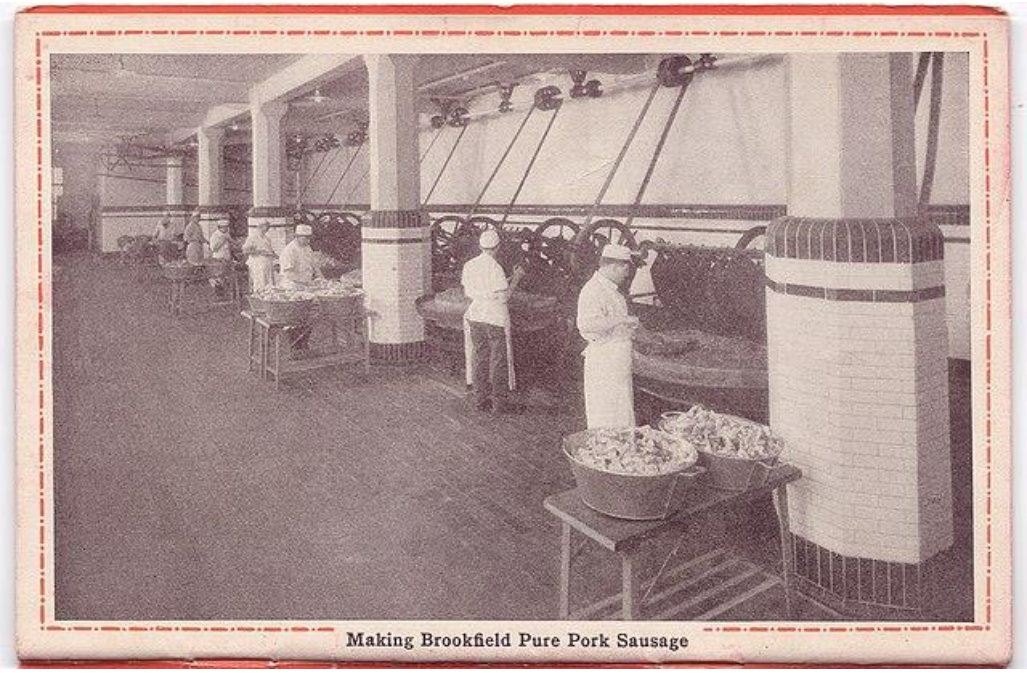
Chapter 2

The Legislative Process



I. How a Bill Becomes a Law

Any exploration of statutory interpretation must begin with an exploration of the way in which a bill becomes a law. Although most judges focus primarily on the text of statutes to ascertain meaning, some judges will examine other sources to determine the purpose or intent of the enacting legislature or the bargains with interest groups that motivated the legislature to adopt the language that it did. Judges who are willing to look for those clues to statutory meaning may find them in the legislative history for the statute, which includes statements made or documents produced at various points in the lawmaking process, as well as amendments to the statute that were offered or rejected at various points in the process. When one understands how the legislative process works, one can better understand why statements were made, documents were produced, or amendments were offered or rejected during the process, and one can decide how much weight courts should accord those actions in interpreting the statute. Even if a judge is not willing to consider legislative history when interpreting a statute, they may be willing to examine the structure of the statute and the use of language in other parts of the statute or other statutes to interpret the statute. Once again, though, when one understands the sequence of procedural events that led the legislature to include particular language in a

statute, one can better understand whether the shorthand rules that apply to interpreting statutes based on their structure make sense when interpreting that language. In short, therefore, regardless of one's philosophical approach to interpreting statutes, by understanding HOW laws are made, one can better understand WHY statutes include the language that is ultimately included and why the language may be ambiguous.

Accordingly, the first section of this chapter focuses on the process that Congress uses to enact legislation. The chapter focuses on ***federal*** legislation, but most states follow processes that are similar in many respects to the federal process. A significant portion of this first section focuses on the traditional approach to federal lawmaking that many readers may remember portrayed in the Schoolhouse Rock Classic, *I'm Just a Bill*, which you can watch here if you're nostalgic. However, increasingly, Congress is bypassing that traditional process and enacting laws through "unorthodox" approaches, which will be described at the end of this section.

A. Constitutional Limits

Bicameralism – Art. I, § 1; § 7, cl.2

Presentment - Art. I, § 7, cls. 2, 3

Enumerated Powers - Art. I, § 8

At the outset, it is important to note that there are some basic constitutional limits on Congressional law-making. Most significantly, a bill cannot become a law unless a bill containing the same language is adopted by the House of Representatives and the Senate. This is the ***bicameralism*** requirement of Article I. In addition, the ***presentment*** clauses of the Constitution require that legislation must be presented to the President before it can become law. As will be noted later in this section, legislation can become a law without the President's signature in some cases, BUT it must be ***presented*** to the President for signature to satisfy the Constitutional presentment requirement. Finally, the Constitution limits Congress' law-making authority by specifically ***enumerating*** Congress' powers. Congress may only enact laws within its enumerated powers. The Internal Revenue Code, for example, is enacted pursuant to Congress' Article I, section 8 power "to lay and collect taxes", while most federal environmental laws, like the Clean Water Act, are enacted pursuant to Congress' enumerated power "to regulate commerce".

While the Constitution imposes those limits on Congressional law-making, Article I, § 5 grants the House and Senate authority to establish their own rules of procedure for enacting laws. As a result, you will note that there are some important differences in the legislative procedures used in the House and the Senate. The differences, in part, reflect the differences between the two chambers of Congress. The House of Representatives is much bigger than the Senate and was established to be "uniquely responsive to the will of the people"[1], whereas the Senate was established as a check on the House, to protect

[1] United States House of Representatives, History of the House, available at: https://www.house.gov/the-house-explained/history-of-the-house

the rights of small states and political minorities.[2] James Madison argued that the Senate was an important safeguard against the "fickleness and passion" that influence the public and members of the House" and George Washington is reputed to have called the Senate the "saucer" to "cool" House legislation, just as a saucer was used to cool hot tea during the era.[3] Consequently, you will notice that the Senate has adopted several procedural tools to encourage more deliberative consideration of legislation, while the House imposes fewer roadblocks to the enactment of legislation. As a result, the House generally approves many more bills than the Senate during each Congress.[4]

The following chart outlines the major differences between the structure of the House and Senate that contribute to the differences in the nature of lawmaking in the two chambers.

House of Representatives	Senate
435 voting members[5]	100 voting members
Representation for states is proportional to state population	Each state has two representatives
Each member represents a district that is usually only a portion of a state	Each member represents the entire state
Members are elected for 2 year terms	Members are elected for 6 year terms

Since members of the House represent smaller, often homogenous districts and must stand for election every two years, they tend to pursue more partisan and short-term

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2 United States Senate, Origins and Development, available at: https://www.senate.gov/artandhistory/history/common/briefing/Origins_Development.htm

3 United States Senate, Senate Created, available at: https://www.senate.gov/artandhistory/history/minute/Senate_Created.htm

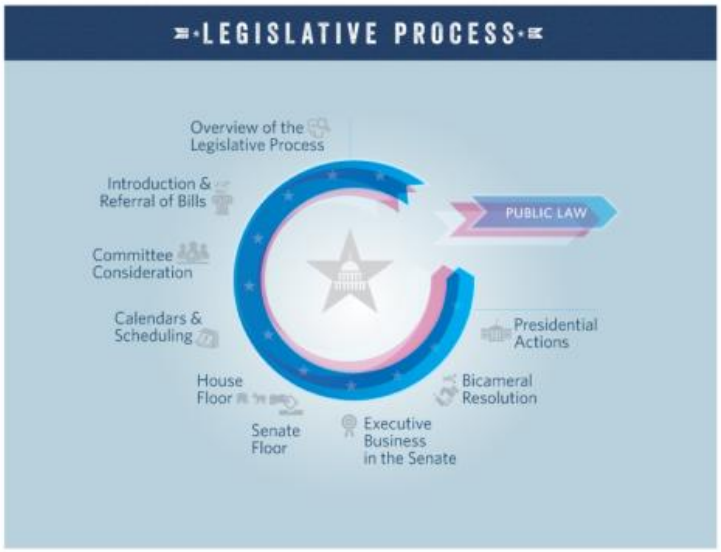
4 According to data available on Congress.gov, in the 116th Congress, the House approved 777 bills, while the Senate approved 262.

5 *See* Apportionment Act of 1911, Pub. L. 62-5, 37 Stat. 13

legislative agendas than Senators, who represent entire States and must only stand for election every six years.

B. The Traditional Legislative Process

Introduction and Committee Referral



Although much legislation is adopted through "unorthodox" measures today, the traditional process begins with the introduction of a bill by one or more members of Congress. While a bill must eventually pass both chambers, it can originate in either chamber, except that revenue legislation (taxing and appropriations) must originate in the House.[6] Occasionally, companion bills are introduced in the House and Senate simultaneously. When a bill is introduced in either chamber, it is assigned a number, based on the chronological order of introduction. Bills that originate in the House are assigned a number beginning with the prefix "H.R.", while bills originating in the Senate are assigned a number beginning with the prefix "S."[7] If a bill is not enacted into law during the term[8] of Congress in which it is introduced, it dies at the end of the term.

