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CHAPTER TWO

REPRESENTATION AND LAWMAKING IN CONGRESS: THE CONSTITUTIONAL AND HISTORICAL CONTEXT

In representation and lawmaking, rules matter. The Constitution specifies a critically important but limited set of rules. One constitutional rule determines the official constituencies of representatives and senators; another determines how members of Congress are elected and how long they serve. Many other features of the system or representation are left to federal or state law. Other constitutional rules outline the elements of the legislative process—generally, the House, Senate, and president must agree on legislation before it can become law, unless a two-thirds majority of each house can override a presidential veto. More detailed rules about the legislative process are left for the House and Senate to determine. While the constitutional rules governing representation and lawmaking have changed in only a few ways since 1789 when Congress first convened, other features of congressional politics have changed in many ways. The constitutional setting of congressional policy making, and the development of the major features of that policy-making process in Congress, are explored in this chapter.

Representation and Lawmaking

Congress serves two, not wholly compatible, purposes—representation and lawmaking. Members of the House and Senate serve individual districts or states, yet they must act collectively to make law for the nation as a whole. Collective action on divisive issues entails bargaining and compromise—among the members of each house, between the House and the Senate, and between Congress and the president. For compromise to be possible, members sometimes must retreat from their commitments to their individual state or district. Determining who must compromise—and how to get them to do so—is the essence of legislative politics. The process can be messy, even distasteful, but, if it is to serve the nation, it is unavoidable.

Congress can be properly evaluated only by understanding our own conflicting expectations about the institution and about the politicians who work within it. To sort out the issues, we begin with a brief introduction to how representation and lawmaking occur in practice on Capitol Hill. As we shall see as we investigate Congress, achieving

both perfect representation and perfect lawmaking, in the ways we desire each of them, is impossible.

Representation

Representation by Individual Legislators. Members of the House and Senate are expected to be *representatives* of their constituents back home. But that is not a very precise job description. We might think of a representative's job as that of faithfully presenting the views of his or her district or state in Congress—that is, of being a *delegate* for his or her constituents. But a delegate-legislator would not have an easy job because constituents often have conflicting or ambiguous views (or none at all) about the issues before Congress. Alternatively, a member of Congress might be considered a *trustee*—representing his or her constituents by exercising independent judgment about the interests of district, state, or nation. But it may be impossible to be a good delegate and a good trustee simultaneously. We must realize that we cannot have both faithful delegates and independent trustees.

A third possibility, one that is probably closer to everyday practice for most members, is to see the representative as a *politico*—one who behaves as a delegate on issues that are important to his or her constituents but on other issues has leeway in setting a personal policy agenda and casting votes. Unfortunately for many members of Congress, constituents are not likely to agree either about which issues are important or about when legislators should act as delegates and when they should exercise their own discretion.[1]

Representation by Congress. Even if individual legislators can be considered good representatives for their own constituents, we might still wonder whether Congress can adequately represent the nation as a whole. Congress could be considered a delegate or trustee of the nation. As a delegate institution, Congress would be expected to enact policies reflecting nationwide public opinion, which is as conflicted, ambiguous, or undeveloped as public opinion within individual districts and states. As a trustee institution, Congress would be expected to formulate policy in a manner consistent with its members' collective judgment about the nation's interests, whatever the state of public opinion. Members regularly invoke public opinion (a delegate perspective) or claim that Congress must do what is right (a trustee perspective) in their arguments for or against specific legislation.

Collective vs. Dyadic Representation. In practice, the collective actions of Congress are the product of the actions of its individual members—the institution does not consciously assume the role of a collective delegate or trustee for the nation. In fact, the correspondence between the quality of representation at the district or state level and that at the national level might be quite weak. To see this, imagine an issue with five possible viewpoints. Now imagine that five different members, representing five separate districts, each holds a different view on this issue. As Table 2.1 illustrates, even if most of the members are not well matched to their district, collectively they represent the nation well. That is, *collective* representation can be good even when *dyadic* representation is not. Congruence between policy and public opinion may be poor at the state or district level

but perfect at the national level. As a general rule, each house of Congress will be at least as good a delegate for the nation as are individual members for their district or state.[2]

The logic of Table 2.1 does not guarantee that the House, the Senate, and the president will be able to agree on legislation. Indeed, James Madison, the chief architect of the Constitution, hoped not. Madison argued that policy should not necessarily reflect the majority's views. He justified the creation of an independent executive branch (the presidency) and a bicameral legislature (the two houses of Congress) on the grounds that policy should not simply reflect majority public opinion. He gave the president and the members of the two houses terms of different lengths, specified different means of selecting them, and gave the president the power to sign or veto legislation. Madison expected the two houses and the president to reflect different interests, which would reduce the chances that a majority could capture all three institutions and impose its will on a minority.

Table 2.1. Two Forms of Aggregating Policy Preferences in the Public and in Congress.

