 1979, the Senate agreed to a 100 hour cap on post-cloture filibuster; in 1983, the Senate trimmed this cap to thirty hours.<sup>318</sup> Absent such reforms, the Nevada delegation might well have engaged in post-cloture tactics following passage of the conference report, or Senator Wallop could have attempted such a tactic in response to Rockefeller's coal tax. With a post-cloture filibuster time-cap in place, however, the Senate moved to proceed with consideration of the EPA Act in a comparatively orderly and quick manner following cloture.

#### F. Preparing for the Next Crisis

Sixth, it has traditionally taken a crisis of some sort to push new energy legislation through Congress. Carter's 1977 energy strategy, for example, was a reaction to the realization that the disparity between U.S. consumption and supply of oil was dramatically increasing U.S. vulnerability to embargo and political black-

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316. TIEFER, *supra* note 35, at 731.

317. *See id.*

318. *See id.* at 724.

mail in the international markets.<sup>319</sup> Similarly, the EAct was driven by U.S. military involvement in the Gulf crisis, which raised public concern regarding U.S. dependence on foreign oil. If the past is any indication of future legislative issues, Congress *will* be forced, most probably by international crises, to revisit energy policy in the coming decades. Legislation in reaction to a crisis, however, does not guarantee the public a comprehensive, sound, and sustainable energy policy. When Congress legislates in reaction to crisis, the core majority support for a bill is stronger, but this also allows special interests to affect a bill's substance more than they normally would. In the case of the EAct, the cost of legislative expedience in reaction to crisis was a reduction in deliberation; this tradeoff between expediency and deliberation was particularly evident in the differing approaches of the Senate and House to developing legislative proposals. It would be prudent for the leadership and committee chairs in both the Senate and the House to begin deliberation and develop consensus on important pending issues, such as CAFE, ANWR, and long-term conservation measures, in times of relative calm.

#### *G. Making Legislation by Subtraction*

The fundamental strategy of the leadership in the House and the Senate in passing the EAct was to create consensus by subtraction, not addition. When an initial package is fairly comprehensive, as was the first Senate bill, S. 1220, and where a crisis is pushing the package, as was the Gulf War, such a strategy might succeed in producing the second-best legislative result. Such strategies can also impede resolution of the most controversial—and most important—issues. Such was the case with the EAct, which is far from comprehensive in its approach; despite its title, the EAct does not address ANWR, CAFE, or long-term conservation sufficiently.

Future energy legislation need not suffer this fate. The leadership in the House, through the Rules Committee, can protect certain controversial but important issues through the use of complex rules. By creating a stake in a bill, best achieved through strategies

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319. See *Carter Energy Plan Fails to Clear*, *supra* note 286, at 708.

such as broad appointment of members to conference, the encouragement of filibuster on a motion to proceed, and amendments designed to pre-empt filibuster during debate, the leadership can minimize the power of filibuster to kill a bill. Only if the leadership is willing to mitigate the power of members in both chambers to subtract from a bill will Congress be able to produce legislation which is truly "Energy made in America."<sup>320</sup> Regrettably, we will have to look to future legislation, not to the EPAct, for such an approach.

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320. Idelson, *supra* note 258, at 3033 (quoting Senator Johnston).