After a bill is introduced, the legislative process differs in the two chambers. In the House, the bill is referred to one or more standing committees that have jurisdiction over the subject matter of the bill by the Speaker of the House, with the advice of the House Parliamentarian. There are twenty standing committees in the House and it is not unusual for there to be some dispute regarding which committee or committees have jurisdiction over a bill. If the bill is referred to multiple committees, one committee is usually designated as the lead committee, but the bill must be reported out of all committees to which it is assigned before it can ultimately be brought to the floor.

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[6] U.S. CONST., Art. I, §7, cl. 1. Treaties and Presidential nominations are approved by the Senate alone.

[7] Joint resolutions require bicameralism and presentment and are assigned numbers using the prefixes "H.J.Res." and "S.J.Res." Concurrent resolutions must be passed by both chambers, but only express the sentiments of both chambers and are not laws, so they do not require presentment to the President. They are assigned numbers using the prefixes "H.Cons.Res." and "S.Con. Res." Finally, a simple resolution is passed by only one chamber and does not have the force of law. Simple resolutions are assigned numbers using the prefixes "H.Res." and "S.Res."

[8] Each term of Congress consists of two one-year "sessions".

In the Senate, after a bill is assigned a number, it must be read three times before it is ultimately adopted. Normally, the bill is read once when it is initially introduced and is read a second time before being referred to a committee unless there is an objection. While legislation does not need to be referred to a committee in the Senate, most legislation is assigned by the majority leader of the Senate, with the advice of the Senate Parliamentarian, to one or more of the sixteen standing committees in the Senate that has jurisdiction over the subject matter of the bill.

Committee Consideration

Once a bill is assigned to a committee, the committee chair has significant discretion in determining how the bill will be managed in the committee. The committee chair is a member of the political party that is in the majority in the chamber in which the committee sits and a majority of the members of each committee are members of that party. When a bill is assigned to a committee, the committee chair could decide to take no action on the bill and simply kill it in committee.[9]

Alternatively, the committee chair could hold hearings on the bill. Committees hold hearings to gather information about the issues and potential effects of legislation, to build a record in support of the legislation (which might be relied on by other legislators or courts in some cases), or simply for political purposes. Witnesses (who may be agency officials, experts in the subject matter addressed in the legislation, representatives of potentially regulated entities or representatives of interest groups) provide oral or written testimony at hearings and answer questions from members of the committee. The chair has significant discretion to decide whether and when to schedule hearings, what witnesses to call to testify at hearings, and what witnesses to call to provide written statements, rather than to testify.

Senate Comm. Hearing on Drilling in ANWR (click to view)

If a committee will eventually report the bill out of committee, the committee will usually "mark up" the bill before reporting the bill out of the committee. Committee "mark-up" is a process that involves debating and voting on amendments to the bill. Once again, the committee chair retains discretion to determine the timing and nature of the mark-up process. Click here to watch a video of a markup of legislation by the House Energy and Commerce Committee. If the committee ultimately votes to approve the bill, with or

[9] Committees also generally have subcommittees that focus on a smaller category of issues within the committee's jurisdiction, and the committee chair could refer legislation to a subcommittee for review before the legislation is considered by the committee. When the bill is referred to a subcommittee, the subcommittee may take the same type of actions as are described in this section for committees. If the subcommittee approves the bill, it will report the bill back to the committee for action.

without amendments, the committee will prepare a report on the bill. The report will include the text of the bill, describe its purposes, and explain the reasons for the committee's recommendations on the bill. In some cases, the report will include separate statements from the minority members of the committee. For an example of a Committee report, you can click here to view the Senate Environment and Public Works Committee report on the Frank R. Lautenberg Chemical Safety for the 21st Century Act.

Calendaring, Floor Debate and Amendment

In the House, after a bill is reported out of committee, it is placed on a calendar for consideration, although that doesn't guarantee that it will be debated on the House floor, as the House leadership ultimately decides which bills will be considered and when. A bill can be brought to the House floor in one of two ways. In some cases, if 2/3 of the voting members of the House agree, a bill can be brought to the House floor under the "suspension of the rules" procedure, which limits debate to 40 minutes and does not allow members to offer amendments.

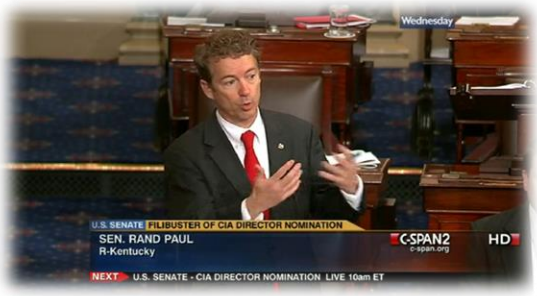
In other cases, the House Rules Committee prepares a special "rule" (a simple House resolution) that establishes the process by which debate on the bill will take place on the House floor. The rule will include the text of the bill and any limits on the timing of debate and the number, type or manner of making amendments to the bill. Click here to see an example of a rule. The "rule" is reported from the Rules Committee to the House and voted on by the members. If the "rule" is approved, the House generally resolves itself into the "Committee of the Whole House on the State of the Union" and considers the bill according to the terms of the rule. In the "Committee of the Whole House", amendments can be introduced and approved by a simple majority and the votes of individual members are not recorded. The "Committee of the Whole House", however, cannot ultimately approve legislation for the House, so, after debate and amendments are completed, the Committee rises and reports the bill to the whole House, as amended, and the House votes, by voice vote, on whether to approve the bill as reported by the Committee.[10]

Regardless of how a bill gets to the House floor, House rules require that amendments that are introduced must be germane (on the precise subject of the legislation). There is no requirement that amendments be germane in the Senate, though. In fact, there are far fewer limits on debate or amendments in the Senate than in the House.

In the Senate, legislation can reach the floor in a number of ways. In some cases, the Senate majority leader can work out a "unanimous consent agreement" that outlines the limits on debate and amendment of legislation that will be brought to the floor. If the Senators approve a unanimous consent agreement, the legislation is brought to the floor

[10] Members can request that voice votes be taken on amendments that were adopted by the Committee of the Whole House.

and considered according to the procedures outlined in the agreement. However, since a unanimous consent agreement must be unanimous, individual Senators have a lot of power to prevent legislation from moving forward through this process. When a unanimous consent agreement is being negotiated, any Senator may inform the majority leader that they object to unanimous consent, in which case they are said to have put a "hold" on the bill.



Legislation can be brought to the Senate floor by the majority leader without a unanimous consent agreement, but, without an agreement, the normal rules of Senate debate apply. Under the normal rules, most issues considered by the Senate (including a motion to proceed on a bill, a motion to amend a bill, and a motion to approve a bill) are not subject to any limits on debate. A simple majority vote of the Senators to end debate on a bill, amendment or other motion will not be sufficient to end debate, so Senators can "filibuster", or in effect, insist on endless debate to delay or prevent final votes on bills, amendments or motions. In addition, as noted above, Senate rules allow members to introduce wholly unrelated amendments to a bill, which can lead to wide-ranging and unpredictable debate.

If a bill is being considered on the Senate floor under the normal Senate rules, the only way to end debate on a motion is to invoke "cloture." Senate Rule XXII provides that Senators can limit debate on a bill amendment or motion by a supermajority vote. If 3/5 of the members voting (60 senators) agree, further consideration of the bill can be limited to 30 hours, during which amendments can be limited to a pre-approved list of germane amendments. After the 30 hours of debate, the Senate will take a final vote on the bill and the final vote only requires a simple majority for approval.

Reconciling Bills

Once a bill is approved by either the House or the Senate, it must be approved by the other chamber and presented to the President for signature before it can become a law. When one chamber passes a bill, it is prepared in official form (***engrossed***) and sent to the other chamber. At that point, there are a few options. First, the second chamber might pass the bill as it was sent to it, using the normal process for enacting legislation in that chamber. The bill will then be prepared in its final form (***enrolled***) and sent to the President for signature. If, however, the second chamber, in considering the bill, makes any changes to the bill that was passed by the first chamber, the second chamber will send the amended bill back to the first chamber for approval. The same options are then available to the first chamber. It can approve the amended bill that it received from the second chamber or make amendments and send the bill back to the second chamber. The process of sending a bill back and forth between chambers is called "amendment exchange," and may continue until both chambers pass the same bill.

