

Note

An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991

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The congressional enactment of legislation involves many elements. Some are well known and well publicized: the clashes of personality, the cautious attention to public opinion and political ramifications, and the place of a bill within the larger political agenda of an administration or a legislature. Less visible, but no less influential, are the procedural mechanisms relied upon by members of Congress to transform a legislative aspiration into a binding law of the United States. A full analysis of the legislative process requires an understanding of the ways lawmakers use procedural tools to outmaneuver one another. Furthermore, procedure can be especially critical in the passage of legislation that addresses controversial issues such as race and civil rights, for legislators can escape public criticism or accountability by using procedural intricacies to mask the content of particular votes or committee recommendations. As Charles Tiefer, Deputy General Counsel to the Clerk of the House of Representatives, asserts, “Congressional procedure is the language of legislative action; its central aspects . . . have at least the meaningfulness and the importance—if not more—possessed by civil procedure as the language of the courts and international law as the language of diplomacy.”¹

1. CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 11 (1989); *see also* STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN

Despite congressional procedure's important effects on the passage of bills, laws are frequently analyzed without any discussion of their procedural histories. Almost every published study of the Civil Rights Act of 1991² overlooks entirely the procedural events in the bill's evolution. Given the remarkable political events surrounding the Act's passage, perhaps it is not surprising that the few existing discussions of the bill's procedural history seem to begin and end with two names: Anita Hill and David Duke.³ Yet such a concentrated focus on the public political events of autumn 1991 ignores the vital procedural mechanisms that directed and shaped the 102d Congress and the 1991 Civil Rights Act. This Note uses the procedural history of the 1991 Act to demonstrate the power of congressional procedure in shaping legislation.

We cannot fully understand the passage of the 1991 Act without studying its procedural history; neither can we understand that procedural history without an examination of the origins of the procedural rules that shaped it. Many of the rules under which the 102d Congress operated were the products of significant procedural reforms of the 1970's. As numerous studies of Congress and legislation in the 1960's and 1970's demonstrate, these reforms grew out of the dissatisfaction of liberal members of Congress with the disproportionate power of Congress' "conservative coalition,"⁴ which had greatly obstructed the passage of measures such as the Civil Rights Acts of 1960⁵ and 1964.⁶ The ensuing liberal procedural reforms diminished the

CONGRESS 1 (1984) ("Understanding how committees work is vital to understanding legislative decision making in Congress.").

2. Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 2 U.S.C., 16 U.S.C., & 42 U.S.C. (Supp. V 1993)).

3. See, e.g., *Compromise Civil Rights Bill Passed*, 47 CONG. Q. ALMANAC 251, 251 (1992) (quoting Representative Washington suggesting that bill's passage was eased when "David Duke took the sheet off that [quota] argument"); Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965, 965 (1993) (arguing that desire to repay Senator Danforth for his help during Thomas hearings may have led President George Bush to sign Civil Rights Act); Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 996 (1993) (reasoning that Hill-Thomas hearings and David Duke's political success in Louisiana may have changed popular perceptions of second Bush veto); Pamela Fessler et al., *Rights Bill Rises from the Ashes of Senate's Thomas Fight*, 49 CONG. Q. WKLY. REP. 3124, 3124 (1991) (asserting that Bush Administration was feeling pressure on race and gender issues); Bob Cohn & Clara Bingham, *A Turnabout on Civil Rights*, NEWSWEEK, Nov. 4, 1991, at 32 (stating that after Duke's success, "it suddenly became important for the White House to stop playing on racial fears and adopt a tone of moderation"); William Raspberry, *Bush, Civil Rights and the Specter of David Duke*, WASH. POST, Oct. 30, 1991, at A23 (op-ed claiming that Duke victory convinced Bush that "he'd rather have a civil rights bill he could sign than to hitch his political wagon to hard-core bigots").

4. The "conservative coalition" is composed of a block of conservative Southern Democrats and conservative Republicans. See, e.g., MACK C. SHELLEY II, *THE PERMANENT MAJORITY: THE CONSERVATIVE COALITION IN THE UNITED STATES CONGRESS* (1983) (charting evolution, political patterns, and influence of conservative coalition); TIEFER, *supra* note 1, at 257-60 (describing interaction between conservative coalition and House Rules Committee).

5. Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18 U.S.C., 20 U.S.C., & 42 U.S.C. (1988 & Supp. V 1993)).

6. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 and in scattered sections of 5 U.S.C. & 42 U.S.C. (1988 & Supp. V 1993)).

power of the conservative coalition by weakening the political power of its Southern Democratic members through changes in the seniority and committee leadership systems, cloture rules in the Senate, and the composition of the House Rules Committee.

This Note analyzes the procedural history of the Civil Rights Act of 1991 in comparison with the procedural histories of the 1960 and 1964 Civil Rights Acts in an effort to highlight the procedural reforms that took place within Congress in the intervening years and their impact on the passage of legislation. Because the 1991 Civil Rights Act had direct analogues in 1960 and 1964, it provides a useful test case for comparing two eras of legislative activity to see whether the procedural reforms of the 1970's made a difference in the passage of legislation. Part I of this Note recounts the procedural history of the Civil Rights Act of 1991. Part II describes, more briefly, the procedural histories of the Civil Rights Acts of 1960 and 1964. Part III focuses on specific procedural reforms of the 1970's and their impact on the 1991 civil rights legislation, through comparisons to the procedural maneuvers of 1960 and 1964. Part IV concludes that reforms concerning seniority, committee organization, and the House Rules Committee had a significant impact upon the passage of the 1991 Civil Rights Act, and increased the overall representativeness of Congress.

I. A PROCEDURAL HISTORY OF THE CIVIL RIGHTS ACT OF 1991

On January 3, 1991, Representative Jack Brooks (D-Tex.) introduced House Bill 1 (H.R. 1), the Civil Rights and Women's Equity in Employment Act of 1991, on the floor of the House of Representatives.⁷ The bill was given the number H.R. 1 to symbolize its prominence on the legislative agenda and to underscore its need for immediate momentum,⁸ and was referred to both the Judiciary Committee and the Education and Labor Committee.⁹ H.R. 1 closely resembled Senate Bill 2104 (S. 2104), the Civil Rights Act of 1990, which had passed both chambers of Congress the year before only to be vetoed by President Bush and fail in an override attempt.¹⁰ The 1991 bill differed from the 1990 bill in a few of its specifics, including language defining the "business necessity" requirement of disparate impact suits¹¹ and the damages

7. 137 CONG. REC. H53, E14 (daily ed. Jan. 3, 1991)

8. Interview with Judith L. Lichtman, President, Women's Legal Defense Fund, in New Haven, Conn (Apr. 13, 1994).

9. 137 CONG. REC. H53 (daily ed. Jan. 3, 1991)

10. The Senate vote on October 24, 1990, fell one vote short of the two-thirds required to override a veto. The final tally was 66 to 34. 136 CONG. REC. S16,589 (daily ed Oct 24, 1990)

11. The Supreme Court has interpreted Title VII of the Civil Rights Act of 1964 to prohibit not only intentional discrimination or "disparate treatment," but also unintentional discrimination that has a "disparate impact" on protected class members. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Disparate impact exists if facially neutral selection or promotion criteria, for example, operate to exclude or reduce the opportunities of protected class members at a disproportionate rate. *Id.* at 431-32. Employers

provision for intentional discrimination.¹² The 1990 bill had created a punitive and compensatory damages remedy under Title VII of the 1964 Civil Rights Act for victims of intentional discrimination;¹³ a \$150,000 cap on these damages had been added to the 1990 bill as a compromise during the legislative battle.¹⁴ In 1991, however, the sponsors of H.R. 1 chose to introduce the civil rights bill without the damages cap.¹⁵ The Bush Administration followed a similar strategy in proposing its version of the 1991 Civil Rights Act, H.R. 1375, moving away from compromise positions it had accepted in 1990.¹⁶ In the words of Representative Bill Goodling (R-Pa.), ranking Republican of the House Education and Labor Committee: "[The Democrats] started more to the left. We started more to the right."¹⁷

The 1991 Civil Rights Act moved rapidly through its first House committees under the guidance of their chairmen.¹⁸ On March 12, the House Education and Labor Committee, chaired by Representative William D. Ford (D-Mich.), approved H.R. 1 by a voice vote.¹⁹ The House Subcommittee on Civil and Constitutional Rights, chaired by Representative Don Edwards (D-Cal.), also approved the bill on the same date.²⁰ The bill was then approved

may argue as an affirmative defense to a disparate impact charge that the challenged criteria are a "business necessity." *Id.* at 431. In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court reinterpreted several aspects of disparate impact theory, thus raising numerous questions about the proper interpretation of business necessity doctrine. These issues included the extent to which business necessity would require that disputed hiring criteria be related to successful job performance, the location of the burden of proof of business necessity, and the specificity with which complaining employees or job applicants would have to pinpoint the employment practices that caused the disparate impact. President Bush's assertion that the 1990 bill would lead to hiring and promotional quotas was based on his interpretation of how the bill addressed these issues within the business necessity standard. See 136 CONG. REC. S16,418-19 (daily ed. Oct. 22, 1990) (President Bush's veto message).

12. Joan Biskupic, *Backers Want Wavering Votes Lined Up for Antibias Bill*, 49 CONG. Q. WKLY. REP. 745, 745 (1991).

13. 136 CONG. REC. S9967 (daily ed. July 18, 1990).

14. *Id.* at H6810-13 (daily ed. Aug. 2, 1990) (debate on and passage of Brooks Amendment by vote of 289 to 134).

15. Adam Clymer, *Battle over Rights Bills Emphasizes Sexual Bias*, N.Y. TIMES, Mar. 4, 1991, at A14.

16. Devins, *supra* note 3, at 991.

17. Joan Biskupic, *Bush Bill Moves to Right*, 49 CONG. Q. WKLY. REP. 684, 684 (1991) (quoting Rep. Goodling); see also Steven A. Holmes, *Battle Lines Form on New Rights Bill*, N.Y. TIMES, Feb. 8, 1991, at A16 ("[B]oth sides are much further apart than they were when negotiations to forge a compromise bill collapsed last fall.").

18. Most bills are examined and "marked up" by congressional subcommittees and committees with jurisdiction over them. See CONGRESSIONAL QUARTERLY INC., HOW CONGRESS WORKS 41-42 (1983) [hereinafter HOW CONGRESS WORKS] (describing bill's progress through congressional committees). Committee jurisdiction can be ambiguous, and referrals may therefore reflect the political assessments of the majority leadership as to which committees will be friendlier to the legislation. See TIEFER, *supra* note 1, at 110-33 (discussing committee jurisdiction, referrals, and multiple referrals). Bills may also be drafted using specific language in attempts to assure the jurisdiction of a particular committee. *Id.* at 114-18. Bills may be amended any number of times by committees and subcommittees. When a committee has finally decided on a version of the bill it supports, it sends the bill, accompanied by a committee report, to the floor of the congressional chamber. HOW CONGRESS WORKS, *supra*, at 41-42; see also discussion of Rules Committee *infra* note 24.

19. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 1, at 18 (1991).

20. 137 CONG. REC. D282 (daily ed. Mar. 12, 1991).

by the full Judiciary Committee on March 19 by a vote of 24 to 10,²¹ with the support of all the Committee's Democrats and three Republicans, including the Committee's ranking minority member, Representative Hamilton Fish, Jr., of New York.²² Both the Education and Labor Committee and the Judiciary Committee rejected the substitute versions of the bill proposed by committee Republicans for the Bush Administration.²³ Remaining differences between the Education and Labor Committee and the Judiciary Committee versions of the bill were to be reconciled in the House Rules Committee.²⁴

The Civil Rights Act's smooth progress through Congress was to end there. Since December of 1990, civil rights activists had been negotiating over the bill's language with the Business Roundtable, a coalition representing about 200 large U.S. corporations, in the hope of crafting an acceptable compromise that the two-thirds of Congress needed to override a near-certain presidential veto could support.²⁵ On April 9, White House Counsel C. Boyden Gray informed the negotiating business leaders of the Bush Administration's disapproval of the talks;²⁶ the talks broke down several days later. Negotiators on both sides later charged that the talks had been scuttled by the White House, specifically by C. Boyden Gray and Chief of Staff John Sununu.²⁷ Hopes for a bipartisan, White House-supported civil rights bill were shaken, and the bill's passage seemed in jeopardy.

In the next month, several compromise versions of the Civil Rights Act were developed, including a substitute proposed jointly by Representative Brooks, chairman of the House Judiciary Committee and lead sponsor of the

21. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 2, at 18 (1991)

22. Biskupic, *supra* note 12, at 747.

23. *Compromise Civil Rights Bill Passed*, *supra* note 3, at 253.

24. Most bills that reach the floor of the House of Representatives must first travel through the House Rules Committee, where they are given a "special rule" that sets limits on the time for debate and the number of amendments allowed. The Rules Committee's powers include "screening out some controversial bills, structuring floor consideration including deciding what amendments to allow, and settling jurisdictional disputes." TIEFER, *supra* note 1, at 252.

25. Negotiating for the Business Roundtable were business leaders from the American Express Co., AT&T, and the Business Roundtable itself. Negotiating for civil rights groups were representatives from the Leadership Conference on Civil Rights, the Women's Legal Defense Fund, the NAACP, the NAACP Legal Defense and Educational Fund, the National Women's Law Center, and the Lawyers Committee for Civil Rights. Sharon LaFraniere & Gary Lee, *White House Lobbies Businesses on Rights Bill*, WASH. POST, Apr. 13, 1991, at A7; Gary Lee, *Behind Closed Doors, Civil Rights Compromise*, WASH. POST, Apr. 10, 1991, at A16.

