House Rules Changes in the 112th Congress Affecting Floor Proceedings

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Summary

On the first day of the 112th Congress, the House agreed to H.Res. 5, which made six changes to House Rules affecting floor proceedings.

H.Res. 5 added a new paragraph to House Rule XII that prohibits a Member from introducing a bill or joint resolution unless it is accompanied by a statement citing "as specifically as practicable" powers granted to Congress in the Constitution to take the action proposed in the legislation. The new Rule further requires that the statements appear in the *Congressional Record* and be made available in electronic form. The content of the statement is not evaluated by the House or any House officer at the time of introduction; the House Clerk determines whether a statement is attached and, if it is not, then the bill cannot be introduced. It is a long-standing principle of House procedure that questions of constitutionality are disposed of when the House votes to consider the bill or when it votes to approve the bill.

H.Res. 5 added a new clause 11 to House Rule XXI that prohibits unreported bills and joint resolutions from being considered on the House floor unless the measure has been available for at least three calendar days; this is similar to an existing three-day availability requirement for reported bills. H.Res. 5 also added a clause to House Rule XXIX establishing that, where existing House Rules require that a matter be "available to Members, Delegates, and the Resident Commissioner," that requirement can be met by placing the document online on a publicly available website designated by the House Administration Committee. The new House Rule is meant to provide an additional means through which Members, congressional staff, and the general public can access these documents. In addition to these formal rules changes, House practices have changed in the 112th Congress regarding the public availability of legislative text in electronic form prior to floor consideration.

H.Res. 5 amended clause 6 of House Rule XVIII to allow the chair of the Committee of the Whole to reduce to "not less than two minutes" the minimum time allowed for a vote that is cast in a series of postponed votes on amendments. Prior to this rules change, the minimum time required for a vote in such a series of amendment votes was five minutes.

H.Res. 5 modified clause 5 of Rule XVII to prohibit the use of a mobile electronic device on the floor "that impairs decorum." Prior to this change, the Rule explicitly prohibited the use of a "wireless telephone" or a "personal computer" on the floor. The change in language is not intended to lead to a more permissive policy regarding the use of electronic devices, but instead preserves existing policy while reflecting the evolving nature of technology and the possibility that some computing devices can be used unobtrusively.

H.Res. 5 eliminated from the Rules the authority granted to the Delegates and the Resident Commissioner to vote in and preside over the Committee of the Whole. Under the former Rule, they could vote in the Committee of the Whole, but if their votes made a difference to the outcome of the vote, then the Committee would automatically rise, and the determinative vote on the amendment would take place in the full House (where the Delegates and Resident Commissioner cannot vote).

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On the first day of the 112th Congress, the House agreed to H.Res. 5, which made several changes to House Rules affecting floor proceedings. Following a well-established practice, H.Res. 5 provided that the Rules of the previous House be the Rules of the new House, but with a set of amendments. Six of these changes to the standing Rules of the House concern the transaction of business on the floor in the 112th Congress.[1]

Requirement for Statement of Constitutional Authority

H.Res. 5 added a new paragraph to House Rule XII that prohibits a Member from introducing a bill or joint resolution unless it is accompanied by a statement citing "as specifically as practicable" powers granted to Congress in the Constitution to take the action proposed in the legislation. In the case of a bill or joint resolution received from the Senate, the new Rule grants the chair of any committee with jurisdiction over the bill the option of submitting a similar statement. The new Rule further requires that the statements appear in the *Congressional Record* and be made available in electronic form.[2]

H.Res. 5 also eliminated the former requirement that committee reports contain a "statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution." That provision had been part of House Rules since the 105th Congress (1997-1998).

