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*Constraints on Cooperative Behavior in the U.S. Continental Congresses:  
1774-1789*

by

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### **Constraints on Cooperative Behavior in the Continental Congresses**

The first delegates to the Continental Congress in 1774 shared two contradictory goals. On the one hand they sought unanimity in their actions. On the other hand the assembled delegates aimed at sustaining the sovereignty of their own colonies. These conflictual goals captured many of the tensions that later plagued the Continental Congresses. The inherent incompatibilities behind building sustained, unanimous coalitions, while simultaneously preventing the Confederation from intruding into colonies' affairs, set into motion a legislative institution doomed to stalemate.<sup>1</sup>

At the outset delegates to the First Continental Congress anticipated that only by putting forward a united front could they expect their petitions to be heard and acted upon by the Crown. Even, with the outbreak of hostilities and as delegates considered the question of independence, unanimity continued to dominate the thoughts (but not actions) of delegates. However, with Congress called upon to deal with increasingly complex questions and charged with directing a revolutionary war on several fronts, unanimity became a scarce commodity. Delegates were only certain that if the revolution failed, unanimity would be the order of the day at the gallows.

The pressure to find unanimity was balanced by concerns held by delegates for their own colonies' power. Delegates to the First Continental Congress were not representatives of 12 independent states, but most viewed themselves as ambassadors from 12 very distinct colonies. Each colony had its own unique political structure, economic infrastructure and social hierarchy. Moreover, each colony sought to sustain those distinctions. With the flurry of new state constitutions in 1776, representatives of the newly constituted states were leery of trading one tyrant for another. In throwing off the shackles of the British Crown, the state delegations were only united in preventing a centralized government to dictate state obligations. Rather than seeking a relatively powerful national government, such as that proposed by Benjamin Franklin in 1775, delegates settled on the outlines of a weak system of Confederation early in July 1776.

Although delegates preferred to reserve most powers for the states, retaining strict state sovereignty, they were forced to act in concert under the umbrella of the Continental Congresses. Certainly the constitutional rules adhered to by the delegates constrained extending centralized powers to Congress. Although the Articles of Confederation, which detailed the powers of Congress, were not formally implemented until 1781, the extensive discussions of the proposed Articles following Independence served to define the status of Congress with respect to the states. Equally important is that this shared

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<sup>1</sup> In this manuscript we adopt the usual convention of referring to the Congresses held between 1774 and 1789 as the Continental Congresses. The First Continental Congress was held in 1774. The Second Continental Congress commenced in 1775, and with the exception of a short recess over the summer of that year, met continuously until 1784. Strictly speaking following ratification of the Articles of Confederation in 1781, the Continental Congress was known as the Congress of the United States. Others have referred to it as the Confederation Congresses. However, the usual convention is to treat the assembly of delegates during the full range of years as the Continental Congress.

understanding among the delegates as to limitations on Congress served to define the operational rules controlling the day-to-day business in Congress. These rules touched on floor activity, voting procedures, and representation. Moreover, the choice of rules reinforced the limitations that delegates set for Congress. In many ways, however, the choice of these rules had pernicious effects on the ability of delegates to reach agreements and develop coherent policy within Congress.

Rules directing floor debate aimed at three general goals. Foremost the delegates intended that all voices be heard. Because the stakes were high for the fledgling nation and because unanimity was considered crucial to prosecuting the war, rules were implemented encouraging open debate. Second, delegates were constantly wary that this patchwork confederated body might usurp state powers. This possibility was particularly dangerous if a majority of states joined into a permanent clique imposing their will on the others. Everywhere delegates looked they saw the basis for factions, sometimes formed by regional groupings, other times by small and large states, and still other times by varying economic interests. Finally, the delegates sought to keep discussion focused on a single issue at a time. Particularly important was preventing any single individual (or faction) from controlling the agenda, thereby keeping issues from discussion. The delegates were particularly concerned with ensuring that any matter brought before Congress received due attention.

Certainly over time these rules of debate shifted and evolved. Yet these general goals shaped the rule affecting floor activity. The effect of the rules was to create an institution whereby all legislative (and most executive) activity was reserved for the floor. Such rules effectively removed instruments allowing majorities to build and sustain long-term coalitions within Congress which might have brought a degree of consistency and coherence to policy making. Finally, these rules ensured that matters were dealt with one-at-a-time, with minor matters often taking precedence over major, pressing issues. While eliminating most possibilities for agenda control, Congress lost the ability to focus on fundamental matters. The net result of the array of rules governing floor debate was an institution designed for minority obstruction, general stalemate, and swept along by issues of the moment.

In the next section we illustrate, with a substantive example, the typical operation of many of these rules. Following this discussion we highlight the major rule revisions that took place during the course of the Continental Congress and what prompted those revisions. Finally, in separate sections, we detail the rules affecting floor debate, voting, and attendance, and we discuss the consequences of these rules for the operation of Congress.

Throughout we are concerned with two themes. First, modifications to the rules were derivative of the initial choices made in the First Continental Congress. At the outset delegates were motivated by two competing concerns -- sustaining the sovereignty of their colonies and striving for unanimity within Congress. As time passed and the issues confronting Congress became increasingly complex, new rules and procedures became necessary to control business within the body. Yet the changes were deliberate modifications and extensions of previous rules. There were no dramatic evolutionary jumps in Congress'

rules. Instead, changes were circumscribed by initial choices made early in the Congress. While many of the delegates exhibited revolutionary behavior when breaking with Britain, few were interested in breaking with past precedents when experimenting with a republican form of government.

The second theme focuses on how those rules exacerbated problems of coordination within Congress. Collegial bodies typically implement rules that allow for sustained, coordinated activity as a means of reducing decision costs. The array of procedural rules adopted by the Continental Congress not only undermined the development of long-term stable coalitions, but those rules also contributed to unpredictability and uncertainty within the body. The very procedures designed by delegates to prevent the rise of faction also had important unintended consequences. By the end of the Revolutionary War these consequences, which had long been deplored by individual members, became manifest through confusion, obstruction and stalemate in Congress.

### **The Operation of Procedures in Congress**

To provide some sense of the simplified floor procedures in use in the Continental Congress, we detail a single issue discussed in a relatively compressed time in early March 1782. This issue concerned a dispute over power by the Quarter Master General of the United States and the Commander of the Southern Army. While a relatively minor issue, it is emblematic of many of the matters treated by Congress. The manner in which the delegates dealt with the issue is indicative of the way in which Congressional procedures shaped legislative and executive matters.

At this point in the spring of 1782 the war with Britain was fundamentally over and delegates were confronted with a number of matters left over from the fighting. Foremost delegates were concerned with elements of the Peace Treaty, especially with the perennial issue of rights to the fishing banks off of New Foundland. Also problematic was the question of what to do with British and German prisoners, a large number of whom wished to remain in America. Of great importance in early 1782 was figuring out ways to curb expenditures from Congress. A simple approach to the problem was to begin disbanding components of the Army. This was to be accomplished through a program of discharging soldiers, selective demotions and cuts in salaries for officers.

In early March 1782, Timothy Pickering, Quartermaster General of the United States, directed a packet to Congress asking that the pay on the Quarter Master General's staff be augmented, allowances for officers be extended, and that he retain control over appointments within his Department (*Papiers*. M247, R199, 1192, pp. 105-6). Even though Washington endorsed his request, Pickering's timing was less than fortuitous. In previous weeks Congress had eliminated a number of clerical positions in the office of the Secretary for Foreign Affairs (JCC 22: 91). Congress had also launched a program to appoint commissioners under the direction of the Superintendent of Finance to settle the accounts of and liquidate assets of various Departments, including the Quarter Master's Department (JCC 22:102-104).

As was common practice, Pickering's letter and supporting documents were quickly assigned to an ad hoc committee made up of Ezekiel Cornell, Abraham Clark and Joseph Montgomery. Their report, issued on 7 March 1782, proposed two pointed resolutions for the floor. First, the report moved that it was inexpedient to raise the pay or subsistence of any officer assigned to the Quarter Master's department. Second, the committee noted the decreased business of the Quarter Master General, largely due to a new method of contracting for supplies. As such it was moved that the pay and subsistence of the Quarter Master General be reduced to the rate received by a Brigadier General (JCC 22:119). Obviously this was the opposite effect intended by Pickering. However, the matter was not immediately taken up by Congress, since this committee's report was referred to a new ad hoc committee. There is no record of who raised the notion from the floor to commit the report to a new committee and it is possible it was one of Pickering's allies in Congress. In the ensuing balloting, only Cornell was elected to the new committee, along with Thomas McKean and Isaac Motte.

This move held the matter over until 13 March 1782, when the committee on the report of the committee on Pickering's letter was ordered to report to the floor. Three distinct motions are recorded, although the first has been stricken. The first motion authorized the Quarter Master General to appoint officers within his Department as needed, pursuant to a resolution passed on 15 July 1780, delegating substantial powers to the Quarter Master General. If this motion was reported to the floor, it likely raised considerable controversy and resulted in the two substitute motions. The first substitute authorized the Quarter Master General to appoint a single additional Deputy at a fixed rate of pay (\$75.00 per month and four rations per day). The second substitute repealed a resolution of 30 October 1780 allowing the commanding officer of the Southern Army to make appointments to the Quarter Master's Department to oversee supplies to that army's district. (JCC 22:128). No action was taken on these matters although it is clear that the discussion on the floor reshaped the report brought back by the committee.

This new report was recommitted to yet another ad hoc committee. Upon balloting, Edmund Randolph, William Ellery, and Abraham Clark were elected to the committee, Clark having served on the initial committee that sought to decrease Pickering's salary.<sup>2</sup> The committee reported the following day with a series of resolutions supporting Pickering's position in making appointments. The first motion repealed the power of the Commanding General of the Southern Army, General Gate, to make appointments of officers to the Quarter Master General's Department in the southern district. The second motion authorized Pickering to make an appointment of his own to the southern district. Finally, the remaining two motions established rates of pay for the new appointment (JCC 22:119).

In discussion on the floor, each motion was considered separately. On the question of the amount of pay, Abraham Clark required that the vote be recorded in the Journals. The question passed by an

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<sup>2</sup> There is no record as to who made the motion to appoint another committee. It is quite possible this was done at the behest of Abraham Clark who wished to cut Pickering's salary. On 14 March 1781 Clark in fact introduced such a motion as an amendment to the report by this committee.

overwhelming margin of 10 states in favor and 1 against (or 26 delegates in favor and 2 opposed, including Clark). Clark, however, was not finished. With passage of the report imminent, he moved an amending resolution based on what he and the original committee had first reported. Given that the business of the Quarter Master General had declined due to contracting Clark proposed that the salary and allowances of the Quarter Master General be reduced to that of a major general (JCC 22:130-31). This was an improvement over his original motion which would have decreased Pickering's salary to the level of a Brigadier General.

Rather than raise an old issue and potentially recommit once again the committee's report, delegates from Connecticut quickly moved the previous question. This prevented a showdown over the Quarter Master General's salary and preserved the resolutions already agreed to in the committee's report. Although Clark forced a roll call vote on the previous question, it was all for naught. The previous question was agreed to, Clark's motion was effectively lost, and Pickering was guaranteed authority to hire an additional Deputy (although he failed to increase salaries in his office).

Pickering's problems for the Congress was only a minor component of a series of problems Congress faced in 1782. However, the procedural machinations used by various delegates in dealing with this issue was quite common, pointing to the openness of the Congress. Several points stand out from this example. First, ad hoc committee were heavily relied upon to handle matters brought before Congress. These committees were not organized for the long-term. Instead, numerous committees might be elected to handle a single matter. Secondly, delegates on the floor were not afraid to "roll" their committees, recommitting proposals brought forward to the floor. In many other circumstances, committees were even presented with detailed instructions from the floor, dictating precisely what the committee would report back to the floor. A third point is that on the floor, delegates commonly resorted to a discussion of committee reports and pieces of legislation by part. In this way different issues were disentangled and dealt with separately, rather than forcing delegates to take an "all or nothing" approach to legislative matters. Fourth, delegates relied exclusively on "unit" rule, in which only the state's vote was counted (based on the simple majority vote of the delegates within that state). A fifth point is that amending activity on the floor was relatively unconstrained. Motions could be added at practically any time, regardless of subject. Although Clark's motion to reduce Pickering's salary was tangential to the report brought to the floor by the committee, it was still regarded as in order. The final point is that use of the previous question is indicative of only one of many devices available to delegates for postponing or otherwise sidetracking legislative matters.

This chapter deals generally with the array of procedures delegates had at their disposal for action on the floor of Congress. As we elaborate, the Continental Congress was a remarkably open institution, in which delegates highly valued open debate and sought to protect state sovereignty through voting according to the unit rule and remaining responsible only to their state assemblies and not the Congress. To this end we tackle three general areas of concern: floor procedures in the Congress; voting rules; and turnover and absenteeism. In turn, we draw out the implications of these rules for structuring the Continental Congress

in very predictable ways. Although many delegates complained that by 1783 the Congress was deadlocked in a stalemate, unable to decide on the pressing problems facing the Confederation, this was a matter in large part due to the institutional rules binding the delegates.

### Floor Procedure

Rules of procedure were important for the delegates in Congress. Those attending the Continental Congress were highly skilled politicians who had considerable training in their own state legislative environments. As creatures of the French "enlightenment" philosophers and products of the Scottish philosophers, these delegates were attuned to the importance of procedure for constraining political behavior. Constitutional principles were paramount for politicians of this period, and no more so than for individuals contemplating, enacting, and enduring a Revolution. Rules of procedure, then, were given considerable attention within Congress, both for what the rules implied for the strategic behavior of delegates and for what the rules meant for aiding the institution in coping with its workload.

In this section we examine legislative procedures governing delegates on the floor of the Congress. Specifically we focus on procedures concerned with building agendas, sequencing the workload, and obstructing business. While formal and informal rules of procedure may appear trivial, especially when compared with the grand issues and principles discussed within an institution, still those rules are often crucial for deciding *which* issues and principles are adopted. Over the past three decades political scientists and economists have spent considerable time analyzing basic collective choice settings and the effects of institutional procedures on outcomes. There is general agreement that, in the absence of mechanisms by which individuals can coordinate and bind their choices, collective outcomes will be "chaotic." Rules of procedure, which constrain the agenda process or grant specialized powers to specific individuals, can close off the "disequilibrium" of collective choice. Most legislative institutions are reasonably complex, non-cooperative settings with rules of procedure that induce regularized collective outcomes.

The Continental Congress, by contrast with many contemporary legislative bodies, was the quintessential collegial institution. In this sense its floor procedures sought to maintain egalitarian access to the agenda by encouraging full participation. An open calendar, largely immune to manipulation by any faction, was maintained in Congress. Finally, these procedures offered considerable protection to minorities through numerous points at which the flow of legislation could be blocked. In these ways the Continental Congress was much closer to the abstract collective choice mechanisms studied by Arrow (1952), McKelvey (1976, 1986), and Schofield (1988? - APSR), than to the "textbook Congress" elaborated by Shepsle (1988). Consequently these floor procedures left the Continental Congress wracked by cyclic voting and incapable of forming and sustaining long-term coalitions.