District	District's Policy Position on a 5-Point Scale	Legislator's Policy Position on a 5-Point Scale	Difference Between District and Legislator
A	5	1	4
B	4	2	2
C	3	3	0
D	2	4	-2
E	1	5	-4
Average	3.0	3.0	

Adapted from Robert S. Weissberg, "Collective vs. Dyadic Representation in Congress," *American Political Science Review* 72 (1978): 535-47. Available at http://www.jstor.org.

Party and Group Representation. A third type of representation is that provided by political parties and other groups. Nearly all members of Congress are recognized as either Democrats or Republicans and often are identified with other groups based on their gender, race, occupation, age, and other personal characteristics. Legislators, presidents, and the public usually see Congress in terms of its party composition. We speak of a "Republican Congress" or a "Democratic Congress," reflecting the importance of party control of the institution. Although voters choose between congressional candidates only in a single district or state and no one votes directly for a Republican or Democratic majority in Congress as a whole, the party of the candidates and voters' views about which party should control Congress influence many elections. In turn, legislators tend to join with others of their own party to enact or block legislation, to develop and maintain a good reputation with the public, and to seek or retain majority control. Plainly, a great deal of representation occurs through the party connection.

Although we do not often speak of a white-male, lawyer-dominated Congress, many people are conscious of the composition of Congress beyond its partisan or ideological makeup. A farming background is important for candidates in many areas of the country, whereas a union background is important in other areas. Organized caucuses of women, blacks, Hispanics, and other groups have formed among members of Congress, and groups outside Congress have developed to aid the election of more members from one group or another. It is said that increasing the number of women and minorities in Congress is essential because legislators' personal experiences shape their policy agendas. Moreover, the presence of role models in Congress may help motivate other members of these groups to seek public office.

The Tradeoffs of Representation. We cannot hope for perfect representation in Congress. Our multiple expectations for representation can all be met only if Americans hold uniform views on questions of public policy. They do not. Tradeoffs and compromise between the different forms and levels of representation are unavoidable. For any single American, the representation provided by his or her senators or representative may not match the representation provided by the entire Congress or by the various groups within it. And neither the individual member nor the institution as a whole can simultaneously be a perfect delegate and a perfect trustee. In practice, we muddle through with mixed levels and styles of representation.

Lawmaking

For Madison, representative government—also known as republican government—served two purposes. One was to make the law responsive to the people. The other was to allow representatives, not the people themselves, to make law. This second purpose was, and still is, controversial. Madison explained in *Federalist No. 10* that he hoped representatives would rise above the inevitable influence of public opinion to make policy in the public interest.

The Unitary Democracy Model. Madison's argument assumes that the common or public interest can be discovered by elected representative through deliberation. In this view, the purpose of the legislative process is to discover those common interests through a process in which legislators share information, offer policy alternatives, and move toward a consensus on action to be taken. Building a consensus, rather than resolving conflicts by force of majority vote, is the object of this process. The emphasis on a common interest has led scholars to label this decision-making process *unitary democracy*.[3]

The Adversarial Democracy Model. Madison's view may not be reasonable. Inherently conflicting interests may lead legislators to articulate those interests and decide controversies by the power of a larger number of votes. Deliberation may be viewed as needless delay to a majority that has no interest in compromise and has the votes to impose policies of its choosing. The majority naturally emphasizes the importance of efficiency and majority rule. The presence of conflicting interests leads us to call this decision-making process *adversarial democracy*.

The Tradeoffs of Lawmaking. Congress cannot easily harmonize the ideals of both adversarial and unitary democracy. Deliberation and consensus building may seem to be the preferred model of decision making, but time and the give-and-take required will frustrate a majority eager to act. In practice, as for representation, Congress will make tradeoffs among the ideal forms of lawmaking. Congress sometimes looks quite deliberative but will be pushed by majorities to be more efficient and look, at least to outsiders, as quite adversarial and partisan. Moreover, the two houses of Congress need not make the same tradeoffs. As we will see in later chapters, the smaller Senate continues to look more deliberative than the larger House—due in large part to significant differences in the rules that the two houses have adopted over the decades to govern themselves.[4]

The struggle to balance alternative models of representation and lawmaking never ends. Contending forces in American politics usually favor different models as they seek to define democratic processes that advantage them. An implication of our discussion is that most sides can find theoretical justification for their positions—to better represent Americans in Washington (usually meaning to increase the influence of one group or another) or to reform lawmaking processes (also usually meaning to increase the influence of one group or another). This is not to say that common interests do not sometimes exist or that the nation as a whole cannot be better represented at times. It is to argue that the history of Congress is not one of smooth progress toward "better" representation and lawmaking processes. Rather, it is a history of political conflict as parties and ambitious politicians sought to appeal for votes and determine policy choices.

The Predecessors of Congress

The First Congress convened on March 4, 1789, under the Constitution drafted in Philadelphia in the summer of 1787. Despite the newness of their institution, the members of the First Congress were not new to legislative politics. The American Congress shares the same roots as Great Britain's parliament. The colonists brought with them British parliamentary practices and quickly established legislatures that governed in conjunction with governors appointed by the British crown. Beginning with Virginia's House of Burgesses in 1619, the colonial legislatures became both elected representative bodies and important lawmaking institutions almost immediately. Most of the legislatures followed procedures similar to those used in Parliament.[5] Representation and lawmaking were well-accepted features of self-governance long before the Constitutional Convention of 1787. Eventually, the usurpation by British governors of the powers of the colonial legislatures became a critical motivation for the Revolutionary War.