Alternatively, if the two chambers have passed separate bills and cannot reconcile them through "amendment exchange," the leaders in both chambers can agree to establish a "conference committee" composed of members from the House and Senate, usually chosen from members on the committees in each chamber that have jurisdiction over the legislation. The conference committee attempts to negotiate an agreement on a compromise bill that includes elements from each of the competing bills. While the committee is not supposed to alter text that was previously approved by both chambers in their consideration of the bills, committees frequently violate that rule in practice. If the committee can create a bill that is supported by a majority of the conferees from both chambers, the committee prepares a "conference report" for the proposed legislation. The format of the conference committee report is similar to other committee reports, in that it includes the text of the proposed legislation, describes the purposes of the legislation, and explains the reasons for the committee's recommendations in the bill and the reasons for the committee's decisions to reconcile conflicting provisions. As with other committee reports, the committee report may include a minority report that explains the areas in which some members disagree with the report and the reasons for their disagreement. The conference committee report is then sent to both chambers to be approved through the normal legislative process for each chamber. If the report is approved by both chambers, the legislation will be enrolled and sent to the President for signature.

Presentment and Presidential Action

When legislation has passed both chambers are is presented to the President as an enrolled bill, the President has 10 days to sign or veto the bill.[11] If the President signs the bill, it becomes a law. If the President does nothing within the ten days, the bill becomes a law without his signature. If, however, the President vetoes the bill, it is returned to the chamber where it originated.[12] If 2/3 of the members in that chamber vote to over-ride the veto, it is sent to the other chamber. If 2/3 of the members of the second chamber also vote to over-ride the veto, the bill becomes a law over the President's veto and without the President's signature.

Once a bill has been signed by the President or has been approved without the President's signature, it is sent to the Office of the Federal Register, assigned a Public Law number (again, based on the chronological order in which it was passed), and included in the Statutes at Large.

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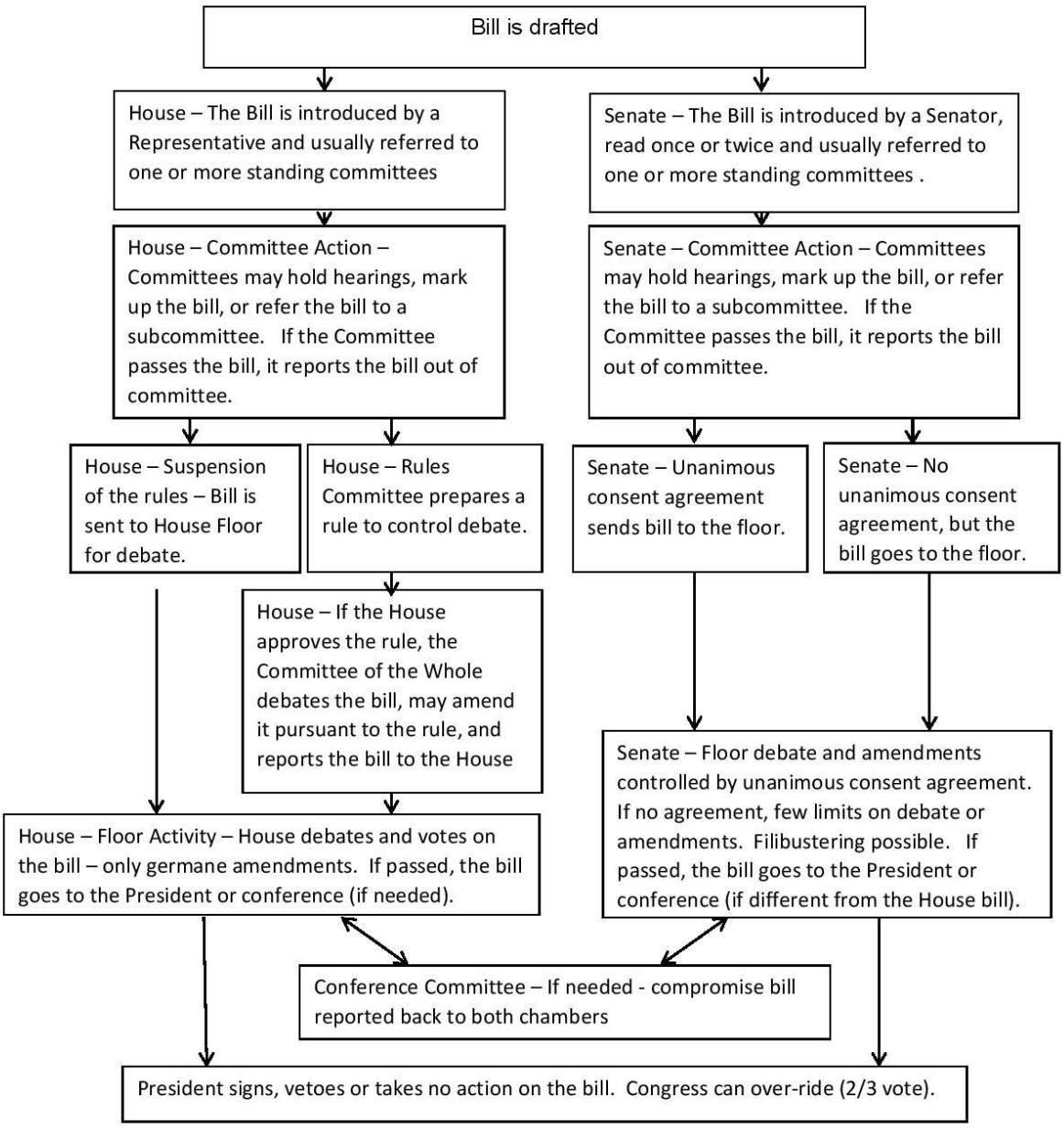
[11] The President's veto power, and Congress' power to over-ride the veto, derives from Article I, § 7 of the Constitution.

[12] The President can only veto an entire bill, and cannot veto a portion of the bill. The "line item veto" was held invalid by the Supreme Court in Clinton v. New York, 524 U.S. 417 (1998).

Flowchart of the Typical Legislative Process



Resources

- How Our Laws are Made (Congress.gov) ; Enactment of a Law (Congress.gov)
- Legislative Process Videos (Congress.gov)
- Summary of the Legislative Process provided by the House and the Senate
- Congress.gov (daily activities of Congress, including hearings and votes)
- Resources from the House of Representatives and the Senate
- Standing Rules of the House
- Standing Rules of the Senate
- Federalist Papers (Full text)
- Glossary of Legislative Terms – Congress.gov; Senate Glossary
- Search for legislation, committee reports, Cong. Record on Congress.gov
- Search for committee hearings on Gov.info ; Sample Committee hearing video
- Video of Congressional hearings and proceedings – Congress.gov; CSPAN
- Video of Floor Proceedings from the House and Senate
- State Legislative Websites
- Library of Congress research guides for state legislative materials
- I'm Just a Bill – Schoolhouse Rock

Questions and Comments

1. Vetogates: Laws are very difficult to pass. From 2001 through 2021, less than 4% of all bills that were introduced in the House or Senate were enacted into law. *See* govtrack, *Statistics and Historical Comparison*. After reading the description of the traditional legislative process above, you probably understand why. There are numerous "vetogates" built into the process that opponents of legislation can use to kill legislation. *See* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720 (1992). How many can you identify? The existence of so many vetogates necessitates "supermajority" support to pass legislation in most cases.

2. Persuasive Voices: If a judge is willing to look at legislative history to interpret a statute, the judge may be willing to accord more deference to statements or actions taken by certain individuals rather than others because the judge believes that the actor played a significant role in controlling the shape of the law that is being interpreted. Based on the description of the traditional legislative process outlined above, which legislators might be viewed as influential actors in shaping the legislation?

3. The Filibuster: Perhaps the most famous example in popular culture of the endless debate associated with the filibuster is the speech given by Jimmy Stewart in *Mr. Smith Goes to Washington*. Although the Senate changed its rules in 1975 to provide that Senators could prevent votes on bills, amendments and other motions simply by

indicating their intent to filibuster, without actually having to speak continuously, Senators continue to engage in such theatrics on occasion for political purposes. Some of the more noteworthy examples of Senate filibustering over the past few decades are Senator Ted Cruz's recitation of Green Eggs and Ham and Senator Rand Paul's 13 hour filibuster on the nomination of a CIA Director.

The filibuster is a creation of the Senate and is not required by the Constitution. In fact, it was originally used in the House, beginning in 1789, but the House stopped using it in 1841. The Senate limited the ability of Senators to curtail debate as early as 1806 and adopted a right of unlimited debate in 1856. In 1917, the Senate amended its rules to allow a vote of 2/3 of the Senate to end debate. After the filibuster process was used repeatedly to prevent enactment of civil rights legislation in the 1960s, the Senate modified its rules in 1975 to allow 60 Senators to defeat a filibuster. The Senate modified its rules again in 2013 to allow a simple majority of Senators to vote to end debate on most Presidential nominees, other than Supreme Court Justices. In 2017, the Senate again amended its rules to allow a simple majority of Senators to vote to end debate on Supreme Court nominations.

What goals is the filibuster supposed to advance? Does it advance those goals today? Should the filibuster be eliminated or modified in some manner? For a look at the issue as seen by late night television comedians, you might want to check out these videos by John Oliver and Trevor Noah.