*The Agenda Process.*

While most legislative bodies have elaborate rules and precedents governing the agenda process, the Continental Congress had few such rules. Instead of rules narrowly proscribing when motions and amendments were in order, rules awarding subsets of delegates special agenda powers, and rules allowing the formulation of complex legislative packages, the Continental Congress's rules were minimal. In general the agenda was kept open by relying on unconstrained debate on the floor, eschewing anything similar to a closed rule for legislation considered on the floor and relying on the Committee of the Whole to handle legislative matters. Likewise, delegates were sensitive to the possibility that one faction or another might gain control over the agenda and consequently, the President's powers over the floor were limited and committees were held in check. Finally, the agenda process explicitly defined procedures whereby issues were rarely bundled across dimensions. This typically meant that legislation was built an issue at a time and that the order of these issues was dictated by events external to Congress. This combination of an open agenda, constraints on agenda setting powers and dimension by dimension consideration of legislative matters meant that no faction within Congress was able to introduce and carry out a coherent platform around which permanent coalitions might have formed. Instead, issues arose in an almost haphazard manner, with differing coalitions forming around each issue.

#### The Open Agenda.

Maintaining an open agenda in the Continental Congress amounted to retaining three features to the agenda process. It included sustaining open debate on the floor, avoiding procedures that might invoke a closed rule, and finally relying heavily on the Committee of the Whole to keep the business of Congress rooted in the floor. Each of these features interacted to produce a remarkably open set of agenda procedures by which few delegates were constrained in introducing or amending matters before Congress.

First and foremost, the delegates were extraordinarily concerned with the rights of delegates to be heard on the floor of Congress. Two approaches were taken to ensure open discussion. The first imposed secrecy on the proceedings and the second imposed limits on other members from interrupting or otherwise interfering with discussions taking place on the floor.

Ensuring secrecy on the floor was both a matter of pragmatism and principle. From the outset of the First Congress, many of the issues under discussion held the scent of treason. Moreover, once Independence was declared and the war was raging, Congress often discussed matters of considerable military importance on the floor. The need for secrecy in dealing with treasonous or military matters was well understood. However, delegates also offered an argument that keeping matters secret on the floor meant delegates would have little to fear from outside parties questioning their motives. Rather than being forced to take "public" positions on the floor of Congress, delegates hoped that secrecy would lead delegates to "sincerely" express their views on issues. In keeping with this end, debates are almost never recorded in the Journals and only the briefest outlines of different debates are found in the correspondence and notes by various delegates to the Congress.

That the doors would remain closed to the public and that matters would remain secret unless voted otherwise by Congress was embedded in one of the three rules of procedure adopted in the First Congress. Delegates apparently took this stricture seriously, since numerous letters from delegates in the first Congress repeat the fact that they wished they could tell their correspondents what was transpiring in Congress, but they could not because they were bound to the rules of secrecy in Congress.<sup>3</sup>

The importance of secrecy was such that at the outset of the Second Continental Congress, prior to adopting any other rules, the delegates resolved "That the doors be kept shut, during the time of business, and that the members consider themselves under the strongest obligations of honor to keep the proceedings secret, until the majority shall direct them to be made public." (JCC 2: 22). Apparently this covenant among the delegates had its anticipated effect, since numerous letters by delegates during May 1775 note they are under the strictest confidence not to reveal what transpires on the floor. In particular, the report by the New Hampshire delegates of 22 May 1775 to their Provincial Committee reports nothing of the floor activity, claiming the delegates are bound to the rules guarding the secrecy of matters in the Congress. (*LettersB* 1: 369-70).

Occasionally there were lapses in strict secrecy during the Congresses. Delegates leaking information about the affairs in Congress prompted a motion on 9 November 1775 in which

every member of this Congress considers himself under the ties of virtue, honor and love of his Country not to divulge directly or indirectly any matter or thing agitated or debated in Congress before the same shall have been determined, without leave of the Congress; nor any matter or thing determined in Congress which a majority of the Congress shall order to be kept secret and that if any member shall violate this agreement he shall be expelled this Congress and deemed an enemy to the liberties of America and liable to be treated as such and that every member signify his consent to this agreement by signing the same." (JCC 3:342-3)

Evidently this resolution (and later, similar resolutions) had a short term effect on delegate behavior. John Adams censored himself in a letter to Abigail on 12 November 1775, noting he considered himself under oath of secrecy. While he wished he could give her some insight into the affairs of Congress, he remained silent (*LettersB* 2: 332):

The most serious challenge to open debate caused by a lapse in secrecy occurred in June 1777. On 11 June 1777, muster master General Gunning Bedford wrote an irate letter to Jonathan Dickinson Sergeant (NJ) a delegate to Congress contending that Sergeant had "reflected very illiberally on my character" and challenged him to meet two days later for purposes of a duel. Sergeant's response was quit simple, replying

"I do not recollect mentioning your Character or Name on any Occasion unless in Congress in the Course of Business. For my Conduct there, I conceive I am answerable only to mat Body &. to my Constituents." (*LettersB* 7:183).

The point here was simple. Regardless of the comments he made, they were made on the floor of Congress. Matters which transpired there were secret business and Sergeant felt no need to respond to

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<sup>3</sup> In particular, see John Adams' letter of 19 September 1774 to Abigail Adams, *LettersA* 1: 35; Richard Henry Lee's letter of 20 September 1774 to William Lee, *LettersA* 1: 37; and Samuel Ward's report of 3 October 1774 to the Governor of Rhode Island, *LettersA* 1: 61.

Bedford. Needless to say, Sergeant's response was less than convincing for Bedford. In a second letter sent the following day, 12 June, Bedford commented

"Your evasion is mean & pitiful; & so far from being an extenuation of the insult, the place where the aspersion was made rather enlightens it. I have been much abused & illtreated by the arbitrary & ungenerous conduct of that house & have long wished to lay my hands on some one particular member, whome I could prove had traduced my character; I am at length so happy as to have fixed on one; & could only wish he was an object more worthy of resentment." (*LettersB* 7: 183).

Closing by considering Sergeant little more than a "poltroon & a coward," Bedford pressed for a duel the following day.

Dueling was not unknown in Revolutionary America. However, instead of taking up the challenge Sergeant presented the letters before his fellow delegates in Congress. At this affront to one of their own the members were outraged. The concern was not for Sergeant's character but that Bedford's action threatened open discussion on the floor. Very quickly two resolutions were considered in Congress, viz.:

"Resolved, That the Freedom of Speech and Debate in Congress ought not to be impeached or questioned in any Court or Place, out of Congress."

"Resolved, That it is the Right and the Duty of this Congress, to vindicate its own Authority from Contempts, and the Priviledges of all its Members." (JCC 8:459)

Other motions were made, including one calling for Bedford to be stripped of his position. However, Thomas Burke (NC) argued with members staving off several resolutions and using the power of the state veto to postpone discussion until the following day. Delegates finally ordered Bedford to appear before Congress to explain his behavior. Appearing on 14 June 1777, Bedford offered some defense of his position, but his explanation was insufficient to prevent passage of a motion in which it was

"Resolved That Mr. Gunning Bedford has been guilty of a high breach of the privileges of this house, in sending a challenge to one of the members of this house, for words spoken by him in this house, in the course of debate:..." (JCC 8:466).

Bedford was then ordered to ask pardon of the House and Sergeant. Having done so, he was excused from the Congress. In the end Bedford retained his position, no duel was fought, and later he was elected to serve as a delegate to Congress although he declined to attend. More importantly, however, Congress had asserted the pre-emminence of the right of free speech on the floor. Moreover, the delegates were in complete support of this point. This event, combined with concerns for secrecy, led delegates to add two amendments to the Articles of Confederation during debate in November 1777. The first guaranteed freedom of speech and debate in Congress while the second protected delegates from arrests and imprisonments while traveling to and from Congress. (JCC 9: 893-4).

Problems with leaking information threatened floor debate even as late as 1782, when David Howell (RI) was accused of violating secrecy in Congress. Howell had sent a letter on 16 October 1782 to a friend in Rhode Island, detailing the status of negotiations with France over a Peace Treaty with Britain and assessments by John Adams concerning the likelihood of obtaining foreign loans. While other

delegates often sent snatches of Congressional business to friends in their own states, Howell's misfortunes were twofold. First, extracts of this letter were printed in the *Providence Gazette*, consequently generating widespread attention (*LettersA* 6: 509). Second, Howell was widely viewed as leading opposition to Congress' imposition of a five percent impost to raise revenue. The ensuing outcry over the letter consumed considerable time in Congress, including debates over the rights and obligations of delegates to Congress and their respective states and a resolution reprimanding Howell.<sup>4</sup> Howell's actions and the concerns of delegates prompted Congress to adopt an oath to be signed by each member, to not

"divulge in the whole or in part any information received by Congress or any of their proceedings specially directed by the majority of the United States in Congress assembled to be kept secret, or which shall be by them declared to be in their nature secret..." (JCC 23: 829)

Passed on Christmas Eve the delegates also ordered that any secret material be so noted in the journals maintained by the Secretary so as no confusion might result

It was not until 1783, once the exigencies of war had passed and a treaty of peace was signed, that delegates began to question the need for closed door proceedings in Congress. Almost six years previously delegates had pressed for votes to be recorded in the Journals so that delegates could demonstrate their responsiveness to their own state assemblies. Now delegates argued that "it is of importance in every free country, that the conduct and sentiments of those to whom the direction of public affairs is committed, should be publicly known .." (JCC 24: 313). To this end resolutions were proposed such that:

"Resolved, That in future the doors of Congress shall be open, unless otherwise ordered by a vote or by the rules of the house. <subject to such rules as shall be hereafter determined for that purpose>

"Resolved, That a committee be appointed to prepare and report a draught of rules upon the subject <of opening the doors>" (JCC 24: 313)

This motion would have had the effect of opening the doors of Congress and allowing all debate on the floor to be made public and would have effectively ended the secret deliberations of the delegates to Congress.

The motion, however, failed to survive. Instead, a number of different amendments were tried, including an amendment tying open doors to deciding a permanent site for the Congress. In the end, however, each of the amendments failed as did the main question. Although Congress occasionally opened its doors (when receiving foreign ministers or other notables), by and large, throughout its life, Congress maintained secrecy, and the delegates continually hoped this would prompt full and open discussion.

Secrecy was not the only means used to maintain an open agenda. Many of the formal rules aimed at keeping decorum on the floor sought to curb interruptions and distractions for the speaker holding the floor. On 16 November 1775 Congress resolved as a standing rule that delegates had to remain in their

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<sup>4</sup> For an extended discussion of this matter, see Burnett, 533-35. Also see Jonathan Arnold's letters of 6 December 1782 and 18 December 1782 to the Governor of Rhode Island (*LettersA* 6: 555; 565), the JCC 23: 813-819, and Madison's Notes of Debate for December 1782. For background on Howell's opposition to the impost, see Rakove, 313-17.

seats while a question was being read or put to a vote (JCC 3: 357). This rule was most likely prompted by chaos among the assembled delegates. Illustrative of this behavior was the response by delegates six months previous to a speech by Thomas Stone (MD). Silas Deane in his Diary entry for 24 May, 1775 noted that Stone, in a discussion in the Committee of the Whole on the current state of America, became "so disagreeable that one half of the Congress withdraw." (*LettersB* 1:402) At this point, in the absence of rules governing floor conduct and the independence of delegates, choosing this particular means of exit was effective, since it quickly brought discussion on the floor to a halt

Later rules revisions gradually expanded the protection of debate on the floor, including the right of Congress to censure delegates who did not come to order when so ordered by the President or at the request of another member (JCC 20:481). Questions of open debate were even considered important enough so that delegates added a clause guaranteeing "Freedom of speech and debate in Congress shall not be impeached or questions in any court or place out of Congress" to the Articles of Confederation (JCC 9: 893). In general the delegates were loathe to limit floor debate.

Also contributing to maintaining an open agenda was the absence of any form of a closed rule. Nothing making it to the floor, whether a committee report or a report from one of the Executive Departments, was able to lay claim to any form of a closed rule. This meant that any motion was in order, including non-germane amendments and amendments by way of a substitute. Early on in the Congress, no limitations were ever placed on motions. This led George Wythe (VA) to observe on 21 October 1775 that "The rule, that the question should be put upon the last motion that is made and seconded, is productive of great confusion in our debates; six or seven motions at once" (JCC, 3:500). South Carolina's Christopher Gadsden, in this same debate succinctly echoed this concern by stating "I wish we could keep to a point" (JCC, 3:501). A standing rule was adopted on 17 July 1776 that prevented a motion being offered if one was already on the floor (JCC 5:573-4). However, amendments to the main question were often offered.

Despite Congress' attempt to regularize its procedures, members continued to complain of unpredictability, volatility, and inefficiency in both legislation and administration. On 5 September 1777, less than two months before he was elected President of Congress, South Carolina's Henry Laurens wrote to fellow South Carolinian John Gervais that he had

"been witness to a Report made by a Committee of the Whole, which had been entered upon the Journal, superseded by a new Resolution even without reference to the Report. A Resolution carried almost *Nem Con* — entered, and half an hour after reconsidered and expunged. When I add that such irregularity is the work of almost every day, you will not wonder that I wish to be any where but in Congress" (*LettersB*, 2:482; see also 2:488).

Quite likely, Laurens' well known attitude toward the need for congressional reform contributed to his selection as President.

Although the rule revisions of 1778 attempted to solidify the practices on the floor, still many delegates remained frustrated with the unpredictability of debate and decision on the floor. In August 1779 Thomas Burke (NC) wrote a long and thoughtful letter to the North Carolina Assembly concerning the

general nature, character, and conduct of the Congress. He began by addressing its inefficiency, saying "It is obvious that much time is Spent on unimportant Subjects, that many Questions of Order are defeated and some of the perhaps decided in a manner that may appear extraordinary to Legislative assemblies." Burke explained that "the latter is Occasioned by the Nature of the Congress which is a *deliberating Executive assembly*, to whose proceedings the rules of order established for deliberating Legislative assemblies will not always apply." Worse though, the absence of workable rules, well adapted to the nature and needs of the Congress, "make the rules of order in that assembly very arbitrary and uncertain, hence frequent disputes arise thereon, much time and debate are wasted" (*LettersA*, 4:367)

These observations by Laurens and Burke point to the absence of rules that constrained the introduction of amendments and other procedures for setting the agenda. The Journals are filled with instances where amendments in the nature of a substitute were used to significantly alter policies. Likewise, even when an amendment failed, this did not close off the amending process. Often a large number of amendments would be tried. As we shall discuss below, given the voting rules employed in Congress, trying a large number of amendments was often a useful strategy. Oftentimes only a handful of delegates needed to switch their vote to yield very different outcomes. Lacking a closed rule gave an advantage to those wishing to obstruct the legislative process.