26. LaFraniere & Lee, *supra* note 25, at A7 (noting "White House's growing concern that the Democrats and business groups will unite on an antidiscrimination bill and gain enough momentum in Congress to override a presidential veto"); see also Sharon LaFraniere, *Businesses Reject Talks on Rights Bill, Citing Bush Stance*, WASH. POST, May 3, 1991, at A1, A11 ("[C]orporate executives feel White House opposition will doom any compromise they could come up with, according to business sources Roundtable representatives say they see no point in resuming talks unless Bush alters his stance.")

27. LaFraniere, *supra* note 26, at A11; LaFraniere & Lee, *supra* note 25, at A7, Priscilla Panton, *Quota Quagmire*, TIME, May 27, 1991, at 21; William Raspberry, *White House Compromise or Sabotage?*, WASH. POST, Apr. 15, 1991, at A9. But see Gary Lee & Sharon LaFraniere, *Business Coalition Pulls Out of Civil Rights Talks*, WASH. POST, Apr. 20, 1991, at A1, A9 (quoting AT&T Chairman Robert Allen's denial that he had been under "any pressure from the White House").

bill, and Representative Fish, ranking minority member of the House Judiciary Committee. The substitute, announced on May 21,²⁸ included three important provisions. First, it added a provision explicitly stating that the bill neither required nor permitted quotas. Second, it reinserted the cap on punitive damages available for intentional sex discrimination that had passed both chambers in 1990. Third, the Brooks-Fish substitute altered the language concerning the "business necessity" defense available to defendants in disparate impact lawsuits.²⁹

The House Rules Committee convened on May 29 and 30 to write a Rule for H.R. 1.³⁰ Judiciary Committee Chairman Brooks and nine other Representatives testified before the committee at that time.³¹ The resulting Rule—House Resolution 162 (H.R. Res. 162)—provided for the House to resolve itself into the Committee of the Whole³² for three hours of general debate on the bill, to be equally divided between the minority and majority parties.³³ The Rule then called for the amendment process to begin, with only three substitute amendments in order, and no amendments in order on those amendments.³⁴ The amendments would be considered in a "King of the Hill" fashion, meaning that whichever of the proposed substitute amendments passed last would prevail.³⁵ The three substitutes would be voted upon in specified order: first, the Towns-Schroeder substitute, which replaced H.R. 1 with the original, more liberal, version of the Civil Rights Act that had passed the House Education and Labor Committee in 1990; second, the Michel substitute, proposed by House Minority Leader Robert H. Michel (R-Ill.), which replaced H.R. 1 with H.R. 1375, the Administration's bill; and, last, the recently developed Brooks-Fish compromise substitute.³⁶ After votes on all three

28. See Sharon LaFraniere & Tom Kenworthy, *Democrats Outline Revised Rights Bill*, WASH. POST, May 22, 1991, at A5.

29. 137 CONG. REC. H3923-24, H3933-34 (daily ed. June 5, 1991) (amendment and summary of provisions); see also Joan Biskupic, *Behind the Fight over Quotas Lie Divisive Racial Issues*, 49 CONG. Q. WKLY. REP. 1442, 1443-45 (1991).

30. See discussion of Rules Committee *supra* note 24.

31. 137 CONG. REC. D674 (daily ed. May 30, 1991).

32. The Committee of the Whole is a House parliamentary fiction—a temporary committee with a quorum of 100 members. HOW CONGRESS WORKS, *supra* note 18, at 51. The House often transforms itself into the Committee of the Whole to debate and amend bills. *Id.* "The House uses the Committee of the Whole procedure because of the Committee's fast-paced and smooth amendment process that (1) basically allots only five minutes' debate on each side per amendment . . . and (2) can end debate through the motion to close or to limit debate." TIEFER, *supra* note 1, at 35 n.47. The Committee of the Whole cannot pass a bill, HOW CONGRESS WORKS, *supra* note 18, at 51, so it must "rise" when its debates are over and report back to the House of Representatives. *Id.* at 53.

33. 137 CONG. REC. H3809 (daily ed. June 4, 1991).

34. *Id.*; see also H.R. REP. NO. 83, 102d Cong., 1st Sess. 1-33 (1991) (including text of three amendments in order).

35. 137 CONG. REC. H3809 (daily ed. June 4, 1991).

36. H.R. REP. NO. 83, *supra* note 34, at 1-33 (including text of three amendments in order); 137 CONG. REC. H3824-25 (daily ed. June 4, 1991) (statement of Rep. Wheat, outlining Rule). This ordering of the amendments was perhaps an effort by the Rules Committee to assure the success of the Brooks-Fish compromise. With this ordering, both liberal and conservative members who supported the compromise as a second-best option could vote for their favored, more ideological proposals without jeopardizing the

amendments, H.R. Res. 162 directed that “[t]he previous question shall be considered as ordered on the bill and amendment thereto to final passage without intervening motion except one motion to recommit.”³⁷

H.R. Res. 162 arrived on the House floor on June 4 and immediately came under heated minority criticism as an overly restrictive “gag rule.”³⁸ In addition, Representative Gerald B.H. Solomon (R-N.Y.) raised a complicated technical criticism of the Rule in a point of order.³⁹ Representative Solomon asserted that the Rule oppressed the minority party by allowing only a straight motion to recommit, rather than a motion to recommit with amendatory instructions. Solomon argued that by excluding those words, the Rule denied the minority the right to use amendatory instructions to offer a final amendment and have a vote immediately recorded on that amendment.⁴⁰ Representative Alan Wheat (D-Mo.), majority floor manager of the Rule, responded that a recent parliamentary ruling had upheld a similar Rule calling for a motion to recommit without instructions.⁴¹ After listening to both arguments, the Speaker ruled in favor of the majority and allowed H.R. Res. 162 to stand as written.⁴²

During general debate on the Rule, Representative Solomon returned to the topic of the motion to recommit, reading into the *Congressional Record* data on the Rules written for fifteen previous major civil rights bills.⁴³ He reminded members that the Rules for nine of these fifteen recent bills had been completely open and noted that, on three other occasions, civil rights bills had proceeded under a suspension of the rules.⁴⁴ Representative Solomon again urged the House to adopt an open Rule, arguing to the Democrats that “[y]ou have a 2 to 1-plus majority. What are you afraid of[?]”⁴⁵

The House Democrats remained unmoved. After one hour of debate on H.R. Res. 162, Representative Wheat moved the previous question on the

success of the compromise. Because members would vote on the Brooks-Fish compromise last, if they voted first for the liberal or conservative proposal, but then supported the compromise, the compromise would pass.

37. 137 CONG. REC. H3809 (daily ed. June 4, 1991). A motion for the previous question cuts off further debate on the underlying matter and brings it to a direct vote. TIEFER, *supra* note 1, at 369–70.

38. 137 CONG. REC. H3812 (daily ed. June 4, 1991) (statement of Rep. Solomon)

39. *Id.* at H3810. Representative Solomon relied on House Rule XI, clause 4(b), which states that “[t]he Committee on Rules shall not report any rule or order . . . which would prevent the motion to recommit from being made as provided in clause 4 of Rule XVI.” CLERK OF THE HOUSE OF REPRESENTATIVES, 101ST CONG., 2D SESS., RULES OF THE HOUSE OF REPRESENTATIVES 15 (1990) (Donald K. Anderson). House Rule XVI, clause 4, states that “[a]fter the previous question shall have been ordered on the passage of a bill or joint resolution one motion to recommit shall be in order, and the Speaker shall give preference in recognition for such purpose to a Member who is opposed to the bill or joint resolution.” *Id.* at 19.

40. 137 CONG. REC. H3811 (daily ed. June 4, 1991) (statement of Rep. Solomon)

41. *Id.* at H3810.

42. *Id.* at H3811.

43. *Id.* at H3813.

44. *Id.* at H3812.

45. *Id.*

Rule.⁴⁶ The motion passed 259 to 165 in a party-line vote, with no Republicans voting in favor of the motion and only one Democrat voting against it.⁴⁷ The House then voted on the Rule itself. H.R. Res. 162 passed by a vote of 247 to 175 with similar partisan support: 6 Republicans in favor and 159 opposed, 240 Democrats in favor and 16 opposed.⁴⁸

Once the House had agreed to the Rule for H.R. 1, the bill itself advanced without procedural complications. Pursuant to H.R. Res. 162, the House rose and resolved itself into the Committee of the Whole⁴⁹ for consideration of H.R. 1, with Representative Kwesi Mfume (D-Md.) as its chair.⁵⁰ Representative Mfume recognized the bill's lead sponsor, Representative Brooks, as majority floor manager and Representative Henry Hyde (R-Ill.) as minority floor manager for three hours of general debate, equally divided.⁵¹ After the debate, the Committee of the Whole turned to the Towns-Schroeder amendment, which it debated for one hour and rejected by a vote of 152 to 277.⁵² The Committee next debated the Michel substitute for one hour, and voted to reject it, 162 to 266.⁵³ Representative Brooks then successfully moved that the Committee rise for that evening.⁵⁴

The next day, June 5, 1991, the House again resolved itself into the Committee of the Whole to consider the Brooks-Fish substitute amendment. After one hour of debate, the amendment passed by a vote of 264 to 166.⁵⁵ The amended version of the bill then passed by voice vote, and the Committee of the Whole rose and reported H.R. 1 back to the House.⁵⁶ The House then voted on the passage of H.R. 1; the bill passed by a vote of 273 to 158.⁵⁷ Despite the efforts of the bill's supporters, the count was fifteen votes short of the two-thirds majority needed for an override vote.⁵⁸

H.R. 1 was read for the first time on the Senate floor on June 11, 1991.⁵⁹ The Senate did not attach much importance to the bill, however, because of

46. *Id.* at H3832; *see also supra* note 37.

47. 137 CONG. REC. H3832-33 (daily ed. June 4, 1991).

48. *Id.* at H3833. The remaining vote in favor of the Rule was cast by Representative Bernie Sanders of Vermont, who was registered as an Independent and consistently voted with the Democrats throughout the debates on and passage of the Civil Rights Act of 1991.

49. *See supra* note 32.

50. 137 CONG. REC. H3834 (daily ed. June 4, 1991). When the House is in the Committee of the Whole, the Speaker appoints a member of his or her party to preside as Chair. HOW CONGRESS WORKS, *supra* note 18, at 51.

51. 137 CONG. REC. H3834 (daily ed. June 4, 1991) (statement of Rep. Mfume).

52. *Id.* at H3896 (daily ed. June 5, 1991).

53. *Id.* at H3908-09.

54. *Id.* at H3909.

55. *Id.* at H3958.

56. *Id.*

57. *Id.* at H3958-59.

58. Reports vary as to the exact numbers required for a veto override; the numbers used in the text were reported in the *Congressional Quarterly Weekly Report*. *See* Joan Biskupic, *Bill Passes House, Not Must; Next Chance Is in Senate*, 49 CONG. Q. WKLY. REP. 1498, 1498 (1991).

59. 137 CONG. REC. S7462 (daily ed. June 11, 1991).

allegations that it was a “quota bill.”⁶⁰ and because of the inability of the House to obtain a veto-proof majority. At least two other civil rights proposals had already been introduced in the Senate by that time. The Bush Administration’s bill, S. 611, had been introduced on March 12, 1991.⁶¹ Three other bills, S. 1207, S. 1208, and S. 1209, formed a three-part proposal introduced on June 4 by Senator John C. Danforth (R-Mo.).⁶² Danforth’s proposal differed from the Administration’s bill primarily in its treatment of the *Martin v. Wilks*⁶³ case and in its “business necessity” language.⁶⁴ Senator Danforth sought the Bush Administration’s support for his bills throughout the month of June, finally asserting in frustration that the White House was stalling on the issue.⁶⁵ Furthermore, as reported in *The New York Times*, “[t]he suspicion that Mr. Bush is more interested in having an issue—the idea that the Democrats support quota hiring to benefit blacks and women—than a bill is widely held in this city, and not just by partisan Democrats.”⁶⁶

Meanwhile, in the middle of Senate consideration of a crime bill on June 25, Senator Jesse Helms (R-N.C.) rose to place a second-order amendment on an amendment concerning handguns.⁶⁷ Senator Helms’ amendment, No. 378, proposed to alter Title VII of the 1964 Civil Rights Act to prohibit “preferential treatment” (which was not defined) in employment based on race, sex, color, national origin, or religion.⁶⁸ Apparently, Senator Helms was attempting to preempt the civil rights bill. Many Senators, however, including Minority Leader Bob Dole (R-Kan.), argued against the amendment; they pointed to negotiations surrounding the civil rights bill and asserted that a crime bill was the wrong place to consider the inflammatory issues of quotas and affirmative action.⁶⁹ After several hours of debate, Majority Leader George J. Mitchell (D-Me.) moved to table the Helms amendment, and the motion passed, 71 to 28.⁷⁰

60. Adam Clymer, *Civil Rights Bill Is Passed by House*, N Y TIMES, Nov. 8, 1991, at A15.

61. 137 CONG. REC. S3020 (daily ed. Mar. 12, 1991).

62. *Id.* at S7020–26 (daily ed. June 4, 1991).

63. 490 U.S. 755 (1989) (refusing to preclude white firefighters in Birmingham, Alabama, from making collateral attack on consent decree between black firefighters and City of Birmingham that included numerical goals for hiring and promotions, reasoning black firefighters should have joined white firefighters as necessary parties in suit).