4. The Congressional Record: The Congressional Record is the official record of the proceedings and debates of Congress and is available online at: https://www.congress.gov/congressional-record. Legislators may "revise and extend" the remarks made on the floor of the House and Senate, so the Congressional Record includes many statements that were never actually made in Congress. Those statements, however, are generally preceded in the Congressional Record by a "bullet" symbol (•).

C. "Unorthodox" Lawmaking

Over the last half century, Congress has become increasingly polarized. According to a 2017 Quorum analysis, bipartisan legislative efforts decreased by 30% between 1989 and 2017. Similarly, a 2014 Pew Research Center report found that members of Congress voted along purely ideological lines in 93% of the roll call votes in the 113th Congress. As members of Congress have adopted increasingly partisan positions, legislative gridlock has become the norm. Between 1973 and 1992, each Congress enacted an average of 697 laws. *See* govtrack, *Statistics and Historical Comparison*. Between 2011 and 2020, however, each Congress only enacted about half as many laws (339). *Id.* It is not hard to understand why the legislative process has been grinding to a halt when a polarized Congress has, at its disposal, the arsenal of "vetogates" described in the preceding section.

Nevertheless, just as "life finds a way[13]," Congress has found ways to enact ***some*** important legislation outside of the traditional processes. Dubbed "unorthodox lawmaking" by political scientist Barbara Sinclair[14], Congress has increasingly turned to ***appropriations legislation***, the ***reconciliation process***, and ***omnibus legislation*** as vehicles to enact major legislation, including the Affordable Care Act and major tax cuts by Presidents Trump and Bush. As will be apparent below, all those processes are ***less transparent*** and involve ***more centralized control by party leaders*** than the traditional processes. In the first year of the 112th Congress, only 7 (8%) of the 91 bills that were enacted followed the traditional legislative process, with committee consideration in both chambers.[15] Committees play a much smaller role in "unorthodox lawmaking" as major laws are not referred to committees, ***or*** are referred to several committees simultaneously, with the committee outputs being blended by the House Speaker or Senate Majority Leader into the legislation that will be enacted. Of the 91 bills that were enacted during the first session of the 112th Congress, 41% were not considered by committees in either chamber.[16] Conference committees are even rarer in "unorthodox lawmaking", and only 3 of the 91 bills in the first session of the 112th Congress were considered by a conference committee.[17]

Appropriations legislation and the reconciliation process have become significant alternatives to the traditional legislative process. Traditionally, appropriations bills were designed to provide funding for existing laws and were not supposed to create new substantive law, according to rules of the House and Senate.[18] However, those limits are not based on the Constitution, and can be waived. As a result, legislators have begun to use the budget "reconciliation" process to enact major legislation outside of the traditional process. In 1974, Congress passed the Congressional Budget Act of 1974 to establish procedures for reconciling the two budget resolutions that are often considered by Congress each year.[19] Pursuant to that law, reconciliation legislation cannot be filibustered in the Senate and legislators cannot add nongermane amendments to the legislation in either chamber.[20] Thus, the reconciliation process avoids several of the important "vetogates" of the traditional legislative process. Although the 1974 law was merely designed as a vehicle to reconcile the two budget resolutions that were being considered annually by Congress, legislators have expanded the use of the process to pass major substantive legislation. There are limits on Congress' use of the reconciliation

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13 JURASSIC PARK (Universal Pictures 1993) (Warning provided by Dr. Ian Malcom).

14 Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress (1st ed 1997).

15 *See* Lisa Schultz Bressman and Abbe R. Gluck, *Statutory Interpretation From the inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan. L. Rev. 725, 762 (2014).

16 *Id.*

17 *Id.*

18 *See* James V. Saturno, *Limitations in Appropriations Measures: An Overview of Procedural Issues,* Cong. Res. Serv. No. R41634, Nov. 30, 2016, available at: https://fas.org/sgp/crs/misc/R41634.pdf

19 P.L. 93-344, 88 Stat. 297 (93d Cong., 2d Sess. 1974).

20 *Id.*

process, as the legislation enacted through that process must be budget-related legislation, but Congress has used the process to enact portions of the Affordable Care Act, as well as major tax cuts during the Bush and Trump Administrations, and the American Rescue Plan Act of 2021 (COVID-19 Stimulus Package).

The enactment of the Affordable Care Act also involved omnibus lawmaking, another major form of "unorthodox lawmaking." With omnibus legislation, a variety of legislative proposals, sometimes including budget proposals, are bundled together in a single legislative proposal. The proposals have often been previously introduced as separate bills and may have been considered by separate committees, in the current Congress or a prior Congress. Congressional leaders in the House and Senate combine the multiple legislative proposals, which often address very diverse subjects, into a single "omnibus" bill, which is then considered by the House and Senate as a whole, without referral to committees. In recent sessions of Congress, 12% of major legislation has been omnibus legislation. [21] Similarly, between 1986 and 2016, 191 of the 390 appropriations laws that were enacted into law were enacted through omnibus legislation.[22]

Questions and Comments

1. What is lost? – Unorthodox lawmaking has the obvious advantage that it allows Congress to enact laws with less than a supermajority of support by avoiding many of the "vetogates" of the traditional process. But at what cost? What values are lost or compromised when Congress adopts laws using "unorthodox" lawmaking?

[21] Lisa Schultz Bressman, Edward L. Rubin & Kevin M. Stack, THE REGULATORY STATE, 3d. ed. 54 (Wolters Kluwer 2020).

[22] *See* James V. Saturno & Jessica Tollestrup, *Omnibus Appropriations Act: Overview of Recent Practices,* Cong. Res. Serv. Rep. No. RL32473, January 14, 2016, available at: https://fas.org/sgp/crs/misc/RL32473.pdf

Research Assignment: Finding Legislative History for Free

1. One can locate a lot of legislative history on federal laws for free through Congress.gov. For instance, on the home page for Congress.gov, there is a search bar with a "more options" choice. By selecting that, one can easily search for legislation by bill or public law number, containing specific terms, introduced by specific members, or acted upon by specific committees. Using that tool (or any other research tool), how many laws were enacted by the 115th Congress and the 116th Congress? For the 116th Congress, (a) how many of those laws originated in the House and how many originated in the Senate; (b) how many were considered in a committee?; (c) which Senator sponsored the most bills that were enacted into law?; (d) how many bills considered by the Senate Environment and Public Works committee were enacted into law?; (e) what policy area was the subject of the most bills that were enacted into law; (f) how many bills were vetoed that eventually became law; and (g) which bill had the most co-sponsors? There were 761 laws enacted by the 100th Congress. How many of them involved committee consideration? How many bills were vetoed that eventually became law?

2. From Congress.gov, one can also find detailed information about the legislative process for all bills that are introduced in each Congress (at least going back to the 93d Congress, before which the history is not as comprehensive), regardless of whether they are ultimately enacted into law. How many bills and resolutions were introduced in the 116th Congress? How many of those addressed environmental protection? How many of the environmental protection bills did ***not*** become law? How many of those environmental protection bills that didn't become law passed at least one chamber? How many bills and resolutions were introduced in the 96th Congress? How many of those addressed environmental protection.

Research Assignment: Finding Legislative History for Free

3. Now, let's take a look at a law that was enacted to see how Congress.gov can provide detailed history regarding the legislative process. In 1980, Congress passed the Superfund law, also known as the "Comprehensive Environmental Response, Compensation and Liability Act of 1980". What is the Public Law Number for that law, in which chamber was the legislation originally introduced and who was the sponsor of the bill? Were there any co-sponsors? When the bill was introduced in the House, was it referred to any committees and were the referrals simultaneous or consecutive? Did the House committee(s) amend the legislation before reporting it out? When the bill came to the House floor the first time, was it brought to the floor pursuant to a rule or under suspension of the rules? Was the bill amended on the House floor? After the bill passed the House, it was sent to the Senate. Was it referred to any committees in the Senate? Did it come to the Senate floor with or without unanimous consent? From the legislative history, you'll note that the Senate ultimately passed the bill that had been passed by the House, even though the Senate had been considering a similar bill, S. 1480, which was introduced in the Senate almost a year earlier than the House bill. The Senate ultimately passed the House bill with amendments, though, so the bills had to be reconciled. Did the House pass the bill as amended by the Senate, or was the bill sent to a conference committee? How many Representatives voted in favor of the bill as amended by the Senate that was returned to the House?

4. The 242 page American Rescue Plan Act of 2021 (COVID legislation) is an example of the more recent "unorthodox" lawmaking. In which chamber did the bill originate and was it assigned to any committees in that chamber? How much time did the House allow for debate on the legislation? Was the bill referred to any committee in the Senate? Was the bill brought to the Senate floor with unanimous consent? Why was there no filibustering of the bill in the Senate? How many amendments were proposed to the bill on the Senate floor and how many passed the Senate? Take a look at the cost estimates prepared for the bill by the Congressional Budget Office as passed by the Senate on March 6, 2021. How much of an increase in the budget did the CBO estimate the legislation would have between 2021 and 2030?