Finally, delegates relied extensively on the floor to conduct the business of Congress. This is demonstrated in the use of the Committee of the Whole as the primary means for handling issues before Congress. At the very outset, in 1774, Congress relied on the Committee of the Whole to deal with issues like non-importation and the proclamation to the Crown. In 1775, before considering Congressional procedures, the delegates went into the Committee of the Whole to consider the state of America in light of recent news of the outbreak of hostilities in Massachusetts (JCC 2:44). As with other legislatures, this Committee had its own set of procedures and parliamentarian. Upon resolving into the Committee of the Whole, the President stepped down and delegates balloted for a chairman. This procedure was settled on quite early (see the Journal entry for 16 May 1775, JCC 2: 53 and Silas Deane's Diary, 16 May 1775, *LettersB* 1:351-2). Although widely used in discussing matters of importance brought before the body, it was not until 29 January 1783 that formal standing rules were established mandating that the Chair of this committee would be elected by the delegates (JCC 24:98,109). In addition, on 5 February 1783 it was settled that voting in the Committee of the Whole was to be tallied under the unit rule, whereby each state cast a single ballot. However, it is apparent that this procedure was of long standing in practice, since as early as 15 January 1776, Richard Smith recorded in his diary that a motion allowing exceptions to selling tea in the colonies was defeated by a vote of seven Colonies to four within the Committee of the Whole (*LettersB* 3:98).

The point of interest here is that even a scattered reading of the Journals indicates that the delegates spent a considerable amount of time in the Committee of the Whole, dissecting at length reports to the Congress or new matters brought to the attention of Congress. Rather than relying on ad hoc committees

or Executive Boards to carry out the business of Congress, instead delegates spent their time overseeing and amending the business at hand in the Committee of the Whole. While in the contemporary Congress the Committee of the Whole is an important parliamentary device, in the Continental Congress it was the primary engine for transacting the business of the assembly.

Discussion of these scattered procedures for enacting legislation paints a useful picture of the Congress. Generally it was a body with few rules and consequently few constraints on delegates. The emphasis on open rules of amending combined with rules protecting secret deliberations aimed at encouraging full discussion on the floor. Finally, relying on the Committee of the Whole pushed delegates to keep matters, no matter how minor, on the floor rather than in one of the numerous committees. This open, collegial body, however, was not without drawbacks. First these procedures combined to make legislative life hectic for the delegates since almost all business transacted on the floor. Secondly, these procedures made it simple for delegates to obstruct the proceedings by introducing small changes to legislation sufficient to break apart a winning coalition.

#### Agenda Control.

In many legislative institutions control over the agenda is tantamount to monopoly control over political outcomes. Presumably most delegates to the Continental Congress were well aware of the implications of agenda control based on extensive experience in their own state assemblies. As Zensky (19??) and others have noted in their studies of colonial and state assemblies at this time, a small core of legislators typically controlled access to the agenda through their specialized powers as Speaker or through serving as a key member on a committee. Given their experiences it is doubtful that any delegate was interested in foregoing personal power to allow another delegate or state delegation to gain control over the agenda at crucial points. Three points served to guard against any subset of delegates from gaining control of the agenda. First, the agenda powers of the President, as presiding officer, were sharply curtailed. Second, Committees were closely monitored, effectively stripped of any means for pushing matters through the floor of the Congress. Finally, Congress adopted a number of standing rules removing discretion in setting the agenda and proscribing the manner in which certain motions might be drawn, in an effort to wipe out any advantage that a delegate might take.

The President of Congress was clearly constrained in his ability to exercise control over the agenda. In the early revision of the procedural rules in 1776 the President was granted the power to recognize one of two individuals when both rose to speak. In addition, the President could decide whether a motion was to be submitted in writing to the chair. However, neither power was extraordinary for controlling the agenda. But in 1781 the formal rules of debate removed the possibility (which apparently was never exercised) that the President could sequence motions or issues before Congress by choosing one over another. Rule 6 stated that if two or more issues came up for consideration, the President was required to call for a vote over which issue would be taken up first, the issue gaining a majority of the states (under

the unit rule) being dealt with first. Such a procedure effectively removed the sequencing of rules as one means of structuring an agenda.

Nor did the President enjoy strong powers over deciding parliamentary matters - another possible source of agenda control. Prior to 1781 the source for resolving points of order was unclear, but almost certainly not placed in the hands of the President. In a Treasury committee report carried over on 22 July 1778, delegates raised a point of order concerning the sequencing of discussion on the floor. During the debate over the point of order an appeal was made by a delegate to Secretary Charles Thomson requesting that he indicate the practice of the house in this matter. This was immediately objected to as out of order. Instead a motion was made which held "that when a difference of opinion arises in Congress with respect to the true meaning of a rule of the House, a member may or right ask information of the secretary of Congress ..." (JCC 11:711). On a close vote, the states were split and the question lost. After additional debate, the point of order was resolved, but by the members.

The rules revision in 1781 granted some powers to the President as a parliamentarian. Rule 26 enabled the President to specifically decide points of order raised from the floor with regard to procedure. However, the rule also allowed an appeal to be made on the floor, at which point the delegates could overturn the President's ruling (JCC 20: 481). While contested points of order are not common in the Journals, still there are recorded instances in which the delegates exhibited a willingness to challenge the President. In February 1785, on a motion to repeal a resolution fixing a place at which a new federal court would be situated, a point of order was raised asking whether opponents to the original resolution could make (and second) such a motion. The President ruled that there were no rules or precedents forbidding either party to call for reconsideration. On appeal, in which a vote was called, the President's ruling was upheld. (JCC 28: 39).

One of the few attempts at augmenting the President's power with respect to setting the agenda occurred in mid-May 1784 just prior to Congress' adjourning until November — the first time Congress contemplated such an adjournment since 1775. A newly devised Committee of the States (allowed for under the Articles) was to take the place of the Congress, acting in its behalf. In the rush to take care of pressing business before Congress before adjournment a committee reported that the President should be granted four powers:

- "1st. To authorize the President to take the sense of Congress, for putting any question without debate when he shall [deem] it requisite.
- "2nd. To preclude every member from speaking more than once, or longer than the President shall judge necessary on any question, provided the President shall adopt one rule to be equally applied to all the Members.
- "3rd. To prevent more than two Members from speaking on one side of any question.
- "4th. To finish on each day, every matter that shall be taken up, without regard to the usual time of adjournment." (JCC 27: 397-8).

Granting such powers would certainly have been unprecedented and there is no evidence that the committee report was given further consideration. In general the agenda powers of the President were deliberately kept

quite weak.<sup>5</sup> Delegates preferred to retain powers over the agenda for themselves, not to place any such powers in the hands of any specific individual.

Committees too were sharply constrained in their agenda control powers. In practice (as we develop more thoroughly in Chapter 5) committees were largely ad hoc bodies, whose members were balloted from the floor. In this respect, few committees lasted any length of time nor were they entrusted with continuing matters of importance. Even the few standing committees which evolved were highly constrained through oversight from the floor -- both in the appointment of ad hoc committees to analyze standing committee reports and with the floor spending considerable time under an open rule dissecting reports. Even the formal rules adopted in 1781 broke apart committee powers, since Rule 8 allowed delegates to break a report down by subject "if it comprehends different subjects, independent of one another, in the form of distinct acts or resolutions a question shall be taken on each ...." (JCC 28:477). This took away the power of committees to bring forward motions bundling together different matters in order to build a majority coalition on the floor. If such were the case, any delegate was entitled to ask that each item be dealt with separately.

Breaking apart its report, however, was not the only problem facing a committee attempting to structure the agenda. There is little record that committees were respected (or trusted) by the floor. The more usual result for a committee report was that it would be either recommitted with new instructions or else "rolled" on the floor. The former meant that the committee would return to its duties, often with a detailed list of specifics issued from the floor. The latter meant that new amendments were added such that the committee's resolution took on a very different meaning or that a new ad hoc committee was appointed, often to dramatically alter the resolution.

While the President and Committees were limited in structuring the agenda, even delegates on the floor were bounded by procedures removing discretion in dealing with various matters on the floor. Clearly the formal rules from 1776 onward specified that once an issue was introduced, it was on the floor until disposal ~ either by a motion to postpone, a state raising its right of postponement, tabling the motion or taking action on the motion. No other matter (except a variety of amendments) was considered in order, although, as we have seen, the niceties of procedure were occasionally abandoned.

The rules governing floor procedure also specified that complex pieces of legislation could not be voted solely as an all-or-nothing package. Rule 11 from the revisions of 1776 stated that

"If a question in debate contain more parts than one, any member may have the same divided into as many questions as parts." (JCC 5: 574)

This meant that complex issues were readily separable, forcing consideration on an issue by issue basis. It was not the case that this was an innovative rule, since it had been used in practice since the First Congress.

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<sup>5</sup> A similar point is elaborated in Chapter 4 where there is a more extensive discussion of the Presidency.

The most clearly constraining rule adopted in Congress specifying how items would be sequenced, was passed on 27 January 1785. The motion resolved

"That whenever a question shall be depending between a larger and smaller sum, a longer or a shorter time, the question shall first be put upon the largest sum and the longest time." (JCC 28:

23)

Such a standing rule left nothing to the imagination, clearly proscribing the order of competing motions and amendments. In such instances, when multiple motions were on the floor, the body could no longer use majority voting to structure the agenda. Instead, the size of the expenditure or length of time decided order. More typically, however, any constraints on the introduction of issues were deliberately kept minimal. Delegates were seldom limited in making motions on the floor. However, real constraints on discretion were applied.

#### *The Calendar.*

The second set of rules affecting the agenda process concerned use of the calendar. A calendar is not only important for controlling a legislative body's workload, but it is also an important tool for agenda setting. The elaborate, formal calendar developed in the US House of Representatives has long provided leadership with important control over building an agenda. Even in the US Senate, with its reliance on unanimous consent agreements, the calendar provides a structure for building coalitions around particular pieces of legislation and controlling the flow of legislation to the floor. The legislative calendar, then, provides an important procedure for streamlining the workload and for building majority coalitions.

The Continental Congress was no less concerned with controlling the flow of business on the floor. However, only a very rudimentary calendar evolved in the Continental Congress. Moreover, it was frequently ignored as a matter of expediency while delegates sought to grapple with the steadily increasing onrush of business. In general, delegates elected to retain a flexible calendar that complemented the open agenda structure they thought was important for addressing issues of the minute. In much the same respect, the matters forced on Congress were typically emergencies, and certainly in the early years threatened the very life of the fledgling nation. Consequently any form of a calendar had to give way to matters requiring the immediate attention of the delegates.

The First Continental Congress did not adopt rules concerning a calendar. In large part this was because that Congress had a well understood agenda. Foremost, it was assembled to declare the grievances and rights of the colonies to the Crown. A subsidiary issue was to decide what action to take in response to the new flurry of taxes and the increasing presence of the British military in the colonies. It was with substantial unity that delegates focused on these matters. Consequently there was little need for a formal calendar dictating what business would be handled

The circumstances of Congress, beginning with the assembly of the Second Congress, however, was an entirely different matter. While delegates had reasonably clear instructions from their assemblies and

provincial conventions as to the matters to be addressed within Congress, most of these instructions were quickly voided by the outbreak of hostilities. Even more important was the fact that delegates to the Second Congress (and subsequent Congresses) confronted an expanding workload as the Congress became both a legislative and an executive body, prosecuting a war, serving as a central treasury, promoting foreign alliances, and regulating supplies. As early as 10 June 1775, in a letter by George Clinton to John Mckesson, the Secretary of the New York Provincial Congress, Clinton had hopes that Congress would soon adjourn, but feared this was unlikely since "Business multiplies upon us by Expresses daily from different Quarters." (*LettersB* 1:469).

These "expresses" that daily flooded Congress were quickly handled in a routinized manner. Entries in the Journal indicate that the normal practice was to devote the opening of Congress each day to reading and disposing of the various dispatches addressed to Congress. Often these matters could quickly be handled on the floor or returned to the President with instructions. If not, many of the letters were turned over to ad hoc committees. The practice of dealing with letters and other dispatches quickly evolved into the first order of business for Congress. It was not until 8 August 1777 that this practice was adopted as a standing rule, but it is clear that this was a long-standing practice and one of the few early examples of the Congress adopting a form of a calendar dictating the order of business (*JCC* 8:640). Although letters and petitions had the potential to be juggled around in the manner to which they were introduced to the delegates, the practice was to read them in the order they were received. Indeed, under the rules revision of 1781, the secretary was required to number the dispatches as they were received. They were then to be taken up in precisely that order. Even such a trivial area for agenda manipulation, either by the President or the Secretary, was neutralized by the delegates.

Delegates also had informal expedients by which to handle and direct Congressional business. From the outset delegate relied on "orders of the day" to bring some predictability to the workload in Congress. As additional items came before an already busy Congress in late-1775, each would be read in turn on the morning following their arrival or their delivery to the President or Secretary. Once read, they would be ordered to lie on the table or, more commonly, they would be "referred" to some specific day, usually within the next few days or a week at most. On the day to which the issue was "referred" it would be privileged as the "order of the day" and would, unless a majority decided to postpone it, come up immediately following the reading of the minutes and new letters and petitions. Unfortunately, as business continued to increase, Congress seldom completed the "orders of the day" for any given session. By mid-October 1775, Congress was ending each day with the following journal entry: "The order of the day renewed, and the several matters referred to this day postponed till to Morrow" (*JCC* 3:296).

The problem with orders of the day was that they did not constitute a calendar in a formal sense. Such orders barely allowed delegates to keep up with the matters pouring into Congress and did not allow issues to be ordered in an coherent way. Attempts were made in mid-December to routinize some of the

practices in Congress. On 14 December 1775 two new rules were adopted, both designed to regulate and order the flow of business from day to day. Congress,

"Resolved. That on the meeting of Congress, half an hour every morning be employed in reading the corrected copy of the journal, till the whole is gone through.

"Resolved. That every morning the minutes of the preceding day be read, before the Congress enter upon new business" (JCC, 3:427).

Two days later, 16 December, a further rule was passed, again designed to control access to the agenda. Congress,

"Resolved. That it be a standing rule of Congress, that no person be allowed to make any motion after twelve o'clock, without special leave, until the orders of the day are either determined or put off to another day" (JCC 3:434).

These rules, however, only provided a temporary expedient in managing the explosion of business before Congress. While early in December 1775 Congress had appointed its first two standing committees, on Officer Qualifications and Treasury, still this was insufficient to handle the backlog of matters. In the absence of mechanisms that controlled the flow of business, many issues were left unfinished and often forgotten. Matters were sufficiently confused so that on 22 December 1775 Congress appointed a committee of three to examine the Journals and report a list of matters that remained unfinished. This committee reported back to the floor the following day, detailing a number of matters which had fallen to the wayside since Congress had returned from a short adjournment in September (JCC 3:454-6). This was the last recess held by Congress until 1784, but it was not the last time a committee would be appointed to disentangle the unfinished business in Congress. The confusion confronting delegates in December 1775 was merely a harbinger of things to come.

