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FEPC—A CASE HISTORY IN PARLIAMENTARY MANEUVER

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NO OTHER legislative struggle in recent years has been the occasion for so many parliamentary maneuvers as the effort to create a statutory Fair Employment Practice Commission and to keep alive the President's Committee on Fair Employment Practice.¹ The bitterly-fought battle in which almost every weapon in the parliamentary arsenal has been used has now lasted almost four years and the end is not yet in sight. The recent filibuster which consumed eighteen meetings of the Senate was not the final, but merely the most recent, in a series of parliamentary moves. The resourceful parliamentarians on both sides of the issue have utilized such devices as points of order, discharge petitions, Calendar Wednesdays, blocking the appointment of conference committees, restrictions in appropriation acts, suspension of the rules, special orders of business, and breaking quorums. The conflict at one stage resulted in an impasse between Senate and House which temporarily cut off appropriations for the War agencies. The latest filibuster blocked Senate business for almost a month.

A discussion of the substantive merits of the FEPC is beyond the scope of this paper. The accounts in the press, and the extensive debates and hearings in Congress have revealed the bitterness which has accompanied this controversy. An account of the parliamentary history of FEPC, however, not only furnishes a graphic description of procedure in the Senate and House but also suggests the need for revision of certain parliamentary

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¹ Both the President's Committee and the proposed commission will be referred to herein as FEPC.

rules.² For the student and attorney trained to think in terms of judicial construction of legislative enactments this account may reveal a phase of "law-making" which has been given slight attention by legal commentators.

FEPC, 1941-1943

On June 25, 1941, President Roosevelt issued an unprecedented Executive Order, No. 8802, in which he "reaffirm[ed] the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, color, creed, or national origin" and declared that it was "the duty of employers and of labor organizations" to provide for the "full and equitable participation of all workers in defense industries, without discrimination." The order also created a non-salaried five-man "Committee on Fair Employment Practice," which was authorized to "receive and investigate complaints of discrimination" in violation of the order and to take "appropriate steps to redress valid grievances."³

The order was signed, it should be noted, almost six months before we entered the war but during the period of national emergency proclaimed after the downfall of France. The order recited that it was issued "by virtue of the authority vested in me by the Constitution and the statutes,

² House rules are published biennially in an annotated volume written by Lewis Deschler, House Parliamentarian, H.R. Doc. 810, 78th Cong. 2d Sess. (1945), referred to herein as "Deschler." House precedents have been collected, analyzed, and indexed in a treatise of eleven volumes, Cannon's Precedents of the House of Representatives of the United States (2d ed., 1936), the first five volumes being a reprint of an earlier collection known as Hind's Precedents (referred to herein as "Cannon's Precedents"). Cannon's Procedure in the House of Representatives, H.R. Doc. 675, 78th Cong. 2d Sess. (1944), is a compact, well-indexed and authoritative manual (referred to herein as "Cannon"). The Senate rules are published biennially in an unannotated manual prepared by the Senate Rules Committee, Sen. Doc. 225, 78th Cong. 2d Sess. (1944). The latest collection of Senate precedents is Gilfry, Precedents: Decisions on Points of Order in the United States Senate, 1789-1913, published by the direction of the Senate, Sen. Doc. 1123, 62d Cong. 3d Sess. (1914). The twelve-page pamphlet "Enactment of a Law," published by the Senate, Sen. Doc. 155, 73d Cong. 2d Sess. (1934), is an excellent summary. Points of order are likewise indexed in the yearly volumes of the Congressional Record and in the official Senate and House Journals. Among nonofficial treatises are Riddick, Congressional Procedure (1941); Haynes, The Senate of the United States (1941); see also the bibliography dated October 20, 1945, prepared by William R. Tansill of the Library of Congress for the Joint Committee on the Organization of Congress, 79th Cong. For law review material on Congressional procedure, see Wilson and Simpson, House Rules: Democratic Discipline, 30 Georgetown L. J. 763 (1942); Tilson, Parliamentary Law in Shaping Legislation, 15 Conn. B.J. 61 (1941); Pepper, Senate Cloture, 74 U. of Pa. L. Rev. 131 (1925); Fess, Importance of Parliamentary Law to the Legal Profession, 40 Chi. Leg. N. 297 (1908); 18 Mich. L. Rev. 343 (1920).

³ Fed. Reg. Doc. 41-4544; 6 Fed. Reg. (Part 4) 3109 (1941). The committee was enlarged to six members by Executive Order 8823, dated July 18, 1941, and to seven members by Executive Order 9111, dated March 25, 1942.

and as a prerequisite to the successful conduct of our national defense production effort." Its issuance, however, was precipitated by the threat of Negro leaders, principally A. Phillip Randolph, President of the Brotherhood of Sleeping Car Porters, to stage an organized Negro "March on Washington."⁴

Shortly after the committee began operating, Vito Marcantonio (A.L.P.-N.Y.) on July 20, 1942, introduced a bill in the House designed to make the committee a permanent statutory administrative agency with power to issue orders enforceable in the courts, similar to that exercised by the National Labor Relations Board.⁵ Sam Rayburn (Dem.-Tex.), Speaker of the House, instead of referring to the bill the appropriate—and liberal—Committee on Labor, referred it to the hostile Committee of the Judiciary, headed by Hatton W. Summers (Dem.-Tex.).⁶ Rule XI, clause 22, of the House Rules provides that all bills relating to and "affecting labor" are to be referred to the Committee on Labor, whereas only bills relating to "judicial proceedings, civil and criminal law" are to be referred to the Committee on the Judiciary.⁷ Since it is extremely difficult to compel a committee to report out a bill, referral to a hostile committee is the first and easiest method of killing it. Rep. Marcantonio's bill, accordingly, died in committee.

Meanwhile, the FEPC, in spite of its lack of powers and its inadequate

⁴ On June 18, 1941, following a meeting with the Cabinet, President Roosevelt appointed Fiorello H. LaGuardia, then Mayor of New York and head of the Office of Civilian Defense, to confer with the leaders of the "March-on-Washington" movement. On June 24, Mayor LaGuardia and Aubrey Williams, Chief of the National Youth Administration, met with Randolph and three of his aides. LaGuardia submitted a draft of a proposed executive order to the Negro leaders and asked them to call off the "march." Following telephone conferences between Randolph and Walter White, Secretary of the National Association for the Advancement of Colored People, the draft was approved and the "march" called off. The next day, the executive order was signed. One stumbling block in this conference was the question whether the order could be made applicable to the federal government. It is significant that the original order on file in the archives of the United States shows that the phrase "or government" is an interlineation in the handwriting of President Roosevelt. Executive orders are drafted by the Bureau of the Budget. The account of the conference described in this note is based on a letter to the writer from one of the participants. See also Logan, *What the Negro Wants* 16, 145 (1944). Logan also participated in this conference.

⁵ H.R. 7412, 77th Cong. 2d Sess. (1942). Rep. Marcantonio had introduced an earlier bill. H.R. 3994, 77th Cong. 1st Sess., on March 13, 1941, forbidding discrimination by any federal agency or government contractor because of race, color, or creed. Sen. James M. Mead (Dem.-N.Y.) on February 9, 1942, also had introduced a bill, S.2256, 77th Cong. 2d Sess., forbidding such discrimination by government contractors.

⁶ For the power of the Speaker of the House, see Chang-Wei, *The Speaker of the House of Representatives* since 1896 (1928).

⁷ The subsequent FEPC bills, substantially similar to H.R. 7412, were referred to the House Committee on Labor.

staff,⁸ initiated hearings in Los Angeles, Chicago, Birmingham, and New York, uncovering widespread patterns of discrimination against Negroes and Jews.⁹ In January, 1943, the FEPC had scheduled an industry-wide hearing in which it prepared to examine the discriminatory practices of the railroads and railroad brotherhoods, particularly the conspiracy of the Southern roads and the Brotherhood of Locomotive Firemen to drive Negro firemen from the industry. Without notice, Paul McNutt, chairman of the commission, canceled the hearing.¹⁰

The FEPC began to disintegrate and once again Negro protests began to flood the White House. On May 27, 1943, President Roosevelt issued another executive order¹¹ abolishing the committee and establishing a new one in its place under the chairmanship of Msgr. Francis J. Haas.¹² The new order differed somewhat from the original one: it recited that it was issued by the President as "Commander in Chief of the Army and Navy"; it was made applicable to "war industries" instead of "defense industries"; it declared that all employers and labor organizations had the "duty" to eliminate not only discrimination in employment but also in "union membership"; it gave the FEPC virtual autonomy by establishing it as part of the "Executive Office of the President"; it specifically authorized the President's Committee to "conduct hearings and issue findings of fact"; and finally, instead of being limited to the redress of valid grievances, the FEPC was authorized to "take appropriate steps to obtain elimination" of the discrimination forbidden by the order.¹³ The first task

⁸ In January, 1942, the entire staff consisted of seven professional and five clerical employees. In May, 1943, there were thirteen professional and twenty-one clerical employees. At its peak in July, 1945, the staff consisted of about 120 persons.

⁹ The decisions of the committee are reported in the War Manpower Reports of the Bureau of National Affairs, Washington, D.C., and likewise in the Labor Relations Reports of the same bureau.

¹⁰ The committee was originally part of the Office of Production Management, the predecessor of the War Production Board. On July 30, 1942, it was transferred from that board to the War Manpower Commission.

¹¹ No. 9346, Fed. Reg. Doc. 43-8651, 8 Fed. Reg. (Part 5) 7183 (1943), amended by Executive Order, 9446, dated December 20, 1945.

¹² On October 18, 1943, Msgr. Haas, who had been appointed a Bishop, resigned, to be succeeded by his deputy, Malcolm Ross, the present chairman of the committee.

¹³ In the interim, a new House of Representatives having been elected, Rep. Marcantonio on February 5, 1943, reintroduced his FEPC bill (H.R. 1732, 78th Cong. 1st Sess.) which was again consigned to the Judiciary Committee. The reintroduction of the bill was necessitated by the fact that the House of Representatives is not a continuous body, and therefore any bill which is not finally approved during the two-year lifetime of a Congress must be reintroduced de novo in the next Congress. Rep. Marcantonio made an unsuccessful effort to discharge the Judiciary Committee from further consideration of the bill (H. Res. 343, 78th Cong. 1st Sess., Nov. 4, 1943). The discharge procedure is discussed at p. 420, *infra*.

of the FEPC under its new leadership was to conduct the railroad hearing previously canceled. In addition, it began to enlarge its staff and to establish a series of field offices in a dozen cities.

This activity of the FEPC prompted an immediate congressional reaction. Congressional opponents of a government agency have three powerful weapons at their disposal: (1) they may by legislation kill the agency; (2) they may starve it to death by withholding necessary appropriations; or (3) they may attempt to "smear" it by a Congressional investigation. The first effort of the foes of FEPC was investigation by a congressional committee.

Howard W. Smith (Dem.-Va.), a member of the House Rules Committee and a powerful figure in the House, had early in the session obtained approval for his resolution creating a "Select Committee To Investigate Acts of Executive Agencies beyond the Scope of Their Authority"¹⁴ and had been appointed its chairman. The FEPC was one of the first agencies the committee investigated. The first hearing involving the FEPC was held on January 11, 1944, for the purpose of examining the legal effect of a "directive" issued by the FEPC against the Philadelphia Rapid Transit Employees' Union. (The union whose members operated the rapid transit system of Philadelphia had refused to permit the upgrading of Negroes to positions as motormen, conductors, and other "platform" jobs.) On February 25, 1944, the Smith Committee heard union complaints about the practices of the War Shipping Administration, which, following the mandate of Executive Order 9346, was insisting that seamen be referred from its placement offices without discrimination because of race. The third hearing of the committee involving the FEPC was held on March 2, 1944, and concerned the directive issued by the FEPC following its railroad industry investigation. No report was ever issued by the Smith Committee on these hearings nor was any recommendation ever made to the House thereon, although from time to time during the course of the FEPC's struggle for Congressional approval, rumors were current that such a report would be issued.

1944 APPROPRIATION

The President's Committee was at this time spending at the rate of about \$500,000 a year, allocated from the President's emergency war funds, Congress having appropriated scores of millions of dollars for the

¹⁴ Pursuant to H. Res. 102, 78th Cong. 1st Sess. (1943).