Research Assignment: Finding Legislative History for Free

5. You can also search for Congressional Committee reports on Congress.gov (beginning with the 104th Congress). The Safe Drinking Water Act was amended in 1996 by Public Law Number 104-182. You'll notice that this legislation was adopted through fairly traditional processes and was reviewed by the Senate Environment and Public Works Committee. When the Senate sent the legislation to the House, the House amended the legislation to adopt a different bill that the House had considered through the House Commerce Committee, so the House did not send the Senate bill to a committee. Since the House and Senate adopted significantly different bills, the chambers decided to appoint a conference committee to reconcile the two bills. You will note that both the Senate Environment Committee and the Conference Committee prepared reports for the legislation. What are the report numbers for each report? According to the Senate committee report, what event motivated Congress to propose the legislation? According to the report, did the Senate committee hold any hearings on the legislation? How many Senators on the Committee voted in favor of the report from the Committee? The conference committee report notes that the House and Senate bills took different approaches regarding "maximum contaminant level goals" for carcinogens. Did the conferees ultimately adopt the House or Senate approach in the compromise legislation?

6. You can also search for remarks of individual legislators in the Congressional Record or you can search by date if, for instance, you want to read the consideration of the Safe Drinking Water Act Amendments on the Senate floor on November 29, 1996. After the bill was read, which Senator made remarks? (Hint: His remarks begin on page S17734). Debate on the bill that was passed by the Senate (see above) began in the House on July 17, 1996. Immediately after the bill was read and after Representative Bliley moved to amend the bill by substituting the House version of the law, Representative Stupak rose to raise concerns about the legislation. What was the nature of his concerns?

Research Assignment: Finding Legislative History for Free

7. Webpages for Congressional committees are also a valuable source of free legislative history. You can access them from govinfo. (Note that govinfo is not linking to the official committee web pages and that many of the committees have their own webpages with similar information or more) Through the govinfo interface, in addition to bills and reports from the committee, you can access information relating to hearings, as well as committee prints and other documents. For instance, from that page, you can discover that the Senate Committee on Environment and Public Works held a hearing on February 21, 2021 (117th Congress) addressing "Investing in Transportation …" Who were the witnesses at that hearing? According to Senator Carper's opening remarks, how much money has Congress put into emergency funds over the 10 years prior to the hearing to supplement the Highway Trust Fund to address our aging infrastructure needs? Although you cannot access the video for that hearing from govinfo, archived video for many of the hearings is available through CSPAN or on committees' webpages. For instance, the video for the Senate Environment Committee's February 21 hearing is archived on its website. (Note – The permalink for that hearing is also accessible here.)

II. The Legislative Drafting Process

The preceding sections focused on how a bill becomes a law under the traditional legislative process and "unorthodox" processes. But how does a bill become a bill? Who drafts legislation? Although legislation can only be introduced in Congress by members of Congress, Senators and Representatives rarely write any legislation on their own and most members of Congress read very little of the actual statutory text in the legislation on which they vote. There are four general categories of legislative drafters, including (1) ***individual members of Congress***; (2) ***Congressional committees***; (3) ***the Executive Branch*** (usually administrative agencies); and (4) ***interest groups***.

Individual Members

Senators or Representatives may author proposed legislation individually or with one or more other members of Congress. In those circumstances, though, the legislators generally rely on either (1) their personal staff or (2) staff from the Congressional Offices of Legislative Counsel to draft the actual legislative text. On their personal staff, members of Congress will employ ***legislative staff*** and ***communications staff.*** Communications staff do ***not*** generally draft any legislation and focus primarily on assisting the member on serving their constituents and getting re-elected. Legislative staff, on the other hand, focus primarily on policy development for the member and will be involved in drafting legislation for the member, if the legislation will be drafted by anyone on the member's staff. Even though legislative staffers focus primarily on policy development, they cannot ignore the member's re-election and constituent service goals when drafting legislation for the member. The amount of expertise that a legislative staffer has on a particular issue will often depend on the size of the member's legislative staff. If the member has a small legislative staff, each staff member will need to focus on a broader ranger of policy matters.

As noted above, though, members of Congress do not rely solely on their own staff to draft legislation. The House of Representatives and the Senate each have an ***Office of Legislative Counsel***. Unlike the staff of individual members, the Office of Legislative Counsel is non-partisan and works with members of both parties and with Congressional committees to draft legislation or to edit or review legislation. According to a survey of legislative drafters conducted by Professors Lisa Bressman and Abbe Gluck, most of the drafting of statutory text is done by the Offices of Legislative Counsel, rather than by legislative staff of individual members.[23]

Congressional Committees

A second category of legislative drafters is Congressional committees. Once again, it is generally not the legislators who sit on the committees who are doing the drafting, though. Instead, legislation drafted by committees is frequently drafted by ***legislative staff*** for the committee. Legislative staff are hired by the Committee chair and the ranking members

[23] *See Bressman & Gluck, supra* note 15 at 740.

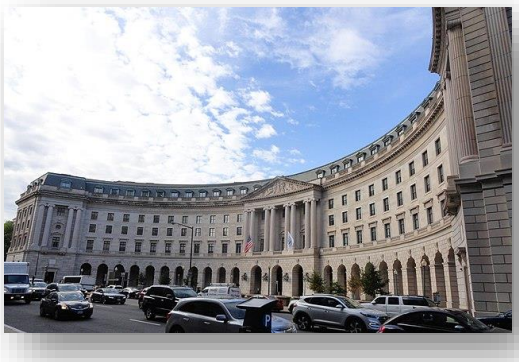
of the committee, so they work, in essence, for the chair and ranking members. Compared to the legislative staff of individual members, the legislative staff of committees have a much narrower policy focus and generally have much deeper expertise in the policy area. Unlike legislative staff for individual members, they do not have any incentive to draft legislation that will advance the re-election prospects for individual members or the interests of specific States or geographic districts. In addition to their own legislative staff, committees also frequently rely on the House and Senate Offices of Legislative Counsel to draft, edit, or review legislation for them, just as individual members rely on those offices.

Committee drafted legislation can come in a variety of forms, as illustrated in the following table:

Partisan Committee Drafting	Committee staff from one party draft legislation to be supported by that party
Bipartisan Committee Drafting	Committee staff from both parties draft legislation to be supported by both parties
Bipartisan Bicameral Drafting	Committee staff from both parties in both chambers draft legislation to supported by both parties in both chambers
Multi-Committee Drafting	Committees work together to draft legislation that will be referred to multiple committees

Through the survey of legislative drafters discussed above, Professors Bressman and Gluck found that there is great diversity in the drafting processes used by different committees, as committees frequently have different drafting rules and conventions and employ different procedures for drafting.[24] Professors Bressman and Gluck also found that when committees are involved in drafting legislation, they frequently bills in a manner that will allow the committee to maintain jurisdiction over the law after it is enacted.[25]

Agencies



Administrative agencies, usually within the Executive branch (but sometimes independent agencies), are a third major category of legislative drafters. As part of a 2015 survey of agency staff engaged in rulemaking that was conducted for the Administrative Conference of the United States, Professor Christopher Walker found that 78% of the agency respondents indicated that their agency "always or often" is involved in drafting the statutes that their agency

24 *Id.* at 752.
25 *Id.* at 753.

administers.[26] Agencies may be involved in the drafting process in several different ways, as they may (1) draft legislation on behalf of the Executive Branch (for the President); (2) draft legislation on behalf of individual members of Congress or on behalf of Congressional committees; or (3) provide informal advice (technical assistance) on legislation to members of Congress or Congressional committees. Professor Walker's 2015 survey found that agencies provide technical assistance on virtually all the bills that get enacted that directly affect their agency.[27]

Just as members of Congress do not, in most cases, personally draft the bills that they introduce, the President of the United States does not draft legislation that the White House advances to Congress. Instead, agencies usually draft such legislation and send it to the White House for review before the President sends it on to Congress.[28] While agencies draft legislation for the White House, agencies also draft and review legislation for Congress. Agencies often have expertise that Congress lacks and agencies prefer to get involved in the legislative process early, in order to prevent Congress from moving forward with legislation that includes mistakes, conflicts with agencies' policies or creates implementation problems for agencies. However, agencies do not have unlimited authority to work with Congress on their own.

The President has established procedures to supervise and coordinate agencies' legislative activities through the Office of Management and Budget (OMB) within the White House. OMB Circular A-19 requires agencies to (1) submit their annual legislative program to OMB for coordination and clearance; (2) submit "proposed legislation" (which includes proposals for or endorsements of proposed legislation) to OMB for preclearance; and (3) submit "reports" on proposed legislation to OMB for preclearance. "Reports" include "any written expression of official views prepared by an agency on a pending bill for (1) transmittal to any committee, member, officer or employee of Congress, or staff of any committee or member, or (2) presentation as testimony before a congressional committee." *See* OMB Circular A-19, §5e. However, agencies do not need to submit legislation to OMB for clearance if they prepare it "as a drafting service for a congressional committee or a member of Congress, provided that they state in their transmittal letters that the drafting service does not constitute a commitment with respect to the position of the Administration or the agency." *Id.* §7i.