One means of controlling the flow of business, in the absence of any formal calendar, was to dictate the meeting times of Congress in order to carry out the daily business. Congress typically assembled in mid-morning and adjourned in the later afternoon, providing time for the various ad hoc committees to deal with their affairs in the early morning and evenings. However, as the workload waxed and waned, the Journals leave an important record as delegates adjusted their hours in order to tackle a shifting workload. This frequent adjusting of hours points to both the inadequacy of practices (and later formal rules) governing a calendar and how delegates were more concerned with temporary matters of expediency, rather than planning any long-term means of handling the workload.

In June 1776 delegates cut back the hours of meeting in Congress, establishing a standing rule that adjournments from Friday would extend to Monday mornings. This was in order to allow committees to prepare "for the house the matters referred to them" (JCC 5:468). However, this rule was little observed, since Congress often met on Saturdays throughout its life, and occasionally found itself in session seven days a week. As the workload become increasingly heavy and as delegates sought to conclude debate over the Articles of Confederation in 1777, Congress resolved to hold sessions twice a day (JCC 8: 756). This practice continued from 1 October until 19 November 1777, when debates over the Articles were completed

and delegates returned to meeting once a day. Business slackened somewhat during at this time and a standing rule was adopted establishing that Congress be required to adjourn at 2 pm(JCC 9:945).

Facing another onslaught of business, Congress on 30 May 1778 returned to the practice of meeting twice a day. At this point any delegate was given the power to require adjournment of the second session, if it ran past six O'clock in the evening (JCC 11:558). In part this provision was added to avoid a clash similar to that involving Thomas Burke the previous month. On 10 April 1778 Congress was still in session at 10 pm when a motion was made to adjourn. The motion failed and Burke staged a walkout, protesting both the matter under consideration and the lateness of the hour (JCC 10:334). Once business returned to normal, Congress returned to a regular schedule of meeting once a day.

The practice of shifting times to deal with shifts in workload continued throughout the life of the Congress. However, in the latter years, attention focused not so much on holding more than one session a day, but with finding enough delegates to constitute a quorum. No matter how Congress adjusted its schedule, it was still a poor substitute for a calendar. While expanding the number of hours allowed Congress to spend more time on the floor to tackle issues, it did not structure the manner with which those issues were dealt.

Only with the adoption of a standing rule on 14 August 1777 did the delegates bind themselves to something resembling an order of business. This standing rule gave reports issued by the Boards of War and Treasury priority over other matters before Congress (JCC 6:642). These two committees handled the bulk of the daily executive work for Congress. Generally these standing committees were empowered to bring formal reports before any other committees or other business could be brought to the floor. This rule was folded into the general rules revisions of 1778 and was left little changed. Only the restructuring of the rules in 1781 affected it by requiring that if two or more reports were brought forward, the delegates balloted on the order in which they were taken up. By 1778, then, the formal structure of the calendar was solidly in place so that dispatches, petitions and letters to Congress held priority following reading of the minutes. Reports by Treasury or the Board of War next took precedence, with this followed by orders of the day. Otherwise the flow of business was kept open.

Additional resolutions were adopted over time more solidly fixing this calendar. However, most of these additions were simply for the short term and were designed to help unclog a backlog of business. In mid-August 1778 special orders were issued by Congress setting aside Tuesdays, Thursdays and Saturdays for regulating affairs concerned with the treasury and finance. Aside from reading and disposing of dispatches, no other business was to "be taken up on those days without the unanimous consent of the house, until the business aforesaid [treasury and finance] is gone through and finished." (JCC 11: 776-7). At the same time a motion was made to meet twice a day to handle these matters, although it failed. It is important to note that delegates were little concerned with establishing a permanent mechanism for scheduling these matters. Instead, these days were reserved for treasury and finance business *only until* the

delegates caught up on this business. Once the backlog was cleared, Congress returned to its normal, minimal calendar.

Congress, however, was not always willing to bind itself to focusing on specific issues when faced with an overload of work. On 27 April 1779, the Committee on Treasury brought forward a report requesting that Congress again resort to reserving Tuesday, Thursday and Saturday for considering reports relating to finance. Amendments were immediately brought forward, striking out Tuesday and Saturday, leaving only Thursday's reserved for such business. However, even this was unsatisfactory for a majority of the delegates. On final passage the floor agreed to meet only the following Thursday to consider matters pertaining to finance. (JCC 14:520). In this way Congress was not bound to any special orders and were left free to consider matters as they arrived.

Subsequent attempts to force the consideration of specific issues required a majority ballot and focused on achieving short-term goals of finishing business. One such resolution passed on 7 June 1779 tabled all dispatches and letters unless granted special orders or considered under unanimous consent. This rule was to "continue in force until Congress shall have gone through the reports of the board of treasury relative to finance, and the report of the committee of thirteen on foreign affairs, and of that on communications from the minister plenipotentiary of France, and no longer" (JCC 14: 696-7). Again, any real constraints on the calendar required majority assent and as such constrained agenda manipulation by any faction.

Examples abound of Congress disrupting even the minimal calendar under which it operated, in order to turn toward important emergencies. In an extended but very informative exchange on 6 April 1781, John Matthews (SC) and Thomas McKean (DE) moved:

"That Congress proceed immediately to the consideration of the present state of affairs of the United States....That for this purpose all public despatches, the reports of the Boards of War, Treasury, and Admiralty (except for such as the President, or a committee to be appointed for that purpose, shall, from time to time, inform Congress, require their immediate attention) be suspended until Congress shall have perfected such inquiry and taken the necessary measures in consequence thereof (JCC, 19:357-358).

That a broad majority of members were prepared to take some substantial action is indicated by the fact that a move to postpone this motion failed by a vote of 8 states to 2.

Following discussion of the Matthews motion, the following resolution was adopted by the Congress. While it did not go quite so far as Matthews and McKean had wished; it did not dedicate all day to these concerns, and it did not give either the President or a special committee the power to sort incoming business and bring only those judged to be sufficiently important to the floor, it did include much of what they sought. It was resolved

"That the house be resolved in a Committee of the Whole, at 12 o'clock on each day, to take into consideration the present state of public affairs, in order to devise further measures effectually to prosecute the war against the enemies of these United States, to satisfy the creditors thereof, and to restore the public credit" (JCC 19,357-358).

Critically, the motion involved Congress setting aside even the reports of their most relevant standing committees and boards; War, Treasury, and Admiralty, to confront the nation's most critical problems in the Committee of the Whole. Though the motion which ultimately passed did not wholly ignore the standing committees and boards, it did dedicate fully half, if not more, of every day to open discussion among all members in the Committee of the Whole.

The only other major attempt to bring some semblance of order to the process of legislating on the floor was embedded in the rules revision of 1781. Rule nine required that any ordinance introduced by a committee report or from the floor required three readings (JCC 20:477-8). This was an innovation in Congress, since, prior to this point, ordinances did not go through distinct formal readings. Quite often, prior to 1781, the text of an ordinance would be read and then postponed in order to provide delegates time to digest the text and draw up amendments. The adoption of rule nine required delegates to agree to a time for a third reading at which point debate would proceed by paragraph. Almost immediately delegates realized that this new rule provided a new mechanism for postponing the consideration of legislation (on this point see the discussions over legislation on 3 January, 1782 in the Journal).

Calendars, then, remained minimal throughout much of the Congress. Only reading the minutes, handling dispatches, and considering reports from the Boards (and later Executive Departments) of Treasury and War were given any special place in the agenda. Delegates could rely on the use of special orders and unanimous consent to control the flow of business. Yet these were not very sharp instruments for controlling the agenda on the floor of Congress. The best delegates could usually accomplish was to reserve short periods of time to focus on the backlog of business. Once that business was handled, delegates quickly resorted to a minimal calendar.

In part two points contributed to maintaining a weak calendar in Congress. First, the problems faced by Congress through much of its life were emergencies that required immediate attention. Even delegates trying to carefully craft an agenda, in which the order of issues was crucial, were often frustrated by new emergencies presenting themselves to Congress. When the Southern Army needed ammunition diverted its way or the French minister needed an immediate reply, Congress was not in the position to delay these matters. In many respects the external events brought on by the war, foreign alliances and matters of trade led Congress from dealing with one immediate need or another. A flexible calendar enabled Congress to quickly consider such matters (although not always quickly respond to those matters).

The second point is that the open agenda dominating the business of Congress left little room for a highly constrictive calendar. Although delegates had many opportunities to erect a strict calendar, they usually shied away from doing so. Delegates, ever suspicious of one another's motives, were reticent to provide any means by which the open introduction of matters on the floor could be taken away. A constrictive calendar represented a real threat to open discussion on the floor, and as such it is little wonder that delegates seldom closed off their choices.

*Obstruction.*

The third and final set of rules affecting the agenda process concerned obstruction powers held by delegates. While none of the rules adopted by Congress allowed a delegate the right to veto legislation, a number of procedures enabled delegates to postpone or otherwise delay the legislative process. Often these powers of delay approached veto rights, since legislation obstructed on the floor was often forgotten, tabled, or otherwise lost

At the outset Congress settled on a procedural rule allowing any delegate to postpone the determination of any question for a day. This rule remained unchanged during the course of Congress and was relied on by delegates to slow the process of debate, marshal arguments, and build coalitions. Delegates held the power of postponement almost as a constitutional right. Early in 1777 its exercise was challenged on the floor. While Congress was meeting in Baltimore, having fled Philadelphia in December 1776 to avoid a British march, a motion was introduced to return Congress to Philadelphia. Objections were raised during the course of debate that Congress' workload was too heavy to suddenly adjourn. However, it was clear that a majority of states preferred adjournment and if voted upon, the motion would carry. At this point North Carolina (most likely Thomas Burke) moved to postpone the matter until the following day.<sup>6</sup> A number of delegates, including J. Adams, Witherspoon, Wilson and Sherman alleged that this was not a matter in which a state veto could be imposed, and that the applicability of such a veto should be put to majority vote. This proposal provoked a new storm. Richard Henry Lee

"urged the violent Impropriety of putting such a Question at a time when a State attempted to avail itself of a Privilege reserved to each by the Original Rules of Congress which Certainly formed its Constitution and that if the rule was thought inconvenient the proper way would be to let the state first avail itself thereof and afterwards Consider the rule and alter and amend it if thought Necessary." (*LettersB* 6:368-9)

Making the matter a constitutional issue pointed to the importance of the early rules passed in Congress nearly three years previously and pointed out how binding many of these members regarded these rules. Thomas Heyward (SC) also agreed as to the constitutional nature of this issue, claiming

"that he thought it a very extraordinary kind of proposition to submit to a Majority whether than Majority should be checked by a Power absolutely reserved for that purpose in the Constitution of Congress." (*LettersB* 6:368-9)

The matter was brought to a head when Burke asserted that if the matter were put to a vote, the state of North Carolina would withdraw from the Congress. Upon issuing this ultimatum, Burke asserted that he would even refuse to enter into debate on the matter. His claim was that the early rules governing Congress

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<sup>6</sup> Most of the discussion here is taken from Thomas Burke's Notes of Debate for 26 February 1777. It is likely that Burke was the delegate raising the constitutional right of postponing discussion. In Burke's letters and observations in a number of points, he is always quite concerned with constitutional issues and rules of procedure in Congress.

must have been entered into by Common Consent, and nothing by Common Consent could dispense with them, that if a Majority of Congress could vote away the rules of the Congress which Common Consent had Established they were a Body bound by no rule at all and only Governed by arbitrary discretion, that if this was the case no state was secure, a Majority might vote that two, three, four or five states should form a Congress, altho the present rule required nine, that the votes should not be by states but by voice Individually. In short any the smallest Number of the Delegates might take upon them the whole Authority of the Congress, that putting the right of the state to the Question was assuming to exercise an arbitrary tyrannical discretion and if it was done he should Consider it as a most violent invasion of the right of his State which he would endeavor to resent as became him, that if the Question was at all put he should be at no loss how to Conduct himself. (*LettersB* 6:368-9)

The claim Burke made here was that rules provide a set of expectations for members. The willful change of those rules undermined those expectations and dramatically altered the strategic calculations made by members. Lee, Haywood and Burke all agreed that "constitutional" rules have a status different from that of ordinary rules of procedure. Since those rules were adopted by unanimity, convention dictated that they could only be overturned under unanimity. The threat to withdraw by North Carolina had its desired effect on Congress. It resulted in postponing the issue until the following day. More importantly, it preserved the right of states to delay discussion over an issue. Although the principle was upheld, a majority voted the following day for adjournment. (*JCC* 7: 164).

Obstructing Congress was routinely achieved in Congress - often by employing Congress' own rules and procedures. An exceptional case of obstruction occurred in 1778, and again involved Thomas Burke (NC), one of the more skilled parliamentary actors in Congress. On 10 April 1778 debate continued into the late evening. The discussion focused on a letter to Washington, and its content appeared too critical for Burke. When a motion to adjourn was finally called at 10 PM, Burke announced a vote in the affirmative, and then "declared the states might vote as they pleased, he would upon his honor adjourn himself; and thereupon he immediately withdrew ..." (*JCC* 10:334). His withdrawal resulted in Congress lacking a quorum. Only nine states had been present prior to the vote on the motion to adjourn. By leaving Burke effectively stalled action. Edward Langworthy (GA) followed Burke and also departed, leaving the Congress well short of a quorum. The remaining delegates determined they had the right to compel the attendance of members of Congress, since a motion to adjourn had not carried. The members ordered a messenger to contact the two delegates who had absented themselves from Congress and request their attendance. Langworthy returned, declaring that when he left he was under the impression that Congress was adjourned. Burke, on the other hand, brashly replied "Devil take him if he would come; it was too late and too unreasonable." (*JCC* 10: 334).

Absent a quorum Congress could do nothing except adjourn and take up the matter the following day. Two points irritated the delegates. First, Burke flaunted the preeminence of his state's position over that of Congress. Only months earlier the states had stricken a provision to the Articles allowing Congress authority over the delegates, instead letting the states retain control over their representatives. Second, by leaving, Burke effectively used a veto to postpone consideration of an issue to which he objected.

When Burke was questioned over his statement of the previous evening, he admitted to the answer he provided the messenger. However, if Congress considered taking any action against him, he first railed against the "tyranny of the majority" which attempted to force him to remain in Congress until unreasonable hours. He expressed clear doubts whether Congress had any authority to exercise power over him, since his credentials were issued by North Carolina. Finally, he noted

"that on his absence last evening, the members ceased to be a body, and therefore he was guilty of no rudeness to Congress; and if he was guilty of an affront, it was to individuals members, and required another kind of an apology; that he was not convinced he had done any wrong; was not disposed to make any kind of apology; and if he had been guilty of improper behaviour, he will answer to his State." (JCC 10:336)

A letter to the President explaining his actions took much the same tack. The only unusual twist he added to his defense was that given the lateness of the hour, he was in such a debilitated condition that he felt he could no longer properly represent his constituents. Rather than make a poor decision based on his weakened condition, he withdrew. (JCC 10:339)

Little came from this confrontation. However, Burke had succeeded in one goal - postponing discussion over a letter he felt was too critical of Washington. The breach of conduct by Burke, and presumably the cumulation of other problems on the floor which was increasing beset with a heavy workload led to a number of delegates circulating and signing a "pledge of order" on 12 April 1778. It read:

"We the subscribers members of Congress pledge our honor to each other that we will meet punctually at the hour of adjournment, that on any subject in debate (except in Committee of the whole house) we will not speak more than <fifteen> Ten minutes, seldom more than once, never more than twice, and that we will unite in supporting order & preserving decency and politeness in debate." (*LettersB* 9:403)

In a letter by William Ellery to Benjamin Huntington on 4 July 1789, recalling the affair, Ellery claims that the major purpose behind the pledge was to eliminate long speeches on the floor. Such speeches typically had the effect of obstructing work on the floor. Needless to say, of the 16 delegates who signed this pledge, Thomas Burke was not in their number.