When Members introduce legislation by dropping it in the hopper, they are required under the new Rule to attach to the bill a signed form stating what authority the Congress has to enact the proposed legislation. To assist staff, the House Legislative Counsel has produced forms for this purpose,[3] but the statement is not required to be on one of these prepared forms. Legislative Counsel is not expected to assist in determining which constitutional authorities to cite.[4] If no statement of constitutional authority is attached, then the House Clerk will not accept the bill for introduction, as is currently the case if other requirements for introduction are not complied with (such as the requirement that the bill contain an original signature of the sponsor).[5] A bill dropped in the hopper without a statement of constitutional authority would be returned to its sponsor.

[1] The resolution also made changes affecting committee procedures and changes affecting the budget process that are not described in this report. Technical and grammatical changes to the House Rules are also not described.

[2] The *Congressional Record* is currently available electronically at http://www.congress.gov. Links to the constitutional authority statement as printed in the *Record* are provided in the Legislative Information System (LIS). The Rules Committee indicated that the intent is to also make available a searchable database of Constitutional authority statements ("Section-by-Section Analysis of the 112th Congress House Rules Package," *Congressional Record*, daily edition, vol. 157, January 5, 2011, p. H13, hereafter "Section-by-Section Analysis").

[3] The form is available on the website of the House Legislative Counsel, at http://legcoun.house.gov/members/cas.html, last visited February 2, 2011.

[4] The Office of House Legislative Counsel, on its website, references an email from the House Republican Conference noting that "While the Office of the Legislative Counsel will assist Members by providing a properly formatted Constitutional Authority Statement form, it is the responsibility of the bill sponsor to determine what authorities they wish to cite ...." For assistance in identifying specific authorities, see CRS Report R41548, *Sources of Constitutional Authority and House Rule XII, Clause 7(c)*, by Kenneth R. Thomas and Todd B. Tatelman.

[5] For more information on the introduction process, see CRS Report 98-458, *Introducing a House Bill or Resolution*, by Betsy Palmer.

The content of the constitutional authority statement is not evaluated at the time of introduction and its existence does not represent a decision by the House regarding the constitutionality of the attached measure. [6] Neither the Clerk nor the Parliamentarian make any judgment as to the content of the statement of constitutional authority. The Clerk simply determines whether or not a statement is attached. Furthermore, the new Rule does not establish a process by which any Member could formally object to the introduction of legislation that he or she believes has an inadequate or inappropriate constitutional authority statement. More specifically, a Member cannot raise a point of order against a bill based on the content of the constitutional authority statement.

It is a long-standing principle of House procedure that the question of constitutionality is disposed of when the House votes to consider the bill or when it votes to approve the bill.[7] If a measure is called up on the House floor as a privileged matter, and a Member makes a point of order that the measure is not constitutional, the chair will not rule as to the constitutionality of the measure and will not submit the question of constitutionality to the House.[8] Instead, in this procedural circumstance, a Member could raise the question of consideration of a bill or resolution that he or she believes is unconstitutional. The House would then vote on whether or not to consider the measure.

Most measures, however, are called up under a motion to suspend the rules or under the terms of a special rule. Under the suspension of the rules procedure, there is no opportunity for a Member to raise the question of consideration. In those cases, the House would be considered to have disposed of questions concerning the constitutionality of the proposition when it passed the bill. When a measure is considered under a special rule, there may or may not be an opportunity to raise the question of consideration.[9] If the question of consideration is not or cannot be raised, the House in effect determines its stance on the question of constitutionality when it agrees to the special rule.

The new requirement that Members submit a constitutional authority statement is intended to focus and inform Member deliberations on the constitutionality of a legislative proposal.[10] While

[6] The former requirement that committee reports contain a statement regarding the power granted to Congress to enact the measure also did not require evaluation by the Speaker or the House as to the sufficiency of the statement. Only in unusual procedural circumstances could a point of order be raised against consideration of a bill, and based on the absence of notes on this provision in the *House Rules and Manual*, it appears that no point of order was ever made against a measure because its accompanying report did not contain a constitutional authority statement (or because it contained an insufficient statement). (U.S. Congress, *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the 111th Congress*, H.Doc. 110-162, 110th Cong., 2nd sess. (Washington: GPO, 2009), Sec. 841 [hereafter *House Rules and Manual*].) In general, the Speaker "makes no determinations as to the sufficiency of a report beyond specific requirements of House rules" (William Holmes Brown and Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* (Washington: GPO, 2003), p. 281 [hereafter *House Practice*]).

