

Instructing Senate Conferees

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The House of Representatives and Senate Explained

Congressional Procedure

A Practical Guide to the Legislative Process in the U.S. Congress

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The Senate and House can create a conference committee to propose the final version of a bill that the two houses have passed in different forms. Sometimes, the Senate votes to instruct its conferees on the nature of the agreement they should reach. These instructions are not binding, and they cannot ask conferees to reach an agreement that goes beyond their authority.

The Senate may sometimes find it useful to have on record a formal expression of its expectations for conferees. Instructions may afford conferees an indication of what kind of provisions the Senate is likely to accept, especially when Senate floor amendments add provisions that conferees may not favor. It is also possible that Senate conferees might use instructions as grounds for maintaining their position in conference; they might even seek instructions for this purpose. Finally, debate on a motion to instruct conferees may afford an opportunity to draw attention to a particular policy question.

For more discussion on the procedures to go to conference, see CRS Report 98-696, *Resolving Legislative Differences in Congress: Conference Committees and Amendments Between the Houses*.

Motion to Instruct Conferees

A motion to instruct conferees can only be made after the Senate has agreed to go to conference on a measure, but before conferees have been appointed. To go to conference, the Senate must complete three parliamentary actions: (1) disagree with the House version (or insist on its own), (2) request or agree to a conference, and (3) authorize the Presiding Officer to appoint Senate conferees. In recent practice, this is usually accomplished through a compound motion containing all three steps, pursuant to Rule XXVIII, clause 2.¹ Once the Presiding Officer appoints conferees it is no longer in order to make a motion to instruct conferees.²

Senators can make motions to instruct conferees by seeking recognition on the floor. Timing the offering of such a motion, however, could be difficult. As previously discussed, the motion to instruct would only be in order after a compound motion to go to conference was agreed to but before the Presiding Officer named conferees. Instead, Senators will usually work with their party leadership to propound a unanimous consent agreement that will allow for their consideration. Such agreements will include language that provides individual Senators with the opportunity to make motions to instruct conferees, often setting time limits for debate and restricting amendments to the motion from being offered. See, for example, the following unanimous consent agreement to go to conference on an appropriations bill during the 115th Congress (2017-2018):

¹ Such a motion is only in order when a message from the House is laid before the Senate, meaning that the House must first either amend a Senate bill (or a Senate amendment to a House bill) or disagree with a Senate amendment. A compound motion made under Rule XXVIII is not divisible—meaning a Senator cannot demand separate votes on the three components of the motion—and is also subject to an expedited cloture process. More discussion of the Rule XXVIII compound motion to go to conference can be found in CRS Report R42996, *Changes to Senate Procedures at the Start of the 113th Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)*, by Elizabeth Rybicki. Prior to the change in the 113th Congress, the Senate took all three steps, outlined above, by unanimous consent if a measure was sent to conference.

² Although uncommon, the compound motion to go to conference can contain language directly appointing named conferees. See *Congressional Record*, daily edition, vol. 163, (October 17, 2017), p. S6424, for such an example. In that instance, conferees were appointed when the compound motion was agreed to and it was no longer in order to make a motion to instruct conferees.

...at 12 noon on Wednesday, July 11, the Senate proceed to legislative session and the Chair lay before the Senate the message to accompany H.R. 5895; further, that the majority leader or his designee be recognized to make a compound motion to go to conference and that the Senate immediately vote on the motion; further, that if the motion is agreed to, Senators CASSIDY and CORKER each be recognized to offer a motion to instruct conferees; that the Senate vote on the motions in the order listed with no further action on the compound motion; that there be 2 minutes of debate between each vote, equally divided in the usual form; and that following disposition of the Corker motion and the appointment of conferees, the Senate resume executive session.³

In this case, the unanimous consent agreement provides that if the motion to go to conference is agreed to, then the named Senators are recognized to make motions to instruct conferees. Furthermore, the agreement provides that each motion is subject to two minutes of debate, equally divided between proponents and opponents, followed by a vote on the motion itself. Following disposition of the motions to instruct, the agreement directs that conferees be appointed.