In light of the OMB guidance, if agencies draft legislation for members of Congress or Congressional committees or provide "official" drafting or editing suggestions to Congress, the agencies must have their work pre-cleared by OMB. If, on the other hand, agencies provide "unofficial" advice on legislation (including drafting and editing legislation), it does not have to be pre-cleared by OMB. Consequently, agencies

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[26] *See* Christopher J. Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting, Final Report to the Administrative Conference of the United States* 2 (Nov. 2015) (hereinafter "ACUS Report").

[27] *Id.*

[28] The President has the Constitutional authority to "recommend to [Congress] such measures as he shall judge necessary and expedient." U.S. CONST., art. II, §3.

frequently provide "technical assistance" to members of Congress and Congressional committees throughout the legislative process without obtaining OMB clearance. In fact, most agency legislative drafting is done through these unofficial channels. OMB Circular A-19 requires agencies to advise OMB of technical assistance requests that they receive and to provide OMB with a copy of their response to any requests, *id.,* but Professor Walker's 2015 survey of agency staff found that agencies generally do not comply with those requirements and that OMB has not made any systematic effort to enforce those requirements.[29] Professor Walker's study also demonstrated that agencies provide technical assistance to members of Congress regardless of the political affiliations of the members.[30] While Congress almost always accepts agencies' technical comments, members and committees are less likely to accept agencies' policy or substantive comments.[31]

Most agencies employ their own ***legislative counsel***, who are charged with drafting and reviewing legislation in the same way that the House and Senate Legislative Counsel provide those services for Congress. However, agencies' legislative counsel are not the only agency staff members who provide drafting assistance to Congress or the Executive Branch. Agencies usually follow one of the following models for coordinating legislative drafting and technical assistance requests within the agency[32]:

Centralized Legislative Counsel Model (predominant model)	Legislative Counsel is the primary drafter of legislation and technical assistance responses.
Decentralized Agency Experts Model	Legislative Affairs Office is the official Congressional liaison, but technical assistance requests are addressed by bureau level policy and program experts and attorneys – Legislative Counsel plays a limited role
Centralized Legislative Affairs Office (more frequently used with independent agencies)	Legislative Affairs Office is the official contact for technical assistance requests and provides responses to Congress for those requests – coordinating with the agency policy and program experts and attorneys, including Legislative Counsel

29 *See* Walker, *ACUS Report, supra* note 26, at 10.
30 *Id.*
31 *See* Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 Geo. Wash. L. Rev. 451, 481 (2017).
32 See Walker, *ACUS Report, supra* note 26, at 28-29.

Interest Groups

Interest groups are the final category of legislative drafters. In some cases, the Executive Branch may work with industry groups (including regulated industries) and/or public interest groups or other regulatory beneficiaries to draft legislation. In other cases, interest groups, industry representatives, academics, individual policy experts, or organizations like ACUS or the American Law Institute may draft legislation on behalf of Members of Congress or Congressional committees. Legislators may also rely on uniform laws or model laws to draft legislation. This process is ubiquitous at the state level. A 2019 USA Today investigation found that more than 10,000 bills were introduced in state legislatures in the preceding eight years that were based on uniform or model legislation prepared by special interest groups. A large percentage of those state laws were based on laws drafted by the American Legislative Exchange Council (ALEC), which describes itself as a "membership organization of state legislators dedicated to the principles of limited government, free markets and federalism."[33]

Resources

- Center for Public Integrity Report re: Model Laws
- Ghostwriting the Government (Harvard Political Review)
- Last Week Tonight with John Oliver – State Legislatures and ALEC

Questions and Comments

1. Rationales for drafting legislation: Professor Jesse Cross has observed that members of Congress occasionally draft legislation or include text in legislation even though they do not want courts to implement the legislation or text.[34] In some cases, the audience for the legislation or text is constituents, and the legislation or text is drafted to indicate to the constituents that the member hears their concerns and supports them. "Message bills" are frequently introduced by members to make a political statement, even though they have no chance of being enacted as laws.[35] In other cases, Cross argues, the audience for legislation or text in legislation is agencies, and the language is included to direct agencies to take certain actions or implement certain policies regardless of whether courts will enforce the directives.[36] Members include the language because Congress can influence or control agency action in ways that do not require judicial

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33 *See* ALEC, *About ALEC, accessible at:* https://www.alec.org/about/

34 *See* Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 Geo. Mason L. Rev. 453, 457 (2018).

35 *See* Ganesh Sitaraman, *The Origins of Legislation*, 91 Notre Dame L. Rev. 79, 109 (2015).

36 See Cross, *supra* note 34, at 457-458.

enforcement.[37] Finally, in some cases, the audience for text in legislation is the nonpartisan Congressional offices like the Congressional Budget Office.[38] Members may include language in legislation, for instance, to obtain a favorable budget score from the Congressional Budget Office in its review of legislation. Professor Cross argues that, in interpreting statutes, courts should ignore (i.e. not enforce) language that is included by Congress to address the non-judicial audiences outlined above. Should Congress ignore such language that is enacted into law? How could such language be identified?

2. Agency Technical Assistance: As noted above, agencies routinely provide technical assistance to Members of Congress and Congressional committees regardless of the political affiliation of the requester. Why might agencies be so willing to provide technical assistance? Although Congress frequently seeks agency technical assistance on legislation, structural roadblocks within agencies have generally prevented agencies from providing technical assistance on appropriations legislation.[39] As Congress increasingly relies on appropriations legislation and the reconciliation process to enact laws, most of the benefits for Congress and agencies are lost.

3. Drafters of Unorthodox Legislation: As Congress enacts more legislation through omnibus bills and reconciliation bills, which persons or entities play a more central role in the drafting process and which persons or entities are involved less frequently in the drafting process?

4. Drafting Manuals: When members of Congress or Congressional Committees draft legislation, they frequently rely on drafting manuals that outline uniform rules and conventions to be used for drafting. Recognizing what those rules and conventions say can assist a court in determining why text is written in a particular manner or is included in legislation or in a specific location in the legislation. The Offices of Legislative Counsel for the House and for the Senate each have drafting manuals that they ask members to follow when drafting legislation. The manual for the House is available here. The Office of Legislative Counsel for the House also provides members with an "Introduction to Legislative Drafting" and a handy "Quick Guide". In addition to those drafting manuals, Congressional committees frequently implement their own style guides and rules. Committees may also take different approaches to legislative drafting. Some committees, for example, engage in "conceptual drafting," where the committee debates and amends legislation using narratives about what the text should accomplish, rather than using the actual text.[40]

Just as Congress relies on drafting manuals, many agencies have adopted legislative drafting manuals, which are not always identical to Congressional drafting manuals. Thus, if a court is willing to focus on the identity of the drafter when it engages in statutory interpretation, it would be helpful for the court to be familiar with the rules and conventions

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37 Id.
38 Id.
39 *See* Walker, *ACUS Report, supra* note 26, at 11, 16.
40 *See* Bressman & Gluck, *supra* note 15, at 750.

set forth in agency drafting manuals, as well as the drafting manuals of the Congressional Offices of Legislative Counsel and Congressional committees.

III. Anatomy of a Law

Most laws have a similar structure that is most apparent when examining the law as enacted, before the law is codified. This section will outline the basic structure of a law, using the Toxic Substances Control Act (TSCA) as an example. Not every law includes all of the types of provisions identified in this section and not every law is structured in precisely the order outlined in this section. Nevertheless, most federal laws are organized in a manner that roughly approximates the structure outlined in this section. The first page of TSCA, including the table of contents, is reproduced below.

Public Law 94-469
94th Congress

An Act

To regulate commerce and protect human health and the environment by requiring testing and necessary use restrictions on certain chemical substances, and for other purposes.

Oct. 11, 1976
[S. 3149]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Toxic Substances Control Act.

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

This Act may be cited as the "Toxic Substances Control Act".

15 USC 2601 note.

TABLE OF CONTENTS

SEC. 2. FINDINGS, POLICY, AND INTENT.

15 USC 2601.

(a) FINDINGS.—The Congress finds that—

(1) human beings and the environment are being exposed each year to a large number of chemical substances and mixtures;

(2) among the many chemical substances and mixtures which are constantly being developed and produced, there are some whose manufacture, processing, distribution in commerce, use, or disposal may present an unreasonable risk of injury to health or the environment; and

(3) the effective regulation of interstate commerce in such chemical substances and mixtures also necessitates the regulation of intrastate commerce in such chemical substances and mixtures.