[7] *House Rules and Manual*, Sec. 628.

[8] See the point of order made against consideration of H.Res. 5, Adopting rules for the One Hundred Ninth Congress, *Congressional Record*, daily edition, vol. 157, January 4, 2005, p. H10.

[9] Special rules that provide for the "immediate consideration" of the measure in the full House preclude the question of consideration, as do rules that authorize the Speaker to "declare the House resolved into the Committee of the Whole House on the State of the Union." *House Practice*, pp. 705-706.

[10] For comments regarding the purpose of the new rule, see the website of the House majority leader, "New Constitutional Authority Requirement for Legislation," at http://majorityleader.house.gov/CAS/, last visited March 8, 2011, as well as debate on H.Res. 5, *Congressional Record*, daily edition, vol. 157, January 5, 2011, pp. H11, H16. See also Jackie Kucinich, "GOP Educating Members About New Constitutionality Rule," *Roll Call*, December 22, 2010.

there is no point of order or vote associated with a constitutional authority statement, House leadership has indicated that in certain circumstances special rules for the consideration of measures will provide time for specifically debating the constitutionality of the measure. The majority leader stated that up to 20 minutes for such debate will be provided in a special rule if requested by a letter to the chair of the Rules Committee signed by 50 or more Members.[11]

Three-day Availability Requirement for Unreported Measures

H.Res. 5 added a new clause 11 to House Rule XXI that prohibits unreported bills and joint resolutions from being considered on the House floor unless the measure has been available for at least three calendar days. The three days excludes weekends and legal holidays, unless the House is in session on such days. A similar three-day layover Rule has long applied to reported measures; under Rule XIII, clause 4(a), measures reported by committees may not be considered on the House floor until the committee report on the matter has been available for at least three calendar days.[12]

In part because the House routinely considers unreported measures under procedures that waive the standing Rules, this change to the standing Rules alone is unlikely to have direct effects on how long unreported measures are available prior to floor consideration. When an unreported measure is considered on the House floor, it is almost always considered under the suspension of the rules procedure or under the terms of a special rule. Absent unanimous consent, all other methods of calling up a bill for initial consideration on the House floor require that the bill be reported (or discharged) from committee.[13] The suspension of the rules procedure waives any Rule that would interfere with the expedited consideration of the measure, which would include the three-day availability requirement. To pass a measure under this procedure, however, requires the support of two-thirds of Members voting.[14] Generally, special rules for the consideration of a measure propose that any point of order that could be raised against the measure be waived.[15] Special rules need the support of a majority of Members voting, a quorum being present, to be agreed to in the House.[16]

[11] Information is from the website of the House majority leader, "Legislative Protocols for the 112th Congress," available at http://majorityleader.house.gov/Protocols/.

[12] The House rule exempts several kinds of reported measures specified in the rule, including resolutions reported by the Rules Committee. For more information on rules governing the length of time measures must be made available before being considered on the floor, and how the House can waive these rules, see CRS Report RS22015, *Availability of Legislative Measures in the House of Representatives (The "Three-Day Rule")*, by Elizabeth Rybicki.

[13] In practice, most measures, reported or unreported, are called up under suspension of the rules or special rules. (See CRS Report R40829, *How Legislation Is Brought to the House Floor: A Snapshot of Recent Parliamentary Practice* , by Christopher M. Davis). But House rules do provide alternative means for reported measures (or measures discharged from committee) to be considered on the floor, and these cannot be used for unreported measures.

[14] For more information, see CRS Report 98-314, *Suspension of the Rules in the House: Principal Features*, by Elizabeth Rybicki.