64. See Biskupic, *supra* note 58, at 1498–99, 1502; Adam Clymer, *Rights Spotlight on GOP*, N Y TIMES, June 7, 1991, at A1, A24; see also *supra* note 11.

65. Helen Dewar & Sharon LaFraniere, *GOP Senators Abandon Efforts on Compromise Civil Rights Bill*, WASH. POST, June 28, 1991, at A7.

66. Clymer, *supra* note 64, at A1.

67. 137 CONG. REC. S8560 (daily ed. June 25, 1991). Senator Helms’ procedural move is somewhat ironic because it mirrors the steps taken by Senator Lyndon B. Johnson in 1960. Johnson exploited the Senate’s lack of germaneness requirements for amendments to get civil rights legislation onto the Senate floor. See *infra* text accompanying note 109. Of course, the two Senators used the same procedural maneuvers to achieve different substantive goals.

68. 137 CONG. REC. S8560 (daily ed. June 25, 1991).

69. See, e.g., *id.* at S8684, S8677, S8680 (daily ed. June 26, 1991) (statements of Sens. Breaux, Dole, and Kennedy).

70. *Id.* at S8731–32 (daily ed. June 27, 1991).

Senate efforts to compromise on a civil rights bill continued throughout the summer of 1991. On June 27, Senator Danforth revised his proposed bills after negotiations with the White House and reintroduced them as S. 1407, S. 1408, and S. 1409.⁷¹ Nevertheless, on August 1, Danforth reported that President Bush had rebuffed his most recent attempt at compromise.⁷² The Senator tried again in September,⁷³ incorporating language from the White House-approved Americans with Disabilities Act of 1990⁷⁴ into the newest version of the bill. This version, S. 1745, was introduced on the Senate floor on September 24, 1991.⁷⁵ This Danforth effort also appeared destined for White House disapproval, however,⁷⁶ and the bill seemed to tread water in the Senate until October.

On October 7, Senator Mitchell moved to proceed to S. 1745 and sent a cloture motion signed by sixteen Senators to the Senate President's desk.⁷⁷ The cloture motion was delayed, however, because of the rapidly unfolding events surrounding the confirmation of Clarence Thomas to the U.S. Supreme Court;⁷⁸ Mitchell reintroduced the motion on October 17.⁷⁹ On October 22, one week after the Senate voted to confirm Thomas,⁸⁰ and four days after former Ku Klux Klan Grand Wizard David Duke was named the Republican candidate in the Louisiana gubernatorial runoff election,⁸¹ the Senate voted 93 to 4 in favor of cloture on S. 1745.⁸²

From there, action was rapid. On October 25, President Bush held a press conference to announce his support for the latest compromise on the Civil Rights Act, stating that "[t]his agreement was reached last night in marathon negotiations, shepherded by Senator John [C.] Danforth of Missouri, nurtured

71. *Id.* at S8983 (daily ed. June 28, 1991); Leslie Rigby, *Benchmarks*, 49 CONG. Q. WKLY. REP. 3126 (1991).

72. Joan Biskupic, *Civil Rights: No Deal*, 49 CONG. Q. WKLY. REP. 2170, 2170 (1991).

73. Helen Dewar, *Danforth Alters Wording in Rights Compromise*, WASH. POST, Sept. 21, 1991, at A6 ("We have incessantly tinkered with this [civil rights] bill in order to attempt to please the administration . . . I don't see how anyone could say no to it' . . ." (quoting Sen. Danforth)).

74. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified in scattered sections of 29 U.S.C., 42 U.S.C., & 47 U.S.C. (Supp. V 1993)).

75. 137 CONG. REC. S13,581 (daily ed. Sept. 24, 1991).

76. Helen Dewar, *Administration Rejects Danforth's Rights Plan*, WASH. POST, Sept. 25, 1991, at A4 ("Asked if [the Administration's opponents of civil rights legislation] might include White House Chief of Staff John H. Sununu, Danforth said, "That's possible."").

77. 137 CONG. REC. S14,493 (daily ed. Oct. 7, 1991). The Senate allows for virtually unlimited debate on bills; the only ways to end debate are by unanimous consent agreement or by voting "cloture" on the bill. HOW CONGRESS WORKS, *supra* note 18, at 58. Under Senate Rule XXII, a cloture petition, if signed by 16 members, constitutes a formal motion to end debate. S. DOC. NO. 1, 102d Cong., 1st Sess. 21-23 (1992) (Senate Manual). If three-fifths of the Senate approves cloture, debate is then brought to a close. *Id.*; see discussion of cloture rule changes *infra* note 112.

78. See Phil Kuntz, *Mired in Procedural, Political Mess . . . Senate Scrambled To Delay Vote*, 49 CONG. Q. WKLY. REP. 2954, 2954-55 (1991).

79. 137 CONG. REC. S14,931-32 (daily ed. Oct. 17, 1991).

80. *Id.* at S14,704-05 (daily ed. Oct. 15, 1991) (confirming Thomas by vote of 52 to 48).

81. Roberto Suro, *Louisiana Puts Ex-Klan Leader in Runoff Race*, N.Y. TIMES, Oct. 21, 1991, at A1.

82. 137 CONG. REC. S14,963 (daily ed. Oct. 22, 1991).

by Senator [Bob] Dole and other leaders of both parties.”⁸³ On October 28, the Senate passed, by a vote of 92 to 0, a nonbinding sense-of-the-Senate resolution,⁸⁴ S. Res. 209, which suggested that the Senate consider changing the federal laws and Senate rules to prevent sexual harassment.⁸⁵ On October 29, the Senate disposed of numerous amendments and a constitutional point of order on S. 1745.⁸⁶ Finally, on October 30, several more amendments were considered, and the Senate voted on the bill’s passage.⁸⁷ The Civil Rights Act of 1991 passed the Senate by a vote of 93 to 5.⁸⁸

Because of the highly contested language alterations that had occurred during the bill’s passage, the Senate approved a three-paragraph “interpretive memorandum” that explained the Act’s use of the term “business necessity.”⁸⁹ On October 29, the Senate agreed by voice vote to direct all courts to the three paragraphs for resolution of any interpretive questions.⁹⁰ At least one scholar has pointed to this congressional failure (or refusal) to resolve statutorily one of the difficult definitional problems of the Act as an explanation for its passage:

The key to the compromise was the bill’s failure to conclusively define business necessity. Instead, by reference to an interpretive memo, the 1991 Act said that judicial interpretation of “business necessity” should be governed by the “concepts enunciated by . . . Supreme Court . . . decisions prior to *Wards Cove Packing Co. v. Atonio*.”⁹¹

Finally, S. 1745 was presented to the House of Representatives for approval: The Rules Committee reported it to the floor on November 7, 1991, with H.R. Res. 270, an entirely closed Rule allowing only one hour of general debate and no amendments.⁹² Liberal Democrats opposed the Rule, arguing that the House should have the opportunity to remove from the Senate bill a provision exempting from the bill’s coverage the ongoing lawsuit against the

83. *Bush News Conference on Civil Rights Accord*, N.Y. TIMES, Oct. 26, 1991, at A7 (alterations in original) (quoting President Bush).

84. See generally HOW CONGRESS WORKS, *supra* note 18, at 41 (describing resolutions expressing “sense” or opinion of chambers). The fact that “sense-of-the-Senate” resolutions do not have the force of law suggests that S. Res. 209 was passed to respond quickly and easily to the political pressure generated by Anita Hill’s allegations of sexual harassment.

85. 137 CONG. REC. S15,290–91 (daily ed. Oct. 28, 1991)

86. *Id.* at D1325–26 (daily ed. Oct. 29, 1991).

87. *Id.* at D1336–37 (daily ed. Oct. 30, 1991).

88. *Id.* at S15,503.

89. *Id.* at S15,276 (daily ed. Oct. 25, 1991) (declaring these paragraphs “exclusive legislative history” of Act) (codified at 42 U.S.C. § 1981 note (Supp. V 1993)); see also *supra* note 11

90. *Id.* at S15,362 (daily ed. Oct. 29, 1991).

91. Devins, *supra* note 3, at 995 (quoting “exclusive legislative history” at 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991)).

92. 137 CONG. REC. H9505 (daily ed. Nov. 7, 1991)

Wards Cove Packing Company.⁹³ Representative Wheat, floor manager of H.R. Res. 270, justified the Rule by referring to the two years of bitter struggle underlying the Civil Rights Act, claiming that “this is an extraordinary situation and thus we have an extraordinary Rule.”⁹⁴ Even opponents of the Rule acknowledged this political backdrop: “[T]he Rules Committee was forced to adopt a closed rule, because the White House said the bill [would] be vetoed if [the] Wards Cove exemption [were] removed.”⁹⁵ On November 7, H.R. Res. 270 was adopted by a vote of 327 to 93.⁹⁶ After brief debate, the House then voted in favor of final passage of S. 1745 by a vote of 381 to 38.⁹⁷ President Bush signed the bill into law on November 21, 1991.⁹⁸

II. PROCEDURAL HISTORIES OF THE CIVIL RIGHTS ACTS OF 1960 AND 1964

Full procedural histories of the passages of the 1960 and 1964 Civil Rights Acts appear in numerous books and articles on the subject.⁹⁹ This summary therefore does not discuss extensively the events and politics shaping the bills. Instead, this Part focuses on specific procedural issues that arose during the passages of the Acts for purposes of comparison with procedural events that marked the passage of the 1991 Civil Rights Act.

A. *The Civil Rights Act of 1960*

During the 1959 session of the Eighty-Sixth Congress, attempts at passing a civil rights act came up short. Recalcitrant committee chairs in both the

93. See, e.g., *id.* at H9506 (statement of Rep. McDermott) (stating that Wards Cove workers’ “quest for justice will be sacrificed on George Bush’s altar of racial politics”); *id.* at H9509 (statement of Rep. Mink) (stating that Wards Cove exemption “debases the very title of this bill”); *id.* at H9511 (statement of Rep. Schroeder) (insisting that “special interest legislation in a civil rights bill is absolutely intolerable”); *id.* (statement of Rep. Mineta) (calling Wards Cove exemption “one of the most outrageous pieces of special interest legislation I have ever seen”). The Wards Cove exemption was inserted into the Senate bill on November 5 by a special corrective resolution, S. Res. 214. *Id.* at S15,950–68 (daily ed. Nov. 5, 1991). The exemption reads: “[N]othing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.” Pub. L. No. 102-166, § 402, 105 Stat. 1071, 1099 (codified at 42 U.S.C. § 1981 note (Supp. V 1993)). This exemption is extraordinary because it precludes relief for a group of plaintiffs whose efforts were a crucial causal factor in creating the need for the legislation.

94. 137 CONG. REC. H9505 (daily ed. Nov. 7, 1991).

95. *Id.* at H9506 (statement of Rep. McDermott).

96. *Id.* at H9516.

97. *Id.* at H9557–58.

98. Statement on Signing the Civil Rights Act of 1991, 1991 PUB. PAPERS 1504 (Nov. 21, 1991); 137 CONG. REC. D1490 (daily ed. Nov. 21, 1991).

99. See, e.g., DANIEL M. BERMAN, *A BILL BECOMES A LAW: THE CIVIL RIGHTS ACT OF 1960* (1962) [hereinafter BERMAN, *A BILL BECOMES A LAW*]; DANIEL M. BERMAN, *A BILL BECOMES A LAW: CONGRESS ENACTS CIVIL RIGHTS LEGISLATION* (2d ed. 1966) [hereinafter BERMAN, *A BILL BECOMES A LAW, SECOND EDITION*]; ROBERT D. LOEVY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964* (1990); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

House and Senate buried proposed civil rights bills and prevented them from ever reaching the chamber floors.¹⁰⁰ For example, under the leadership of liberal Chairman Emanuel Celler (D-N.Y.), the House Judiciary Committee did receive¹⁰¹ and report out¹⁰² a bill, H.R. 8601, but it promptly stalled in the House Rules Committee, which was chaired by civil rights foe Howard W. Smith (D-Va.).¹⁰³ The Senate version of that bill, S. 2721, was channeled to the Senate Judiciary Committee,¹⁰⁴ chaired by Senator James O. Eastland (D-Miss.), who had turned the committee into a "graveyard of civil rights legislation."¹⁰⁵ Attempts in both chambers to escape the obstructionist committees, including a House discharge petition filed by Representative Celler,¹⁰⁶ were fruitless, and 1959 ended without the passage of civil rights legislation.¹⁰⁷

In 1960, Senator Lyndon B. Johnson (D-Tex.) took a more aggressive approach by bypassing the Senate Judiciary Committee altogether. On the morning of February 15, 1960, he introduced H.R. 8315, which authorized the Secretary of the Army to lease land to certain Missouri schools.¹⁰⁸ Johnson then took advantage of the Senate's lack of germaneness rules and added to the bill an amendment encompassing the failed civil rights legislation of 1959.¹⁰⁹ Senator Johnson had chosen carefully: The bill was a useful vehicle not only to avoid Senator Eastland's Judiciary Committee and get a civil rights bill onto the Senate floor, but also to minimize later stonewalling in the House of Representatives because the House had already passed it.¹¹⁰ Southern Senators were outraged by Senator Johnson's move; Senator Richard B. Russell (D-Ga.), for instance, declared that "that is not the way the Senate operates. That is a political carnival."¹¹¹ Nevertheless, a civil rights bill had reached the Senate floor.