Reaching unanimous consent to consider motions to instruct conferees is done with the implicit understanding that consideration would otherwise potentially require three-fifths of the Senate to end debate on the question by invoking cloture. In other words, motions to go to conference or to instruct conferees are debatable and potentially subject to a filibuster. To restrict debate and proceed to a vote on the underlying motion, cloture must be invoked (requiring 60 votes, assuming only one vacancy in the Senate).⁴ As is often the case in the Senate, the requirement for three-fifths support leads to negotiations between the majority and minority leadership, and these negotiations can concern motions to instruct. A coalition of three-fifths of the Senate could prevent any motions to instruct conferees by invoking cloture on a compound motion that includes language directly appointing conferees. In general, however, negotiations usually occur between party and committee leadership to structure the terms of a unanimous consent agreement that provides for a limited number of motions to instruct when Senators have expressed an interest in offering them.

Absent potential restrictions that might be included in a unanimous consent agreement, a motion to instruct is amendable and also subject to division. An amendment to a motion to instruct could offer further or different instructions. If a motion to instruct contains more than one separable proposition, such as instructions on different subjects, a Senator could demand that the motion be divided for voting. There is also no limit under Senate Rules on the number of motions to instruct that can be offered. The motion may also be laid on the table.

Restrictions on and Types of Instructions

Inasmuch as conference committees are negotiating forums, the two chambers impose few general rules governing their work or restricting the content of the agreements they can reach. Instead, the Senate and House leave it largely to conferees themselves to decide how they can conduct negotiations most productively. Although practice nevertheless permits the Senate to instruct its conferees, all such instructions are limited in the following two ways:

³ *Congressional Record*, daily edition, vol. 164, (July 10, 2018), p. S4880.

⁴ For more discussion of the cloture process, see CRS Report 98-425, *Invoking Cloture in the Senate*, by Christopher M. Davis.

1. Instructions to conferees are never binding. A point of order may never be sustained against a conference report because it is not consistent with instructions that the Senate gave its conferees; and
2. It is not in order to instruct Senate conferees to reach some agreement that is not within their authority as conferees.⁵

In particular, rules of each chamber (in the Senate, Rule XXVIII, paragraphs 3 and 4) require conferees to restrict their agreements to the scope of the differences between the Senate and House positions. In recent practice, however, provisions may satisfy this requirement so long as they are reasonably related to the matters in disagreement.⁶

A motion to instruct may, for example, instruct Senate conferees to insist on, or to recede from, a certain Senate position in conference; to accept, or not to accept, a certain House position; or to negotiate a compromise position with the House that satisfies specified conditions.⁷ Given that instructions to conferees are not binding, motions to instruct may be stated in broad advisory language rather than as specific legislative text.

Examples of Recent Motions to Instruct

The form and content of motions to instruct offered in recent practice have varied. For example, motions to instruct can be relatively short, directing conferees to advocate for a specific position adopted by the Senate, as follows:

The Senator...moves that the managers on the part of the Senate at the conference on the disagreeing votes of the two Houses on the House amendment to the resolution be instructed to insist that the final conference report include the provision in the concurrent resolution as agreed to by the Senate that provides for the establishment of a deficit-neutral reserve fund related to strengthening the United States Postal Service by establishing a moratorium to protect mail processing plants, reinstating overnight delivery standards, protecting rural service, allowing the Postal Service to innovate and adapt to compete in a digital age, or improving the financial condition of the Postal Service.⁸

Alternatively, a motion to instruct can be composed of multiple propositions. The following example was offered to the FY2017 National Defense Authorization Act and includes four clauses with advisory language based on statements made by officials in the executive branch:

The Senator...moves that the managers on the part of the Senate at the conference on the disagreeing votes of the two Houses on S. 2943 (the National Defense Authorization Act for Fiscal Year 2017) be instructed to insist that the final conference report include authorization for the following commitments recently made by the President and Secretary of Defense: S.Con.Res. 11

⁵ Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S.Doc. 101-28 (Washington: GPO, 1992), pp. 479-482.