[15] Special rules frequently contain a statement that "all points of order against consideration of the bill are waived." Exceptions for certain points of order are sometimes made; common exceptions in the 111th Congress were points of order arising under clause 10 of Rule XXI ("Pay-as-you-go" Rule in the 111th Congress) and under clause 9 of Rule XXI (regarding earmark disclosure).

[16] For more information, see CRS Report 98-433, *Special Rules and Waivers of House Rules*, by Megan Suzanne (continued...)

Changes in House practice in the 112th Congress, however, have effected actual change in the availability of unreported measures considered on the floor. Texts of measures not reported from committee (and even, in fact, ones not yet formally introduced) have been made available for three days in electronic form on the Rules Committee website. In earlier Congresses, such texts were not publicly available electronically in a centralized place. The practice of posting the text of draft bills—as opposed to formally introduced and numbered bills—does not technically respond to the requirement of the new Rule, and the bills were considered under procedures that waived the Rule. To this extent, it is not the change in the Rule that has directly affected availability (the Rule, after all, was waived). Instead, an apparent change in practice by the new majority has led to the online posting of the text of unreported measures.

Public Availability of Measures and Matters in Electronic Form

H.Res. 5 added a clause to House Rule XXIX providing that committee reports and unreported bills and joint resolutions will be considered available under House Rules if they are "publicly available in electronic form at a location designated by the Committee on House Administration." Under a separate order included in H.Res. 5, until the House Administration Committee has an opportunity to designate such a location, these documents will be considered available if they are posted on the Rules Committee website.[17]

It is not a requirement under the Rule that the measures be available in the designated location; instead, the new House Rule is meant to provide an additional means through which Members, congressional staff, and the general public can access these documents.[18] What H.Res. 5 established was that, where existing House Rules require that a matter be "available to Members, Delegates, and the Resident Commissioner," that requirement can be met by placing the document online on a publicly available website designated by the House Administration Committee.[19] To fulfill the requirement in this way, the document placed on such a website must be the one that has been formally filed, introduced, or submitted. Posting online the text of a bill that has not yet been introduced, for example, or a draft of a committee report that has not yet been formally filed with the clerk, will not meet the requirement of the Rule.

Prior to this rules change, a committee report could be considered available only after it was prepared by the Government Printing Office (GPO). Committee reports are distributed in print form to document rooms in the Capitol, and also are placed online through the Legislative

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[17] The order providing that in the transition period a document will be considered available for purposes of consideration on the floor if it is on the Rules Committee website is Section 3(n)(1) of H.Res. 5, 112th Congress.

[18] According to the section-by-section analysis of the rules changes provided by the Rules Committee, "the provision is intended to place electronic distribution on par with traditional printing, rather than entirely replace it" ("Section-by-Section Analysis," p. H13).

[19] The rules change appears to apply to five different provisions of House rules that require matters to be available prior to floor consideration: Rule X clause 6 regarding expense resolutions of committees, both primary (clause 6(a)) and supplemental (clause 6(b)); Rule XIII clause 4(a)(1) regarding committee reports; Rule XIII clause 4(c) regarding printed Appropriations Committee hearings; and the new Rule XXI clause 11 regarding unreported bills and joint resolutions.

Information System (LIS) and are available to the general public through THOMAS.gov. The text of measures and reports in electronic form are generally located through LIS or THOMAS by searching a database by bill number or keyword. In contrast, the rules change appears to anticipate the development of a website where measures soon to be considered on the House floor will be identified and made available.[20] In addition, the existing GPO process for making documents available can take a day or two. Because it is possible that committee reports will be placed online on the new website faster than they can be prepared and placed online by the GPO, the new rules change might allow the House to consider measures sooner than previously after the formal filing of the report.