(b) POLICY.—It is the policy of the United States that—

(1) adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environ-

At the broadest level, most laws have the following three components: (1) ***Introductory Material***; (2) ***The Core Provisions of the Law*** (establishing and implementing rights and duties); and (3) ***Ancillary Provisions***.

A. Introductory Material

Most statutes include the following provisions as introductory material: (1) ***Public Law Number***; (2) ***Long Title and Enacting Clause***; (3) ***Short Title***; (4) ***Findings and Purposes;*** and (5) ***Definitions***. As noted above, for federal laws, legislation is assigned a Public Law Number at the time that it is enacted based on the chronological order of enactment. For TSCA, the Public Law Number is Public Law 94-469, signifying that it was the 469th law enacted by the 94th Congress. If you look at the example above, you will notice that the law was enacted on October 11, 1976 and published at page 2003 of Volume 90 of the Statutes at Large (more on that in the next section of this chapter). You will also notice that the bill that was enacted into law was originally introduced as S.3149.

Long Title and Enacting Clause

Immediately after the Public Law Number, legislation usually includes a long title and an enacting clause. According to the House Drafting Manual, the long title should "accurately and briefly describe what a bill does." The title gives legislators and the public general notice regarding the purpose or function of the law. In TSCA, above, the long title is the provision that begins with "An Act [t]o regulate commerce …" Immediately following the long title is the enacting clause. Technically, only material following the enacting clause is enacted into law. In TSCA, the enacting clause is the clause that begins, "Be it enacted …"

Short Title

Many laws include a short title after the enacting clause, and the House Drafting Manual recommends including them for major legislation or to facilitate cross-references in statutes. As the name suggests, the short title is a condensed title (often an acronym) that is added for political or marketing purposes, or to make it easier to refer to the bill generally. The "popular names" listing in the U.S. Code generally refers to the short titles of statutes. As will be discussed later, some courts will examine titles (including the long and short titles) to determine the meaning of ambiguous provisions in statutes. The short title of TSCA – The Toxic Substances Control Act - is flagged above with the heading "Short Title."

Findings and Purposes

Laws frequently include legislative findings and a listing of the purposes for the law, following the short title of the law. The "purposes" generally outline Congress' goals and objectives in enacting the law, while the findings often include more detailed factual findings and outline the reasons why the law was enacted. The findings section may also be used to identify the Constitutional basis for the law. As noted later in this book, some courts will look at the purposes section to aid in interpreting ambiguous provisions in the

law to achieve the purposes established for the law. The House Drafting Manual counsels against including purpose sections in laws (which it claims are redundant), except to identify the Constitutional basis for the law. Section 2 of TSCA, above, is an example of a findings and purposes section.

Definitions

If laws include definitions that will apply across the law, they will often be collected in a single "definitions" section that is included in the introductory section of the law, although some laws include the definitions section towards the end of the law. If laws include definitions that will only apply to portions of the law, those definitions will be included in the portion of the law to which they will apply, rather than in the general "definitions" section. The "Definitions" section is included to provide shorthand references to entities or provisions of the statutes that will be referenced repeatedly throughout the law; to clarify legislative intent when the law includes a term that could have multiple meanings; or to replace the ordinary meaning of a term with a different meaning. The Clean Water Act, for instance, defines "navigable waters" as "waters of the United States," indicating that the "navigable waters" do not necessarily need to be "navigable." Section 3 of TSCA is the law's "Definition" section and includes definitions for "State" (to clarify that the District of Columbia and various U.S. territories and possessions are States), "process" (providing a technical definition for a term that could have several general meanings) and "distribute in commerce" (an important term that outlines the scope of activities regulated under the law).

B. Core Provisions of the Law

The second general portion of a law is the portion that outlines the core provisions of the law. This usually includes provisions that ***create rights or duties*** and provisions that ***implement and enforce*** the rights and duties created by the law. Although the two sections will be described separately, it is not always easy to separate the two types of provisions in practice, as the law may include provisions that simultaneously create a duty and establish a penalty for violating that duty. A law may provide, for instance, that "Any person who operates a vehicle in a park may be fined $100 for each offense", without including a separate provision that states "No person may operate a vehicle in a park."

Rights and Duties

The core provisions of most laws are the provisions that establish rights and duties. The provisions prohibit or require specific conduct, set standards and outline the scope of standards, and may impose obligations on government actors as well as the public. The provisions may also incentivize, rather than require, private conduct. TSCA Sections 4 (establishing testing requirements), 5 (requiring manufacturing and processing notices), 6 (providing for the regulation of hazardous chemical substances and mixtures), 8 (establishing recordkeeping and reporting requirements) and 16 (prohibited acts) are some examples of rights and duties provisions.

Implementation and Enforcement

The other core provisions of most laws are the provisions that set forth procedures, sanctions and remedies for implementing and enforcing the rights and duties created by the law. If the statute creates an agency or gives the agency enforcement and implementation authorities, those will usually be included in this section of the law. TSCA Sections 11 (inspections and subpoenas), 16 (penalties), 17 (specific enforcement and seizure), and 20 (citizens' civil actions) are some examples of implementation and enforcement provisions.

C. Ancillary Provisions

The last general portion of a law is the portion that addresses ancillary matters. This portion usually appears at the end of the law. Some of the provisions that may be included in this portion of the law include ***effective dates***, ***authorization and appropriations provisions***, and ***conforming amendments***. In rare cases, laws include ***sunset provisions*** (which terminate the law on a specific date or when certain conditions have been met), which would be included in this portion of the law as well.

Effective Date

Federal laws are generally effective upon enactment but Congress can delay the effective date for the law generally or for specific provisions of the law by specifying alternate effective dates in the law. Even though TSCA was enacted in October, 1976, Congress, in Section 31 of the Act, delayed the effective date until January 1, 1977.

Authorization and appropriations provisions

If the government will need to spend money to implement and enforce a law, the law will frequently include provisions that authorize specific amounts of money to be appropriated to a government agency or actor for specific times periods for purposes specified in the "authorization" provision. An ***authorization provision*** is different from an ***appropriations provision***, though, in that an authorization provision "authorizes" an appropriation, but does not actually make an appropriation of money to the government. An appropriations provision, on the other hand, actually appropriates money from the Treasury to be paid to the government agency or actor for a specific time period and for a specific purpose. TSCA, in Section 29, includes an authorization provision.

Conforming amendments

Conforming amendments address how to reconcile the law with existing laws and include (1) ***renumbering of existing code sections***; (2) ***repeals of existing laws***; (3) ***severability clauses***; and (4) ***preemption clauses***.

Repeals by implication are disfavored, so Congress will usually include explicit provisions in laws to repeal existing law(s) or portions of existing law(s) if it intends the new law to supersede the existing law(s).

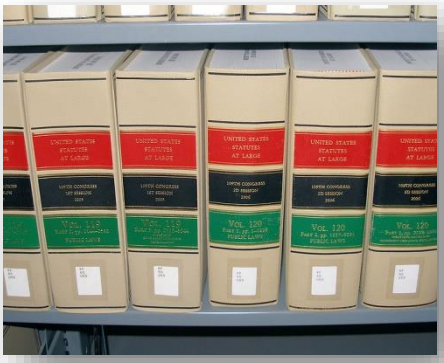
Severability clauses are included to address the manner in which a court should interpret a statute if a portion of the statute is held to be unconstitutional or is otherwise invalidated. When a court invalidates a portion of a statute, it must determine whether the rest of the statute can still be enforced or whether the entire statute should be invalidated because a portion of it was held to be invalid. If the court concludes that Congress would have intended to have the remainder of the statute enforced even though a portion of the statute was invalidated, the court will ***sever*** the invalid portion from the remainder of the statute and enforce the rest. If, on the other hand, the court determines that Congress would not have intended to have the remainder of the statute enforced without the invalid portion, the court will invalidate the whole statute, finding that the provision is ***inseverable***. In a severability clause (or inseverability clause), Congress can indicate whether it intends that specific portions of the law are severable from the rest of the law or whether the entire law should be invalidated if those provisions are invalidated. Congress might include such clauses when it anticipates that there may be provisions that could be invalidated. Most courts treat ***severability clauses*** as evidence of Congress' intent, though, rather than adopting bright line rules that the clause resolves the statutory interpretation issue. There is no severability clause in TSCA.

Preemption clauses in federal laws address whether the law will displace state law, so that states cannot enforce state legislation or common law in the area addressed in the federal law. Even without an express provision addressing preemption, though, a court might find that a federal law implicitly preempts state law. Section 18 of TSCA includes a provision that preempts State law in limited circumstances, but otherwise provides that States can continue to enforce their own laws.