The matter was partially resolved at the end of April when a committee investigating the matter reported back to the floor condemning Burke's behavior. While the committee found his behavior disorderly and indecent, it was more concerned with Burke's defense of his actions. The report indicated

"That the principle upon which he has attempted to justify his withdrawing from the house is dangerous, because it strikes at the very existence of the house, and, as in the present case actually happened, would enable a single member to put an instant stop to the most important proceedings of Congress." (JCC 10: 391)

Congress then ordered that a copy of the minutes and proceedings be sent on to the assembly of North Carolina. This pushed the matter off onto North Carolina. At the same point Burke requested leave to return to North Carolina from President Laurens and a series of letters flooded the Governor and assembly of North Carolina from Congress. Although delegates objected to the powers exercised by Burke, nothing was done to remove this right.

While mechanisms for obstructing legislative matters were few, they were regularly used, Especially important was the power of a single delegate to postpone discussion for a day on behalf of his state. While such a tactical move could not prevent a majority from acting, delay was often important for getting delegates to reconsider a matter or for building a new coalition around an amendment. Similarly, obstruction was often possible using ordinary parliamentary rules to table motions or postpone their consideration — although to be sustained, a majority was required. Finally, in the later years of Congress, with high absenteeism rates among delegates and extraordinary majority voting rules, withdrawal (or failing to attend) had serious implications for handling business, since a quorum was difficult to sustain. Even the threat of withdrawal had strategic implications for obstructing business. Obstruction, then, was commonplace in Congress, and the procedural rules encouraged delegates to use obstruction to their advantage.

*Summary.*

The rules of floor debate utilized by Congress remained remarkably unchanged from the first hopeful meeting of forty-seven ambassadors from the British colonies to the final days of Congress where a handful of delegates met from day to day, failing to achieve a quorum. These procedures opened discussion on the floor, ensured no faction gained agenda setting powers, and provided delegates with basic powers of obstruction and delay. Changes to these procedures were incremental and remained shaped by delegate's choices in the First Continental Congress.

In many ways these procedures defined a political structure with properties similar to the "institution-free" settings addressed by McKelvey (1986), Schofield (1985?), and others. These procedures imply inconsistency in collective choices (disequilibrium). Typically this translates to the absence of permanent coalitions. Since new issues can be introduced at any time, any actor can uncover an issue that splits apart a winning coalition. In turn this gives rise to instability in decision making with agendas that can shift unpredictably. The Continental Congress's procedures greatly undermining the possibility that long-term regional, ideological, or factional coalitions could be formed and maintained. Instead, the Continental Congress was buffeted by shifting coalitions, responding to the myriad of issues brought before it in a kaleidoscopic fashion. As we shall see next, the voting rules and procedures controlling attendance only exacerbated these problems.

### **Voting Rules**

In this section we focus on the rules used by delegates to decide legislative and executive matters in the Congresses. Considerable work in political science details various democratic voting schemes (see the survey by Riker, 1982). The conclusion is that all such schemes are flawed, since any voting rule yields non-democratic choices, is susceptible to manipulation, or is inconsistent. Consequently, the choice of any

particular voting rule has important implications for collective choices. The voting mechanism settled upon by the Continental Congress was no exception ~ it too fundamentally shaped policy making.

As an assembly of ambassadors rather than representatives, the delegates faced the sticky problem of how to cast ballots. Although the matter was quickly settled in the First Congress, the decision to use the "unit rule" remained a point of contention throughout the life of Congress. The choice of a voting rule whereby each state cast a single ballot only exacerbated problems of disequilibrium in Congress. Adoption of the unit rule tossed aside other majoritarian voting schemes in favor of an aggregation rule that granted important powers of obstruction to pivotal individuals within states. While simple (weighted) majority rule dominated the early life of the Continental Congress, following the Articles of Confederation, extraordinary majority rule was adopted, now requiring the assent of nine states to most "important" issues. This only added to problems in assembling majority coalitions dealing coherently with the work of Congress.

Of all the questions decided on by the delegates in the First Continental Congress, none lay so heavily on the future events of the Congress than the decision of a voting rule. Central to this decision was the relationship among the states and their role in Congress. As we have noted, delegates to the First Continental Congress regarded themselves as little more than ambassadors from their various colonies. As such, they were equal in each other's eyes, having assembled freely for the purpose of discussing action with respect to the Crown.

The problem of how to apportion votes was immediately apparent. Since the circular letter calling for a Congress neglected to mention the size of any delegation sent to Philadelphia, the colonial delegations differed dramatically in size. At the outset the Maryland delegation with four members had as many delegates as Massachusetts, even though the latter state was much more populous than the former. Meanwhile the size of state delegations ranged from two to seven. Giving each delegate an equal vote in matters before Congress was certainly implausible, since such a rule would only benefit those colonies with sufficient foresight to recognize the advantages of sending large delegations to Philadelphia.

As ambassadors to the Congress, delegates were nearly unanimous in their view that the fundamental voting unit was to be the individual colony. James Duane in his diary for 5 September 1774 notes a motion put

"That there was the highest necessity for fixing a Rule on the present Occasion with respect the Mode of Voting (to witt) whether the Sense of the Congress should be taken by the Majority of Voices of the Members; or Whether each Colony should have a Vote & the Majority be determined in that way?" (*LettersB* 1:26)

The delegates quickly agreed that votes should be cast by individual colony. However, beyond this point agreement broke down. Debate and discussion on an appropriate voting rule was held over until the following day.

At the outset a motion was put to the full body to appoint a committee "to fix the mode of voting by allowing to each province one or more votes, so as to establish an equitable representation according to

the respective importance of each Colony." (JCC 1:25) This motion, however, carried in the negative as members preferred to resolve the problem on the floor. In debate recorded by John Adams in his diary, Patrick Henry (VA) made the most radical suggestion, arguing forcefully (as always) that each colony's vote should be weighted according to its population. As with discussions a decade and a half later, delegates immediately raised questions concerning means of counting slaves and indians. In response to Henry, Thomas Lynch (SC) suggested that property should also be a consideration in weighting votes "and that it [voting] ought to be a compound of Numbers and Property, that should determine the Weight of the Colonies." (*LettersB* 1:28) Further proposals then followed, noting that if property was to be taken into account, so too should trade and other measure of a colony's wealth. Richard Henry Lee (VA) helped close the debate over schemes for weighted voting by concluding that there was insufficient information available to determine how to weight colonial votes no matter which weighting scheme was used. An accurate census was not available for weighting by population, wealth, trade, or some combination thereof. John Adams probably recorded the suspicions of others when he privately wrote

"I question whether it is possible to ascertain at this time, the numbers of our people or the value of our trade. It will not do in such a case to take each other's word, it ought to be ascertained by authentic evidence from records." (*Works* 2: 366)

Ending debate on this note left a final, obvious choice, that of a single vote for each colony. Samuel Ward (RI) noted that even in a populous and wealthy state such as Virginia, there was considerable variation in population and trade among the counties, and yet each county had the right to send two representatives to the House of Burgesses (*LettersB* 1:28). Ward linked this point to the importance of colonial sovereignty, and this position was strongly supported by the smaller colonies. Adams (and undoubtedly others) objected that "this method will be liable to great inequality and injustice; for five small Colonies, with one hundred thousand people in each, may outvote four large ones, each of which has five hundred thousand inhabitants." (*Works* 2: 366). Debate finally dragged to a close as the delegates finally concurred with Christopher Gadsden (SC) who concluded that "I cant see any Way of voting but by Colonies." (*LettersB* 1:28)

Congress then resolved "That in determining questions in this Congress, each Colony or Province shall have one Vote. -- The Congress not being possessed of, or at present able to procure proper materials for ascertaining the importance of each colony" (JCC 1:25). The final clause was deemed important for this resolution. The Connecticut delegation, in a letter to Governor Jonathan Trumbull, reported that substantial objection was made to voting equally by colony due to its inherent inequality in representation. However, this was the only means for solving the impasse over a method of voting and that "Entry was made on the Journals To prevent its being drawn into precedent in future." (*LettersB* 1:168)

The means for implementing a "unit" rule, in which each colony was to cast a single vote was left undefined. However, it is apparent that the delegates quickly settled on a method. Although formal rules were not adopted in this early period, the practice quickly evolved so that the delegates within each state cast

their ballots individually. The secretary would tally those votes within the state and then announce the state's vote based on a majority in that state. The earliest picture of this method is found in a diary entry by Silas Deane (CT) for 5 October 1774 in which he reports a motion carrying by a vote of 6 to 5 with Pennsylvania's delegation divided and consequently its vote not counted. (*LettersB* 1:145). This entry makes three points clear. First, simple majority rule was used to decide matters in this Congress. Second, votes were cast by individuals (this can be deduced by the fact that the Pennsylvania delegation cast an equal number of ballots on each side of the motion). Finally, tied votes within a colony were not counted, instead, it was simply noted that the delegation was tied and the vote had no effect on the outcome.

Clearly many of the delegates to the First Continental Congress thought they would be meeting only once, and gave little thought to future meetings of the Congress. Consequently, in order to move on, the voting rule was dispensed with in a simple manner and its practice was quickly implemented. As we noted in Chapter 2 the delegates were more concerned with achieving unanimity on the issues rather than worrying about mechanisms that highlighted division among the delegates. The matter of a voting rule, while important for detailing the relationship among the states, was regarded as something less important for determining legislative outcomes.

With the meeting of delegates in mid-May of 1775 for the Second Continental Congress, matters took on a more serious note. The first sustained skirmishes with British troops occurred the previous month. The Crown had not responded favorably to the letters addressed it by the First Congress. Therefore, the delegates faced rather serious new problems. Given the substantial overlap of delegates from the First Congress and the general sense of those delegates noted in the JCC that "unit rule" would not necessarily be a precedent, the delegates at the outset of the Second Continental Congress had the opportunity to change this rule. For all intents and purposes, Lyman Hall settled the matter of the unit rule when he appeared before Congress on 13 May 1775 as a delegate from the parish of St. John's in Georgia. The delegates unanimously agreed that he be admitted as a delegate, "subject to such regulations as the Congress shall determine, relative to his voting." (JCC 2:44-5). Discussion of Hall's status in Congress was delayed until 15 May 1775. At this point the debate focused on two points. First it resurrected debates from the previous year concerning the nature of representation and weighted voting in Congress. Second, debate centered on whether Hall represented the entire colony of Georgia, or simply the portion made up of the parish of St. John's.

Following considerable debate on these matters, Hall

"arose and after observing that the present distressful situation of American affairs had <compelled the Colonies> induced a necessity of this Congress, which was composed of Delegates representing whole colonies <though there was no law empowering the delegates to represent their particular provinces, yet inasmuch as>; that he did not represent a <whole> colony <as> [was] <established by law> but only a part of it, he did not <desire> insist on giving a vote as a colony, but was contented to hear and assist in the debates, and give his vote in all cases except where the sentiments of the Congress were taken by colonies." (JCC 11:49-50; see also Samuel Ward's Diary, 15 May 1775, *Letters* 1: 350)

By taking this position Hall effectively ended discussion of representation and the voting rule. Debate at the point Hall stepped in was heating up, returning to points that dominated discussion the previous Fall. Hall's voluntary disenfranchisement powerfully supported the position that whole colonies were the appropriate representative unit in Congress. This effectively blocked consideration of alternative methods of voting until new proposals were introduced during discussions of the Articles of Confederation.<sup>7</sup> The final act, cementing the use of the unit rule came three days later, when, on 18 May, Congress adopted the resolution "That the Rules of conduct to be observed in debating and determining questions laid down by the last Congress be adopted and observed by the present Congress." (JCC 2:55)

Although the manner of counting ballots was resolved quite early, little thought was given over to what constituted a majority. The fundamental question was whether a majority was constituted by a simple majority of the 13 colonies (7 votes) or by a simple majority of the colonies present in Congress. As long as all of the colonies were present in Congress (including a full complement of delegates from Georgia who arrived in mid-year, 1775) a simple majority meant the agreement of seven states. Even when a few state delegations were deadlocked, a seven state majority could be mustered. However, by December 1775 Congress found both the number of delegates and Colonies substantially reduced. Richard Smith's diary entry for 23 December 1775 records some misgivings over simple majority rule at this point. In an act by the Connecticut legislature forbidding settlers to move onto disputed lands, John Jay (NY) introduced a motion advising the Connecticut legislature to extend its time frame for issuing such an order until the Continental Congress could delve into the matter. While the motion carried by a vote of 4 colonies to 3, the Connecticut delegation immediately objected to the vote, wishing it set aside. They argued that the vote "was not carried by a Majority of the Colonies present, *sed non allocavit*." (Letters 2: 517). The combination of few delegates, absent Colonies and divided colonies gave some credence to Connecticut's objection. However, for the time being the delegates settled on majorities linked to the number of colonies present.<sup>8</sup>

With ratification of the Articles of Confederation in March 1781 the problem of what constituted a majority resurfaced. On one point the Articles were clear. Across a large array of issues the Articles specified that an extraordinary majority of nine states was required for passing legislation (see Article 9). These issues included Congress agreeing to treaties and alliances, appropriations, and military matters.

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<sup>7</sup> On 21 June 1775, Benjamin Franklin introduced into the Committee of the Whole proposed Articles of Confederation. Here he proposed a radical break with the concept of unit rule. His Article 4 required annual elections of delegates and Article 7 specified that one delegate would be sent to Congress for every 5000 polls cast (with this number being rescaled from time to time). Finally, under Article 8, each delegate would exercise a vote in Congress. However, there is little indication that these proposed Articles of Confederation were given any serious attention by delegates.

<sup>8</sup> It was not until 1776 that the delegates formally adopted a quorum rule specifying that nine states be present before Congress could conduct business. This effectively imposed a minimum five state majority rule. In remarks on the newly proposed Articles of Confederation before the North Carolina Legislature in November 1777, Thomas Burke noted the usual practice of voting in the Continental Congress while defending state powers. He pointed out that "The Congress now determines by a majority which need not be more than five, and of which seven is always conclusive ..." (LettersA 2: 557).

Across other issues what constituted a majority remained an open question. The language in Article 9 held that such matters could be resolved "by the votes of a majority of the united states *in congress assembled.*" (JCC 19:220, italics added). However, this wording was sufficiently vague so as to occasion almost immediate debate.