The public remarks of the Speaker and other members of the majority party leadership indicated that the operations of the House, and not just the standing Rules, would change in the 112th Congress.[21] In fact, in the first months of the 112th Congress, the practices of the House regarding public availability of legislative proposals in the form to be considered on the floor appear to be changing. Specifically, prior to the 112th Congress, if a motion was made to suspend the rules and pass a bill with an amendment, the text of the proposed amendment was typically not publicly available in electronic form prior to the vote. Members and staff seeking to see the proposed change would either contact the committee of jurisdiction or examine a printed copy of the amendment available on the floor at the time the suspension motion was made. In contrast, the Rules Committee in the 112th Congress has posted the legislative text to be considered on the House floor under a motion to suspend the rules, and the posted text reflected changes to be proposed within the motion to suspend.[22] The majority leader has indicated that this is the intended practice for the 112th Congress.[23]

Authority to Set Two-Minute Votes on Amendments

H.Res. 5 also amended clause 6 of House Rule XVIII to allow the chair of the Committee of the Whole to reduce to two minutes the minimum time allowed for a vote that is cast in a series of postponed votes on amendments. Prior to this rules change, the minimum time required for a vote in such a series of amendment votes was five minutes.

The House of Representatives resolves into the Committee of the Whole, a parliamentary device designed to allow greater participation by Members in debate, to consider most bills where several amendments are to be considered.[24] The chair of the Committee of the Whole has the authority to postpone a request for a recorded vote on an amendment, and can resume

[20] According to the Rules Committee, "the rule contemplates a singular location that will direct Members and the public to the text of measures to be considered by the House and its committees" ("Section-by-Section Analysis," p. H13).

[21] *Congressional Record*, daily edition, vol. 157, January 5, 2011, p. H5, H15.

[22] For example, on January 18, 2011, the House agreed to suspend the rules and pass H.R. 292 with an amendment. The bill had been introduced on January 12, 2011. The amendment to the bill, which proposed to replace the entire text of the bill as introduced, was posted publicly in electronic form on the Rules Committee website on January 15, 2011, three days prior to floor consideration. (From Rules Committee website, http://rules.house.gov/, follow link to "Legislative Text to Be Considered on the House Floor" and text of bills considered "Week of January 17, 2011.")

[23] See the website of the House majority leader, "Legislative Protocols for the 112th Congress," available at http://majorityleader.house.gov/Protocols/.

[24] For more information, see CRS Report RL32200, *Debate, Motions, and Other Actions in the Committee of the Whole*, by Bill Heniff Jr. and Elizabeth Rybicki.

proceedings on that amendment at any time. In practice, the chair often postpones the votes on several amendments, and then at a later time arranges for the Committee of the Whole to vote on the amendments in a series, one right after the other. The first vote in any such series must be at least 15 minutes long, but after that, under the new Rule, votes can be reduced to "not less than two minutes." House Rules place a minimum, but not a maximum, on the length of time for votes by electronic device.

Prior to this rules change, the minimum time for most votes was either 15 or 5 minutes. Occasionally, the minimum time for a vote on an amendment in the Committee of the Whole was reduced to two minutes, but only if the House entered into a unanimous consent agreement[25] or approved a special rule[26] granting the chair that authority. Under the new Rule, the chair will, for the first time, have flexibility under the standing Rules to set the length of the vote. Because the Rule says "not less than 2 minutes," the chair can set the vote for 5 minutes or, presumably, any other length of time as long as it is not less than 2 minutes.

Use of Electronic Devices on the House Floor

H.Res. 5 modified clause 5 of Rule XVII to prohibit the use of a mobile electronic device on the floor "that impairs decorum." Prior to this change, the Rule explicitly prohibited the use of a "wireless telephone" or a "personal computer" on the floor. The change is not intended to lead to a more permissive policy regarding the use of electronic devices. Rather, the change in language will keep the written Rule current even as technology changes. Device-by-device restrictions in the Rules would likely quickly become outdated.[27]

Under the language of the former Rule, what constituted a "personal computer," was left to the discretion of the Speaker under his authority to "preserve order and decorum" (House Rule I, clause 1). In practice, the Speaker generally allowed Members to use an unobtrusive device such as a BlackBerry, to, for example, consult email, but prohibited Members from talking on such smartphones or from using a full-sized laptop computer on the floor. Members did occasionally use tablet computers on the House floor, which can be obscured on the committee table while Members address the House, or held low on laps for brief consultations.