President's unrestricted confidential war-time expenditures.¹⁵ Congressional opponents of the FEPC now began to look askance at the President's wartime purse and, on February 23, 1944, Sen. Richard B. Russell (Dem.-Ga.), the ablest and most resourceful opponent of the FEPC, announced that he intended to prevent use of this money by the FEPC. He introduced an amendment to the independent offices appropriations bill¹⁶ to forbid the use of *any* appropriation to pay the expenses of any agency created by executive order after such agency had been in existence for more than one year, unless Congress specifically authorized the expenditure of funds for it. On March 9, 1944, President Roosevelt transmitted to Congress a budget for the FEPC totaling \$585,000, the committee's first request for a Congressional appropriation.¹⁷ Fearful that the Russell amendment might immediately cut off all funds from the FEPC, Sen. Douglass Buck (Rep.-Del.) on March 22, 1944, introduced an amendment to the independent offices appropriation bill proposing the grant of \$150,000 for the committee for the balance of the fiscal year, i.e., until June 30, 1944. On March 24, 1944, the debate on the Russell amendment began in the Senate. Joseph H. Ball (Rep.-Minn.) first proposed an amendment, which Sen. Russell accepted and which was adopted by a voice vote, making it clear that the Russell limitation would not apply until after June 30, 1944.¹⁸ Thereupon Sen. Buck proposed another limitation to the original Russell amendment in these words: "except the Fair Employment Practice Committee." Sen. Buck's proviso was adopted 36 to 22 by roll-call vote.¹⁹ Sen. Russell then attempted unsuccessfully to withdraw his entire amendment.²⁰ After further debate, Edwin C. Johnson

¹⁵ See, for example, 55 Stat. 682 (1941) authorizing the expenditure of \$2,500,000 on "unvouchered expenditures" and 55 Stat. 818 (1941) appropriating \$10,000,000 for "objects of a confidential nature."

¹⁶ H.R. 4070, 78th Cong. 2d Sess. (1944).

¹⁷ H.R. Doc. 486, 78th Cong. 2d Sess. (1944). Many months prior to the introduction of the Russell amendment, the Budget Bureau had requested the FEPC to submit a detailed request for a Congressional appropriation.

¹⁸ 90 Cong. Rec. 3059-60. (1944). References to the Congressional Record after June 30, 1945, are to the temporary or unbound edition. All other references are to the permanent bound edition.

¹⁹ 90 Cong. Rec. 3062 (1944). Sen. Russell attempted unsuccessfully to prevent a roll-call vote, presumably to allow opponents of the Buck proviso to vote against it without having to account publicly for their vote. Article 1, section 5 of the Constitution of the United States provides that "the Yeas and Nays of the Members of either House on any question shall, at the Desire of one-fifth of those Present, be entered on the Journal."

²⁰ A motion may not be withdrawn by the mover after it has been amended, Rule XXI, § 2.

(Rep.-Colo.) moved that the vote on the Buck proviso be reconsidered,²¹ which was agreed to, 30 to 28. A third vote was then taken on the proviso, which was disapproved by a roll-call vote of 33 to 27. The Russell amendment was subsequently adopted²² and the FEPC now had to look exclusively to Congress for its funds.

The real menace of the Russell amendment to the continued functioning of the FEPC was not apparent until later. On May 25, 1944, the House Appropriations Committee reported out an appropriation bill which carried an item of \$500,000 for the FEPC,²³ only \$85,000 less than President Roosevelt's request. A dramatic series of incidents then occurred which require some analysis. The Appropriations Committee of the House is one of its most powerful and most privileged units. Under the House rules, no general appropriation of any sort may be reported by any committee except the Appropriations Committee. Nor is an amendment proposing an appropriation in order during the consideration of any bill reported by any other committee.²⁴ The Appropriations Committee is the largest standing committee in the House consisting this session of forty-five members, more than one tenth of the House.²⁵ It is an "exclusive" committee, i.e., its members may not serve on any other committee.²⁶ Most important of all, it enjoys the privilege of being able to get a House vote on any general appropriation bill reported by it, without the intervention of the Rules Committee, and the bill remains privileged until disposed of.²⁷ To prevent the Appropriations Committee from usurping the functions of other committees, however, the Appropriations Committee is deemed a non-legislative committee and may not report any "legislation" in any general appropriation bill.²⁸ The rule also provides that no appropriation shall be reported in any such bill "or be in order as an amendment thereto,

²¹ In both Houses and under customary parliamentary procedure, a motion for reconsideration can only be made by a voter who voted originally for the prevailing side, Senate Rule XIII, § 1; House Rule XVIII.

²² Independent Offices Appropriation Act of 1945, § 213 (Pub. L. No. 358, June 27, 1944).

²³ H.R. 4879, H.R. Rep. 1511, 78th Cong. 2d Sess. (1944). For a brief nontechnical description of Congressional appropriation procedure, see Young, *This Is Congress* c. 7 (1943).

²⁴ House Rule XXI, § 4. Private claims bills are not within the rule, Deschler, *op. cit. supra*, note 2, at § 348.

²⁵ H.R. 537, 79th Cong. 1st Sess., approved February 28, 1946. The permanent size of the committee is thirty-five members, Rule X.

²⁶ This is an unwritten, but well-established, rule, Cannon, *op. cit. supra*, note 2, at 83.

²⁷ Deschler, *op. cit. supra*, note 2, at § 732.

²⁸ House Rules, XXI, § 2.

for any expenditure not previously authorized by law."²⁹ The question, therefore, upon which the FEPC appropriation hinged, was whether an executive order was a previous authorization of law within the meaning of the rule.³⁰ But the rules of the House, particularly those declaring certain matters out of order, are not self-executing. A point of order must be invoked and the presiding officer must sustain it. A custom has also developed whereby points of order are either ignored or "waived" by unanimous consent. Furthermore, the House Rules Committee has the power to propose to the House that it shall adopt a special order of business barring points of order on a particular bill or portion thereof. This recommendation or "rule" of the Rules Committee becomes binding when adopted by a majority of a quorum of the House.

As we have noted, on Thursday, May 25, 1944, the Appropriations Committee had reported out an appropriation bill carrying an item for the FEPC. But late in the afternoon of May 23, Clarence Cannon (Dem.-Mo.), chairman of the Appropriations Committee, in an unusual move requested unanimous consent that all points of order be waived on the appropriation bill, which, he announced, would be reported out the next day. After some questions by John Taber (Rep.-N.Y.), the ranking minority member of the Appropriations Committee, the unanimous consent was granted.³¹ On May 25, when the appropriations bill came up for consideration, Malcolm C. Tarver (Dem.-Ga.) objected that the unanimous consent had been granted before the bill had been reported and before the Appropriations Committee as a whole had even considered it.³² Speaker Rayburn, citing precedents, overruled the point of order, whereupon Clifford P. Case (Rep.-S.D.) took an appeal to the entire House.³³ John W. McCormack, (Dem.-Mass.), the majority leader of the House, moved that the appeal be tabled. This motion was carried by a voice vote and the Speaker thereby sustained.³⁴ Rep. Cannon, smarting under the charge

²⁹ The Senate rules contain somewhat similar provisions, see p. 424, *infra*.

³⁰ This point is discussed at p. 425, *infra*.

³¹ 90 Cong. Rec. 4917 (1944). The members of each party look to the ranking members of their party on any committee to safeguard the party's political interests.

³² The Appropriations Committee is divided into numerous subcommittees, each of which deals with a particular appropriation bill. The full committee meets one or two days before the bill is scheduled to be reported to consider the recommendations of the particular subcommittee involved.

³³ Such appeals are rare and are rarely successful. The tradition of the House is that the presiding officer shall be advised by the official parliamentarian, a paid employee, on parliamentary questions and that the precedents of the House shall be rigorously followed.

³⁴ Under the House rules, a motion to table is tantamount to a motion to defeat since there is no way of taking a matter from the table except by unanimous consent or a suspension of the rules, Cannon, *op. cit. supra*, note 2, at 408.

that he had tricked the House, took the floor in his defense. Mr. Cannon is recognized as the greatest authority in the House on its procedure, being a former Parliamentarian of the House and author of its authoritative collection of House precedents. He argued that the FEPC item would not in any event have been subject to the point of order, "for the reason that the item [the FEPC] is submitted by the Bureau of the Budget as being authorized under the war powers of the President." He then asked unanimous consent that the special rule waiving points of order, previously agreed to by the House, be modified so as not to apply to the FEPC item. Rep. Marcantonio, the most resourceful and alert parliamentarian on the FEPC side, objected, however, and the unanimous consent was denied. Rep. Cannon thereupon asked that he be recognized for the purpose of moving a suspension of the Rules. Speaker Rayburn replied properly that the motion to suspend the rules could only be made on two specified days in the month and was not then in order.³⁵ The House then resolved itself into the Committee of the Whole House on the State of the Union and proceeded to debate the appropriations bill.³⁶ The debate continued for two days, in the course of which Rep. Cannon argued at great length that the FEPC item was "authorized by law."³⁷ Finally a vote was had on the Tarver motion to strike from the appropriation bill the entire amount set aside for the FEPC. The motion was carried in the Committee of the Whole, first by a division vote of 139 to 95, and then by a teller vote of

³⁵ Rule XXVII, § 1, provides that the Speaker shall not entertain a motion to suspend the rules except on the first and third Monday of the month. Such a motion requires a favorable vote of two-thirds of those voting.

³⁶ Under the rules, all appropriation bills are debated in the Committee of the Whole, which consists of all the members of the House (Rule XXIII, § 3). This committee serves two useful functions. Article 1, section 5, of the Constitution of the United States provides that "... a majority of each [House] shall constitute a quorum to do business." A quorum of the Committee of the Whole, however, is 100 instead of the 218 which is a majority of the House (Rule XXIII, § 2). Thus the debate (but not the final vote) on an appropriation bill proceeds before a smaller body, more easily held together. Secondly, the House rules forbid a roll-call vote in the Committee of the Whole (Cannon, *op. cit. supra*, note 2, at 104), a device sometimes used for purposes of delay. Thus the constitutional requirement of a roll-call "on any question" on the request of one-fifth of the members present is circumvented. The presiding officer of the Committee of the Whole is not the Speaker but is a member designated by the Speaker.

³⁷ 90 Cong. Rec. 5016-5020 (1944). He cited *Hirabayashi v. United States*, 320 U.S. 81 (1943); an article by former Chief Justice Hughes, 42 A.B.A. Rep. 232, 238 (1917); *Ken-Rad Tube and Lamp Corp. v. Badeau*, 55 F. Supp. 193 (Ky., 1944); an opinion of an Attorney General, 39 Op. Att'y Gen. 347 (1939); the autobiography of Theodore Roosevelt; the wartime powers of Presidents Lincoln, Adams, Jefferson, Polk, McKinley, Buchanan, and Wilson; the seizure by President Franklin D. Roosevelt of the North American Aviation Company plant before we entered the war; the proclamation of the Monroe Doctrine; and other executive orders issued by President Roosevelt during World War II.

141 to 103.³⁸ Shortly thereafter, the Committee of the Whole "rose" and its presiding officer reported to the Speaker the committee's recommendation that the FEPC item be stricken. Rep. Marcantonio, still fighting, moved for a roll-call vote, which was denied because not seconded by the requisite one-fifth of those present. In a last desperate effort, he demanded a vote by tellers, which was ordered. The vote this time was 123 in favor of the FEPC item and 119 against. The majority of 38 had shrunk to a deficit of 3 votes in the hour that had elapsed between both votes, although the size of the total vote remained substantially the same, 244 in the Committee of the Whole and 242 in the House. There is no way of determining, in the absence of a record vote, whether the result was due to a change of heart on the part of certain Congressmen or a difference in the composition of the total vote. The FEPC appropriation had passed the House,³⁹ but it faced unknown dangers in the Senate.

On June 15, 1944, the Senate began the consideration of the House-approved bill containing the FEPC item. The jockeying began at once. That same day, John A. Danaher (Rep.-Conn.) filed a notice of his intention to move to add to the bill by way of a rider the full text of a bill to create a statutory fair employment practice commission.⁴⁰ Friends of the FEPC were wary of this maneuver, fearful that it would jeopardize the passage of the vital appropriation measure, since some Senators who might approve a wartime agency without sanctions would reject a statutory agency whose orders were enforceable. The next day Sen. Danaher announced that he had discussed the matter with Malcolm Ross, chairman of the FEPC, and upon Ross's request would not press the amendment.⁴¹ Sen. Russell began a frontal attack on the FEPC item with a motion to strike it out. On June 20, by roll-call vote, his motion was defeated, 38 to 21. His forays were more successful. Three riders were added to the FEPC item designed to limit its powers. These riders in effect forbade Presidential seizure of any plant for noncompliance with any order of the

³⁸ The House has four methods of voting: (1) a viva voce vote; (2) a division vote, in which hands are raised and counted; (3) a teller vote, in which first the members for and then those against pass between two members (tellers) who count them; (4) a roll-call vote. A division is available on request, except when the voice vote is so clear that the request is dilatory; a teller vote, like a roll-call, requires a request from one-fifth of those present, Cannon, *op. cit. supra*, note 2, at 418.