Only five days following ratification of the Articles, President Samuel Huntington opened discussion to settle the question of what exactly constituted a majority. This debate occupied almost the entirety of 5 March 1781 and half of the following day. James Duane (NY), James Madison (VA), Jesse Root (NJ) and others argued that given that a nine state quorum was necessary to conduct business, the wording of Article 9 implied that five states comprised a majority — just as in the pre-Confederation Congresses (see Thomas Rodney's Diary, 5 March 1781, *LettersA* 6: 8). No doubt these delegates looked backward to the difficulties with assembling a coalition of five states given the extent to which delegations within states could be divided. However, this argument was undone, primarily by Thomas Burke's (NC) comments that this issued had been argued at length during debates over the Articles. The sense of Congress that that time was that a simple majority meant the assent of a simple majority of the total states in the confederation. The reason a specific number was excluded under the Articles was the supposition that additional states would join the Confederation (notably Canada). At that point the size of the majority would change (*LettersA* 6:8). Burke's point was supported by John Mathews (SC) who noted that the South Carolina delegates were instructed to strike the words "in Congress assembled" during debates over this Article in 1777. If this had been done it would be clear that a simple majority would refer to a simple majority of the states in the Confederation, not just those present in Congress.

Although no mention is made in the *Journals*, Thomas Rodney's *Diary* entry for 6 March 1781 (*LettersA* 6:9) and Ezekiel Cornell's letter to Governor Greene of Rhode Island (*LettersA* 6:9) note that Congress settled on a decision rule requiring the assent of seven states for minor matters. Nine state votes were required for the major matters noted in Article 9 of the Confederation.

The consequence of this choice meant that gaining a majority on even minor matters in ordinary times demanded a supermajority. As we describe in the next section, following ratification and with the war winding down in 1782, absenteeism became a serious problem for Congress. Often it was difficult to obtain a quorum in Congress. With attendance barely hovering at 10 voting state delegations, requiring a seven vote majority demanded a considerable degree of unanimity among delegates.

The explicit requirement in Article 9 for an extraordinary majority on matters of finance and defense placed an even heavier constraint on passing legislation in Congress. Practically from the outset delegates recognized the strategic opportunities from requiring nine votes on these constitutionally mandated matters. Most explicitly the extraordinary majority rule provided yet another procedural rale for blocking positive action in Congress.<sup>9</sup> For example, Thomas Burke (NC) almost immediately made use of this

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<sup>9</sup> On the theoretical implications of extraordinary majority rules, see Badger 19?? etc.

point to reconsider a previously settled matter. On an appropriations matter handled by the Board of War on 25 March 1781, he called a recorded vote to clarify a vote taken the previous day. It was contended that allowing the expenditure requested by the Board required the assent of nine states. In the subsequent vote, the motion was lost (JCC 19: 286). In subsequent months and years, questioning the number of votes needed to pass a piece of legislation was a favorite means of obstruction, and on close votes, for overturning previous motions.

The unit rule, coupled with adherence to strict majorities and supermajorities for a number of matters, made positive legislative action problematic in Congress. Often these rules required unanimity among the states present before Congress. However, unlike the earliest days of the First Continental Congress, unanimity was a scarce commodity among (and often within) the fractious state delegations. If anything, the unit rule enhanced the powers of delegates to exercise "negative" agenda powers — powers which enabled members to block positive legislative or executive action.

#### *Voting Procedures.*

Implementation of majority and supermajority rules came rather quickly. By the First Congress procedures were adopted which were retained throughout the subsequent years of the Congresses. In short, on every votes each state's delegation was polled by the Secretary. Thompson began by calling on the most senior member of the New Hampshire delegation, the next-most senior, and continuing until reaching the junior-most member of that delegation.<sup>10</sup> The Secretary next polled delegates from Massachusetts, again calling first on the most senior and ending with the least senior delegate. The poll of states proceeded in the same order, from north to south, always beginning with New Hampshire and ending with Georgia. Once all delegates gave their voice vote, the Secretary tallied each state's vote. Here the rule was clear. A simple majority of the state delegation decided its vote. If the delegation was evenly split, its vote was recorded as "divided," with the net effect that the vote was not counted. Once the votes were tallied by state, the Secretary announced the results.

This voting procedure carried with it three features: the strict order in which votes were cast, both by states and delegates; the reliance on voice votes; and that delegates individually cast their votes, which were subsequently aggregated into a state vote. Taken in combination these features provided delegates important incentives for strategic behavior. The order in which ballots were taken gave those later in the order informational advantages. Since all voting was by voice, this too enhanced information for those later in the voting order. Instead of requiring that each delegation caucus and cast a single vote, individually polling delegates heightened incentives for strategic behavior.<sup>11</sup>

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<sup>10</sup> Seniority was not defined as years of uninterrupted service, but rather when one first entered Congress. In examining the roll calls recorded by the Secretary, Charles Thomson was quite consistent in how delegates were polled

<sup>11</sup> While no attempts were made to force a delegation to cast a single vote, there were periodic attempts to regularize a form of state caucusing. In 1781 a rule was proposed such that

With full information as to previous votes, no requirement binding a delegate to a caucus, and simple majority rule within delegations, individuals had important strategic incentives. Most of the advantages stemmed from the fact that delegations were small (frequently with only two delegates on the floor). As we show in subsequent chapters state delegations were not unified. With a small, even number of delegates, one strategic option was to negate a state's vote by forcing a tie within the delegation. A second option was for a delegate to cast a "sophisticated" ballot, leading the state to cast a decisive vote taking away passage, thereby blocking legislation. These strategies gave delegates "negative" agenda powers, powers to block changes to an agenda.<sup>12</sup>

While delegates may have had the incentives to behave strategically in casting their ballots, did they have the opportunity? Knowing whether a delegate voted strategically is nearly impossible, since it requires knowing each delegate's preferences over all issues and then observing when a delegate voted contrary to this myopic self-interest. Although such studies have been undertaken, they are typically focused on a specific issue and require heroic assumptions about actor's preferences (in particular, see Enelow 1977 and Denzau, Riker and Shepsle, 1987). Here we examine voting by delegates from 1777 through 1788 and ask whether the shift of a single delegate's vote could have resulted in a different outcome. By a different outcome, we are concerned with three cases: whether a majority could be dissolved; whether a minority could become a majority; and whether a tie could be broken. In each case we conservatively estimate the possibilities for sophisticated behavior by focusing on the case where a single delegate's vote would result in a different outcome. We cannot and do not attempt to answer the question of how often delegates used sophisticated strategies. Table 3-1 lists, by year, the percentage of votes susceptible to manipulation of a single delegate for all recorded votes. Overall 13.2 percent of the recorded roll call votes could have been changed by the switch of a single pivotal delegate. Clearly the opportunities were present (and possibly taken) for strategic behavior.

<Table 3-1 About Here>

The possibility that others engaged in strategic voting was not lost on members. Prior to 1777 no written record was kept concerning how votes were cast. This prompted several delegates to push for recorded roll calls so that members might have a record returned to their states. For example, early in 1777 over a motion to adjourn Congress and return to Philadelphia, there was considerable agitation over whether Congress could afford the time off. The considerable business pressing on Congress, some delegates argued, made it difficult to justify an adjournment, no matter how short. On 27 February 1777 it was

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"The members of each state shall sit together in Congress for the more ready conference with each other on any question about to be taken that the house might not be disturbed by the members moving from one point to another to confer on the vote to be given." (JCC 20: 482)

Clearly delegates did engage in some form of caucusing while the vote was called. However, this motion was postponed indefinitely, falling to the wayside together with a motion requiring all delegates to wear purple gowns while sitting in Congress.

<sup>12</sup> For discussions of "sophisticated" voting, see Farquharson, 1969; McKelvey and Niemi, 1977; Herzberg 1985; and Wilson and Herzberg, 1987.

resolved to return to Philadelphia upon adjournment. Before adjourning, however, Samuel Chase offered a resolution

"That all the proceedings of Congress be entered on the Journal, and that the same except such parts which a majority shall order to be kept secret, be immediately published, and that on every important Question agitated and debated in Congress the yeas and nays of every member be entered on the Journal if required by any one of the States." (*Journal* 7:164)

Although the motion failed, it won the support of a number of delegates. Thomas Burke in his notes of debate detailed his remarks on this point contending that

"it was very proper the Congress should have the public check on them, and that as every member was liable to be impeached by the State he represented, it was a Justice to him and to the State that his votes should be entered on the Journals, that the state might be furnished with Testimony to prosecute, and the delegate with Testimony to defend himself — postponed." (*LettersB* 6:382)

The issue again came to a fore on 2 August 1777, when finally, and without any apparent contention, a new resolution was passed resolving

"That all proceedings of Congress, and all questions agitated and determined by Congress, be entered on the journal, and that the yeas or nays of each member, if required by any State, be taken on every question as stated and determined by the house." (JCC 8:599)

This resolution later became incorporated into a general restructuring of the rules of procedure in 1778 (JCC 11:535).

Little foresight accompanied this switch in the rules. While a recorded vote could be called at the request of any delegate, it was also possible to force a roll call vote on the same issue even though a vote had already been taken. On the first recorded roll call vote, which concerned the promotion of Benedict Arnold, the question was put and defeated without being recorded. In turn a delegate from Rhode Island immediately called for a recorded roll call of that vote which was entered onto the Journal. The strategic character of this procedure was not apparent until 23 August 1777 in which a vote was passed amending a report by the committee on how best to investigate the retreat from Fort Ticonderoga. Immediately upon passage a delegate from New Hampshire asked that the votes be recorded on the Journal. In turn this led delegates to vote again, with the outcome reversed as the amendment was defeated. Thomson's entry on the Journal tersely notes "So the States were equally divided, one of the members having changed his opinion." (JCC 8:669). The threat of a permanent record for this vote was sufficient to shift at least one voter's ballot and it served the purposes of the delegates from New Hampshire who hoped to defeat the amendment.

Three days following this about face on a vote due to the sequencing of voting (a "straw poll" followed by a recorded vote), delegates passed a resolution mandating that if the vote was to be recorded, a member must ask the same prior to taking the vote. At the same time this resolution detailed the manner of voting on issues, specifying that "the individual members of each State shall be called upon to answer aye or no to the question, which answer shall be entered on the journal, and the question determined by the majority of states, as the majority of votes in each shall make appear." (JCC 8:677).

Although the Continental Congress was small by comparison with the contemporary Congress, the voting procedure was sufficiently unwieldy to put noticeable drag on the decision process. Practically every issue required a roll call vote across the assembled delegates. Since issues could be brought up in any order and since emergencies predominated, anticipating any agenda was an impossibility. Consequently each vote was no doubt accompanied by a general reshuffling of delegates on the floor as state delegations hurriedly formed into caucuses to determine if there was a state position. If anything this led to additional delays on the floor. Figure 3-1 provides a quarterly breakdown of the number of recorded roll call votes in the Congress from 1777-1788. Even by contemporary standards, there were a large number of recorded roll calls in the Continental Congress. However, Congress typically faced a far greater number of roll call votes than entered on the Journal. Recorded votes were only entered at the request of a delegate and typically so that delegate could have his position recorded for consumption in his state. Votes on almost all issues still required a majority of states, and these could only be aggregated by a poll of members by the Secretary. The use of unanimous consent was rare (as was unanimity following the First Continental Congress). Instead, voting was a time consuming task that ate into a valuable resource for the delegates ~ their time.

<Figure 3-1 About Here>

Generally, the unit rule used in the Continental Congress aimed at ensuring equality among the states — especially given the variable nature of representation within state delegations. The subsequent adoption of extraordinary majority rule on major issues (a 9/13's majority) following ratification of the Articles of Confederation aimed precisely at the protection of minorities. As we illustrate in the next section, requiring a minimum of seven votes to pass normal issues usually meant an extraordinary majority given high rates of absenteeism. Again, this afforded minority protection, albeit protection in the form of negative agenda power — the power to block legislative matters.

But the unit rule and the peculiar procedure for polling individual members before aggregating a state's ballot had a more pernicious effect on Congress. First, as already noted, such a rule provided substantial opportunities for a small handful of pivotal actors to be decisive. Ordinarily this translated to the possibility for blocking legislative matters. More importantly, the unit rule undermined the possibility that long term, programmatic coalitions could be assembled and sustained in Congress. A majority coalition could not be built by garnering a majority of delegates. Instead, any majority required a majority of state delegations. As we develop in depth in the final chapter delegations themselves were often divided. Permanent coalitions, however, required greater stability than that gained by putting together a majority of states. While in the first several years of the Second Continental Congress a radical faction dominated, that coalition's number was larger than the (bare) state majority that typically could be assembled. The unit rule effectively prevented delegates from using forms of vote trading to build majority coalitions ~ again because it was never sufficient to build a majority of delegates, but instead oversized majorities were needed to simply obtain a majority of state delegations. Under the unit rule few had an incentive to engage in building permanent coalitions - even those like Hamilton who later became important party leaders.

### Absenteeism and Turnover

The formal rules of debate and informal practices governing floor behavior in the Continental Congress opened rather than constrained the agenda process. These rules made the selection of collective choices more rather than less fragile. In a similar fashion the imposition and extension of the "unit" rule opened the possibility of majority rule voting cycles by undermining conditions for vote trading and retaining simple majority rule procedures for most issues. As if these two institutional features were not enough to ensure a non-cooperative environment with its attendant "chaotic" outcomes, the Continental Congress was unable to implement rules governing the attendance of delegates. As a consequence Congress was plagued by extensive levels of turnover and absenteeism by delegates. The problems became so severe, that Congress was unable to meet in session for many months during the last several years due to the lack of a quorum.

#### *Undermining Stable Coalitions.*

Unconstrained entry and exit from a decision making setting injects considerable uncertainty into building majority coalitions. On the one hand a new coalition can be built around each issue brought before the body. However, the net effect is a considerable expenditure of resources on constructing a new coalition at each point and considerable uncertainty is introduced as to whether any individual will be among the winners. On the other hand, coalitions can be built for the long run by using a series of vote trading maneuvers in which actors swap votes across issues.

Holding together a coalition based on vote trading, however, has two requirements. First it requires that actors engaging in trades have a medium of exchange (a vote) and a means for honoring that exchange. The latter problem is particularly severe, since an actor promising a future vote in exchange for another's present vote then has powerful incentives to renege on the agreement. An actor holding a pledged vote can demand even more from his trading partner if his partner has previously cast his vote as promised (see Jensen and Meckling, 1976 on the incentives for post-contractual opportunism). Equally problematic is that a promise on a vote is not a durable commodity. If an actor exits the institution, a promise for a vote is not automatically transferred to his replacement.

The second requirement is some mechanism by which to enforce agreements. In the absence of any mechanism to bind actors to their promises, the incentives for renegeing are even stronger. Most legislative bodies lack any mechanism which enforces agreements across members. Among the possibilities for providing such an enforcement mechanism is leadership and repeated interaction. Leadership positions have been pointed to as a means for coordinating member behavior. Empowered to organize the flow of business, leaders are often granted powers to reward and punish members and those

powers can work to ensure that long-term vote trading agreements are reached across legislative actors.<sup>13</sup> A different approach is suggested by Axelrod (1984). Since actors in legislative settings typically meet for lengthy periods of time, they have numerous repeated interactions. If actors choose a "nice" strategy, cooperation will flourish. This amounts to playing a strategy of "tit-for-tat," where if another actor reneges on an agreement at the next iteration no agreement will be made with that individual, those who renege will quickly be isolated from the remainder of the legislative body. This is not unlike a reputational effect in which, after repeated interactions, individuals are categorized as to different degrees of reliability. The least reliable are quickly isolated and excluded when forming agreements.