Of course, passage of the bill would not be so simple. The Senate's absence of rules that limit debate permits endless filibustering of controversial issues like the civil rights legislation. In 1960, Senate Rule XXII allowed a cloture petition to end debate only if two-thirds of those Senators present and voting agreed that debate should end.¹¹² On March 8, thirty-one

100. See BERMAN, A BILL BECOMES A LAW, *supra* note 99, at 7-37

101. 105 CONG. REC. 15,398 (1959).

102. *Id.* at 16,621.

103. See BERMAN, A BILL BECOMES A LAW, *supra* note 99, at 22

104. 105 CONG. REC. 19,682 (1959).

105. WHALEN & WHALEN, *supra* note 99, at 4.

106. See BERMAN, A BILL BECOMES A LAW, *supra* note 99, at 23-25

107. *See id.* at 36-37.

108. 106 CONG. REC. 2444 (1960).

109. *Id.* at 2470. Senator Johnson did not place the text of the amendment on the record *Id.*

110. BERMAN, A BILL BECOMES A LAW, *supra* note 99, at 53, 55

111. 106 CONG. REC. 2474 (1960).

112. S. DOC. NO. 2, 87th Cong., 1st Sess. 23 (1961) (Senate Manual). From 1917 to 1949, Senate Rule XXII provided for cloture only with the support of two-thirds of those Senators present and voting. From 1949 to 1959, that rule was tightened, requiring the approval of two-thirds of the entire Senate membership

Senators—fifteen more than were necessary to bring a vote on cloture to the Senate floor¹¹³—filed a cloture petition.¹¹⁴ The vote two days later fell far short of two-thirds: Only forty-two Senators supported cloture while fifty-three opposed it.¹¹⁵ The filibuster continued, and as pressure for a more moderate civil rights bill mounted, eyes turned toward the House to see what sort of bill the Representatives could pass.¹¹⁶

The House of Representatives was still facing the same obstacle as in 1959—Rules Committee Chairman Howard Smith—and was still attempting to use the same weapon to wrest civil rights legislation from his control: the discharge petition. Under House Rule XXVII(4), discharge petitions could be filed by any House member once a bill had stood before any committee for more than thirty days or before the Rules Committee for seven days.¹¹⁷ Such petitions required the signatures of a majority of House members (218) to succeed.¹¹⁸ Liberal Democrats had acquired only 175 signatures on their discharge petition for H.R. 8601 when the names were leaked to *The New York Times* and promptly printed on January 22, 1960.¹¹⁹ Because the petition was signed by 145 Democrats but only 30 Republicans, House Republicans suddenly came under great pressure to add their signatures to the petition to avoid appearing as though they were stalling the civil rights bill.¹²⁰ When the number of signatures on the petition grew so that it seemed he might actually lose control of the bill, Chairman Smith finally gave in and announced hearings on H.R. 8601,¹²¹ which began on February 4, 1960.¹²² When the Committee finally wrote a Rule (H.R. Res. 359), Minority Leader Charlie Halleck (R-Ind.) encouraged Republicans to support it in order to share political credit for advancement of the bill.¹²³ H.R. Res. 359 was therefore successfully reported out of the Rules Committee on February 23, 1960.¹²⁴ The Rule allowed for fifteen hours of general debate on H.R. 8601, followed

for cloture to pass. HOW CONGRESS WORKS, *supra* note 18, at 60–63 (describing evolution of cloture rule). In 1959, Senate Majority Leader Johnson pushed for and won a return to the pre-1949 formula. S. DOC. NO. 2, *supra*, at 23. The rule stayed that way until the 1975 revisions, which required only a three-fifths vote of the entire Senate membership for cloture. S. DOC. NO. 1, 95th Cong., 1st Sess. 23–25 (1977) (Senate Manual). The three-fifths rule remained in effect in 1991. S. DOC. NO. 1, *supra* note 77, at 21–23.

113. The signatures of 16 Senators were needed to initiate a cloture petition under Senate Rule XXII. S. DOC. NO. 2, *supra* note 112, at 23.

114. 106 CONG. REC. 4933 (1960).

115. *Id.* at 5118.

116. BERMAN, A BILL BECOMES A LAW, *supra* note 99, at 72.

117. H.R. DOC. NO. 458, 86th Cong., 2d Sess. 478–79 (1959) (House Manual); *see also* HOW CONGRESS WORKS, *supra* note 18, at 55.

118. H.R. DOC. NO. 458, *supra* note 117, at 479; *see also* HOW CONGRESS WORKS, *supra* note 18, at 55.

119. 175 in House Sign Civil Rights Plea, N.Y. TIMES, Jan. 22, 1960, at A11; List of 175 Supporters of Civil Rights, N.Y. TIMES, Jan. 22, 1960, at A11.

120. BERMAN, A BILL BECOMES A LAW, *supra* note 99, at 75.

121. *Id.*

122. 106 CONG. REC. D52 (1960).

123. BERMAN, A BILL BECOMES A LAW, *supra* note 99, at 78–79.

124. 106 CONG. REC. 3259 (1960).

by amendments;¹²⁵ it passed on March 10, 1960, by a vote of 312 to 93.¹²⁶ The bill itself passed the House on March 24, by a vote of 311 to 109.¹²⁷

On March 24, Senator Johnson asked the Senate Clerk to read H.R. 8601 on the Senate floor for the first time.¹²⁸ Senator Eastland then requested that the bill be referred to the Judiciary Committee without instruction, thus without any time limit for reporting the bill back to the full Senate.¹²⁹ The Senate rejected Eastland's proposal 19 to 72,¹³⁰ and approved instead, 86 to 5, a referral to the Committee with a five-day time limit for its examination of the bill.¹³¹ Thus, on March 30, 1960, the Senate addressed H.R. 8601.¹³² After several days of debate on the bill, the Civil Rights Act came before the full Senate for a vote on April 8, 1960, and passed by a vote of 71 to 18.¹³³ A common final step in a bill's passage, reconciliation in a conference committee of the bills passed by the two chambers,¹³⁴ was unnecessary in this case because on April 21, the House voted 288 to 95 to accept the Senate amendments to the bill.¹³⁵ The Civil Rights Act of 1960 was signed into law by President Eisenhower on May 6, 1960.¹³⁶ The Senate filibuster had taken its toll, however:¹³⁷ Thurgood Marshall pronounced the bill not "worth the paper it's written on."¹³⁸

B. *The Civil Rights Act of 1964*

The passage of the Civil Rights Act of 1964 featured many of the same procedural dramas as the 1960 passage, with a background of even greater national awareness, anxiety, and pressure.

On June 20, 1963, Judiciary Committee Chairman Emanuel Celler introduced a civil rights bill, H.R. 7152, which was promptly referred to the Judiciary Committee.¹³⁹ As he had in 1960, Celler used his liberal Subcommittee No. 5 to hold hearings and mark-up on the bill,¹⁴⁰ until, on October 8, the full Judiciary Committee began consideration of H.R. 7152.¹⁴¹

125. *Id.* at 5192-93.

126. *Id.* at 5198-99.

127. *Id.* at 6512.

128. *Id.* at 6451.

129. *Id.* at 6452.

130. *Id.* at 6454-55.

131. *Id.* at 6455; see also BERMAN, *A BILL BECOMES A LAW*, *supra* note 99, at 97

132. 106 CONG. REC. 6931 (1960).

133. *Id.* at 7810-11.

134. For a discussion of conference committees, see generally TIEFER, *supra* note 1, at 767-71

135. 106 CONG. REC. 8507-08 (1960).

136. Statement by the President upon Signing the Civil Rights Act of 1960, 1960-61 Pt B PAPERS 398 (May 6, 1960); 106 CONG. REC. D497 (1960).

137. GARY ORFIELD, *CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE* 43 (1975)

138. BERMAN, *A BILL BECOMES A LAW*, SECOND EDITION, *supra* note 99, at 135 (quoting Marshall)

139. 109 CONG. REC. 11,252 (1963).

140. WHALEN & WHALEN, *supra* note 99, at 40-41.

141. 109 CONG. REC. D485 (1963).

Celler's bill, however, faced difficulties in the full committee. Although his subcommittee had reported out a strong bill, Celler knew that such a bill would not survive in the Rules Committee or on the House floor, and that compromises were necessary for passage.¹⁴² On October 22, however, Representative Arch Moore (R-W. Va.) moved to report H.R. 7152 to the full House without modification.¹⁴³ Representative Celler immediately adjourned the committee meeting¹⁴⁴ and turned to President Kennedy for assistance.¹⁴⁵ The next evening, the President met with House majority and minority leaders to try to persuade them to vote against the Moore motion and to craft a compromise that could survive a full House vote.¹⁴⁶ President Kennedy was successful: Representative William McCulloch (R-Ohio), the ranking minority member of the Judiciary Committee, worked with House Democrats and Justice Department officials to craft a compromise bill that the Committee accepted by a vote of 20 to 14 on October 29, 1963.¹⁴⁷

The newly amended H.R. 7152 next had to face Representative Smith, still Chairman of the House Rules Committee. Although the House had enlarged the Rules Committee in 1961, raising the number of Democrats to ten from the previous eight,¹⁴⁸ the Committee was still a significant roadblock for civil rights legislation. Confrontation with the Rules Committee and attempts to escape it thus led to extensive procedural manipulations of the House rules in 1963. Supporters of H.R. 7152 had three possible options for wresting the bill

142. WHALEN & WHALEN, *supra* note 99, at 49.

143. H.R. REP. NO. 914, 88th Cong., 1st Sess. 63 (1963) (minority report).

144. *Id.*

145. LOEVY, *supra* note 99, at 70.

146. WHALEN & WHALEN, *supra* note 99, at 50. It is understandable that conservatives opposed to civil rights legislation would have been happy to support the Moore motion—an unrealistically strong bill would have certainly died on the House floor. More interesting is Attorney General Robert F. Kennedy's assessment of the motives of liberal civil rights supporters for reporting such a bill out of committee: "[Liberals] would rather lose the whole bill and lose the legislation than make the kind of effort we wished. An awful lot of them . . . were in love with death." *Id.* at 53.

147. 109 CONG. REC. D522 (1963); *see also* LOEVY, *supra* note 99, at 71.

148. 107 CONG. REC. 1589-90 (1961) (passage of amendment to enlarge committee); *see also* H.R. DOC. NO. 619, 87th Cong., 2d Sess. 352 (1963) (House Manual) (reporting committee size change); HOW CONGRESS WORKS, *supra* note 18, at 96 (calling enlargement "House revolt" against conservative grip on power). The 1961 expansion was perceived by some Representatives as a political attempt to "pack" or "purge" the Rules Committee in order to advance a liberal agenda. *See, e.g.*, 107 CONG. REC. 1575 (1961) (statement of Rep. Brown) (asserting resolution was designed for single purpose of packing Rules Committee); *id.* at 1577 (statement of Rep. Arends) (claiming proposal would turn Rules Committee into "rubberstamp" of leadership); *id.* at 1578 (statement of Rep. Judd) (same); *id.* at 1583 (statement of Rep. Weaver) (implying committee-packing plan was political maneuver); *id.* at 1585 (statement of Rep. Poff) (arguing that "purging" Rules Committee would usurp its independent power). Other Representatives argued that the proposal would democratize the Rules Committee by decreasing the disproportionate, obstructionist power of its conservative coalition, thereby allowing the House to vote on important issues of the day. *See, e.g.*, *id.* at 1581-82 (statement of Rep. Yates) (including in House record newspaper article calling for Rules Committee to "let the House vote"); *id.* at 1582 (statement of Rep. Blatnik) (arguing that conservative coalition had "stranglehold" on Rules Committee); *id.* at 1586 (statement of Rep. Moorhead) (stating that vote would test members' belief in process of representative democracy). This debate reveals that expansion of the committee was proposed and passed in order to decrease the ability of the Rules Committee to block legislation. *Cf. infra* text accompanying notes 270-74.

from the grasp of the Rules Committee: the discharge petition (House Rule XXVII), Calendar Wednesday (House Rule XXIV), and House Rule XI.