³⁹ The final vote was 247 to 58. 90 Cong. Rec. 5153 (1944).

⁴⁰ An amendment or rider to an appropriation bill but not to any other type of bill must be "germane" under the Senate rules (Rule XVI, § 4). Sen. Danaher's move was therefore a gesture.

⁴¹ 90 Cong. Rec. 6014 (1944).

FEPC, forbade the committee to issue any regulation or order modifying any act of Congress, and gave respondents in FEPC proceedings the right to appeal to the President.⁴² Sen. Russell's fourth rider, to prevent the FEPC from spending more than 25 per cent of its appropriations in salaries for Negro employees, was rejected, however, by a 31 to 22 vote.⁴³ The bill passed the Senate and on June 22, the conference committee report was adopted by both Houses. The bill subsequently became law.⁴⁴ FEPC was assured of at least another year's existence.

PERMANENT FEPC

In the meantime, A. Philip Randolph and others associated with him had come to the conclusion that legislation was needed to furnish FEPC with the powers it lacked. A National Council for a Permanent FEPC was created under the honorary chairmanship of Senators Robert F. Wagner (Dem.-N.Y.) and Arthur Capper (Rep.-Kans.) to push such legislation. More than a hundred national organizations joined in the effort. On January 17 and 18, 1944, three identical bills⁴⁵ were introduced in the House, proposing the establishment of a statutory Fair Employment Practice Commission, patterned after the National Labor Relations Board, with power to issue judicially enforceable orders against discriminatory employers and trade unions. The bills were referred to the House Committee on Labor, of which Mrs. Mary T. Norton (Dem.-N.J.) was chairman. On June 21, 1944, the day after FEPC's appropriation victory in the Senate, Dennis Chavez (Dem.-N.M.) introduced a bill on behalf of himself and five other Senators to create a statutory FEPC.⁴⁶ Congress recessed shortly thereafter for the political conventions.⁴⁷ Sen. Chavez's

⁴² None of these riders proved to be of great consequence.

⁴³ 90 Cong. Rec. 6350 (1944). The basis for the proposed amendment was the charge that too many of the employees of the FEPC were Negroes.

⁴⁴ National War Agency Appropriation Act, 1945 (Pub. L. No. 372, June 28, 1944).

⁴⁵ H.R. 3986 by Thomas E. Scanlon (Dem.-Pa.), H.R. 4004 by William L. Dawson (Dem.-Ill.), and H.R. 4005 by Charles M. LaFollette (Rep.-Ind.); all 78th Cong. 2d Sess. (1944). Under the House Rules, unlike those of the Senate, two or more members may not introduce a single bill. To establish joint sponsorship, therefore, identical bills must be introduced. The minute variations among the three bills are due to typographical errors.

⁴⁶ S. 2048, 78th Cong. 2d Sess. (1944). This bill was identical with the Scanlon bill in the House, note 45, *supra*.

⁴⁷ The Republican National Convention adopted the following plank for its 1944 presidential campaign: "We pledge the establishment by Federal legislation of a permanent Fair Employment Practices Commission." The Democratic plank was a masterpiece of evasion: "We believe that racial and religious minorities have the right to live, develop and vote equally with all citizens and share the rights guaranteed by our Constitution. Congress should exert its full constitutional powers to protect those rights."

bill was reported favorably by the Committee on Education and Labor on September 20, 1944, but was not brought out on the floor during the remaining months of the 78th Congress.⁴⁸ In the House, following public hearings, the Scanlon bill was reported favorably on December 4, 1944, by the House Committee on Labor.⁴⁹ Mrs. Norton immediately filed a discharge petition,⁵⁰ but the session of Congress expired before the petition received sufficient signatures. The bill therefore did not come before the House.

The 79th Congress began its first session on January 3, 1945, and within a month thirteen separate bills were introduced in the House by as many Congressmen, proposing the creation of a permanent FEPC.⁵¹ The House Labor Committee, to which the bills were referred, acted with dispatch. Because of the prior session's public hearings, no further hearings were held, and on February 20 the Labor Committee reported a committee bill, H.R. 2232, introduced, at its request, by its chairman, Mrs. Norton.⁵² Three days later, Mrs. Norton introduced a resolution,⁵³ which was referred to the Rules Committee, asking for a House vote on H.R. 2232. Mrs. Norton required this help from the Rules Committee, because without it there was no practical method of bringing her bill on the House floor for a vote. The House Rules are devised to prevent such consideration against the wishes of the Rules Committee. Only revenue and appropriation bills (and the bills of a few minor committees with extremely limited jurisdiction⁵⁴) can get on the House floor without a special rule from the Rules Committee. In this respect the House procedure differs from the Senate and that of almost every other parliamentary body. If the Rules Committee refuses to grant a rule, the only parliamentary alternatives are

⁴⁸ Cal. No. 1126, Rep. 1109. Allen J. Ellender (Dem.-La.) dissented. Hearings before the Senate committee were conducted from August 30 to September 8, 1944. In reporting his bill, Sen. Chavez announced that the Senate Committee on Education and Labor had agreed not to call it up until after the Presidential elections of November, 1944. Robert A. Taft (Rep.-Ohio) likewise agreed to this delay, 90 Cong. Rec. 7973 (1944).

⁴⁹ Union Calendar No. 668, Rep. 2016. The hearings before the House committee were held from June 1 to 16, 1944, and on November 16, 1944.

⁵⁰ H. Res. 668, 78 Cong. 2d Sess. (1944).

⁵¹ These bills are identified and distinguished in the report of the House Committee on Labor, Rep. 187, 79th Cong. 1st Sess. (1945). Although the Senate is a continuous body, a bill must be reintroduced and referred to committee in one Congress, although reported out of committee in a prior Congress, see note 13, *supra*.

⁵² Individual minority reports were made by O. C. Fisher (Dem.-Tex.) and Clare E. Hoffman (Rep.-Mich.).

⁵³ H. Res. 146, 79th Cong. 1st Sess. (1945).

⁵⁴ The list is given in Cannon, *op. cit. supra*, note 2, at 90.

a discharge petition or the use of Calendar Wednesday.⁵⁵ The Rules Committee is therefore a powerful weapon in the hands of the majority leadership. To insure that party's control over the Rules Committee, eight out of its twelve members are Democratic, although in every other committee the percentage of Republican membership is roughly equal to the percentage of Republicans in the entire House.⁵⁶ Of the eight Democrats on the Committee, four are Southern Democrats and two are from border states.⁵⁷ The Rules Committee, however, does not have the power to decide questions of procedure. It may merely *recommend* a special rule or order of business to the House, which the latter must agree to by a majority vote.⁵⁸ In practice, however, its recommendations are seldom rejected.

Mrs. Norton appeared before the Rules Committee on March 8, 1945,⁵⁹ and requested it to report out a special rule. The most amazing parliamentary gyrations then took place. The Republican members were more or less committed to the establishment of a permanent fair employment practice commission because of the Republican party platform of 1944. The expected division, therefore, on Mrs. Norton's request, was six Southern and border-state Democrats against four Republican and two Northern Democrats. The Republicans, however, refrained from attending the scheduled meetings of the committee. Since every Republican vote was necessary, any absence jeopardized the chances of obtaining a majority. The Southern Democrats in turn often absented themselves to prevent a committee quorum.⁶⁰ On more than one occasion when a Southern Democrat was absent the Republicans engaged in dilatory tactics to delay the vote. Since only two members of the committee of twelve, Adolph J. Sabath (Dem.-Ill.), its chairman, and John J. Delaney (Dem.-N.Y.), sincerely favored the granting of a rule, it was impossible to compel action. The Rules Committee usually acts with dispatch merely upon the application of the committee chairman requesting a rule, and rarely discusses the

⁵⁵ This rule is discussed at p. 421, *infra*.

⁵⁶ By unwritten rule, Cannon, *op. cit. supra*, note 2, at 83.

⁵⁷ E. E. Cox, Ga., Howard W. Smith, Va., William M. Colmer, Miss., J. Bayard Clark, N.C., Joe B. Bates, Ky., and Roger C. Slaughter, Mo.

⁵⁸ Cannon, *op. cit. supra*, note 2, at 368.

⁵⁹ See 91, Cong. Rec. 2741 (1945).

⁶⁰ These maneuvers are not a matter of formal record, but the writer attended the public meetings of the Rules Committee and observed Republican members walk out of the committee room just before the vote on the FEPC rule was scheduled to take place. Albert Gore (Dem.-Tex.) charged that the Republican members of the committee "procrastinated" to avoid a vote in the absence of a Democratic committee member, 91 Cong. Rec. 11962 (Dec. 10, 1945).

merits of the legislation involved. This time the Rules Committee met six times over a three-month period to hear Congressional opponents of the legislation.⁶¹ Finally on June 12, 1945, a vote was taken and the committee split 6 to 6, thus denying the request for a rule.

Despairing of any help from the Rules Committee, Mrs. Norton, on April 27, 1945, had filed a discharge petition to by-pass it.⁶² Rule XXVII, section 4, of the House Rules provides that whenever 218 members (an absolute majority of the House) have signed a petition to discharge the Rules Committee from further consideration of any special rule or order of business referred to it, the entire House must then vote whether such rule shall be adopted.⁶³ In effect, therefore, the signing of Mrs. Norton's discharge petition by the requisite number would have been tantamount to a special rule reported by the Rules Committee.⁶⁴ To make revolt by the House membership difficult, Rule XXVII is laden with restrictions. Thus, the petition must be kept in the custody of the Clerk of the House, must be signed at his desk only during the sessions of the House,⁶⁵ and the names of the signers must be kept secret until 218 have signed.⁶⁶ In fact a premature disclosure of the signers gives rise to a question of the privilege of the House,⁶⁷ i.e., any member may object to this breach of the rules. The greatest difficulty, of course, is the tremendous number of signatures required, 218, merely for the purpose of obtaining an opportunity for a House vote on the rule. After a period of intensive solicitation by Congressional friends of the FEPC legislation, almost all the non-Southern Democrats had signed the petition. Most of the Republican and *all* the Southern Democrats abstained.⁶⁸ On December 10, 1945, Albert Gore

⁶¹ By tradition, only members of Congress may appear before the Rules Committee, although its sessions are public. The committee met on March 8, April 19, April 20, April 25, April 28, 1945, and June 12, 1945; see statement of Chairman Sabath, 91 Cong. Rec. 5796 (1945).

⁶² Known as Discharge Petition No. 4. 91 Cong. Rec. 1966, Appendix (1945).

⁶³ Rule XXVII also contains appropriate safeguards against dilatory or filibustering tactics.

⁶⁴ On June 11, 1945, the anti-poll tax bill was brought out on the House floor by means of a discharge petition.

⁶⁵ Cannon, *op. cit. supra*, note 2, at 160.

⁶⁶ It is difficult for lobbying groups to solicit signatures or to mobilize public opinion against those who have not signed, since no one can state authoritatively who has or has not signed.

⁶⁷ Cannon, *op. cit. supra*, note 2, at 161.

⁶⁸ Minority Leader Joseph W. Martin, Jr., (Rep.-Mass.) announced on December 11, 1945, that as soon as possible after the holiday recess enough Republicans would sign the discharge petition to bring the bill to the floor of the House, "The Washington Post" (Dec. 12, 1945); see also "The Republican News," p. 2, col. 4 (Jan., 1946), the official organ of the Republican National Committee. As of May 1, 1946, four months after the House reconvened, the promise has not yet been fulfilled. There are 190 Republicans in the House.

(Dem.-Tenn.) told the House that 157 members, of whom only 50 were Republicans,⁶⁹ had signed the petition. The failure to sign the petition kept the bill off the House floor.