The Speaker's announced policy for the 112th Congress provided additional guidance regarding the use of electronic equipment on the House floor. As in earlier announcements, the policy did explicitly prohibit the use of telephones and the wearing of telephone headsets, and it instructed Members to turn off any audible ring before entering the chamber. It also re-stated the direct prohibition on personal computers that was previously in House Rules, but added that "electronic tablet devices do not constitute personal computers within the meaning of this policy and thus may be unobtrusively used in the Chamber."[28]

[25] See, for example, proceedings in the 111th Congress in *Congressional Record*, daily edition, vol. 155 March 12, 2009, p. H3345; March 18, 2009, p. H3594; June 10, 2009, H6430; September 17, 2009, p. H9675; and daily edition, vol. 156, July 30, 2010, p. H6493.

[26] In the 111th Congress, see, for example, H.Res. 609, H.Res. 610, H.Res. 644 and H.Res. 964.

[27] For more information on the intent of the Rule change, the history of the Rule, and informal advice given by the Parliamentarian regarding the use of electronic-tablet devices, see the "Section-by-Section Analysis," p. H14.

[28] *Congressional Record*, daily edition, vol. 157, January 5, 2011, p. H30.

Elimination of Voting by Delegates and Resident Commissioner in Committee of the Whole

H.Res. 5 eliminated from the Rules the authority granted to the Delegates (representing American Samoa, the District of Columbia, Guam, the Northern Mariana Islands and the Virgin Islands) and the Resident Commissioner (from Puerto Rico) to vote in and preside over the Committee of the Whole. The Delegates and the Resident Commissioner first had the authority to vote in the 103rd Congress (1993-1994). This authority was removed from the House Rules in the 104th Congress (1995-1996) and reinstated in the 110th Congress (2007-2008).

As mentioned above, the Committee of the Whole is a parliamentary device used to debate and amend legislation under more efficient procedures than those of the full House. Major legislation that is subject to several amendments is considered in the Committee of the Whole, and therefore it is where most record votes on amendments take place. The Committee of the Whole is, however, a committee of the House, and it therefore reports to the House when it completes consideration of a matter. The full House then acts on any amendments recommended by the Committee of the Whole, and it is the House that votes on passing the bill. Although any Member can request a separate vote in the House on an amendment recommended by the Committee of the Whole, most of the time, the House routinely approves any amendments recommended by the Committee of the Whole *en gros*, or all together, and without a record vote.

Under the former Rule, if the votes cast by the Delegates and Resident Commissioner made a difference to the outcome of the vote on an amendment, then the Committee of the Whole would automatically rise, and another vote on the amendment would take place in the full House (where the Delegates and Resident Commissioner could not vote). The constitutionality of allowing the Delegates and Resident Commissioner to vote was upheld in federal court based on these reconsideration procedures.[29] When the former Rule was in force, in the 103rd, 110th, and 111th Congresses, the Committee of the Whole rose automatically four times to report a vote on an amendment because the votes cast by the Delegates and Resident Commissioner made a difference to the outcome.[30]

[29] William Holmes Brown and Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* (Washington: GPO, 2003), p. 450. For more information, see CRS Report R40170, *Parliamentary Rights of the Delegates and Resident Commissioner From Puerto Rico*, by Christopher M. Davis, and CRS Report RL33824, *The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole*, by Kenneth R. Thomas.

[30] CRS Memorandum "Amendments Reported from the Committee of the Whole Subject to a Demand for a Separate House Vote or Automatic House Reconsideration: 103rd-111th Congress," by Christopher M. Davis, printed in the *Congressional Record*, daily edition, vol. 157, January 5, 2011, p. H17.

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