Liberal Democrats began with the first method. Replicating his 1960 strategy, on December 9, 1963,¹⁴⁹ Representative Celler filed a discharge petition, which was promptly signed by one hundred other members of the House.¹⁵⁰ Republican Representatives alleged that the petition was merely an attempt to embarrass Republicans who had not signed it, and responded to the effort by arguing for bringing H.R. 7152 to the House floor as soon as possible under Calendar Wednesday.¹⁵¹ Under Calendar Wednesday rules, a committee member could call up to the floor and members could vote on any unprivileged bill, thus avoiding roadblocks set up within a committee.¹⁵² Striking back politically, Republicans publicly urged those Democrats who truly wanted to pass civil rights legislation to use Calendar Wednesday to call up H.R. 7152 on December 11, 1963, the soonest available date.¹⁵³ As both the Republicans and the bill's supporters well knew, however, Calendar Wednesday procedure contained provisions that would have sunk H.R. 7152. Because House Rule XXIV(7) required that a bill be disposed of by the end of the legislative day,¹⁵⁴ any bill raised under Calendar Wednesday could fall victim to delaying tactics by opponents.¹⁵⁵ This was a threat to the Act because Calendar Wednesday proceeds alphabetically by "call of committee," so that the Judiciary Committee could have been the twelfth committee to present a bill.¹⁵⁶ Fearing that these procedural minefields would kill the civil rights bill, Democrats were forced to oppose the Republican suggestion to call up the bill on Calendar Wednesday.¹⁵⁷ Republicans then attempted to use the Democratic vote against the motion to bring up H.R. 7152 on Calendar Wednesday¹⁵⁸ politically: They argued that the vote indicated that Democrats were not truly pro-civil rights and that their accusations that Republicans were stalling the passage of legislation were in bad faith.¹⁵⁹

149. WHALEN & WHALEN, *supra* note 99, at 84

150. LOEVY, *supra* note 99, at 91; *see also* discussion of discharge petitions *supra* text accompanying notes 117-18.

151. BERMAN, A BILL BECOMES A LAW, SECOND EDITION, *supra* note 99, at 90-94, LOEVY, *supra* note 99, at 92-95.

152. H.R. DOC. NO. 619, *supra* note 148, at 468-69 (Rule XXIV(7)), *see also* ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 275-76 (2d ed. 1985), TIEFER, *supra* note 1, at 336

153. LOEVY, *supra* note 99, at 93.

154. H.R. DOC. NO. 619, *supra* note 148, at 469-71. A two-thirds vote could have overcome this requirement. *Id.*

155. HOW CONGRESS WORKS, *supra* note 18, at 56

156. BERMAN, A BILL BECOMES A LAW, SECOND EDITION, *supra* note 99, at 92, WHALEN & WHALEN, *supra* note 99, at 85. Thus if the 11 preceding committees used up most of the allotted time, the Civil Rights Act might have been introduced with insufficient time to consider it

157. BERMAN, A BILL BECOMES A LAW, SECOND EDITION, *supra* note 99, at 92

158. 109 CONG. REC. 24,217-18 (1963) (avoiding Calendar Wednesday with vote to adjourn)

159. LOEVY, *supra* note 99, at 94; WHALEN & WHALEN, *supra* note 99, at 85

This political battle continued until the threat of the third removal method broke the deadlock. House Rule XI(25) allows any three members of a committee to call for a meeting of that committee.¹⁶⁰ If after seven days the committee has not yet met, a majority of the committee members may request that the clerk of the committee schedule a committee meeting immediately.¹⁶¹ When the Rules Committee's ranking Republican member Clarence J. Brown (R-Ohio) began to consider siding with liberal Democrats to use Rule XI to force Chairman Smith to begin hearings, Smith finally gave in.¹⁶² The hearings on H.R. 7152 began on January 9, 1964.¹⁶³

The hearings before the Rules Committee lasted for the better part of a month, with twenty-nine Southern Representatives testifying before the Committee in opposition to the bill.¹⁶⁴ Finally, when there were no further witnesses, Chairman Smith could hold off a vote on the bill no longer. On January 30, the Rules Committee reported H.R. 7152 out of committee¹⁶⁵ by a vote of 11 to 4, with only Southern Democrats opposing.¹⁶⁶

The Rule proposed by the Rules Committee, H.R. Res. 616, was an open one allowing for no more than ten hours of general debate divided evenly between the majority and minority parties.¹⁶⁷ H.R. Res. 616 passed the House of Representatives by voice vote on January 31, 1964,¹⁶⁸ after which the House resolved itself into the Committee of the Whole.¹⁶⁹ For ten days, the House debated the Civil Rights Act and consistently voted down weakening amendments proposed by Southern Democrats without procedural complications.¹⁷⁰ Representatives Celler and McCulloch worked together to help ensure this success by creating a forceful whip system that herded liberal and moderate members to the floor for votes.¹⁷¹ On February 8, Rules Chairman Smith made one last effort to derail the bill by offering a controversial amendment that would add sex discrimination to the bill's proscribed acts.¹⁷² Contrary to his strategic expectations, the amendment

160. H.R. DOC. NO. 619, *supra* note 148, at 363.

161. *Id.*

162. WHALEN & WHALEN, *supra* note 99, at 85-86.

163. *Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong., 2d Sess., pt. 1, at I (1964).

164. *See id.* at III (listing Representatives who made statements); *id.* pt. 2, at III-IV (same).

165. 110 CONG. REC. D41 (1964).

166. *See* LOEVY, *supra* note 99, at 99 (stating vote count).

167. 110 CONG. REC. 1511 (1964).

168. *Id.* at 1516.

169. *Id.*

170. *Id.* at 1516-2805.

171. LOEVY, *supra* note 99, at 109-10; WHALEN & WHALEN, *supra* note 99, at 108-09.

172. 110 CONG. REC. 2577 (1964); *see also* LOEVY, *supra* note 99, at 120; WHALEN & WHALEN, *supra* note 99, at 116.

passed by a vote of 168 to 133¹⁷³ but did not destroy the bill: On February 10, 1964, the House passed H.R. 7152 by a vote of 290 to 130.¹⁷⁴

The next step for H.R. 7152 was the Senate and near-certain filibuster. During the October 1963 negotiations between Representative McCulloch and the Kennedy Department of Justice, the Administration had promised McCulloch that it would not play the legislative chambers against each other by allowing compromises with Senate Republicans that weakened the House bill, as it had done in 1957 and 1960.¹⁷⁵ Therefore, despite President Johnson's concern that, as in 1960, it would be impossible to get the sixty-seven votes needed for cloture, the strategy of waiting, amending, and compromising under the general time allowances of Senate Rule XIX¹⁷⁶ was not possible for H.R. 7152, because the liberal Senators' negotiating hands had been tied.¹⁷⁷

On February 26, the Civil Rights Act was read for a second time on the Senate floor.¹⁷⁸ Senate Majority Leader Mike Mansfield (D-Mont.) then took an unusual step: Instead of referring the bill to a committee, he made a motion to place the bill directly onto the Senate calendar.¹⁷⁹ Numerous Senators objected, arguing that it was vital for a committee to examine the bill.¹⁸⁰ Nevertheless, Mansfield won the vote on his motion 54 to 37,¹⁸¹ and the bill was placed on the Senate calendar, out of the reach of Senate Judiciary Committee Chairman Eastland.

Senator Mansfield planned to call up H.R. 7152 for Senate consideration on March 9.¹⁸² Under Senate Rule VII, in order to schedule consideration of the bill without debate on the issue of scheduling, Mansfield would have needed to advance the bill during "morning hour," a two-hour period at the start of the legislative day.¹⁸³ Senator Richard B. Russell (D-Ga.) prevented this move, however, by taking up the whole two hours of "morning hour" on March 9 with a mini-filibuster.¹⁸⁴ Mansfield's subsequent motion to call up

173. 110 CONG. REC. 2584 (1964).

174. *Id.* at 2804-05.

175. WHALEN & WHALEN, *supra* note 99, at 13, 125.

176. Senate Rule XIX limited every Senator to two speeches per day on any one question in debate S. DOC. NO. 1, 88th Cong., 1st Sess. 21 (1963) (Senate Manual). A Senate "legislative day" can extend over many actual days. WHALEN & WHALEN, *supra* note 99, at 129.

177. WHALEN & WHALEN, *supra* note 99, at 129-30.

178. 110 CONG. REC. 3692 (1964).

179. *Id.* at 3692-93; *see also* WHALEN & WHALEN, *supra* note 99, at 134.

180. *See* 110 CONG. REC. 3711 (1964) (statement of Sen. Eastland) (arguing that this acceleration of Senate procedure amounted to "legislative lynching"); *see also id.* at 3695 (statement of Sen. Russell) (arguing that committee procedure was important for gathering needed information), *id.* at 3710 (statement of Sen. Ervin) (arguing that Judiciary Committee would point out defects of bill).

181. *Id.* at 3719.

182. *Id.* at 4743 (including in record notice given by Sen. Mansfield of intention to call up H.R. 7152).

183. S. DOC. NO. 1, *supra* note 176, at 9 (allowing any Senator to lay before Senate any bill sent by House of Representatives; motion to do so "shall be determined without debate"); *see also* HOW CONGRESS WORKS, *supra* note 18, at 58 (explaining "morning hour").

184. 110 CONG. REC. 4743-54 (1964).

H.R. 7152¹⁸⁵ was thus subject to debate, and the bill's opponents began their first filibuster.¹⁸⁶ It lasted until March 26, when the Senate finally agreed, by a vote of 67 to 17, to a motion allowing consideration of H.R. 7152.¹⁸⁷ After Senator Wayne Morse (D-Or.) moved to send the bill to the Judiciary Committee,¹⁸⁸ which motion the Senate defeated by agreeing to table it,¹⁸⁹ the Senate was ready for the second filibuster—this time on the Civil Rights Act itself.

The second Senate filibuster began in late March and continued through the entire spring of 1964.¹⁹⁰ The endless stalling slowly increased pressure on the Senators to vote for cloture. From April to mid-May, Senator Hubert H. Humphrey (D-Minn.)—the Democratic Whip and co-majority floor manager of H.R. 7152—negotiated possible compromises with Minority Leader Everett McKinley Dirksen (R-Ill.), Majority Leader Mansfield, and officials from the Department of Justice.¹⁹¹ As mentioned above, however, these negotiations were constrained by the Administration's promise to Representative McCulloch to keep the Senate bill close to the House version.¹⁹² The talks finally proved fruitful in mid-May, when Dirksen agreed to a compromise close enough to H.R. 7152 to be acceptable to McCulloch.¹⁹³ In a press conference announcing the compromise, Dirksen declared that "[n]o army can withstand the strength of an idea whose time has come."¹⁹⁴ The so-called "Dirksen substitute"¹⁹⁵ was introduced in the Senate on May 26, 1964.¹⁹⁶

On June 1, in the thirteenth week of the Senate filibuster, Majority Leader Mansfield declared that a cloture petition would be filed at the end of the week, with a vote on cloture scheduled for June 9.¹⁹⁷ Supporters of the Civil

185. *Id.* at 4754.

186. *Id.*

187. *Id.* at 6417.

188. *Id.*

189. *Id.* at 6455.

190. Senate consideration of H.R. 7152 lasted from March 9, *id.* at 4754, to June 19, *id.* at 14,511.

191. WHALEN & WHALEN, *supra* note 99, at 155–85.

192. *Id.* at 125, 156, 181; *see also* text accompanying notes 175–77.

193. WHALEN & WHALEN, *supra* note 99, at 183.

194. E.W. Kenworthy, *Rights Bloc Wins Closure Support*, N.Y. TIMES, May 20, 1964, at A1, A34. Whalen and Whalen point out that Dirksen incorrectly attributed this phrase to Victor Hugo's diary. WHALEN & WHALEN, *supra* note 99, at 185. The phrase is actually derived from Victor Hugo's *Histoire d'un Crime*, in which he wrote: "On résiste à l'invasion des armées; on ne résiste pas à l'invasion des idées." VICTOR HUGO, *Histoire d'un Crime*, in VICTOR HUGO OEUVRES COMPLÈTES: HISTOIRE 456 (Sheila Gaudon ed., Éditions Robert Laffont 1987) (1877). For translation, see JOHN BARTLETT, *FAMILIAR QUOTATIONS* 491 & 491 n.6 (Emily M. Beck ed., 15th ed., Little, Brown 1980) (1855) ("An invasion of armies can be resisted, but not an idea whose time has come."). For additional coverage of Dirksen's position, see E.W. Kenworthy, *Rights Plan Goes to Senate Today*, N.Y. TIMES, May 26, 1964, at A27 (describing Dirksen press conference).

195. WHALEN & WHALEN, *supra* note 99, at 188.

196. 110 CONG. REC. 11,897 (1964); *see also* WHALEN & WHALEN, *supra* note 99, at 188.

197. 110 CONG. REC. 12,274–76 (1964); *see also* WHALEN & WHALEN, *supra* note 99, at 190.

Rights Act then engaged in a “counter-filibuster”¹⁹⁸ throughout the week, in order to “‘nail down those cloture votes.’”¹⁹⁹ The cloture petition was filed on June 8,²⁰⁰ with a vote scheduled for Wednesday, June 10.²⁰¹ The filibuster came to an end as Senator Robert Byrd (D-W. Va.) held the floor from 7:38 p.m. on June 9 until 9:51 a.m. on the morning of June 10.²⁰² The Senate then voted on cloture; the petition passed by a vote of 71 to 29.²⁰³

Senate rules allowed each member to speak for one hour following cloture.²⁰⁴ Additional amendments proposed by resistant Southern Senators were voted upon during that time, almost all of which were defeated.²⁰⁵ On June 17, the Dirksen substitute passed the Senate by a vote of 76 to 18.²⁰⁶ On June 19, after a failed final attempt to refer H.R. 7152 to the Judiciary Committee,²⁰⁷ the Senate at last voted on final passage: The bill passed by a vote of 73 to 27.²⁰⁸

On June 22, the Senate reported the passage of H.R. 7152 to the House of Representatives.²⁰⁹ Representative Celler immediately endorsed the Senate version of the bill, and asked the House to agree to it unanimously.²¹⁰ Four Representatives objected.²¹¹ For this reason, under normal House procedure, the bill had to be sent back to the Rules Committee and Chairman Smith.²¹² In response to this situation, an internal White House memo to President Johnson from Larry O’Brien, special assistant to the President, stated that “[w]e must assume that Howard Smith will delay as long as possible on granting a rule.”²¹³ The memo described two options for avoiding Chairman Smith. The first possibility called for applying House Rule XI.²¹⁴ The second

198. 110 CONG. REC. 12,642 (1964) (statement of Sen. Russell).

199. WHALEN & WHALEN, *supra* note 99, at 190 (quoting Sen. Hubert Humphrey).

200. 110 CONG. REC. 12,922 (1964).