D. Structure Conventions

As you browse through TSCA or other statutes, you will notice that federal laws follow some general conventions regarding structure, usually established by the drafting manuals of the Office of Legislative Counsel. For instance, as in TSCA, many laws include a table of contents in the introductory material. If a law is very long, it will often be divided into separate "Titles", each of which address discrete topics. Sections and subsections of laws often have headings or titles, and the House Drafting Manual suggests that section headings should be used for all sections if they are used at all. The laws also generally follow standard numbering conventions. Other than titles, the top level components of laws are "sections" and they are numbered beginning with 1. Proceeding downward, sections are followed by subsections (labeling starting with (a)); paragraphs (labeling starting with (1)); sub-paragraphs (labeling starting with (A)); clauses (labeling starting with (i)); and sub-clauses (labeling starting with (I)).

IV. The Codification Process



When a federal law is first enacted, it is assigned a Public Law number as discussed above, and it is published as a "slip law" by the Government Publishing Office (GPO). At the end of each session of Congress[41], the GPO is supposed to compile the slip laws from that session into a single volume known as the Statutes at Large, where the laws from that session are reproduced exactly as they were enacted by Congress. The printed edition of the Statutes at Large is ***legal evidence*** of the laws, concurrent resolutions, proclamations by the President, and proposed and ratified amendments to the Constitution. *See* 1 U.S.C. § 112. After the laws are published as slip laws and published in the ***Statutes at Large***, they are "codified", or incorporated into the United States Code.

The ***United States Code*** was envisioned as a harmonized compilation of all of the laws of the United States, "***general and permanent in nature***."[42] Whereas the Statutes at Large is organized chronologically by date of enactment, the United States Code arranges and consolidates statutes in order based on the subjects that they address. As of 2021, the Code was divided into 53 different titles. The process of "codifying" laws in the U.S. Code is carried out by the ***Office of Law Revision Counsel*** of the House of Representatives (***OLRC***). As will be illustrated below, the OLRC often re-organizes laws or removes sections of the laws in the codification process to create a more readable and uniform code, so the laws, when codified, will usually not look the same in the Code as in the Statutes at Large.

Within the Code, there are actually two types of law: ***positive law*** and ***non-positive law.***[43] For about half of the titles in the Code, the OLRC has arranged the law that was included in the Statutes at Large into harmonized compilations of the law, submitted those compilations to Congress and Congress has enacted the compilations into law.[44] Once Congress enacts a title of the Code into law, it is ***positive law*** and replaces the Statutes at Large as legal evidence of the law.[45] However, once a title is positive law, Congress must make all future amendments to that title by reference to the specific sections of the

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41 As of June, 2021, GPO had only published the Statutes at Large through 2013 on its website.

42 Act of June 27, 1866, ch. 140, 14 Stat. 74.

43 Section 205(c) of House Resolution No. 988, 93d Congress, as enacted into law by Public Law 93-554 (2 U.S.C. 285b), provides the mandate for positive law codification.

44 For an example of a bill that codifies a title as positive law, see Public Law 111-314, which enacted Title 51 of the Code.

45 1 U.S.C. § 204.

title to be amended.[46] The titles preceded by an asterisk on this listing provided by OLRC have been enacted into positive law.

The rest of the titles in the Code have been arranged into harmonized compilations of the law by OLRC, but have not yet been enacted into law by Congress. Those titles are ***non-positive law*** and are merely ***prima facie evidence*** of the law. If there is a conflict between non-positive law titles of the U.S. Code and the Statutes at Large, the Statutes at Large takes precedence over the non-positive law titles of the Code. *See United States v. Ward*, 131 F.3d 335, 339-40 (3d Cir 1997).

The process of "codifying" a law that OLRC undertakes varies depending on whether the law to be codified is amending positive law or non-positive law. With every law, OLRC reviews each provision of the law to decide ***whether*** and ***where*** the provision will be included in the U.S. Code. OLRC has much greater discretion when codifying ***non-positive law*** than when codifying positive law. For non-positive law, OLRC must first determine which sections of the law are "***general and permanent***", because only general and permanent provisions are included in the U.S. Code.[47] Appropriations provisions, for instance, are not permanent, so OLRC generally will not include them in the Code. If OLRC determines that a provision of a statute is general and permanent, it will then decide ***where*** to place it in the Code. If the law amends an existing provision of law, OLRC will simply amend the existing provision in the Code. However, if the provision is completely new, OLRC has significant discretion in deciding how to incorporate the provision into the Code. As a result, provisions in a single law may be codified in multiple different titles of the Code. In addition, in many cases, OLRC may choose to include text enacted by Congress in explanatory notes in the Code, rather than in stand-alone sections of the Code. OLRC does not consult with Congress when codifying non-positive laws.

When Congress enacts a law that should be codified in a title of the Code that has been enacted as ***positive law***, OLRC has much less discretion in codifying the law. As noted above, for positive law titles, Congress is supposed to indicate, in any amendment, the sections of the positive law that are to be amended. When Congress does that, OLRC has no discretion to change or re-organize the law in any way. However, if Congress enacts a law that closely relates to a title of positive law, but does not directly amend the positive law, OLRC must either (1) include the law in a note following a section of the positive law title or (2) incorporate the law into a non-positive law title, as described in the preceding paragraph.[48]

As is evident from the discussion above, although the codification process is supposed to create a more organized and uniform compilation of the laws of the United States, it creates some problems. First, most bills enacted by Congress end up being codified in

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[46] *See* Jarrod Shobe, *Codification and the Hidden Work of Congress,* 67 U.C.L.A. L. Rev. 640, 645 (2020).

[47] *Id.* at 656.

[48] *Id.* at 658.

several different titles in the Code.[49] Consequently, it is often difficult, when reading the Code, to determine which law created the provision that one is reading, as the Code will not necessarily include all of the provisions of a law sequentially and separated from provisions of any other law.[50] More importantly, many sections of a law may be omitted from the Code version because they are not "general and permanent" and the headings or numbering for provisions may be removed or reorganized. Finally, OLRC includes many provisions of law that were enacted by Congress in the editorial notes for other provisions of the Code.[51] Those provisions are difficult to locate and, because of the way in which the notes are included, it may be difficult to determine which material in the notes was enacted by Congress, as opposed to purely editorial notes added by OLRC.[52] The types of statutory provisions most frequently included in the notes are effective dates, short titles, regulations, rules of construction, purposes, findings, savings provisions, and study and reporting requirements.[53]

Questions and Comments

1. Unorthodox Lawmaking: Many federal laws are being enacted through omnibus legislation and through appropriations legislation (and reconciliation). Because omnibus bills are drafted by many different committees or entities and may address many different substantive areas of law, they tend to be long and include more errors and inconsistencies than laws enacted through the traditional processes.[54] Consequently, there are many more "rough edges" that need to be smoothed out by OLRC in codification and many more opportunities for OLRC to misinterpret Congressional intent when reorganizing and removing provisions from the law. Because omnibus laws include so many different provisions addressing different topics, the laws will usually be codified across an even broader scope of titles than laws that address a narrower topic(s).[55] In general, the law as codified will likely reflect OLRC's work to a greater extent than laws enacted through the traditional processes.

Laws passed through the reconciliation process that include appropriations provisions also create codification problems for OLRC. While appropriations laws are not supposed to include substantive provisions, as noted above, Congress frequently ignores that self-imposed rule. As a result, laws passed through "unorthodox" lawmaking may include appropriations provisions that also include substantive law requirements.[56] While OLRC will not codify appropriations provisions because they are not general and permanent, it

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49 *Id.* at 661.

50 *Id.* The notes in the Code will usually identify the statute that originally created the provision, as well as any statutes that amended it, but will not specify which language in the provision was originally included and which language was changed in the amendments. *Id.*

51 *Id.* at 666-667.

52 *Id.*

53 *Id.*

54 *Id.* at 674-675.

55 *Id.*

56 *Id.* at 676.

must take extra care to identify substantive provisions intertwined with appropriations provisions which should be codified.[57]

2. Alternative compilations of the "Code": In addition to the official version of the U.S. Code, there are several unofficial versions maintained by other entities, where the structure of the laws more closely resembles the structure of the original laws enacted by Congress. Many of the entities maintain them in order to assist them in interpreting the laws or in drafting new laws. The Office of Legislative Counsel for the House of Representatives, for example, maintains a collection of laws that either do not appear in the U.S. Code or have been included in a Title of the Code that has not been enacted into positive law. Similarly, many federal agencies maintain a collection of the laws that they administer or that affect them directly.[58] As with the Office of Legal Counsel, the laws in the agency collection more closely resemble the structure of the original laws and include all of the language that was enacted by Congress. Finally, private companies, including West (U.S. Code Annotated) and Lexis (U.S. Code Service), publish their own versions of the Code. Professor Jesse Cross raises concerns that the establishment of alternative versions of the code that are easier to understand creates an "uneven playing field for those groups that likely already have a disadvantage in accessing and understanding the law."[59]

Chapter Quiz

Now that you've finished Chapter 2, why not try a CALI lesson on the material at: https://www.cali.org/spl/19041 It should take about 30 minutes to complete.

57 *Id.*
58 *Id.* at 682-683.
59 *Id.* at 644.