All of this discussion highlights the importance of low membership turnover for vote trading. In a complex legislative environment votes will not be traded only across pairs of issues, but across many issues. The result is the growth of an informal economy where members accumulate promises (votes) and expend votes. Since these promises are non-transferrable (one actor cannot reassign another's promise) what is involved are complex pairs of agreements between individuals. If members exit at unpredictable intervals, promises for future performance are quickly obscured. It is difficult to see why members in a setting with considerable absenteeism and turnover would agree to trade votes given the uncertainty that any member will be present to honor that commitment.

The flip side is also true. If reputational effects provide a powerful mechanism for assuring performance in vote trading, where turnover is high, reputations of incoming members will be uncertain. Likewise, new entering members will lack information as to the reputation of others. Consequently few actors will have incentives to engage in vote trades if they have to rely on reputation. As we will show turnover and absenteeism were central problems in the Continental Congress. As such, this closed off yet another avenue from which long-term stable coalitions could have evolved.

Delegates to the Continental Congress well understood these problems of building coalitions from a membership that was constantly changing. In complaints to Governor Iredell of North Carolina concerning the pace of business in the Congress, Samuel Johnston (NC) wrote "that the frequent change of the members does in almost every instance break in upon the best digested system, and renders inefficient the best concerted measures" (*LettersA*, 6:49,8 April 1781). The problem Johnston was pointing to was precisely the problem of anticipating who would be present on any issue and then building a sustained coalition around that issue. To build a long-term coalition was practically unthinkable.

#### *A Drag on Decision Making.*

In addition to undermining the formation of stable coalitions, turnover and absenteeism places a drag on the decision making process. The entry of new members has two important effects. First, updating each new member wastes a valuable, non-renewable resource: time. Legislative bodies ordinarily have

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<sup>13</sup> See Calvert, 1987. Party is another such mechanism that can be used and is related to powerful leadership. On this point see the discussion by Brady and Cooper, 1982.

tremendous demands on time, since heavy workloads imply that some issues receive attention while others will not. In most legislative settings the competition for legislative attention truly is zero-sum. Second, it means that old issues are rehashed, oftentimes re-exposing old cleavages dividing the membership. Ordinarily, issues which are brought forward under consideration have included strategic amendments to ensure a majority. However, as new members enter and question a piece of legislation, responses to those questions often raise old objections and introduce new conflict.

Delegates to the Continental Congress were painfully aware of these points. Madison, as was so frequently the case, looked beyond individual cases to general principles in considering the implications of member turnover for efficient legislative performance. In late December 1782 Congress was reconsidering the control it had given to the French over American peace negotiations. Madison noted that the initial "considerations still justified the original measure in the view of the members who were present & voted for it. All the new members who had not participated in the impressions which dictated it and viewed the subject only under circumstances of an opposite nature, disapproved it" (*Journals*, 24:875).

Another issue taken up about a week later again spurred Madison to think about the impact of new members on a legislative body. Discussion surrounded a consular convention recently completed, but not yet in effect, between the United States and France. One provision of this agreement barred consuls from engaging in trade. Madison notes that though "The sentiments of the members were various...It was observable that this diversity of opinions prevailed chiefly among the members who had come in since the Convention had been passed in Congress; the members originally present adhering to the views which then governed them" (*Journals*, 25:846). Madison concluded from these two and other similar discussions that "experience constantly teaches that new members of a public body do not feel the necessary respect or responsibility for the acts of their predecessors, and that the change of members and *circumstances* often proves fatal to consistency and stability of public measures" (JCC 25:846).

Madison's complaints focused primarily on new members entering the legislative body who either lacked the information necessary to reach a well-formed opinion or whose opinions interrupted the flow of business by breaking apart carefully crafted majorities. These complaints and others by delegates, were predicated on substantial rates of turnover and absenteeism in the Continental Congress. But these comments only serve to substantiate the larger theoretical point that building and sustaining stable coalitions is difficult in an environment where the membership is constantly shifting.

#### *Absenteeism and Turnover Rates in the Continental Congress.*

How extensive was delegate turnover and absenteeism in the Continental Congress? Moreover, were the concerns voiced by Samuel Johnston and James Madison only isolated events or a picture of the more general problems faced in Congress? Turnover was a serious problem for the Congress. Table 3-2 shows the percentage turnover of members by year. These yearly turnover data are based on the "Congressional year" in which delegates were to appear in early November and serve through the following

October. For the years reported in Table 3-2 turnover is calculated from the number of members not returning to Congress, divided by the total number of members attending in the preceding year. Since there was no fixed number of delegates for the Congress, such a turnover measure controls for fluctuations in the total number of members attending each year. Turnover throughout the period increased from a little under 10 percent in the first Congresses to over 60 percent by the final Congresses. This meant that as the workload of the Congress increased, there was a marked increase in the number of experienced delegates leaving the Congress. This also made it difficult for individuals to coordinate long-term congressional business, since it was difficult to predict who would be present in the future.

<Table 3-2 About Here>

These turnover figures are not terribly unusual for this period. In a study of turnover rates in British North American Colonial Assemblies, Jack P. Greene finds very similar rates of turnover in those bodies. Moreover, even in the subsequent Federal Congresses, these rates of turnover are comparable (Alford and Brady, 1988). One enormous difference between the Continental Congress and these other bodies is based on the existence of a strong leadership core in these other bodies and the absence of leadership in the Continental Congress. As Greene argues, the presence of a leadership core and a strong Speaker in many of these colonial assemblies provided institutional memory and contributed to the agenda setting power of an entrenched leadership. Even in the early Federal Congresses, substantial institutional memory remained in the hands of delegates holding long terms of office.

The extent of turnover, however, was far greater than that suggested the data presented in Table 3-2. It was quite common for delegates to leave for weeks or months at a time to attend to personal or state business. The fluctuating and sporadic nature of attendance in the Congress is well illustrated by Figure 3-2 which depicts, on a monthly basis, the changing composition of membership. The line plots the percentage turnover from month to month in the Continental Congress. In some months as little as 5 percent of the membership would turnover. However, in other months, turnover could reach 70 percent or more. Not surprisingly, turnover was usually higher between the months of October and November when the new Congressional year began. Finally, in the last five years of the Congress there was substantially greater variation in turnover than in the earlier years. This meant that coordinating delegates became increasingly difficult. The overall point illustrated by the figure is that there is no clear pattern to the turnover. Given that, on average, there was a 17.5% monthly turnover rate, it was nearly impossible for members to engage in any form of trading favors as a means of augmenting their power. This in turn removed this exchange process as a means of institutionalizing majority coalitions. -

<Figure 3-2 About Hero

It is clear that turnover is damaging for sustaining institutional memory and using that accumulated experience as a means for building legislative leadership. Equally damaging for the Continental Congress was the fact that the length of attendance for members was quite short. Excluding both 1774, the first Congress, and 1789 the final (partial) year of the Congress under the Articles of Confederation, we find that

members served, on average, only six months out of each Congressional year. For most delegates this meant that even though the Congress met year around, the job as delegate was, at best, part time. A somewhat different picture of the level of service is found in Table 3-3. Here, over the full span of the Congress we break down the total amount of time in which members served. Only a small percentage of members served for 60 months or more (just over two percent). Likewise, just over 20 percent of the members served in the Congress for 24 months or more. By contrast, just under half of the members (45.6 percent) served for twelve months or less. In fact, the rules under the Articles of Confederation deliberately sought to constrain long-term service in the Congress. Members under Article 5 were not permitted to serve any more than three years out of any six year period. This rule, coupled with the very high rates of turnover, effectively constrained members from seeking to build long-term majority coalitions.

<Table 3-3 About Hero

Our data for Congress indicates that turnover and absenteeism was problematic. Of these twin problems, the latter was probably far worse than the former. Absenteeism disrupted work in Congress, broke apart factional alliances, and often resulted in institutional stalemate due to a lack of a quorum.

*Coping With Absenteeism.*

The Congress tried a number of ways to staunch absenteeism. Although it passed formal rules governing delegate behavior, sent letters to the states, and pleaded for delegates to attend, the Congress faced an overwhelming roadblock to coercing the behavior of delegates. Members attending Congress were only responsible to their states. Congress held no controls over its members, since delegates were agents for their respective states. The only constraints held by Congress were with respect to the rules of debate, where delegates could be (but were not) censured for chronic absenteeism. Beyond this, constraints on delegates were defined (after 1781) in the Articles of Confederation. In the Articles it was abundantly clear that the states were to exercise control over their own delegations.

Almost from the outset of the Continental Congress problems of absenteeism were apparent. Three types of problems were to plague the Congress. The first two occurred early in the life of the Congress. One concerned attrition within state delegations which threatened an individual state's representation. The other concerned overall levels of absenteeism in the Congress which threatened whether a quorum was attained in order to carry out business. The final problem concerned delegates who served longer than the time allowed under the Articles of Confederation, once they were implemented in 1781.

While absent delegates were not a problem for the short session held under the First Continental Congress, by the Second Continental Congress missing delegates posed a problem. Problems of state representation and a quorum in Congress came to the fore in the waning months of 1775. In October the New York delegation found its numbers greatly depleted due to illness and absences. In the credentials accompanying the delegation to Congress, the New York Provincial Convention named twelve delegates, any five of whom were authorized to act (JCC 2: 17). This was a much larger delegation than most of the

other states. States like Massachusetts, Connecticut, New Jersey, and Maryland had appointed from five to seven delegates, constituting any three to be sufficient for a quorum. So depleted was the New York delegation by October, that in a letter to the Provincial Convention the delegates submitted "it therefore to your consideration whether a delegation of the power to three when the rest are absent, would not be advantageous to the colony" (*Letters!*: 193,16 October 1775). Without restructuring the credentials, New York was in danger of losing its vote on the floor. Without a sufficient quorum of five delegates, the remaining delegates from the state would not be allowed to cast a vote for the state.

New York was not the only state coping with absent delegates. Absenteeism among delegates in the other states prompted Congress to action a month later. On 16 November 1775 it was resolved "That for the future, no member absent himself from Congress without leave of Congress." (JCC 3: 357). This rule was to remain a standing rule governing floor behavior throughout the remainder of the Congress. However, it was to be honored as much in the breach as in practice. At the same time, delegates were ordered by Congress to "write to their colleagues, who are absent, and inform them that the Congress expect their immediate attendance." (JCC 3: 357). Although Congress sought to toughen its stand at this point, the evidence is mixed as to the success of such exhortations.

It is not apparent that absenteeism gained the missing delegates any advantage in escaping the workload of Congress. In December 1775 Stephen Crane (NJ) was elected to a grand committee to outfit armed vessels (the precursor to the Navy Committee). However, as Richard Smith notes in his diary entry for 14 December 1775, Crane was absent (*LettersB* 2:486). Richard Smith also notes, a little over a week following his comments on Crane, that absenteeism began to cut into the ability of Congress to carry out its work. On a motion by John Jay (NY) to recommend to the Connecticut legislature that it extend its timetable on forbidding settlers into disputed territory, Smith notes "his motion was carried 4 Colonies to 3 & the rest either divided or absent The Delegates of Connecticut wanted to set aside this Vote because it was not carried by a Majority of the Colonies present, *sed non allocavit* (*LettersB* 2:517,23 December 1775) The point was well made, since absenteeism and divided delegations often resulted in majority votes that lacked a majority of the states.

By 17 July 1776 discussions over the Articles of Confederation began in full force. Several of the articles directly addressed the duties of the states with respect to their delegations. In the initial draft, Article 16 made it clear that the states were to fully support and be responsible for their own delegations (JCC 5: 549-50). Article 22 introduced an additional wrinkle for delegates, limiting the term of service of any delegate to three years out of any six (JCC 5: 552). Although numerous revisions would later be made to the Articles and it would be another five years before they were adopted, still these two features were maintained.

A notable addition and change in the Articles affecting delegates was an amendment adopted on 14 October 1777 which mandated that a state could be represented by no fewer than two nor more than seven delegates (JCC 9: 803). The lower figure set a minimal size for a state to have a quorum so that its vote

would be counted. However, prior to the adoption of the Articles, numerous states were represented by only a single delegate.

Another Article was struck out on 11 November 1777 which would have empowered Congress with control over the delegates. Allowing that "the United States in Congress Assembled, shall have Power to censure and to fine any of their Members, the better to enforce Obedience to the Rules and Orders of the House." (Journal 9:887) Although no reason is given for striking this Article, it is quite likely that delegates sought to reserve the right of censure for the states.

Although ensuring representation was regarded the responsibility of the states, still Congress was confronted with the daily problem of obtaining a quorum. Instead of relying on delegates to send letters to missing colleagues (as it had tried in the past), Congress adopted a new expedient on 1 October 1776.

Noting that

"Whereas, a full representation in Congress of the several United States, is highly necessary on business of much importance to America; therefore,  
"Resolved. That the president be desired to write letters to the conventions and assemblies of the respective states, requesting that measures be taken, to cause, as speedily as possible, a full representation of the said states in Congress." (JCC 5:837)

This attempt at gathering delegates to Congress was little more successful than other pleas for full attendance.

Prior to the adoption of the Articles of Confederation state assemblies resorted to a number of schemes to ensure the state vote would be counted in Congress. On 24 July 1778 a question was raised whether Georgia could authorize, in its credentials, a single delegate to cast a ballot. This was quickly affirmed, with the other state delegations pressuring their state assemblies to reduce the numbers need to provide representation in Congress. In quick order, the same was affirmed for North Carolina (JCC 11: 715). Exactly seven months later, when considering an issue, it was questioned from the floor whether Connecticut could cast its vote with only a single delegate. The credentials clearly stated that two members were minimally necessary in order for the state vote to be counted. On a resolution allowing a single delegate from Connecticut to cast its ballot, the states were divided and the resolution was defeated (JCC 13: 249) The following day, when Connecticut had two delegates assembled the question was again put whether the credentials of the state could be overturned within Congress and allow a single delegate to cast Connecticut's vote. This time, however, the states were unanimous in rejecting the motion (the Connecticut delegation being divided, JCC 13: 250). This vote effectively reasserted the rights of states in deciding issues of representation.