201. *Id.* at 12,923.

202. *Id.* at 13,133–219.

203. *Id.* at 13,327.

204. S. DOC. NO. 1, *supra* note 176, at 24 (Senate Rule XXII(2) forbids any Senator to speak more than one hour post-cloture).

205. *See, e.g.*, 110 CONG. REC. D267, D269, D272–73, D277–79 (1964) (listing amendments proposed by Senators Byrd, Cooper, Eastland, Ervin, Gore, Long, McClellan, Russell, Sparkman, Stennis, Thurmond, and Tower).

206. *Id.* at 14,239.

207. *Id.* at 14,442; *see also id.* at 14,433 (text of Senator Gore’s motion to refer bill to Judiciary Committee).

208. *Id.* at 14,511.

209. *Id.* at 14,630–31.

210. *Id.* at 14,631; *see also* E.W. Kenworthy, *Civil Rights Bill Passed, 73–27*, N.Y. TIMES, June 20, 1964, at A1 (quoting endorsement of Senate version of bill by Representatives Celler and McCulloch).

211. 110 CONG. REC. 14,631 (1964).

212. EDWARD F. WILLET, JR., HOW OUR LAWS ARE MADE, H.R. DOC. NO. 158, 99th Cong., 2d Sess 37 (1986); *see also* WHALEN & WHALEN, *supra* note 99, at 219. *See generally* HOW CONGRESS WORKS, *supra* note 18, at 63 (describing acceptance of bill by second chamber).

213. Memorandum from Lawrence F. O’Brien to President Johnson (June 18, 1964), in 13 CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT, 1945–1968, at 165–66 (Michal R. Belknap ed., 1991) [hereinafter CIVIL RIGHTS 1945–1968].

214. *Id.*; *see also* WHALEN & WHALEN, *supra* note 99, at 219–20 (discussing Rule XI option), *supra* text accompanying note 160 (discussing House Rule XI).

option was to proceed under "suspension of rules," which would allow for only forty minutes of debate on the bill,²¹⁵ but would require the support of two-thirds of the House for its suspension.²¹⁶ The next possible date for rules suspension was July 6, which was inconvenient for Republican members because it was extremely close to the date of the Republican convention.²¹⁷ Representatives Celler and McCulloch therefore chose the first option, placing H.R. Res. 789, a resolution "to provide for the concurrence of the House of Representatives to the Senate amendment to H.R. 7152,"²¹⁸ in the hopper²¹⁹ on Monday, June 22.²²⁰ H.R. Res. 789 was immediately referred to the Rules Committee,²²¹ and on June 24, three Representatives filed a formal Rule XI request for the Rules Committee to hear the resolution.²²² A June 25 letter to President Johnson from advisor Jack Valenti stated that "Judge Smith is not opposed to giving a rule. But he insisted that any Congressmen who wanted to testify would be allowed to do so."²²³ The committee members voted 7 to 4 to conduct all hearings in one day,²²⁴ however, and then voted 10 to 5 to grant a Rule for H.R. Res. 789 that allowed only one hour of debate and required that the bill be immediately reported to the House.²²⁵ Furthermore, the committee members went so far as to invoke a committee rule permitting any committee member to report a Rule to the House if the chair refuses to do so, effectively stripping the bill away from Chairman Smith.²²⁶

On June 30, the House Rules Committee reported H.R. 7152 back to the House floor.²²⁷ The drama finally came to an end on July 2, 1964, when the House voted 289 to 126 in support of H.R. Res. 789, thus agreeing to all Senate changes to H.R. 7152.²²⁸ The bill had passed both chambers; President Johnson signed it into law that night.²²⁹

215. H.R. DOC. NO. 619, *supra* note 148, at 477.

216. *Id.* at 474-75; *see also* CIVIL RIGHTS 1945-1968, *supra* note 213, at 166.

217. WHALEN & WHALEN, *supra* note 99, at 219; *see also id.* at 159 (citing Senator Dirksen's desire to avoid forcing Congress to return to Washington after Republican convention).

218. 110 CONG. REC. 14,672 (1964). For text of H.R. Res. 789, *see id.* at 15,869.

219. The hopper is a box at the side of the clerk's desk. TIEFER, *supra* note 1, at 33.

220. 110 CONG. REC. 14,672 (1964); WHALEN & WHALEN, *supra* note 99, at 220.

221. 110 CONG. REC. 14,672 (1964).

222. LOEVY, *supra* note 99, at 307-08; WHALEN & WHALEN, *supra* note 99, at 220; *see also supra* text accompanying note 160.

223. Letter from Jack Valenti to President Johnson (June 25, 1964), in CIVIL RIGHTS 1945-1968, *supra* note 213, at 167.

224. WHALEN & WHALEN, *supra* note 99, at 220-22 (citing transcripts of closed executive session of Rules Committee on file at National Archives).

225. *Id.* at 222 (same); *see also* LOEVY, *supra* note 99, at 307-08.

226. WHALEN & WHALEN, *supra* note 99, at 222-23 (citing transcripts of closed executive session of Rules Committee on file at National Archives); *see also* LOEVY, *supra* note 99, at 307-08.

227. H.R. REP. NO. 1527, 88th Cong., 2d Sess. 1 (1964).

228. 110 CONG. REC. 15,897 (1964). For text of H.R. Res. 789, *see id.* at 15,869.

229. Radio and Television Remarks upon Signing the Civil Rights Bill, 1963-64 PUB. PAPERS 842-44 (July 2, 1964); 110 CONG. REC. D513 (1964).

III. THE IMPACT OF CONGRESSIONAL PROCEDURE REFORMS

With the procedural histories of the Civil Rights Acts of 1960, 1964, and 1991 as a backdrop, this Note now examines whether congressional procedural reforms had an identifiable impact on the passage of the Civil Rights Act of 1991. This analysis does not attempt to demonstrate a simple cause-and-effect relationship between the reforms of the 1970's and the passage of the 1991 Civil Rights Act; far too many other factors affect the legislative process to enable such an approach. Nevertheless, this Part illuminates the fingerprints of prior congressional reforms on the 1991 legislative process.

A. *Reforms of Seniority Rules and Committee Leadership*

The largest obstacles that confronted the 1960 and 1964 Civil Rights Acts were committee chairs who wielded their disproportionate power to block the bills' progress.²³⁰ These Southern Democratic chairs opposed civil rights legislation, and although they held their leadership positions because of the Democratic majority in both chambers of Congress, on civil rights issues they worked against the majority of those Democratic members by consistently joining Republicans to block legislation.

Unsurprisingly, most Democratic members responded to this situation with reforms that diminished the control of committee chairs over the legislative agenda. As David Rohde states in *Parties and Leaders in the Postreform House*, newly elected liberal members of that era "found institutional arrangements (especially the disproportionate powers of committee chairmen) to be biased against their interests and in favor of those of the 'conservative coalition.' They sought to redress the institutional imbalance through the reforms of the 1970's, which weakened chairmen and strengthened the majority party."²³¹ These reforms also redistributed power among more members of Congress, so that the Democratic congressional leadership became more disparate and more representative of its membership.

The passage of the 1991 Civil Rights Act demonstrates the importance of these reforms. Rather than fighting the Democratic leadership, 1991 subcommittee and committee chairs worked with it to pass their common legislative agenda. Although the voting patterns of the conservative coalition remained unchanged, the Democratic majority was no longer held its captive.²³²

230. See *supra* part II.

231. DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 162 (1991)

232. The conservative coalition did still exist as a voting bloc, however, and greatly increased the difficulty of passing the 1991 Act. For example, the bloc prevented House passage of H.R. 1 by the two-thirds needed to render a presidential veto inconsequential. See *supra* text accompanying notes 57-58

When the Civil Rights Acts of 1960 and 1964 were before Congress, they faced a body steeped in tradition, particularly the influential tradition of committee leadership by seniority. As Tiefer explains, before the 1970's, "the iron rule of seniority made selection of the most senior Member as chair automatic."²³³ In 1964, 95% of all House committees were chaired by their most senior members; in the Senate, that figure was 100%.²³⁴

Despite their facial neutrality, congressional seniority rules produced an observable political bias in both chambers in the early 1960's. Given the relative volatility of Northern Democratic congressional seats compared to Southern ones, Southern Democrats were disproportionately represented among the most senior members of Congress and thus dominated the leadership of most congressional committees.²³⁵ As documented by Mack C. Shelley II, in 1960, 63% of Senate committees and 65% of House committees were chaired by Southern Democrats; in 1964, the respective figures were 63% and 60%.²³⁶ Indeed, Shelley's data reveal percentages of comparable magnitude for several consecutive decades.²³⁷ This disproportionate power distribution survived into the mid-1970's; in 1974, the numbers were 47% and 43%, respectively.²³⁸

Congressional reforms of the 1970's altered both the seniority system and the appointment of committee leadership.²³⁹ Reforms in the House of Representatives were originally rooted in the actions of discontented liberal members of Congress, who began meeting in the mid-1950's and formed the House Democratic Study Group in 1959.²⁴⁰ After examining the voting

233. TIEFER, *supra* note 1, at 102.

234. The Senate figure includes committees chaired by their second-most-senior member if the most senior member had waived his or her seniority. Figures calculated by author from data compiled in 20 CONG. Q. ALMANAC 27-32 (1964) (listing members by seniority); *id.* at 39-59 (listing committee membership); *id.* at 39 (example of notation used to indicate seniority waiver).

235. GEORGE B. GALLOWAY, HISTORY OF THE HOUSE OF REPRESENTATIVES 83 (1976) (analyzing regional distribution of chairships); SHELLEY, *supra* note 4, at 67 (documenting "the classic era of committee dominance by senior Southerners protected by uncompetitive elections and generally not answerable to the official party leadership"); TIEFER, *supra* note 1, at 102 (noting that senior conservative Southern Democrats dominated committee chairships).

236. SHELLEY, *supra* note 4, at 66.

237. *Id.* at 66-67.

238. *Id.* at 67. Other authors have replicated these data with some variation in results. For example, Shelley found Southern committee leadership percentages of 47% and 43% in 1973, *id.*, but Roger H. Davidson states that, in 1973, "Southerners composed less than 30% of congressional Democrats, yet commanded 46 percent of House full-committee chairmanships and 53% of those in the Senate," Roger H. Davidson, *Subcommittee Government: New Channels for Policy Making*, in THE NEW CONGRESS 99, 106 (Thomas E. Mann & Norman J. Ornstein eds., 1981).

239. Prior to the 1970's, there had been some effort to diminish the importance of seniority. For example, in 1953, the Senate Democratic Steering Committee approved what came to be known as the "Johnson Rule," named for Senator Lyndon B. Johnson, which required that every Democratic Senator be given a seat on one major committee before any could get a seat on a second major committee. HOW CONGRESS WORKS, *supra* note 18, at 110; *see also* SMITH & DEERING, *supra* note 1, at 30. The Senate Republican Conference made the same rule change in 1965. HOW CONGRESS WORKS, *supra* note 18, at 110.

240. *See* Mark F. Ferber, *The Formation of the Democratic Study Group*, in CONGRESSIONAL BEHAVIOR 249, 249-54 (Nelson W. Polsby ed., 1971).

patterns of House members and especially House committee chairs, the House Democratic Study Group began to initiate changes that would "create a situation in which liberal policy proposals would win more often."²⁴¹

The reforms began with the Legislative Reorganization Act of 1970.²⁴² The Act first limited the use of proxy voting in committees in both the House and the Senate,²⁴³ which decreased the ability of committee chairs to wield disproportionate power during votes.²⁴⁴ The 1970 Act also required recorded teller votes in the House Committee of the Whole during the amendment process upon the request of one-fifth of a quorum,²⁴⁵ and mandated that House and Senate committee roll-call votes be recorded in the committee reports.²⁴⁶ In addition, the 1970 Act significantly limited the power of senior Senators, who were restricted to membership on only two major and one minor committee and allowed to chair no more than one full committee and one subcommittee of a major committee.²⁴⁷

Congressional reconfiguration continued through intraparty reforms. Democratic Caucus reforms on January 20, 1971, stipulated that the House Democratic Committee on Committees would nominate committee chairs, that nominees need not be the most senior committee members, that the nominees

241. ROHDE, *supra* note 231, at 19.

242. Pub. L. No. 91-510, 84 Stat. 1140 (codified as amended in scattered sections of 2 U.S.C., 31 U.S.C., & 40 U.S.C. (1988 & Supp. V 1993)). This measure was "passed by a coalition of two groups of outsiders (House Republicans and liberal Democrats)." Lawrence C. Dodd & Bruce I. Oppenheimer, *The House in Transition*, in CONGRESS RECONSIDERED 21, 26-27 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1977). Section 101 of the Legislative Reorganization Act reserves for both chambers the option to change their rules at any time, based on their constitutional authority to determine their rules of proceeding U.S. CONST. art. I, § 5, cl. 2.

243. Pub. L. No. 91-510, § 106, 84 Stat. at 1146; *First Congressional Reform Bill Enacted Since 1946*, 26 CONG. Q. ALMANAC 447 (1970) (describing Act).