In the meantime, because of the lack of success with the discharge petition, Rep. Norton had fallen back on the last parliamentary device available for getting a vote on the FEPC bill reported out by the House Labor Committee: the Calendar Wednesday rule.⁷⁰ According to the House Rules, Wednesday of each week is set aside for the consideration of the reports of committees which otherwise would need a rule from the Rules Committee. The committees are called in a specified order and each committee may theoretically use one Wednesday to call up one of its reports. Calendar Wednesday may not be suspended or skipped except by unanimous consent or upon motion requiring approval of two-thirds of those present. The rule, however, has atrophied. During both sessions of the 78th Congress not a single Calendar Wednesday was invoked and during the first session of the 79th Congress it was used only once.⁷¹ There are two reasons for the failure to take advantage of the rule⁷²: first, the House leadership almost always wishes to utilize the Wednesday sessions for what it considers more pressing legislation, and a refusal to suspend means a revolt against that leadership; second, Calendar Wednesday is cumbersome in its application, since the debate on a bill considered under the rule is for practical purposes limited to one Wednesday. But Mrs. Norton, having no alternative, announced that she intended to utilize the rule. On Tuesday, September 25, when the customary request was made for unanimous consent to suspend next day's Calendar Wednesday, she objected.⁷³ The House normally meets at 12 noon with but a few members present. By the time the Chaplain's prayer is read, the Journal read and approved, and the routine morning business transacted, the other members trickle in. On Wednesday, September 26, however, within fifteen minutes after the session began, William M. Whittington (Dem.-Miss.) moved the adjournment of the House, which was carried by a vote of 74

⁶⁹ 91 Cong. Rec. 11962 (Dec. 10, 1945).

⁷⁰ Rule XXIV, § 7. This rule was first adopted in 1909.

⁷¹ Riddick, *The First Session of the Seventy-Eighth Congress*, 38 Am. Pol. Sci. Rev. 301 (April, 1944); *The Second Session of the Seventy-Eighth Congress*, 39 Am. Pol. Sci. Rev. 317 (April, 1945); see also any issue of the House Calendar, 79th Cong., published weekly.

⁷² During the first session of the 76th, 77th, and 78th Congresses 2,005 public bills were reported out of committee, but only 1,746 were acted upon by the House, according to the final House Calendar of Dec. 21, 1943.

⁷³ 91 Cong. Rec. 9135 (Sept. 25, 1945).

to 31,⁷⁴ thus ending the calendar and legislative day.⁷⁵ The friends of FEPC thus learned a lesson: Calendar Wednesday could not be utilized unless a firm, stable, and continuous majority was at hand to defeat all dilatory motions. Three unsuccessful efforts were later made to take advantage of Calendar Wednesday.^{75a}

THE 1945 APPROPRIATION

While these events were taking place, the FEPC began its uphill fight for a Congressional appropriation for the next fiscal year, beginning July 1, 1945. On March 21, 1945, President Roosevelt submitted a budget request for the agency in the sum of \$599,000—a slight increase over its last appropriation.⁷⁶ The FEPC estimate was one item in a request of \$1,120,453,330 for a group of nineteen war agencies. The FEPC item was referred to a subcommittee of the House Appropriations Committee, which on May 22, 1945, voted to cut the FEPC budget to \$250,000.⁷⁷ On June 1, 1945, the full Appropriations Committee, however, reported out the war agencies appropriations bill, omitting entirely any request for the FEPC.⁷⁸ The Appropriations Committee reported that it had omitted any recommendations for the Office of Price Administration and the FEPC, because legislation on these two subjects was currently pending in the House, and “the only logical course is to await legislation developments.” The report of the committee was far from candid. The committee refused a recommendation for FEPC, not because it expected that the agency would soon receive statutory authority, but because it feared that to include FEPC in

⁷⁴ 91 Cong. Rec. 9188 (1945). A motion to adjourn does not require a quorum, U.S. Const. art. I, § 5.

⁷⁵ See p. 435, *infra*.

^{75a} On Wednesday, May 15, 1946, a motion to adjourn was adopted by a vote of 99 to 81 shortly after the House convened, thus preventing the call of committees under the rule. On Wednesday, May 26, 1946, the same tactic was repeated, the House adjourning at 3:10 P.M. by a vote of 83 to 81, following six dilatory roll calls. On Wednesday, June 5, 1946, the motion to adjourn was defeated three times by roll call votes of 199 to 103, 188 to 102, and 182 to 107, but finally was adopted at 4:41 P.M. by a vote of 145 to 43. These are the first record votes in the House on the FEPC issue. The Southern Democrats voted in a bloc for adjournment, joined only by a scattering of Republicans. During this session, five dilatory roll calls were ordered, over the objection of FEPC supporters. Two committees were called, however, during the session, and passed over, leaving 15 committees still to be called before the House Committee on Labor may call up the FEPC bill.

⁷⁶ H.R. Doc. 120, 79th Cong. 1st Sess. (1945).

⁷⁷ This action is not a matter of public record.

⁷⁸ H.R. 3368, Rep. 653, 79th Cong. 1st Sess. (1945). The vote in committee was 22 to 11, see 91 Cong. Rec. 6770 (1945).

the appropriations bill would jeopardize the appropriations for the other war agencies.

As we have seen, FEPC had narrowly avoided collision with the rule forbidding appropriations for "any expenditure not previously authorized by law." The device of waiving points of order by unanimous consent, which had been utilized in 1944, could not be tried again because of Southern opposition. John E. Rankin (Dem.-Miss.) had as early as March 13, 1945, warned the House that the FEPC appropriation was subject to a point of order.⁷⁹ In fact the point of order had already been successfully invoked on March 2, 1945, to strike a proposed appropriation for a refugee shelter operated by the War Relocation Authority, the presiding officer ruling that "an Executive Order does not meet the requirement" of an authorization of law within the meaning of the House rule.⁸⁰ If, however, the FEPC was not authorized by law, neither was the Petroleum Administration for War, the Office of Inter-American Affairs, the Office of Defense Transportation, the Office of Scientific Research and Development, the War Relocation Authority, and the Office of War Information, each of which was created by executive order without any specific statutory authorization.⁸¹ The Appropriations Committee had the choice of sacrificing the FEPC and then obtaining a rule from the Rules Committee barring points of orders against the other executive order agencies, or of insisting that all of such agencies including the FEPC be treated alike on this parliamentary question. Although the latter choice would certainly have snarled up necessary appropriations, it would have been a consistent and honest position and would have safeguarded the FEPC. The committee chose the easier course and struck out the FEPC item.⁸² Mrs. Norton later charged that there was "an unholy alliance between the Appropriations

⁷⁹ 91 Cong. Rec. 1252, appendix (temporary edition).

⁸⁰ This is apparently the first time the rule was employed to defeat an appropriation for a war agency. Although the issue is academic now, a strong case based on House precedents can be made out to show that an executive order is an authorization of law. Previous rulings on this point do not limit the term "law" in the rule to statute. Thus, it has been held that a constitutional provision (7 Cannon's Precedents, op. cit. supra, note 2, at § 1248), a ratified treaty (Ibid., at § 1352), a judgment of the Court of Claims (Ibid., at § 1291), an obligation under an executed contract (Ibid., vol. 4, at § 3645), and even the resolution of a prior House, which is not binding in any way upon a later House (Ibid., vol. 4, at § 3660) are deemed "law." An executive order properly issued by the President pursuant to his constitutional powers should likewise be regarded as "law." Rep. Sparkman cited no precedents to support his ruling.

⁸¹ Some of the other executive order agencies in the bill could trace their authority to an authorization in a war powers statute.

⁸² On June 26, 1945, Frank B. Keefe (Rep.-Wis.), a member of the Appropriations Committee, stated on the floor of the House that the committee had decided to cut out the FEPC item to ensure a protective rule from the Rules Committee, 91 Cong. Rec. 6770 (1945).

Committee and the Rules Committee."⁸³ Perhaps it is more accurate to state that the friends of FEPC on both committees were an exceedingly timid lot.

On June 7, 1945, the House began to consider the war agencies appropriation bill without any protective rule. Rep. Marcantonio threatened to raise a point of order against the other war agencies in the bill, unless funds were provided for the FEPC. Rep. Cannon hurriedly appeared before the Rules Committee that same day and urged a rule barring points of order, but only "against the bill or any provision contained therein." Rep. Marcantonio likewise appeared, but urged a rule which would protect amendments as well, and thus would have permitted the addition of an FEPC item. The committee granted the narrower rule requested by Rep. Cannon,⁸⁴ thus demonstrating its hostility to the FEPC.⁸⁵ On June 8, 1945, after the rule of the Rules Committee was approved, the House began to debate the war agencies appropriations bill. Rep. Marcantonio made a futile attempt to amend the bill by adding an item for FEPC, but Rep. Rankin's point of order was sustained.⁸⁶ The bill passed the House, was sent to the Senate, and was then referred to the Senate Appropriations Committee.

The FEPC faced further parliamentary difficulties in the Senate. Although, as will be pointed out later, the Senate rules are relatively liberal and simple, Rule XVI, relating to amendments to appropriation bills, is as restrictive as any House regulation. Section 2 of this rule forbids the Senate Committee on Appropriations from reporting an appropriation bill "containing amendments proposing new or general legislation."⁸⁷ A severe sanction is imposed for a violation of this rule: not merely the elimination of the offensive language but the recommitting of the *entire* bill. Similarly, Section 4 of the rule provides that an amendment "which proposes general

⁸³ *Ibid.*, at 6771.

⁸⁴ H. Res. 289, 79th Cong. 1st Sess. (1945). The rule was designed to allow points of order against any effort by amendment to include the FEPC item. It seems clear that the Rules Committee would not have granted a rule barring points of order, had the bill contained the FEPC item; see speech of Rep. Cannon on June 7, 1945, 91 Cong. Rec. 5733-35 (1945). The Rules Committee here acted in behalf of a committee privileged to report without its intervention. Without such help, the Appropriations Committee would have required a suspension of the point of order rule by a two-thirds vote. The Rules Committee required only a majority vote for its recommendations.

⁸⁵ The Rules Committee also rejected a last-moment request of Pres. Truman made on June 5, 1945, (after the House Appropriations Committee had refused to recommend funds for FEPC), urging a special rule for FEPC and pointing out that its appropriation was endangered. The text of the President's letter appears in 91 Cong. Rec. 5796 (1945).

⁸⁶ *Ibid.*, at 5831.

⁸⁷ The Senate is not bound by this rule, however, if the House passes an appropriation containing "legislation," S. Jour. 502 (1916).

legislation" may not be offered from the Senate floor.⁸⁸ The Senate Appropriations Committee was consequently called upon to decide whether an appropriation for an agency created by executive order was "new or general legislation." By "legislation" is meant, of course, a command of the state forbidding the commission of certain acts or directing the performance of others. The appropriation which the President had requested for FEPC did not in itself forbid discrimination or any other act; its aim was merely to provide funds by which the FEPC could carry out the functions vested in it. The "legislation" is contained in the executive order. That order would not have been repealed by the failure to appropriate funds for the FEPC, nor would it have been given statutory authority by such fiscal grant. Theoretically, the FEPC could function without any funds, using volunteer help exclusively. Indeed, one provision of the executive order, directing the federal procurement agencies to include nondiscrimination clauses in all federal contracts, imposed an obligation whether or not there was an FEPC and whether or not funds were provided for it.

The Senate precedents cited in Gilfry are contradictory. In 1909, one presiding officer, after observing that there "was no well defined line of decision" on the point, stated:

The impression created upon the mind of the present occupant of the chair, after a somewhat careful and thorough examination of the subject, is that the Senate has been largely controlled in its interpretation of the rule for more than a third of a century by a consideration of the public interest involved at the time being, rather than by any regard for its technical meaning or strict application.⁸⁹

The Senate Appropriations Committee was not even willing to include the FEPC item and wait for a ruling from the presiding officer. (If the entire bill had been recommitted, it would have been a simple matter to report out a new bill the next day which omitted the FEPC item.) It adopted a face-saving compromise. By a vote of 14 to 4, it reported out the appropriation bill on June 20, 1945, without the FEPC item, but authorized Sen. Chavez on its behalf to move to suspend the rules to allow an amendment appropriating \$446,200 for the FEPC.⁹⁰ The FEPC was flung from the frying pan into the fire, for a suspension of the rules requires a two-thirds vote.⁹¹ Since 20 of the 22 Southern senators⁹² were implacable

⁸⁸ Section 4 refers to amendments offered by individual senators.

⁸⁹ Gilfry, *op. cit. supra*, note 2, at 120.

⁹⁰ Calendar No. 373, Rep. 380 (on H.R. 3368), 79th Cong. 1st Sess. (1945). Sen. Chavez filed the required notice of motion the same day, 91 Cong. Rec. 6322-23 (1945).

⁹¹ Rule XL. It is characteristic of the Senate rules that Rule XL does not even state the size of the majority required. The two-thirds concurrence is a matter of unwritten law based on Senate precedents.