Following adoption of the Articles, states were now required to have at least two delegates present in order for the state to cast a ballot. However, in order to accommodate problems with states even assembling this number, the new rules governing floor behavior and debate adopted in 1781 lowered the size of a quorum for Congress to conduct business from nine to seven states. Even this, however, was unable to cure problems with attaining a quorum. Once again Congress, on 2 July 1783, formally adopted a

motion requesting that the state send delegates as quickly as possible in order to handle matters of great interest to the United States. Although a quorum of seven states was present at this point, many of the issues under consideration now required a minimum majority of nine states for passage. Even the quorum available at this point evaporated two weeks later, when Congress adopted a resolution

"That whenever the President shall be obliged to adjourn Congress, from the want of seven States, an entry shall be made in the daily Journal of the states present, and of the names of the individual members present from the states unrepresented." (JCC 24:436)

From this point on the complaints by delegates both in private letters and on the floor of Congress are almost constant. Yet Congress was powerless to compel the attendance of delegates. In many ways the frustration expressed in a motion by David Howell (RI) on 10 February 1784 concerning the lack of attendance in Congress was typical. He noted that

"Whereas notwithstanding letters have been repeatedly written to the states unrepresented in Congress urging them in the strongest terms to send on their Delegates yet such has been the inattention of several of the states to this important point that there have been but eight states on the floor for twenty days past, and nine states for a few weeks only since the commencement of the present Congressional year,..." (JCC 26:74)

As if the problems of attendance were not bleak enough, Congress' Committee on Qualifications began in 1784 to contribute to the problem. On 1 March 1784 the Committee reported that Sam Osgood (MA) was incapable of serving any further, since he had served for a period of three years since the ratification of the Articles. (JCC 26:121).<sup>14</sup> Less than two weeks later the Committee rejected several other delegates, claiming their credentials had expired. In particular the entire delegation from Delaware was declared ineligible to serve since their credentials were good for only a year, yet they had been appointed over a year ago. (JCC 26:137). To lessen confusion over terms of service, on 23 March 1784 the Committee proposed that states appoint their delegates to begin their terms on November 1 of each year (JCC 26:156-7). However, as with other resolutions attempting to prompt the states to concerted action, it had little impact. Delegates, when they deigned to serve, were appointed throughout the year.

Credential problems continued to haunt Congress until its demise. While but a minor irritation to conducting the business of Congress, it still prompted a number of delegates to press the states for increased representation on their delegations. On 19 April 1784 the following resolution was adopted, detailing one side effect of underrepresentation in Congress:

Resolved. That the legislatures of the several states be informed, that whilst they are respectively represented in Congress by two delegates only, such an unanimity for conducting the most important public concerns is necessary as can be rarely expected. That if each of the thirteen states should be represented by two members, five out of twenty-six, being only a fifth of the whole, may negative any measure requiring the voice of nine states: that of eleven states now on the floor

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<sup>14</sup> Osgood was later reinstated by a motion from the floor (JCC 26: 159, 23 March 1784. The delegates ruled, in an imaginative way, that the reference in Article 5 of the Confederation was to consecutive terms of service. On 6 September 1785 the Committee ruled that several delegates who had served more than the three years in six limited under the Articles of Confederation referred to the Congressional year rather than when delegates began their service (JCC 29: 882-4). Thus several delegates were able to serve longer than three years.

of Congress, nine being represented by only two members from each, it is in the power of three out of twenty-five, making only one-eighth of the whole, to negative such a measure, notwithstanding that by the Articles of Confederation, the dissent of five out of thirteen being more than one-third of the number, is necessary for such a negative. That in a representation of three members from each State, not less than ten of thirty-nine could so negative a matter requiring the voice of nine states: that from facts under the observation of Congress they are clearly convinced, that a representation of two members from the several States, is extremely injurious by producing delays, and for this reason is likewise much more expensive than a general representation of three members from each State: that therefore Congress conceive it to be indispensably necessary, and earnestly recommend, that each State, at all times when Congress are sitting, be hereafter represented by three members at least; as the most injurious consequences may be expected from the want of such representation." (JCC, 26:245-6)

Problems with attendance became so serious in 1786 that delegates took two paths to resolve the problem. First a committee was appointed to determine the powers that Congress could exercise to compel the attendance of members. When the first committee's report was considered inadequate, a second committee was appointed to strengthen the language (JCC 30: 197). The resolution that passed, however, again pointed to the constitutional bind in which the Congress found itself entangled. The resolution affirmed that the states had final say over their own delegates and chastised the states for not ensuring full representation in Congress. A sternly worded amendment was proposed, holding that "a delegate having taken his seat in Congress, has no right to withdraw himself without permission, obtained either from Congress or the state he represents,..." (JCC 30: 408). This would have given Congress the power to compel attendance by delegates once they had shown up. However, on a roll call vote, the amendment was killed.

Since the issue was quite obviously a constitutional matter, a Grand Committee on amendments to the Articles of Confederation introduced a series of changes to a number of the articles. Of the most interest here was proposed changes to Article 20 which concerned control over delegates and their attendance in Congress. The proposed changes gave the states a timetable by which to announce who their delegates would be for the next Congressional year. Those delegates who abandoned their office without leave of their state would then be subject to sanctions by Congress, including disqualifying them of holding any future office of trust or profit under the United States or any of the states separately. (JCC 31:498). However, implementation of these changes required ratification by a supermajority of the other states. Before the amendments were ratified, the Confederation was radically altered through the meeting of the Constitutional convention less than a year later.

#### Summary.

While turnover was a problem for the Congress, requiring that new, incoming members be acclimated to the press of business and means of handling that business, turnover was a minor irritant compared with the effects of absenteeism. By practically any measure, absenteeism was a serious problem. The fact that Congress had little power over the delegates exacerbated this problem. The states were rarely interested in disciplining delegates to Congress, and indeed, most were genuinely pleased to find anyone agreeing to attend the Congress.

The effects of absenteeism and to a lesser extent, turnover, were twofold. In one sense it undermined the formation of long-term standing coalitions in Congress. Since it was nearly impossible to predict who would be present on the discussion of any issue, no faction in Congress had any incentive to try and build permanent mechanisms for trading votes in Congress. Absenteeism simply made the process too unpredictable. In a second sense, turnover and absenteeism placed a severe drag on the decision process as new delegates entered the institution and had to be "educated" to the issues. As well, the absence of delegates, old and new, meant that quorums were often difficult to attain, delaying business in Congress. While these matters were problematic in the early years of the Continental Congress, they succeeded in paralyzing the Congress in the later years.

### Conclusion

Much has been written concerning the failure of the Continental Congress. Those pinpointing causes for its demise usually focus on Congress<sup>1</sup> lack of power with respect to the various states. This included problems with getting states to support legislation coming out of Congress and forcing states to contribute their assessed quotas to fund the growing government. The conclusion generally reached is that the Continental Congress was so weakened in its powers that it was a paralyzed institution. Only by taking a bold step, by greatly augmenting the powers of the central government, could this national government sustain itself. Our conclusion is that the Continental Congress was indeed doomed to institutional paralysis. However, its failure was rooted much more deeply than in the relative balance of power between central and state government. The institutional structure that evolved under the Continental Congresses guaranteed inconsistency in collective choices, proliferated points of obstruction, and undermined coordination of interests. Even had the powers of the central government been increased, the institutional design was such that stalemate, obstruction and chaos would have remained the order of the day.

The Continental Congress was not a complete failure. It did manage to successfully prosecute a revolutionary war, establish strong foreign ties with major powers, and settled fundamental problems of overlapping claims to western lands (while setting the foundations for modern mass public education). However, as the war wound down Congress increasingly tied itself into knots, in large part due to its procedural rules governing floor behavior. Three general sets of rules contributed to these problems: rules governing floor procedures; voting rules; and rules concerning representation.

The floor procedures used in Congress aimed at opening, rather than closing general parliamentary practices. This was accomplished by keeping all business tied to the floor, ensuring that no faction gained agenda setting powers, and enhancing the powers of individual delegates to obstruct the legislative process. The result was to create an institution whereby any issue could be introduced (or reintroduced) at any time. The absence of a legislative calendar, coupled with rules blocking any individual from grabbing specialized

agenda setting powers meant that building coherent, long-standing, coalitions was impossible. Any coalition could be quickly dissolved by skilled political actors finding new issues around which to build a new majority. In the Congress, these actors were skilled politicians -- often the most influential leaders in their states - and the institution leveled few constraints on what issues could be introduced. Instead of a Congress in which factional divisions were quickly solidified and entrenched, these floor procedures led to a Congress buffeted by shifting coalitions as a kaleidoscope of issues split apart the delegates.

The peculiar voting rules used in Congress also contributed to instability and impermanent coalitions. Here the problems of majorities were acute. Rather than requiring a majority of delegates, the "unit" rule required a majority of states. Moreover, following the ratification of the Articles of Confederation most issues required supermajorities. While ensuring considerable protection for minorities, the unit rule became an important tool for obstruction. Coupled with high levels of absenteeism, the voting procedure adopted in Congress made it difficult to take positive legislative action. The "unit" rule also served to undermine the development of long-term stable coalitions in Congress. Generally such a rule exacerbated tendencies toward the instability of collective choices.

Finally, representation remained firmly held within each of the states. Since Congress could not exercise control over delegates (and since no delegate's vote mattered, except as within a state delegation) absenteeism remained an unsolvable problem throughout the life of the Continental Congress. The persistence of absenteeism contributed to instability in collective choices by undermining numerous mechanisms by which legislative matters could be coordinated. In addition a tremendous drag was placed on the decision process as new delegates entered Congress at almost every point. Confusion within the institution was augmented by the daily entry and exit of delegates. While absenteeism was an important problem in the early years of the Congress, in the later years it threatened the life of the institution.

Blaming the failure of the Continental Congress on the skewed power relations between the states and the central government masks important questions. There is no doubt that the inability of Congress to successfully develop independent sources of revenue and to impose legislative matters on the states contributed to its demise. However, even had adjustments been made to change these power relationships, the institutional structure of the Congress carried with it fundamental flaws. Only by carefully detailing the incentives and strategies of actors within this short-lived institution can we understand the more deeply rooted sources of its failure.

**TABLE 3-1**

**CLOSE VOTES ON RECORDED ROLL CALLS BY YEAR**

<u>Year</u>	<u>Close Votes (%)</u>
1777	12.9
1778	18.7
1779	16.2
1780	12.7
1781	11.3
1782	14.5
1783	9.4
1784	10.5
1785	10.5
1786	9.3
1787	13.6
1788	18.0

Source: Data collected by the authors from *Roll Call Votes of the Continental Congress 1777-1789*.

**TABLE 3-2****TURNOVER RATES IN THE CONGRESS BY YEAR**

<u>Year</u>	<u>Turnover (%)</u>
1775	9.26
1776	16.44
1777	47.73
1778	43.48
1779	38.57
1780	38.36
1781	36.11
1782	35.29
1783	39.68
1784	58.06
1785	63.04
1786	48.08
1787	45.28
1788	60.38
1789	64.44

Source: Data collected by the authors from *Letters of the Members of the Continental Congress*. Turnover is calculated from: (# leaving (i-1)th Congress)/(total # in (i-1)th Congress).

Table 3-3

FREQUENCIES OF OVERALL LENGTH OF SERVICE IN MONTHS

60	Months or more	7
59-48	Months	6
47-36	Months	12
35-24	Months	46
23-12	Months	116
9-11	Months	37
6-8	Months	44
3-5	Months	45
2	Months	17
1	Month	<u>12</u>
		342

Note: The table records total months of service for each delegate over the entire history of the Congresses. Service often was not rendered in consecutive months.

Source: Data collected by the authors from the *Letters of the Members of the Continental Congress*.

Figure 3-1

Quarterly Number of Recorded Roll Call Votes:  
August 1777 - December 1788

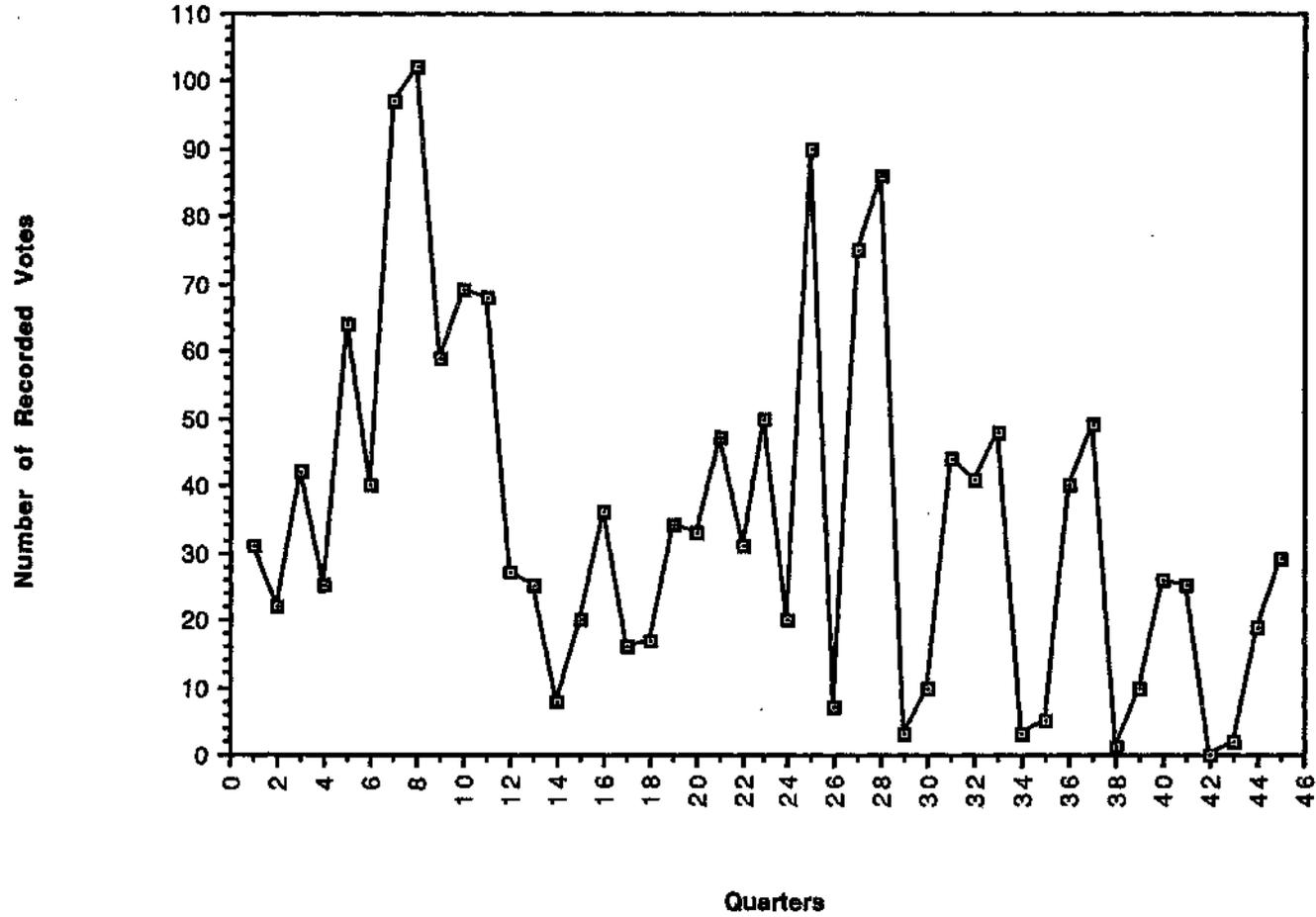


Figure 3-2

### Monthly Turnover in Delegates to the Continental Congress