244. Although this Note focuses on reforms that remained intact in 1991, not all of the reforms of the 1970's have lasted up to the present day. Proxy voting, a process that increases the power of committee chairs by allowing them to hold and cast the votes of absent committee members, was one such reform. Currently, voting by proxy is not allowed on the floors of either the House or the Senate, but until the beginning of the 104th Congress, it was allowed in the committees of both chambers. HOW CONGRESS WORKS, *supra* note 18, at 92. The 1970 Legislative Reorganization Act strictly curtailed proxy voting, prohibiting the practice unless committee rules specifically sanctioned it, in which case the proxies had to be limited to a specific issue and authorized in writing. *Id.* In 1974, the House voted to ban proxy voting altogether, but this prohibition was revised in 1975 to allow once again committees to permit the use of specific proxies. H.R. DOC. NO. 416, 93d Cong., 2d Sess. 420-21 (1975) (House Manual), *see also* RULES OF THE HOUSE OF REPRESENTATIVES, *supra* note 39, at 11, RENEWING CONGRESS PROJECT, RENEWING CONGRESS: A FIRST REPORT 40 (1992) [hereinafter RENEWING CONGRESS]. The Senate has similar rules, leaving regulation of proxies to individual committees. S. DOC. NO. 1, *supra* note 77, at 55, *see also* TIEFER, *supra* note 1, at 173. Led by Speaker Newt Gingrich (R-Ga.), the Republican-controlled House of the 104th Congress voted to ban proxy voting in committee on January 4, 1995. Kenneth J. Cooper & Helen Dewar, *Passing the Torch on Capitol Hill*, WASH. POST, Jan. 5, 1995, at A1 (describing House rule changes).

245. Pub. L. No. 91-510, § 120, 84 Stat. at 1157.

246. *Id.* § 104, 84 Stat. at 1145; *see also First Congressional Reform Bill Enacted Since 1946*, *supra* note 243, at 448-49 (describing 1970 reforms).

247. Pub. L. No. 91-510, § 132(d)(6)(a)-(g), 84 Stat. at 1165-67, *see also* S. DOC. NO. 1, *supra* note 77, at 37-39 (Rule XXV on committee membership); *First Congressional Reform Bill Enacted Since 1946*, *supra* note 243, at 450.

would be recommended individually instead of as a slate, and that the Caucus would debate and vote on any nomination at the request of ten committee members.²⁴⁸ The 1971 changes included two other provisions that directly diminished the power of House committee chairs: (1) a rule limiting subcommittee chairships to one per member, thus opening up leadership positions for more junior members,²⁴⁹ and (2) a rule allowing subcommittee chairs to hire one staff member each, rather than leaving all hiring in the hands of the full committee chair.²⁵⁰ Republican House members enacted reforms similar to those of the Democrats on the same day, allowing their chairs or ranking minority members on each committee to be selected not strictly by seniority but by a secret ballot vote of the Republican Conference.²⁵¹

In 1973, the House Democratic Caucus ratified yet another round of reforms.²⁵² These included: (1) automatic Caucus votes on committee chairs, by secret ballot if demanded by twenty percent of the Caucus;²⁵³ (2) the creation of a new Steering and Policy Committee within the Caucus to consider party policy positions; and (3) the "Subcommittee Bill of Rights," which guaranteed subcommittee jurisdiction, referral of legislation to subcommittees, and votes on nominees for subcommittee chairs in order of seniority.²⁵⁴ These reforms all decreased the power of committee chairs and increased the autonomy and power of subcommittee chairs.²⁵⁵ Senate Republican reforms followed the same trend: In 1973 the Republican Caucus agreed that the Republicans on each committee would nominate their ranking members.²⁵⁶

In 1974, the House Democratic Caucus reassigned the responsibility for committee chair nominations from the Democratic Committee on Committees (composed of the House Speaker and the Democratic members of the Ways and Means Committee) to a Democratic Steering and Policy Committee elected

248. *Seniority System Challenged in Both Houses*, 27 CONG. Q. ALMANAC 17, 17 (1971) [hereinafter *Seniority System*]. The 1971 reforms grew out of recommendations by the Democratic Caucus' Committee on Organization Study and Review, better known as the Hansen Committee, named for its Chair, Representative Julia Hansen (D-Wash.). *Id.*; see also SMITH & DEERING, *supra* note 1, at 44.

249. LEROY N. RIESELBACH, *CONGRESSIONAL REFORM IN THE SEVENTIES* 45 (1977); see also *Seniority System*, *supra* note 248, at 17.

250. See ROHDE, *supra* note 231, at 21; SMITH & DEERING, *supra* note 1, at 44.

251. See Dodd & Oppenheimer, *supra* note 242, at 29; *Seniority System*, *supra* note 248, at 17, 19.

252. See RIESELBACH, *supra* note 249, at 45; SMITH & DEERING, *supra* note 1, at 44-45.

253. *Seniority Rule: Change in Procedure, Not in Practice*, 31 CONG. Q. WKLY. REP. 136, 137 (1973).

254. SMITH & DEERING, *supra* note 1, at 44-45. The 1973 reforms also included procedures intended to prevent the use of closed rules to stifle debate on Ways and Means bills. Dodd & Oppenheimer, *supra* note 242, at 29-30.

255. See HOW CONGRESS WORKS, *supra* note 18, at 101; Dodd & Oppenheimer, *supra* note 242, at 39.

256. TIEFER, *supra* note 1, at 104. Tiefer points out, however, that when Republican members of the Senate Foreign Relations Committee voted Senator Richard Lugar (R-Ind.) their ranking minority member in 1987, the Republican Caucus overruled that vote and strictly followed seniority, naming Senator Jesse Helms the ranking minority member. *Id.*

by all Democratic members.²⁵⁷ The Caucus, however, reserved for itself the power to reject nominations made by the Steering and Policy Committee.²⁵⁸ Finally, in 1975, the Senate Democratic Caucus followed earlier House reforms, agreeing to secret ballot votes on committee chairs if twenty percent of the Democratic Senators so requested.²⁵⁹

B. *Effects of the Reforms of Seniority Rules and Committee Leadership*

The immediate impact of the 1970's reforms on congressional behavior was significant. After the Democratic Caucus had tested the power of the reforms by unseating three committee chairs in 1974, one junior House member reported that freshman members had reason to believe that senior committee leaders could no longer afford to ignore their concerns.²⁶⁰ In addition, Richard P. Conlon, staff director of the Democratic Study Group, asserted in 1972 that the reform instituting recorded teller votes in the Committee of the Whole had forced chairs to consider the opinions of "the entire membership of the House," rather than merely those of the more conservative members of the Committee of the Whole.²⁶¹ Similarly, Congressional Quarterly Inc. summed up the new relationship by stating that "[t]he key to the power of the Democratic Caucus remained its authority to select committee chairmen. When the Caucus 'urged' a committee to take action, the assumption was that the chairman would heed the recommendation, or face the consequences."²⁶²

In addition to more responsive leadership, one of the most obvious effects of the decade's reforms was the change in the leadership's composition. Whereas Southern Democrats had chaired upwards of 60% of all committees in the 1960's,²⁶³ by 1979, they chaired only 20% of Senate committees and only 27% of House committees.²⁶⁴ This trend has continued to the present: In the 102d Congress, only 34% of all committee chairs were Southerners.²⁶⁵

257. DAVIDSON & OLESZEK, *supra* note 152, at 218; TIEFER, *supra* note 1, at 94. *See generally* PREAMBLE AND RULES OF THE DEMOCRATIC CAUCUS, 101ST CONG., 1ST SESS. 7-11 (1989) [hereinafter DEMOCRATIC CAUCUS RULES] (outlining caucus rules for committee membership and chairs)

258. *See* HOW CONGRESS WORKS, *supra* note 18, at 111; Dodd & Oppenheimer, *supra* note 242, at 31. The 1974 reforms also included changes concerning the House Appropriations Committee. *Id.* at 31, *see also* RIESELBACH, *supra* note 249, at 45. For a compilation of all the Democratic Caucus rules, *see* DEMOCRATIC CAUCUS RULES, *supra* note 257.

259. TIEFER, *supra* note 1, at 104-05.

260. *See id.* at 103-04 (quoting unnamed member in CONGRESS OFF THE RECORD THE CANDID ANALYSES OF SEVEN MEMBERS 8-9 (John F. Bibby ed., 1983)).

261. *See Legislative Reorganization Act: First Year's Record*, 30 CONG. Q. WKLY REP 485, 488 (1972) (quoting Conlon).

262. HOW CONGRESS WORKS, *supra* note 18, at 21; *see also* SMITH & DEERING, *supra* note 1, at 44 (stating that 1971 reforms "limited the full committee chairs' ability to dominate their committees")

263. *See supra* text accompanying note 236.

264. SHELLEY, *supra* note 4, at 67.

265. The author calculated these figures from data compiled in 47 CONG Q ALMANAC 23D-61D (1991) (listing committee membership).

In addition, the percentage of majority members who were committee or subcommittee chairs grew from 27.2% in the House and 87.5% in the Senate in 1955 to 52.2% in the House and 98.3% in the Senate in 1981.²⁶⁶ This trend has also continued to the present day; today half of the members of the House Democratic Caucus are subcommittee chairs.²⁶⁷ As Professors Dodd and Oppenheimer assert, "the reforms of the 1970–1975 period [were] the key in guaranteeing subcommittee influence in the House," since those reforms mandated a minimum of sixteen new subcommittee chairs.²⁶⁸ The reforms not only changed the composition of congressional leadership²⁶⁹ but also democratized that leadership through forced redistribution of leadership positions.

Moreover, these procedural reforms altered the way congressional leadership controlled the legislative agenda. This change is most evident in the case of the House Rules Committee and its obstructionist role in 1960 and 1964 compared to its role in 1991. The House Rules Committee had been the subject of procedural reforms before the changes of the early 1970's detailed above.²⁷⁰ In addition, in 1975, the House Democratic Caucus adopted a Caucus rule giving the House Speaker the power to appoint the chair and Democratic members of the Rules Committee, subject to ratification by the

266. SMITH & DEERING, *supra* note 1, at 51.

267. RENEWING CONGRESS, *supra* note 244, at 32.

268. Dodd & Oppenheimer, *supra* note 242, at 35.

269. Although the causes of the changes in congressional leadership have been researched extensively, a thorough presentation of the contributing factors is beyond the scope of this Note. Analyses of demographic shifts in congressional leadership demonstrate persuasively that fluctuations in the volatility of seats in different regions of the country, in addition to the increased strength of the Republican party in the South, have played an important role in diminishing Southern dominance over committee leadership since the 1970's. *See, e.g.*, ORFIELD, *supra* note 137, at 7, 11, 29–34 (attributing decline of Southern committee leadership to lost safe seats due to urbanization and Republican challenges in South and arguing that seniority is not inherently conservative but inherently biased in favor of those whose seats are safest); SHELLEY, *supra* note 4, at 68, 72 (acknowledging demographic changes due to increased Southern electoral competitiveness and emerging Northern safe seats); TIEFER, *supra* note 1, at 104 (noting rise of primary elections and increasing Republican power in South); *see also* GALLOWAY, *supra* note 235, at 83 (analyzing regional distribution of chairs). Even when discussing demographic changes, however, these studies acknowledge the important impact of congressional procedural reforms on the composition of committee leadership. *See* RENEWING CONGRESS, *supra* note 244, at 13 (describing how 1970's reforms strengthened House Speaker); RIESELBACH, *supra* note 249, at 43–47 (asserting that "democratizing reforms" of 1970's gave more members "a piece of the action"); SHELLEY, *supra* note 4, at 68 (noting influence of 1970's reforms); SMITH & DEERING, *supra* note 1, at 35–57 (same).

270. In 1961, for instance, Speaker Sam Rayburn (D-Tex.) expanded the Rules Committee in order to increase the membership of pro-leadership, liberal Democrats. *See* discussion *supra* note 148 and accompanying text. In addition, after the 1964 election produced a new, more liberal, Democratic majority in the House, the Democrats enacted a "21-day rule" that empowered the chair of any committee that had reported a bill to the Rules Committee to introduce that bill onto the House floor if it had faced 21 days of Rules Committee delay and if the Speaker recognized the member. HOW CONGRESS WORKS, *supra* note 18, at 56–57; ORFIELD, *supra* note 137, at 36. The 21-day rule was repealed, however, when liberal House Democrats lost their majority to more conservative Democrats in the 1966 elections. HOW CONGRESS WORKS, *supra* note 18, at 56–57; ORFIELD, *supra* note 137, at 36. An attempt in 1971 to reinstate the rule failed. ORFIELD, *supra* note 137, at 36.

Caucus.²⁷¹ According to many authors, this change brought the Rules Committee more firmly under the command of House leadership and “loosened the conservative coalition’s grip on the panel.”²⁷² Upon receiving the right to appoint members to the Rules Committee, Speaker Carl Albert (D-Okla.) chose two strong liberals to fill the open positions. One of those appointees was freshman Representative John Joseph (Joe) Moakley of Massachusetts,²⁷³ who was to become Rules Committee Chairman in 1989²⁷⁴ and chair the Committee during the passage of the 1991 Civil Rights Act.

The procedural histories recounted in Parts I and II of this Note illustrate the ways Rules Committee Chairman Howard Smith worked to obstruct and delay civil rights legislation in the 1960’s. In 1960 and 1964, Representatives who supported civil rights legislation struggled repeatedly to force the Rules Committee to relinquish control over the Civil Rights Acts and allow them onto the House floor. In February of 1960, Chairman Smith refused to hold hearings on H.R. 8601 until the names on a discharge petition grew so numerous that it became clear the bill might be forcefully discharged from his purview.²⁷⁵ In autumn of 1963, Chairman Smith was again the key obstacle to civil rights legislation: His refusal to write a Rule for the civil rights bill precipitated the struggle between the Democrats’ discharge petition and Republican efforts to call up the bill during Calendar Wednesday proceedings.²⁷⁶ Then, in June 1964, after the bill had finally passed the Senate, Chairman Smith delayed it once again, until a Rule XI request forced him to hold hearings.²⁷⁷ Furthermore, even though Smith was forced to allow the civil rights bills through the committees, the Rules that emerged for both the 1960 bill (H.R. Res. 359)²⁷⁸ and the 1964 bill (H.R. Res. 616)²⁷⁹ were open: They allowed ten to fifteen hours of general debate and unlimited germane amendments. These open Rules led to lengthy debate, numerous amendments, and slower passage of the bills.