⁹² Sen. Pepper of Florida voted for the agency; the late Carter Glass (Dem.-Va.) had been absent from the Senate for several years because of illness.

foes of the FEPC and at least half a dozen Republicans were likewise opposed to further continuance of the agency, the affirmative support of at least twice as many supporters (52 senators) was required to approve the suspension motion.

The Senate began its consideration of the appropriation bill on June 26, 1945, five days before the beginning of the new fiscal year. But Theodore G. Bilbo (Dem.-Miss.) was unwilling to hazard the suspension motion. On June 27, he obtained possession of the floor with the announced intention of occupying it indefinitely, in order to prevent Sen. Chavez from moving to suspend the rules. During the course of his remarks, Sen. Bilbo yielded the floor temporarily to Kenneth McKellar (Dem.-Tenn.), who proposed a compromise. Sen. McKellar suggested that in lieu of the \$446,200 for one year which Sen. Chavez had proposed in his notice of motion, the sum of \$250,000 be provided for the FEPC, but only for six months of operation.⁹³ Sen. McKellar appealed to Senators Chavez and Bilbo to accept the compromise and so make possible the passage of the appropriations bill carrying one billion dollars for sixteen different war agencies. Both refused, Chavez because the McKellar amendment would not allow the FEPC any funds after December 31, 1945; Bilbo, because the proviso did not specifically state that the FEPC would be terminated at the end of the six-months period.⁹⁴ The day ended with Bilbo in firm possession of the floor.

The next day, Thursday, June 28, Sen. Bilbo resumed where he had left off and then yielded the floor. Alben W. Barkley (Dem.-Ky.), the majority leader, subsequently was recognized and suggested a different form of compromise: an appropriation of \$250,000 for a twelve-month period.⁹⁵ Sen. Chavez announced his acceptance, but Sen. Bilbo stated that he could not do so without conferring with his associates. Sen. Taft, in the interim, had been collecting signatures on a petition for cloture (Rule XXII), which, if approved, would have shut off all debate on the appropriations measure.⁹⁶ Under Rule XXII the "debate upon any pending measure" may be limited in the following manner:

⁹³ 91 Cong. Rec. 6820-21 (1945).

⁹⁴ *Ibid.*, at 6822-23.

⁹⁵ *Ibid.*, at 6922.

⁹⁶ In the House of Commons, closure may be invoked at any time and without notice or other formalities, but the speaker (who renounces political affiliations upon his election) may in his discretion "refuse the closure if in his opinion the motion is an abuse of the rules of the House or an infringement of the rights of the minority." Campion, *Introduction to the Procedure of the House of Commons* 159 (1929).

1. A petition to that effect must be signed by sixteen senators.
2. The petition must be "presented to the Senate."
3. The petition is voted on *two days* later at 1:00 P.M.
4. Two-thirds of the senators present must vote for cloture.
5. Thereafter each senator is entitled to speak for one hour on the pending measure, all dilatory motions or amendments being out of order and all points or order and appeals therefrom being decided without debate.

Since the fiscal year ended on Saturday, June 30, it was essential for Sen. Taft to present his signed petition that day, June 28. Sen. Barkley, however, refused to yield the floor to Sen. Taft, so that the latter might present his cloture motion. Instead, Sen. Barkley moved for a recess to give Sen. Bilbo and his associates a chance to consider the compromise he had offered. Sen. Taft, opposing the motion to recess, obtained a roll-call vote, which disclosed 28 senators opposed to recess and 19 in favor.⁹⁷ This vote was not decisive, since only 47 senators had voted, less than a quorum.⁹⁸ The sergeant-at-arms was then directed to request the presence of missing senators.⁹⁹ After a slight delay two senators entered the chamber, whereupon Sen. Barkley withdrew his request for a recess and yielded the floor.

It was now late in the evening and Sen. Taft needed to file his cloture petition by twelve o'clock that night in order to obtain a vote on cloture by Saturday. But a quorum call again disclosed the lack of a quorum, only 42 senators answering to their names. Again the sergeant-at-arms was directed to round up missing senators. But an hour and a half elapsed¹⁰⁰ before he could procure the forty-eighth senator,¹⁰¹ who did not appear until 12:12 A.M. on Friday, June 29. The Democratic leadership had defeated the Republican plan for a cloture vote before the end of the fiscal year.¹⁰² Sen. Taft then filed his petition for a vote on cloture which was signed by 10 Democrats, 21 Republicans, and 1 Progressive,¹⁰³ Sen.

⁹⁷ 91 Cong. Rec. 6925 (1945).

⁹⁸ A quorum is a majority of the Senate. U.S. Const. art. 1, § 5.

⁹⁹ A power specifically authorized by the Constitution, art. 1, § 5.

¹⁰⁰ See the charge of Wayne Morse (Rep.-Ore.) on July 12, 1945, 91 Cong. Rec. 7581.

¹⁰¹ At that time, because of a vacancy, the Senate consisted of only 95 senators.

¹⁰² It was charged on the floor of the Senate that the Sergeant-at-arms, an elected officer of the Senate (and therefore chosen by the Democratic majority) had deliberately "stalled" in his corraling activities, 91 Cong. Rec., 6927 (1945).

¹⁰³ 91 Cong. Rec. 6927 (1945).

Chavez filed his FEPC amendment to the appropriation bill,¹⁰⁴ and at 12:33 A.M. the weary Senate recessed.

Friday, June 29, was a short session, devoted almost entirely to an intemperate address by James O. Eastland (Dem.-Miss.). On Saturday, June 30, Sen. Chavez formally offered his amendment to the appropriation bill to provide \$446,200 for the FEPC. The presiding officer Clyde R. Hoey, (Dem.-N.C.) promptly ruled it out of order and Sen. Chavez took an appeal from his ruling to the Senate. Sen. Barkley argued that the ruling of the presiding officer should be sustained. He conceded that the FEPC amendment was not "new or general legislation"¹⁰⁵ within the meaning of Rule XVI, section 2, but insisted that it was nevertheless barred by the italicized clause of the following rule:

1. All general appropriation bills shall be referred to the Committee on Appropriations, and no amendments shall be received to any general appropriation bill the effect of which will be to increase an appropriation already contained in the bill, or to add a new item of appropriation, *unless it be made to carry out the provisions of some existing law*, or treaty stipulation, or act, or resolution previously passed by the Senate during that session; or unless the same be moved by direction of a standing or select committee of the Senate, or proposed in pursuance of an estimate submitted in accordance with law.

Sen. Barkley contended that the proviso "unless it be made to carry out the provisions of some existing law" excluded the FEPC item. His view was challenged by Joseph C. O'Mahoney (Dem.-Wyo.), who argued that since the President admittedly had the power to issue an executive order, his act was in accordance with "law." Any other interpretation, the senator from Wyoming pointed out, "constituted a threat to every single executive order which has been issued by the President in this emergency."¹⁰⁶

Both sides, however, appear to have overlooked the last proviso in section 1, reading:

; or unless the same be moved by direction of a standing or select committee of the Senate, or proposed in pursuance of an estimate submitted in accordance with the law.

¹⁰⁴ Difficult parliamentary questions about the Chavez amendment were raised during the debate. Under the rule, once cloture was adopted, no amendment would thereafter be in order. In addition, as we have seen, before Sen. Chavez could get a vote on his amendment, he still needed a two-thirds majority on his motion to suspend the rules. Hence, a two-thirds concurrence was needed twice, once on the motion to limit debate and again on the motion to suspend Rule XVI.

¹⁰⁵ 91 Cong. Rec. 7054 (1945).

¹⁰⁶ No precedent was cited by those who argued against Sen. Chavez's amendment, but such precedents rarely are cited in Senate debate. After James Mead (Dem.-N.Y.), who was well briefed, cited Gilfry in support of the FEPC amendment, Sen. Russell intimated that he had never heard of Gilfry.

This proviso, it must be emphasized, is preceded by a semi-colon and modifies all the other restrictive conditions. In other words, the rule forbids amendment to appropriation bills which increase items or add new items unless (1) the amendments carry out some provision of existing law; or (2) the amendments are moved by direction of a standing committee; or (3) the amendments are "proposed in pursuance of an estimate submitted in accordance with law." If any and all amendments are barred which do not carry out the provisions of existing law, then what is the purpose of the clause allowing amendments to be moved by direction of a committee? That clause must have been intended as an *alternative* to the requirement that the amendment carry out the provisions of existing law. The FEPC amendment was protected by the third alternative, since it was prepared by the Bureau of the Budget and "submitted in accordance with law" by the President.¹⁰⁷

Sen. Chavez, however, withdrew his appeal and moved to suspend the rules in order to circumvent the point of order.¹⁰⁸ Sen. Barkley, who in all these parliamentary matters strove desperately to hold together the Northern and Southern wings of his party, then proposed a compromise appropriation of \$250,000 for FEPC and offered an amendment to that effect.¹⁰⁹ No point of order was made, and on June 30, 1945, Sen. Barkley's compromise was accepted by a vote of 42 to 26.¹¹⁰ The appropriation bill was then quickly adopted and conferees were appointed to meet with the House to iron out the differences in the Senate and House versions of the war agencies appropriation bill.¹¹¹

While these events were taking place in the Senate, the House Appropriations Committee made an attempt to wind up FEPC's affairs in an orderly manner, for FEPC found itself faced with the prospect not only of having no funds with which to operate during the coming year, but even without funds with which to liquidate.¹¹² The House Appropriations

¹⁰⁷ H.R. Doc. 120, 79th Cong. 1st Sess. (1945); 42 Stat. 20 (1921), 31 U.S.C.A. § 111 (1927).

¹⁰⁸ Sen. Chavez would not have lost any parliamentary right or advantage by insisting on his appeal, and, that failing, by pressing his motion to suspend. Sen. Chavez, however, in all of these maneuvers, rarely took a position which differed from that of the leader of his party in the Senate.

¹⁰⁹ Sen. Barkley agreed to withdraw his amendment, if a point of order was made against it. As we have seen, almost any Senate rule can be waived by the simple expedient of not raising a point of order.

¹¹⁰ 91 Cong. Rec. 7065 (1945).

¹¹¹ The names of the conferees appears at 91 Cong. Rec. 7068 (1945).

¹¹² The accumulated annual leave of its employees, i.e., the vacation pay allowed them by law, amounted to about \$45,000, 91 Cong. Rec. 6777 (1945).

Committee on June 25, 1945, therefore voted out a "joint resolution" appropriating \$125,000 to FEPC for purposes of liquidation.¹¹³ Although, as has been noted, the House Appropriations Committee has the privilege of having the general appropriations bills it reports out considered immediately by the House,¹¹⁴ the liquidation resolution for FEPC was not a general appropriation bill. Thus the Appropriations Committee needed a rule from the Rules Committee to bring the joint resolution on the floor for consideration. On June 28, 1945, the Rules Committee, however, refused to grant the rule requested. Although that committee could have voted out a stringent and restrictive rule allowing a vote only on the joint resolution and forbidding any amendments on the House floor, its rules or special orders or procedure are merely recommendations to the entire House. The House by a majority vote could have amended such a rule by incorporating a full \$500,000 appropriation for FEPC without any provision for liquidation.¹¹⁵ Hence the Rules Committee declined to act, and no simple parliamentary device was available to compel it to act.¹¹⁶

The adoption by the Senate of the war agencies appropriation bill did not mean the end of the legislative fight. Ordinarily when the Senate amends a House bill, conferees from both Houses are at once appointed to compose the differences in the two versions.¹¹⁷ Under the House rules, however, any Senate amendment to a House bill must be referred to the House Committee having jurisdiction.¹¹⁸ This rule is almost always waived

¹¹³ H. J. Res. 219, Rep. 786, Union Calendar No. 234, 79th Cong. 1st Sess. (1945). The resolution contained a proviso that if the agency "were continued by an act of Congress" the money could be used for operational purposes until additional funds were provided. For references to the debate in the Committee, see 91 Cong. Rec. 6768-69 (1945).

¹¹⁴ See Deschler, *op. cit. supra*, note 2, at § 732; Rule XI, Clause 45.

¹¹⁵ The procedure for amendment of a rule from the Rules Committee is by no means simple. A motion to amend can be offered only if the floor is obtained for that purpose. Since the motion for the previous question is usually adopted quickly, thus cutting off opportunities for amendment, the only practical alternative is to vote down the previous question, Cannon, *op. cit. supra*, note 2, at 388. Following the defeat of the motion for the previous question, the Speaker will recognize the leader of those opposed to the rule, who can then offer an amendment to the proposed rule. See 92 Cong. Rec. 609 (Jan. 30, 1946).