⁶ For more discussion on this scope requirement, see CRS Report RS22733, *Senate Rules Restricting the Content of Conference Reports*, by Elizabeth Rybicki.

⁷ Recent examples of motions to instruct can be found at *Congressional Record*, daily edition, vol. 165 (September 25, 2019) p. S5681. In that case, the motions to instruct were offered as resolutions after conferees had been appointed, pursuant to the terms of a unanimous consent agreement. See *Congressional Record*, daily edition, vol. 165 (September 18, 2019) p. S5569, for the text of the unanimous consent agreement.

⁸ *Congressional Record*, daily edition, vol. 161 (April 15, 2015) p. S2202.

Maintaining a force of approximately 8,400 soldiers, sailors, airmen and Marines within Afghanistan into 2017 as announced by President Obama on July 6th to continue to train and advise Afghan forces and to conduct counterterrorism operations;

The President's budget request for the European Reassurance Initiative to establish increased rotational presence in Europe, provide ample United States Armed Forces end strength and combat capability to meet all regional contingency plans, increase operational responsiveness of the North Atlantic Treaty Organization, and to fulfill President Obama's commitment to move forward with "the most significant reinforcement of collective defense anytime during the Cold War";

Sufficient naval, air, ground and amphibious force structure and weapons systems to fulfil the commitment made by Secretary of Defense Ashton Carter at the Shangri-La Dialogue that within the Asia-Pacific theater "the United States will remain the most powerful military and main underwriter of security in the region for decades to come";

Sufficient levels of military forces, munitions, logistics support, intelligence, surveillance, and reconnaissance assets, and other enabling support, and the deployment of sufficient operational capabilities to meet President Obama's commitment to go after ISIL aggressively until it's removed from Syria and Iraq and finally destroyed.⁹

As a final example, the following motion to instruct includes instructions to reject certain language and insist on other provisions:

The Senator...moves that the managers on the part of the Senate at the conference on the disagreeing votes of the two Houses on the Senate amendment to the bill H.R. 2577 be instructed to reject proposals that would rescind existing Ebola emergency funds provided by the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235), and designated by Congress as an emergency requirement pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985, as such funds support Ebola preparedness and response efforts which are critical to preventing, detecting, and responding to potential future Ebola outbreaks, and to insist that the final conference report include \$510,000,000 to reimburse Ebola accounts, as provided for in the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235) and designated by Congress as an emergency requirement pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985, for obligations incurred for Zika virus response, as such emergency Ebola funds support critical initiatives to prevent Ebola outbreaks, such as country operations and public health infrastructure in Liberia, Sierra Leone, and Guinea, public health research on infection control, including detection of person to person transmission of Ebola, and advanced research and development of new Ebola vaccines and therapeutics.¹⁰

Subsequent Instructions

Once a measure is in conference, the Senate may no longer instruct its conferees by motion (except by unanimous consent). However, subsequent instructions to conferees could be made through the adoption of a simple resolution or a "sense of the Senate" amendment to other legislation. These options are uncommon, however, and would be subject to the same rules of consideration for all amendments and resolutions.

No motion to instruct conferees is in order after conferees have filed their report or while the Senate is considering it. However, when the Senate is the first chamber to consider a conference

⁹ *Congressional Record*, daily edition, vol. 162 (July 14, 2016) p. S5112.

¹⁰ *Congressional Record*, daily edition, vol. 162 (June 8, 2016) p. S3633.

report, a motion to recommit with instructions (to the conferees) is in order. This motion is debatable, and the instructions are amendable, but the motion may be laid on the table.

The Senate also may defeat a conference report and then agree to motions for a second conference. When motions for a second conference are adopted, a motion to instruct conferees at the new conference is in order until the new conferees are named, in the same way as initially.

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