In contrast, the 1991 Rules Committee worked hand in hand with the Democratic leadership to pass the Civil Rights Act; Chairman Moakley twice

271. DAVIDSON & OLESZEK, *supra* note 152, at 273; ROHDE, *supra* note 231, at 98; TIEFER, *supra* note 1, at 259–60; *see* DEMOCRATIC CAUCUS RULES, *supra* note 257, at 4

272. DAVIDSON & OLESZEK, *supra* note 152, at 273. Tiefer describes the behavior of the Rules Committee as “obstructing on behalf of the conservative coalition” until “the majority party gradually cut back the Rules Committee’s independence.” TIEFER, *supra* note 1, at 259–60. The postreform committee then became an “arm of the leadership.” HOW CONGRESS WORKS, *supra* note 18, at 96–97. *see also* GALLOWAY, *supra* note 235, at 69 (stating that 1974 Democratic Caucus change allowing Speaker to nominate Democratic Rules Committee members “suggests that the Democrats have chosen to strengthen the role of the leadership and party government in its relationship with [the Rules C]ommittee”)

273. RIESELBACH, *supra* note 249, at 57.

274. Chuck Alston, *A Nuts-and-Bolts Democrat*, 47 CONG. Q. WKLY REP 1305, 1305 (1989)

275. *See supra* text accompanying note 121.

276. *See supra* text accompanying note 151.

277. *See supra* text accompanying note 222.

278. *See supra* text accompanying note 125.

279. *See supra* text accompanying note 167.

used the Rules Committee to hasten House passage of the Civil Rights Act of 1991. First, in shaping the Rule for the original consideration of H.R. 1, Moakley assured the success of the bipartisan Brooks-Fish compromise by allowing only three hours of debate and three amendments in a prescribed "King of the Hill" order.²⁸⁰ Second, when the 1991 bill returned to the House, Moakley ignored liberal Democratic criticism of the Wards Cove exemption and wrote a totally closed Rule that allowed no amendment or alteration.²⁸¹ Chairman Moakley's use of the Rules Committee, of which he was a member due to its expansion in 1961,²⁸² indicated that changes in congressional procedure had the tangible effect of bringing the Committee more in line with the views of the majority of Democratic members. As envisioned by the 1975 reformers, the 1991 Rules Committee functioned as a tool of House leadership, easing and speeding legislative passage of liberal measures.

Other aspects of the legislative passages of the 1960 and 1964 Civil Rights Acts also demonstrate the importance of the procedural reforms of the 1970's. Neither the 1960 nor the 1964 bills, for example, were based on versions that originated in the Senate, because Senator Eastland's Judiciary Committee was totally unresponsive to the interests of liberal Democratic Senators. Civil rights legislation was ultimately successful only because Chairman Celler supported it and was willing to use his House Judiciary Committee to that effect.²⁸³ If the 1975 reform allowing secret ballot votes on Senate committee chairs had been in place already, Eastland might have been forced to respond to the concerns of other Democratic Senators, rather than allowed to side so readily with Republicans. In addition, the shape of the entire 1991 Democratic leadership could be considered a product of the reforms of the 1970's: Because of the limits on the number of chairs members could hold, more 1991 members were senior members and leaders of committees and subcommittees. The fact that the passage of the 1991 Civil Rights Act was eased by a Democratic leadership much closer ideologically to the wishes of the majority of Democratic members demonstrates the effect of this redistribution of power.

C. *Changes in Senate Cloture Procedures*

Another aspect of congressional procedure that has been the subject of numerous reforms is the Senate cloture rule, Senate Rule XXII.²⁸⁴ The history of the passage of the 1964 Civil Rights Act leaves no doubt that

280. See *supra* text accompanying note 35.

281. See *supra* text accompanying note 92.

282. See *supra* notes 148, 273-74 and accompanying text.

283. See *supra* text accompanying note 140.

284. See *supra* note 112 and accompanying text.

cloture was an essential tool in moving civil rights legislation forward to a vote.²⁸⁵ In 1963, six Senators, including Senator Humphrey, wrote to President Kennedy that:

The current proposals to modify Senate Rule XXII are, of course, directly related to the Democratic record on civil rights in the 88th Congress. . . . Since more than 60 percent of the Senators have supported cloture on FEPC legislation on two occasions in the postwar period, the modification of Rule XXII to permit three-fifths cloture is of obvious importance.²⁸⁶

One scholar has also noted the conservative bias of the filibuster, which frequently works to prevent or postpone liberal policy initiatives.²⁸⁷ The Civil Rights Acts of 1960 and 1964 provide examples of this conservative tendency. Filibusters were the Senate's tool of choice for blocking civil rights legislation: The 1960 Senate bill was stalled by failure to reach the two-thirds needed for cloture,²⁸⁸ and the 1964 bill faced two long filibusters, first on the issue of whether even to consider the bill,²⁸⁹ and then on the bill itself.²⁹⁰

Despite efforts at reform in 1969 and 1971,²⁹¹ cloture rule changes did not take place until 1975, when the Senate finally decreased the votes needed for cloture from two-thirds²⁹² to three-fifths of the entire Senate membership.²⁹³ Further reforms in 1979 placed a one-hundred-hour cap on

285. See text accompanying notes 182–208; see also CIVIL RIGHTS 1945–1968, *supra* note 213, at 33 (memorandum from Senate Majority Leader Mansfield to President Kennedy (June 18, 1963)) (“In present circumstances, there is only one practicable way in which [passage of as much of the Administration’s legislative proposals on civil rights as possible] can be assured, by counting 67 votes on cloture for whatever bill is pushed.”).

286. CIVIL RIGHTS 1945–1968, *supra* note 213, at 15 (letter from six Democratic Senators to President Kennedy (Jan. 8, 1963)).

287. ORFIELD, *supra* note 137, at 44 (stating that filibuster rule usually biases legislative process against liberal attempts to change status quo). It could be argued that the role of the filibuster as a conservative tool against liberal initiatives has simply been a function of the near-continuous minority status of the Republican party in the Senate in recent decades. Because they were in the minority, Republicans and conservative Democrats used the filibuster as their only consistently potent weapon against a more liberal agenda. Thus, it might be argued that we should now expect to see the filibuster become the tool of liberal Democrats, as they rely on it to block conservative initiatives of the Republican majority in the 104th Congress. This argument can support Orfield’s assertion, however, if one uses the term conservative not so much to denote political party, but rather in its more essential sense—as conserving the status quo. If Democrats of the 104th Congress use the filibuster against the Republican majority, they will probably be doing so in order to preserve the current status quo from the proposed changes of the Republicans’ “Contract with America.” Thus, the filibuster will still be used as a means of blocking legislation by those who wish to preserve the status quo.

288. See *supra* text accompanying note 115.

289. See *supra* text accompanying note 187.

290. See *supra* note 190.

291. ORFIELD, *supra* note 137, at 41; see also *Senate Again Rejects Change in Filibuster Rule*, 27 CONG. Q. ALMANAC 13, 13 (1971).

292. See *supra* note 112 and accompanying text; see also MICHAEL FOLEY, *THE NEW SENATE* 29 (1980).

293. See *supra* note 112.

all action on a bill after cloture has been invoked, in order to eliminate postcloture filibusters;²⁹⁴ in 1986, this cap was shortened to thirty hours.²⁹⁵

It is uncertain whether the three-fifths cloture rule facilitated the passage of the 1991 Civil Rights Act. It is true that a filibuster was less of a threat in 1991 than during the passages of the 1960 and 1964 Acts, because a 1991 filibuster could have been overcome by only sixty votes. By the time cloture was finally invoked in 1991, however, extraordinary political events had created a need for compromise that allowed the motion to pass overwhelmingly.²⁹⁶ Furthermore, as is often the case when different parties control the White House and Congress, the possibility of a presidential veto in 1991 transformed the requirement of a simple majority to pass legislation. When a presidential veto is imminent, two-thirds of the Congress must pass a law to escape the veto threat. Given President Bush's 1990 veto and his threats of a veto throughout 1991, it seemed as though two-thirds of the Senate would be required for passage of the Civil Rights Act of 1991. In that situation, the cloture rule change from requiring two-thirds of the Senators to requiring only three-fifths would have had little visible effect. Thus, despite the important 1975 reform of Senate cloture rules, the passage of the 1991 Civil Rights Act does not readily demonstrate the impact of this reform. This circumstance serves as a reminder that congressional reforms do not operate in a vacuum: Presidential support of, or opposition to, legislation can often trump the power of congressional procedural reforms. Procedural reforms are a potent means of changing Congress, but our system of checks and balances limits their impact.

IV. CONCLUSION

The passage of the 1991 Civil Rights Act resulted from the confluence of many factors. Significant developments in political climate and race relations undoubtedly contributed to some differences between the legislative struggles of 1960, 1964, and 1991. Similarly, specific political events in the autumn of 1991 helped to precipitate the Act's passage.

In addition, procedural changes of the 1970's played an essential role in the 1991 bill's progress. The reforms of the 1970's were enacted by liberal Democrats and moderate Republicans in an effort to wrest control of legislation away from a minority conservative coalition of Southern Democrats and conservative Republicans. That coalition exists as a visible, growing camp in many legislative battles today. The passage of the 1991 Civil Rights Act, however, demonstrates that the camp had fewer procedural weapons at its disposal in 1991 than it did in the 1960's, as a direct result of the procedural

294. TIEFER, *supra* note 1, at 724.

295. S. DOC. NO. 1, *supra* note 77, at 22; TIEFER, *supra* note 1, at 724.

296. See *supra* text accompanying notes 79-82.

reforms of the 1970's. By loosening the tradition of seniority and altering the rules for committee leadership, reformers weakened a leadership system that had become a structural impediment to civil rights legislation. Furthermore, by changing the process of appointment to the House Rules Committee, House Democratic reformers turned the Rules Committee into an instrument of the leadership rather than of Democrats aligned with the minority party. These reforms aided the passage of the 1991 Civil Rights Act by empowering friendly committee leaders who were eager to move the bill to the chamber floors.

The reforms also increased the representativeness of congressional leadership. Traditions of seniority in committee chairship appointments and disproportionate power held by committee chairs had functioned as antidemocratic forces in the heart of one of our nation's most democratic institutions. The ability of committee chairs to prevent votes on pieces of legislation that target issues of national concern and that are supported by the majority of members of Congress is troubling at best, and fundamentally antidemocratic at worst. The procedural reforms of the 1970's by no means eliminated the opportunities for this kind of obstruction, but they certainly diminished such opportunities. Thus, in 1991, the battles over the Civil Rights Act were waged on the chamber floors, not in debates over whether the bill would be allowed onto the floor or through invisible committee delays. This shift in the locus of political debate had a profound democratizing effect on both Congress and legislation. The weakening of the minority's chokehold on Congress was therefore the most significant contribution of the reforms of the 1970's.

With the election of the 104th Congress creating a Republican majority in both chambers for the first time in decades, congressional procedural rules have assumed renewed prominence. Indeed, House Speaker Newt Gingrich made changes in House procedure an early priority for the 104th Congress. Gingrich seems to have learned the lessons of the 1970's reforms and is mimicking those reforms' consolidation of the Speaker's power over committee chairs by eliminating proxy voting in committee,²⁹⁷ imposing term limits on committee chairships,²⁹⁸ and at times disregarding seniority in nominating committee chairs.²⁹⁹ The Senate, however, is not following the same trend; it seems to be retaining committee leadership by seniority, even in the face of recent controversy surrounding Senator Jesse Helms.³⁰⁰

297. Cooper & Dewar, *supra* note 244, at A1

298. Adam Clymer, *The 104th Congress*, N.Y. TIMES, Jan. 6, 1995, at A20 (describing House rule changes); Cooper & Dewar, *supra* note 244, at A1

299. Adam Clymer, *Strong Speaker, Strong House?*, N.Y. TIMES, Dec. 4, 1994, at A32 (noting Gingrich disregarded seniority in some choices of chairs)

300. Adam Clymer, *Congress Returns To Select Leaders for the New Term*, N.Y. TIMES, Nov. 28, 1994, at A1 (quoting Sen. Dole's defense of seniority system), Helen Dewar, *Saving Helms Vows To Hold His Tongue, Dole Won't Deny Him Chairmanship*, WASH. POST, Nov. 24, 1994, at A25 Jesse Helms

How these new reforms will affect legislation remains to be seen. The conservative coalition that was the target of the reforms of the 1970's now constitutes, at least for the next two years, the dominant majority in both chambers of Congress. These next two years will therefore provide an opportunity to see how factions within the Republican majority will develop as compared to those within former Democratic majorities, and how such factions will use procedural tools and reforms to enlarge their power. The politics will differ, but the importance of procedure will not.

sparked a controversy in late November 1994, by stating that the military did not support President Clinton and that the President would need a bodyguard if he visited North Carolina. Clymer, *supra*, at A1.