¹¹⁶ A discharge petition can discharge a rule from the Rules Committee, but the petition needs 218 signatures and can be called up for vote only on the second or fourth Monday of a month. In addition, the rule for which discharge is sought must have been pending before the Rules Committee for seven days, Rule XXVII, § 4.

¹¹⁷ Under the House Rules, where one chamber has designated a figure in a bill and the other has not, the conferees are restricted to a point between zero and the designated figure, Cannon, *op. cit. supra*, note 2, at 128. The conferees could therefore not increase the appropriation above the \$250,000 voted by the Senate. The same restriction does not apply to the House itself, 8 Cannon's Precedents, *op. cit. supra*, note 2, at § 3189; *ibid.*, vol. 5, at § 6187.

¹¹⁸ Cannon, *op. cit. supra*, note 2, at 112.

by unanimous consent and the bill sent to the conference. When the war agencies appropriation bill, however, was returned from the Senate to the House on June 30, this unanimous consent was refused.¹¹⁹ Thus the fiscal year ended and sixteen war agencies, including the FEPC, faced the first payday of the new fiscal year without funds.¹²⁰

The next move was by Chairman Sabath of the Rules Committee. He called a meeting to consider a special rule for the appropriation bill, but was defeated on July 2, by a tie vote of 5 to 5. That same day the Speaker referred the bill to the House Appropriations Committee.¹²¹ The next day the Appropriations Committee by a vote of 21 to 11¹²² refused to report out the bill. Had the bill containing the Senate FEPC amendment been reported out by the House Appropriations Committee, the point of order would no longer have been valid, since the House rule forbidding unauthorized expenditures is not applicable to Senate amendments.¹²³ The House Appropriations Committee, instead, met that same day and voted out an entirely new appropriation bill which still contained no item for the FEPC¹²⁴ and in almost all other respects was identical with the appropriation bill it had reported previously on June 1, 1945. The House found itself at the same point from which it had started. The Appropriations Committee again requested a rule from the Rules Committee to protect the executive order agencies in the bill from points of order, but this time the rule was denied.¹²⁵

The new war agencies appropriation bill came before the House on July 5. Rep. Marcantonio, Emanuel Celler (Dem.-N.Y.), and Mrs. Norton immediately made points of order against the appropriations for the National War Labor Board, the Office of Defense Transportation, the Office of Economic Stabilization, the Office of Inter-American Affairs, the Office of War Information, the War Production Board, the War

¹¹⁹ 91 Cong. Rec. 7101 (1945). Four Southern Democrats objected.

¹²⁰ A special provision (Sec. 404) was, however, hurriedly inserted in the proposed Second Deficiency Appropriation Act authorizing obligations in anticipation of the enactment of regular appropriation acts, H.R. 3579, 79th Cong. 1st Sess. (1945).

¹²¹ 91 Cong. Rec. 7249 (July 2, 1945).

¹²² See 91 Cong. Rec. 7344-45 (July 5, 1945) as to the vote.

¹²³ While Rule XX, § 2 prohibits House conferees from agreeing to a Senate amendment authorizing any expenditure not authorized by law, the section expressly allows the House itself to authorize such approval by the conferees. See also 8 Cannon's Precedents, op. cit. supra, note 2, at § 3188.

¹²⁴ Union Calendar No. 251, Rep. 851, H.R. 3649, 79th Cong. 1st Sess. (1945).

¹²⁵ Presumably because the Rules Committee feared that any rule it proposed might be amended on the House floor. Congressional friends of the FEPC were organizing for that very purpose. See 91 Cong. Rec., appendix, p. 3522, 3523 (July 5, 1945).

Shipping Administration, the Office of Strategic Services, and the Petroleum Administration for War. All of their points were sustained¹²⁶ and the items objected to, stricken. The bill was thereupon adopted by the House and sent to the Senate. The Senate, however, was in no mood for further House jockeying. The Senate Appropriations Committee, to whom the new war agencies appropriation bill passed by the House was referred, refused to consider it. The Senate, following its session on Monday, July 9, recessed to July 12 to give the House time in which to work out a solution. On the morning of Wednesday, July 11, the House Appropriations Committee met and voted to report out the first war agencies appropriation bill (H.R. 3368) as amended by the Senate, but, in place of the Senate language for the FEPC item, substituted the following:

Salaries and expenses: For completely terminating the functions and duties of the Committee on Fair Employment Practices, including such of the objects and limitations specified in the appropriation for such agency for the fiscal year 1945 as may be incidental to its liquidation: \$250,000.

When the House met that afternoon, Rep. Marcantonio, who acted as the Congressional watchdog for FEPC, warned that the proposed appropriation could be used only for purposes of liquidation and threatened a floor fight against it.¹²⁷ The Appropriations Committee was hurriedly called into session and then added the following proviso to the language above quoted:¹²⁸

Provided that if and until the Committee on Fair Employment Practice is continued by an Act of Congress the amount named herein may be used for its continued operation until an additional appropriation shall have been provided.

On July 12, the House considered the House Appropriation Committee's substitute for the Senate FEPC item. An amendment by Rep. Colmer (Dem.-Miss.) to strike the words "and until" in the proviso above quoted (which would have robbed it of its purpose) was defeated by a vote of 116 for and 180 against.¹²⁹ But a second proviso offered by Rep. Case (Rep.-S.D.) reading: "Provided further that in no case shall the fund be available for expenditure beyond June 30, 1946," was approved by a vote of 142 to 116.¹³⁰ The bill was thereupon adopted. Events thereafter were routine. The Senate conferees accepted the House version of the FEPC item, and both Houses accepted the conference report.¹³¹ The bill

¹²⁶ *Ibid.*, at 7338.

¹²⁷ 91 Cong. Rec. 7525 (July 11, 1945).

¹²⁸ 91 Cong. Rec. 7594 (July 12, 1945).

¹³¹ There was no record vote in the Senate or the House.

¹²⁹ *Ibid.*, at 7607.

¹³⁰ *Ibid.*, at 7608.

was sent to the President for signature on July 14, and became law on July 15, 1945.

Within a month world events completed what Congress had begun. The surrender of Japan and the rapid reconversion of "war industries" to peacetime pursuits put an end to most of the jurisdiction of the FEPC. The halving of the appropriation, far from being a compromise,¹³² deprived the agency of the possibility of fulfilling even its circumscribed tasks. In August, 1945, the staff of FEPC was reduced from 117 to 51 and five of its 15 field offices closed. On December 15, 1945, its staff was still further reduced to a corporal's guard and all but three of its field offices closed.^{132a}

THE 1946 FILIBUSTER

On January 6, 1945, Sen. Chavez had introduced a revised version of his 1944 bill to create a statutory FEPC, sponsored jointly by seven senators.¹³³ Following a second set of hearings held from March 12 to 14, 1945, the Senate Committee on Education and Labor, on May 24, 1945, reported out Sen. Chavez's FEPC bill favorably by a vote of 12 to 6.¹³⁴ No attempt was made during the rest of the year to bring the bill to the Senate floor. On December 21, 1945, however, just before the Christmas recess, Joseph Ball (Rep.-Minn.) told the Senate that he, H. Alexander Smith (Rep.-N.J.), and Wayne Morse (Rep.-Ore.) intended to force consideration of S. 101 "early in 1946." Sen. Chavez at once announced that

¹³² Sen. Morse accused the supporters of the FEPC of accepting a compromise which the agency's officials predicted would mean its end, 91 Cong. Rec. 7577 (July 12, 1945).

^{132a} Although the Senate on April 26, 1946, added a special deficiency appropriation for FEPC of \$27,600 to the Second Deficiency Appropriation Bill, H.R. 5890, 79th Cong. 2d Sess., this item was eliminated by the Senate-House conferees. FEPC's failure to obtain this sum to pay for the terminal leave of its remaining employees necessitated the abrupt termination of its existence on May 30, 1946.

¹³³ S. 101, 79th Cong. 2d Sess. (1946). The sponsors comprised the six senators who had introduced the 1944 bill (S. 2048, 78th Cong. 2d Sess., 1944) plus George D. Aiken (Rep.-Vt.).

¹³⁴ Calendar No. 286, Rep. 290, 79th Cong. 1st Sess. (1945); see the Washington Post (May 25, 1945). Sen. Taft was the only non-Southerner to vote with the minority, which included Senators Hill, Pepper, and Fulbright. The bill prohibited discrimination in employment or trade union membership by reason of race, color, creed, national origin, or ancestry and created a five-man commission appointed by the President to investigate complaints, hold hearings, and issue cease and desist orders enforceable in the courts. The bill was applicable to employers of six or more persons, engaged in operations affecting interstate commerce; government contractors; labor unions; and employment practices of all Federal agencies. The bill also required all Federal contracts to contain non-discrimination clauses and provided for a black-list of contractors violating the Act. Finally, the bill declared that the right to work without discrimination was an "immunity" of the citizens of the United States not to be abridged by any Federal or state instrumentality.

he would move to take up this bill "directly after Congress reconvenes."¹³⁵ The 79th Congress began its second session on Monday, January 14, 1946, and almost immediately (following a series of parliamentary maneuvers on both sides) became entangled in a protracted filibuster on the FEPC bill. This latest and most dramatic move in the parliamentary battle deserves close analysis.

The Senate rules are a model of liberality and simplicity, compared to those of the House. Precedents count for little in deciding questions of procedure and are rarely cited. Senatorial courtesy counts far more than any rule. The official manual containing the Senate rules is not even annotated, nor is there any recent collection of precedents.¹³⁶ There is a Rules Committee in the Senate, but unlike its House counterpart, it plays no part in arranging the order of business or the manner of debate. There is a calendar¹³⁷ upon which are entered bills reported favorably by a committee,¹³⁸ but any bill may be called from the calendar for consideration by the Senate regardless of its position thereon by a simple motion requiring a majority vote.¹³⁹ Once consideration of a bill has been voted, it can be disposed of only by a motion to consider another bill. The displacing motion likewise requires only a majority vote.¹⁴⁰ A bill may be discharged from committee by a simple majority vote requiring only one day's notice.¹⁴¹ The rules allow the president pro tempore or presiding officer to name a senator to perform the duties of the chair in his absence,¹⁴² and this designee may in turn delegate his duties to a successor. It is a common practice for the chair to be occupied successively by several senators during the day. The president pro tempore can however regain the chair any time he wishes.

On January 17, 1946, after the routine morning business was dispensed with, Sen. Chavez obtained recognition from the then presiding officer, Francis J. Myers (Dem.-Penn.), and at once moved that the Senate proceed to the consideration of S.101, the FEPC bill. Sen. Chavez took advantage of a little-used rule, which provides that motions for consideration made before 2:00 P.M. are not debatable,¹⁴³ and thus prevented a filibuster on the motion for consideration. Upon a roll-call vote his motion was car-

¹³⁵ 91 Cong. Rec. 12,680 (Dec. 21, 1945).

¹³⁸ Rule XIV.

¹³⁶ See note 2, *supra*.

¹³⁹ Rule IX.

¹³⁷ Rule VIII.

¹⁴⁰ Rule IX.

¹⁴¹ Rule XXVI; see Gilfry, *op. cit. supra*, note 2, at 270; S. Jour. 238 (1922).

¹⁴² Rule I, § 3.

¹⁴³ Rule VII. Robert M. LaFollette (Progressive-Wis.), enforced this rule by a point of order immediately after Sen. Chavez's motion, 92 Cong. Rec. 85 (Jan. 17, 1946).

ried 49 to 17,¹⁴⁴ and he then began to discuss his bill. At 3:42 P.M., however, Sen. McKellar moved the adjournment of the Senate until the next day, which motion was adopted by a voice vote.¹⁴⁵

Failure to oppose this motion was the first fatal blunder of the friends of FEPC, a blunder which paved the way for the successful filibuster. Under the rules, the Senate may adjourn or *recess* each day. If it recesses, the prior legislative day continues, so that the *first* business on the next calendar day is the resumption of the unfinished business of the day before. If the Senate *adjourns*, however, the next day is a new legislative day and must begin with the reading and correction of the Journal and the transaction of other routine business. It would have been a simple matter for Sen. Chavez and his associates who had a majority on their side to have fought off all motions to adjourn and insisted upon a recess.¹⁴⁶ The motion to recess also would have enabled the utilization of another rule which hampers a filibuster. Rule XIX provides that no senator shall speak more than twice upon any one question in debate on the same day.¹⁴⁷ The question before the Senate on January 17 was the FEPC bill. If thereafter the Senate had continued to recess from day to day, the FEPC bill would have continued to be the "question in debate" and in time each of the twenty Southern filibusterers¹⁴⁸ would have spoken twice. Debate might therefore have been shut off without cloture.

Although the Southern senators were admittedly surprised on January 17,¹⁴⁹ they were fully prepared when the Senate reconvened on the 18th. Following the prayer of the Chaplain, Sen. Barkley, the majority leader, made the routine request (which, however, requires unanimous consent) that the Journal¹⁵⁰ of the prior day's proceeding be approved without read-

¹⁴⁴ 92 Cong. Rec. 85. Two Republicans sided with 15 Southern Democrats on the negative.

¹⁴⁵ PM of Feb. 6, 1946, reports an interview with Charles L. Watkins, the official Senate parliamentarian, in which the latter states that he "thought fast" and told Sen. McKellar to "adjourn the Senate" so that FEPC would no longer be the pending business on the next legislative day.

¹⁴⁶ Motions to adjourn or recess are decided without debate, Rule XXII.

¹⁴⁷ Except by leave of the Senate, which requires a majority vote and is not debatable. The "day" in the rule apparently means "legislative" day, S. Jour. 365 (1935).

¹⁴⁸ There are 11 Southern States: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia, but the late Carter Glass (Dem.-Va.) had been absent from the Senate for several years and Sen. Pepper of Florida was opposed to the filibuster.

¹⁴⁹ Sen. Russell stated that "the motion caught us flat-footed," 92 Cong. Rec. 168 (Jan. 21, 1946).

¹⁵⁰ The Journal is the condensed "official" report of the Senate proceedings, as distinguished from the Congressional Record, which is a verbatim transcript. In the early years of the Senate, there was no verbatim transcript nor any publication similar to the Congressional Record.

ing. John H. Overton (Dem.-La.) objected and then moved to correct the Journal to include therein the prayer delivered by the Chaplain on the preceding day. The tactical value of this motion was that it was debatable at length¹⁵¹ and there is no easy way to bring the debate on this subject to a conclusion. The Senate of the United States, unlike almost every other parliamentary body,¹⁵² does not allow a motion for the previous question.¹⁵³ Sen. Overton after a few references to the omission of the prayer began to debate the FEPC bill. Nor was there any way to prevent him from speaking on any subject under the sun while he had the floor, for the Senate rules do not require a senator's remarks to be germane or even addressed to the question under consideration.¹⁵⁴ It soon became apparent that a full-dress filibuster¹⁵⁵ was in progress. Sen. Overton was followed by Josiah W. Bailey (Dem.-S.C.) and thereafter by almost every southern Democrat. The Southern bloc made it clear that it was determined at all costs to prevent a vote on S.101.

On January 23, Senator Taft moved that Sen. Overton's motion to include the prayer in the Journal be tabled. This motion, which is not debatable,¹⁵⁶ was adopted by a vote of 48 to 28, but little was accomplished thereby. Clyde R. Hoey (Dem.-N.C.) at once moved another trivial correction to the Journal of January 17. The Senate could dispose of any motion by tabling it, but could not prevent another motion addressed to the same Journal. Sen. Pepper attempted a desperate measure. He objected to Sen. Hoey's remarks on the FEPC bill because they were not germane and, when Sen. McKellar, in accordance with the precedents, promptly overruled the objection, Sen. Pepper announced that he appealed from

¹⁵¹ Rule III not only provides that the reading of the Journal may not be suspended unless by unanimous consent, but declares also that a motion to correct the Journal is deemed a privileged question until disposed of.

¹⁵² The House of Commons has allowed the motion for the previous question since 1888, Campion, *Introduction to the Procedure of the House of Commons* (1929). For authoritative descriptions of British parliamentary procedure see May, *Parliamentary Practice* (13th ed., 1924); Redlich, *Procedure of the House of Commons* (English translation, 1908); Jennings, *Parliament* (1945).

¹⁵³ A final vote can be fixed for a specified time only by unanimous consent, under Rule XII § 3.

¹⁵⁴ Thomas Jefferson's *Manual of Parliamentary Procedure*, which at one time governed Senate procedure, provides (Sec. XVII): "No one is to speak impertinently or beside the question, superfluously, or tediously." This rule has, however, long been obsolete.

¹⁵⁵ For a history of filibustering, see Burdette, *Filibustering in the Senate* (1940). On January 18, Sen. Overton admitted: "... I know, that if the bill were put to a vote at the present time by the Senate, it would be passed," 92 Cong. Rec. 123 (Jan. 18, 1946).

¹⁵⁶ Rule XXII.

the decision of the chair.¹⁵⁷ Such appeals are specifically recognized by Rule XX which provides:

A question of order may be raised at any stage of the proceedings, except when the Senate is dividing, and, unless submitted to the Senate, shall be decided by the Presiding Officer, without debate, subject to an appeal to the Senate.

This bold stroke menaced the entire filibuster. If the Senate overrode the ruling of the chair and compelled Sen. Hoey to speak on the subject matter, Sen. Pepper could likewise have appealed other rulings of the chair and a majority of the Senate would soon have controlled the procedure. Sen. McKellar avoided the danger by a crude if effective expedient. He announced: "The chair does not consider the question raised by the Senator from Florida a point of order. . . . A vote cannot be had upon the so-called appeal."¹⁵⁸

Sen. McKellar's decision was tantamount to a holding that a majority of the Senate could not correct its rules by the device of overriding his ruling on a point of order. While difficult questions might arise if the Senate attempted to revise certain explicit written rules by this method, it is difficult to see why it could not reverse precedents of the past, based solely upon the traditions of the Senate. There is nothing in the written rules which either allows or forbids a senator to depart from the question under discussion in debate. Sen. Pepper was immediately followed by Sen. Taft who made the point of order that Sen. Hoey's motion was "frivolous." Sen. McKellar could with propriety either have overruled this unprecedented motion or submitted it to the Senate for decision. He did neither, but held that Sen. Taft could not make the point of order because, "the Senator would have to obtain the floor before making a point of order." This second ruling was directly contrary to what Sen. McKellar had himself said not less than five minutes before in disposing of Sen. Pepper's point. Sen. Pepper had asked: "In other words, while one senator has the floor, it is not possible for any other senator to raise a point of order?" To which Sen. McKellar replied: "Oh yes, it is possible." Sen. McKellar was, of course, wrong in overruling Sen. Taft's objection. Apparently, the only point of order which cannot be made while another senator has the floor is the point of lack of quorum.¹⁵⁹ Rule XX provides: "A question of order may be raised at any stage of the proceedings except

¹⁵⁷ The decision of the chair may be reversed by a majority vote, Gilfry, *op. cit. supra*, note 2, at 67, 76, 87.

¹⁵⁸ 92 Cong. Rec. 247 (Jan. 23, 1946).

¹⁵⁹ See remarks of Sen. McKellar, 92 Cong. Rec. 822 (Feb. 4, 1946).

when the Senate is dividing." Rule XIX, which is even more directly in point, provides:

If any senator, in speaking or otherwise, transgress the rules of the Senate, the Presiding Officer shall, or any Senator may call him to order; and when a Senator shall be called to order, he shall sit down, and not proceed without leave of the Senate.

The Senate was not in a mood, however, to challenge Sen. McKellar. At this point, as in other stages of the filibuster, the friends of FEPC, with only a few exceptions, showed no capacity for fighting back at the Southern bloc. Sen. McKellar thereafter was careful whom he designated to act as presiding officer. From January 18 through January 30, 1946, he relinquished the chair only to Southerners.¹⁶⁰ On January 25 H. Alexander Smith (Rep.-N.J.) pointedly observed: "I realize that those who oppose this measure control the chair."¹⁶¹

There remained the possibility of invoking the cloture rule. On February 4, Sen. Barkley was recognized¹⁶² and filed a cloture petition signed by 48 senators.¹⁶³ Sen. Russell thereupon made the point of order that the business before the Senate was a motion to correct the Journal and not the FEPC bill, citing Rule III which provides:

The reading of the Journal shall not be suspended unless by unanimous consent; and when any motion shall be made to amend or correct the same, it shall be deemed a privileged question and proceeded with until disposed of.

Sen. Barkley countered by arguing that the only pending "measure" before the Senate was S.101, which was the unfinished business of the Senate, a contention concurred in by Sen. Taft.¹⁶⁴ Sen. McKellar sustained Sen.

¹⁶⁰ The chair was occupied during this period by Senators McKellar, O'Daniels, Hoey, Hill, McClellan, Johnston, Ellender, Maybank, Eastland, Russell, and Stewart. Thereafter, it was plain that there was no mood to resist their filibuster.

¹⁶¹ Sen. Mead, who vainly sought recognition while Sen. O'Daniel was presiding, accused the chair of recognizing Sen. Eastland, although the latter was in his seat while the New Yorker was on his feet, 92 Cong. Rec. 95 (Jan. 17, 1946). Rule XIX provides that the first Senator to address the presiding officer shall be recognized.

¹⁶² Sen. Stewart then occupied the floor, but Sen. McKellar, citing two Senate precedents of 1925 and 1927, held that the former's possession of the floor must be yielded to Sen. Barkley so that the latter might file the cloture petition.

¹⁶³ The list of signers appears in 92 Cong. Rec. 822 (Feb. 4, 1946). Of the 48 signers, 23 were non-Southern Democrats, 23 Republicans, 1 a Southern Democrat (Pepper), and 1 a Progressive.

¹⁶⁴ Sen. Barkley also argued that when 2 o'clock arrived, the morning hour "automatically" concluded and made in order the unfinished business. Rule IX does provide that "not later than 2 o'clock" the calendar "shall be taken up and proceeded with." The rule conflicts with Rule III making the correction of the Journal "a privileged question, and proceeded with until disposed of." Sen. Taft, during the debate on the applicability of the cloture petition, argued that at 2 o'clock, the correction of the Journal should go over until next day. But no one, from January 18 to February 4, objected to the consideration of the Journal after 2 o'clock.

Russell's point of order and held that the "business now pending before the Senate" was not S.101 but the correction of the Journal, and that the latter business was of the highest privilege and could not be suspended until disposed of. Sen. Barkley then took an appeal to the Senate to uphold "the right of the Senate to pass upon its own rules." The Southern bloc was prepared for the appeal. When Sen. McKellar announced correctly that the appeal was debatable, Sen. Stewart began to filibuster on the appeal. And so for four more days, the debate on S.101 technically took place in the course of an appeal from the ruling of the chair.¹⁶⁵ The Senate thus found itself in a difficult, but not impossible, situation. A resolute group could have filed a cloture petition to limit debate on the appeal,¹⁶⁶ but Sen. Chavez was by now ready to admit defeat.

On February 4, the knots that had snarled up the Senate for three weeks were untied. Sen. Barkley withdrew his appeal, Sen. Hoey withdrew his motion to correct the Journal of January 17, Sen. Barkley moved to approve that Journal (which was agreed to by unanimous consent), S.101 became the unfinished business of the chamber, Sen. Barkley filed his cloture petition, and Sen. McKellar, pursuant to the rule, fixed a definite hour two days later for the vote on the cloture petition. The reason for this sudden tactical withdrawal by the Southerners was obvious to all. They had counted noses and were mathematically certain that Sen. Chavez could not muster the necessary two-thirds vote to impose cloture.¹⁶⁷ In return for allowing a vote on cloture, Sen. Chavez had agreed to restore the FEPC bill to the calendar, if cloture were defeated. On Saturday, February 9, the vote on cloture was defeated by a vote of 48 to 36, 24 less than the requisite two-thirds. Of those favoring cloture, 22 were non-Southern Democrats, 25 were Republicans, and 1 was a Progressive. In addition, 2 Democrats and 4 Republicans were paired in favor of the bill¹⁶⁸ and 1 absent Democrat was announced as favoring cloture. Of the 36 negative voters, 19 were Southern Democrats, 9 non-Southern Democrats, and 8

¹⁶⁵ The debate on an appeal from a ruling on a point of order need not be germane. S. Jour. 16 (1937).

¹⁶⁶ Sen. McKellar had cited precedents to indicate that cloture was applicable not only to pending measure, i.e., legislative acts, but even to resolutions, parliamentary actions, or to "business" pending before the Senate, 92 Cong. Rec. 824 (Feb. 4, 1946).

¹⁶⁷ On January 21, 1946, Sen. Russell asserted: "... there will never be a vote on cloture unless we know beyond peradventure that the motion for cloture will be defeated," 92 Cong. Rec. 170 (Jan. 21, 1946).

¹⁶⁸ Pairing is simply a device whereby absent Senators or Representatives may record their position on questions. Such "votes" are not considered in determining the results of a decision since no proxy or absentee votes are allowed on the floor of either House.

were Republicans.¹⁶⁹ As part of the agreement, Sen. Chavez then moved to displace S.101 in favor of an appropriation measure. This motion was adopted 71 to 12. The FEPC bill was restored to the calendar where it will, in all likelihood, remain until the next session of Congress, in January, 1947.¹⁷⁰

Cloture was defeated because a small group of senators from non-industrial States refuse on any issue to vote for it. The absence of an effective means of limiting debate of course increases the influence and power of any one senator. A senator may by the mere threat of what is diplomatically called an extended explanation often compel a deference to his views. When a bloc of senators is determined to fight for a point of view, the vast majority of the Senate must yield and seek some compromise or face a legislative log-jam. Thus the mere threat of unlimited debate affects senatorial, and particularly committee, action. The cloture rule was first adopted in 1917, following President Wilson's denunciation: "A little group of wilful men, representing no opinion but their own, have rendered the great Government of the United States helpless and contemptible."¹⁷¹ Since then cloture has been evoked successfully only four times.¹⁷² On the other hand, since 1917 cloture has been defeated no less than eleven times. The anti-lynching bill was filibustered to death in 1922 and again in 1938. The anti-poll-tax bill was successfully filibustered in 1942 and 1944, despite the fact that each time it has passed the House. But filibusters have been broken without invoking the cloture rule. The friends of FEPC made only half-hearted attempts to break this one. The struggle against the filibuster seemed to many political observers a sham, if not a fraud.¹⁷³ The supporters of the FEPC on both sides of the aisle conducted the fight in a Marquis of Queensberry atmosphere. Every courtesy was extended to the opposition and no effort put forth to make their task more difficult. To many, the struggle of the FEPC bloc seemed almost like a political chore, a disagreeable duty to be got over with as

¹⁶⁹ Carter Glass (Dem.-Va.) was the only senator whose vote or position was not announced. For the House rule, see Cannon, *op. cit. supra*, note 2, at 224.

¹⁷⁰ If, however, the discharge petition on the House FEPC bill (H.R. 2232, 79th Cong. 1st Sess., 1945) is successful, the Senate Committee on Education and Labor will have to decide whether it will report out the House bill and face another filibuster.

¹⁷¹ *New York Times* (March 5, 1917). The statement was made on March 4, but not as part of the inaugural address. Pres. Wilson was attempting to break the filibuster blocking the passage of his armed-ship bill.

¹⁷² To limit debate on the Versailles Treaty (1917), the World Court (1926), the branch banking bill (1927), and the bureau of prohibition bill (1927). For a legislative history of the cloture rule in the Senate, see 92 Cong. Rec. 655 (Jan. 31, 1946).

¹⁷³ See Arthur Krock's column in the *New York Times*, February 14, 1946.

soon as possible. A flabby majority could not expect to beat down a determined filibuster.

During the eighteen days which this filibuster consumed, not a single evening or Saturday session was held, although more aggressive friends of the FEPC such as Sen. Morse repeatedly insisted on such meetings.¹⁷⁴ Sen. Chavez, the FEPC floor leader, and Sen. White, the minority leader, had agreed, and had publicly announced that they would attempt, to keep the Senate in session at least until 6 P.M. each day, but their resolution faltered.¹⁷⁵ Filibusters are broken by long sessions in which the obstructionist's vocal cords are worn down and dilatory motions defeated. But Sen. Chavez and his associates time and time again allowed speakers on the floor to yield for time-consuming (and body-resting) quorum calls¹⁷⁶ which were not in order without unanimous consent.¹⁷⁷ On one day, January 28, unanimous consent was obtained three times for such interrupting quorum calls, and on February 1, twice.¹⁷⁸ Another indication of the Chesterfieldian attitudes which prevailed during the debate was the manner in which unanimous consent was frequently granted to allow a senator to yield the floor temporarily while another senator held forth on some extraneous matter.¹⁷⁹ Of course, each of these interruptions only consumed that much more time and allowed the Southern bloc that much more rest.¹⁸⁰ No thought seems to have been given to the possibility of amending or suspending the rules (which require a two-thirds vote),¹⁸¹ although in one historic filibuster in 1891 on the so-called Force bill, the Senate sustained the ruling of the presiding officer that a motion to amend the rules

¹⁷⁴ 92 Cong. Rec. 358, 428, 538 (Jan. 24, 25, 29, 1946).

¹⁷⁵ On January 23, both senators agreed to a recess at 4:40 P.M., on February 4, Sen. Chavez moved a recess at 4:14 P.M., and on February 5 at 4:34 P.M.

¹⁷⁶ 92 Cong. Rec. 345, 392, 715 (Jan. 24, Jan. 25, Feb. 1, 1946).

¹⁷⁷ See note 159, *supra*, and accompanying text. Huey Long was taken from the floor during his filibuster of June 12-13, 1935, by yielding for a purpose other than a question; see also Burdette, *op. cit. supra*, note 155, at 185; S. Jour. 392 (1932).

¹⁷⁸ 92 Cong. Rec. 442, 459, 467, 715, 733 (Jan. 28, Feb. 1, 1946). Some of these quorum calls were out of order, because they were repeated without intervening business, mere debate not being considered business; see S. Jour. 362 (1943); S. Jour. 497 (1942).

¹⁷⁹ Thus on January 28, Sen. Murray was allowed to interrupt to discuss the UNO, 92 Cong. Rec. 460, 466 (Jan. 28, 1946); on January 29, Sen. Wherry was allowed to interrupt to discuss the plight of German nationals, 92 Cong. Rec. 527-537 (Jan. 29, 1946).

¹⁸⁰ The Senate has not always been so considerate of a filibusterer's feelings. The Huey Long filibuster of May 21, 1935, was broken by the successful objection that Huey Long had lost the floor by leaving it during a quorum call. Burdette, *op. cit. supra*, note 155, at 105. Burdette refers to one filibusterer who was forbidden to rest on his desk while speaking.

¹⁸¹ Rule XL.

is of higher privilege than a motion to correct the Journal of an earlier day.¹⁸²

CONCLUSION

Unquestionably, the failure of the FEPC was not solely due to antiquated rules of parliamentary procedure. The opposition to the FEPC was reflected not only in the well-organized Southern bloc but also in the apathy and uncertainty which characterized those who claimed to be supporters of the legislation. Thus, the parliamentary history of the FEPC does not necessarily contradict the assertion of the House Parliamentarian that a majority "may work its will at all times in the face of the most determined and vigorous opposition of a minority."¹⁸³ The FEPC could count upon neither a real majority nor the leadership in either House for a determined stand.

The history of FEPC does, however, suggest the need for the two changes in the rules which will at least facilitate the bringing of the issue under consideration before the entire House or Senate for a decision. There must be a curb upon the opportunity to filibuster in the Senate, and an escape from the domination of the Rules Committee in the House.

These reforms will not be easy of achievement. The Joint Committee on the organization of Congress¹⁸⁴ which has just issued its recommendations¹⁸⁵ for overhauling Congress was not empowered to investigate the rules of either House. Desirable as its proposals are for the reduction of committees, the creation of Congressional responsibility for a legislative program and the strengthening of the research agencies of Congress, none of these recommendations relates to the parliamentary rules of procedure.

The Senate is a continuous body and unlike the House its rules are not adopted at the beginning of each Congress. (The present Senate rules were adopted in 1884 and since then only five major amendments have been adopted.) Strengthening the cloture rule means, therefore, the introduction of a resolution, its referral to the hostile Committee on Rules, 9 of whose 13 members voted against cloture during the FEPC filibuster, and its adoption by the Senate. But difficult as the task is, President Wilson in

¹⁸² 22 Cong. Rec. 1656-1784 (1891). This ruling is not, however, squarely in point, for the Journal under discussion was the Journal of January 20, 1891, and the Senate had adjourned on January 21 without disposing of that motion. [The motion to correct the Journal of January 20 which was debated on the calendar and legislative day of January 22 was perhaps therefore not "the Journal of the preceding day" within the meaning of Rule III, § 1.]

¹⁸³ Deschler, *op. cit.* supra, note 2, at vi.

¹⁸⁴ Appointed pursuant to H. Conc. Res. 18, 79th Cong. 1st Sess. (1945).

¹⁸⁵ Report No. 1011, 79th Cong. 2d Sess. (1946).

1917 was able by marshaling public opinion to compel the Senate to adopt the cloture rule by a vote of 76 to 3, thus breaking a tradition of unlimited debate which had existed since 1789.¹⁸⁶ What the Senate requires is a rule easily invoked which can limit debate in a reasonable manner. A majority of the Senate should have the power to limit each senator to one hour's debate on any bill, resolution, motion, or other question, or portion thereof, pending before the Senate. The rule should provide that upon the filing at the desk of the presiding officer (thus eliminating the necessity for recognition) of a petition signed by sixteen senators, the first order of business upon the next calendar day immediately after the Chaplain's prayer shall be a debate on the cloture petition limited to one hour. At the end of this hour, the vote shall be taken. If cloture is agreed to, all amendments and all dilatory motions shall thereafter be out of order, all points of order shall be determined without debate, and all debate shall be germane until all time under the cloture rule is exhausted.

The House Rules require a reform, equally drastic, but much more capable of achievement. If the discharge rule is amended so that a smaller number than 218 is required to bring a bill out on the floor, democratic process in the House will be strengthened. A quorum of the House is 218 and a majority of that quorum is sufficient to adopt any measure. It is anomalous that a much larger number of representatives is required merely for the purpose of bringing a bill out on the floor for consideration. A substantial minority of the House is entitled at least to a roll-call vote on any issue which it considers vital. The discharge rule has not always required the signature of 218 members. In 1924, when for the first time the rule provided for a minimum of signatures, the requisite number was only 150.¹⁸⁷ Two years later it was increased to 218, but in 1931 it was again reduced, this time to 145, at which point it remained for four years. On January 3, 1935, it was again increased to 218, a figure which has remained constant since then. It should be fixed at 110, a majority of a quorum.

The House rules are adopted at the beginning of the first session of a new Congress. On January 3, 1947,¹⁸⁸ a majority of the House, by this device, can free itself from the domination of the Rules Committee. Thereafter the signing of a discharge petition containing the requisite number of signatures will prevent any committee from bottling up legislature, will compel the Rules Committee to provide an opportunity for a vote on such

¹⁸⁶ From 1789 to 1807 a motion for the previous question was recognized in the Senate, but its purpose was not to shut off debate. See Haynes, *op. cit. supra*, note 2, at 397.

¹⁸⁷ See Riddick, *op. cit. supra*, note 2, c. 13.

¹⁸⁸ This day is fixed by the United States Constitution, Amend. XX, § 2.

legislation, and may block "gag" orders by which the Rules Committee artificially constricts the procedure of amendment on the House floor.

The apparent lack of parliamentary discipline and the evidence of questionable parliamentary ethics may suggest the need for additional stringent controls and, perhaps, the creation, as in the House of Commons, of a non-political speaker.¹⁸⁹

Questions as to "legislative intent" which frequently trouble the courts and the writers¹⁹⁰ appear even more complex in light of the gyrations, compromises, and pushing and filling which are integral parts of any controversial bill. The usual techniques of legal analysis seem either inappropriate or inadequate to explain this part of the American legal system. This may explain in part the failure of the legal writers to subject to critical discussion the impact of parliamentary procedure upon the substantive law. There appears to be no other reason why this area of the law should remain the exclusive domain of the political scientists.

¹⁸⁹ The Parliamentary history of FEPC poses troublesome questions beyond the immediate scope of this article. To those inclined to speculate upon the relationship between the legislature and the judiciary, the FEPC history affords material for further speculation. In the vague realm of "public policy" what is the significance of the failure to enact such legislation as the FEPC? Is the legislature the only forum in which issues should be decided or should the courts exercise less restraint in constructing a body of rules to govern what appear to be rather basic human rights? See 13 Univ. Chi. L. Rev. 477 (1946).

¹⁹⁰ See, for example, Diamond, *The Webb-Pomerene Act and Export Trade Associations*, 44 Col. L. Rev. 805, 810-11 (1944), where the author attempts, by reference to the Congressional debates, to construe the intent of the framers of that act.