Besides their experience from the colonial era, the members of the First Congress had more recent legislative experience from participating in the Continental Congress and in their state legislatures in the years after independence. The first Continental Congress met in 1774, at the time of the Boston Tea Party and British assertion of military and political control over Massachusetts, as a step toward jointly working out differences between the colonies and the British government. The Continental Congress was not intended to be a

permanent body but rather a temporary convention of delegates from the colonies. The crisis with Britain extended its life into the Revolutionary War, and its role in the new nation was formalized in 1781 with the ratification of the Articles of Confederation.

The Continental Congress was severely handicapped by its own rules. Very open floor procedures and a weak presiding officer undermined efforts to coordinate the diverse interests of the states and encouraged factionalism.[6] The Articles of Confederation did nothing to change that. Although they legitimated the national government that the Continental Congress symbolized, the articles gave the Congress little power. The Continental Congress could not regulate commerce or raise taxes, and without executive and judicial institutions to implement and enforce the laws it passed, it was wholly dependent on the willingness of state governments to carry out its policies.

In contrast to the weak Continental Congress, most state legislatures were very powerful. The new state constitutions adopted after independence gave the legislatures the power to appoint the state governors, guaranteeing that these officers, once appointed by the British crown, would serve at the pleasure of the egalitarian, popularly elected branch. The new governors were not granted the power to veto legislation, and most were denied the power to make executive branch appointments, which were left to the legislature. Governors, it was hoped, would be mere administrators. But soon legislative tyranny came to be viewed as a major problem. In the 1780s, an economic depression led debtors to demand relief from their creditors, and because debtors greatly outnumbered creditors, the legislatures obliged them. This undermined financial institutions, creating instability. Thomas Jefferson referred to the situation in Virginia as “elective despotism.” Majority rule itself came to be questioned, and people began to wonder whether republican government was viable.[7]

The practice of having a bicameral, or two-house, legislature was well established in the states by the time the Constitution was written in 1787. Britain had evolved a bicameral parliament based on its social class system, with the different classes represented in the House of Commons and the House of Lords. All of the American colonies except for Pennsylvania and Georgia had bicameral legislatures in 1776. Even after the Revolutionary War, when the British model was called into question, most states continued with a bicameral legislature. Debate over the proper relationship between the two houses was frequent, and the states experimented with different means for electing their senates. Representing different classes in different institutions had lost its appeal, but the idea of preventing one house from becoming too powerful was widely discussed. By 1787, most political observers were keenly aware of the strengths and weaknesses of bicameral systems.[8]

The Constitution’s Rules of the Game

Against the backdrop of an ineffectual Continental Congress and often tyrannical state legislatures, the framers of the Constitution sought a new balance in 1787. They constructed a stronger national government with a powerful congress whose actions could be checked by the president and the Supreme Court.

For the making of public law, the Constitution establishes a specific process, involving three institutions of government, with a limited number of basic rules. The House of Representatives, the Senate, and the president must all agree to enact a new law, with the House and Senate expressing their agreement by simple majority vote. If the president vetoes the measure, two-thirds of the members of the House and of the Senate must agree to override the veto. If any of the three players withholds consent or if a presidential veto is upheld, the legislation dies.

The Constitution also provides for the election of members of Congress and the president, prohibits legislation of certain kinds, specifies the size of majority required in Congress for specific actions, and identifies the player who must make the first or last moves in certain circumstances. And the Constitution also provides for the Supreme Court, to determine whether Congress and the president abide by its rules.

The framers of the Constitution gave Congress tremendous political power. Article I, Section 8 of the Constitution grants to Congress broad discretion to "provide for the common defense and general welfare of the United States." It also specifies the basic powers of the national government and grants to Congress the authority to make laws to implement those powers. This general grant of power is supplemented by more specific provisions. Congress is given the power to tax, to regulate the economy, to create courts under the Supreme Court, to create and regulate military forces, and to declare war. Section 9 grants Congress control over government spending: "No money shall be drawn from the treasury, but in consequence of appropriations made by law."

The Constitution entrusts the Senate with the authority to ratify treaties and confirm presidential nominations to executive and judicial offices. Congress can regulate congressional and presidential elections and must approve agreements between individual states and between states and foreign governments. The breadth of Congress's powers is reinforced in the "elastic clause," which provides that Congress can "make all laws which shall be necessary and proper for carrying into execution" the powers enumerated in the Constitution.

To protect members of Congress from personal intimidation by executive, judicial, or local officials, the framers of the Constitution devised several important clauses. First, beyond the age and citizenship requirements, the Constitution leaves to the members of each house the authority to judge the qualifications of its members, to rule on contested election outcomes, and to punish or expel members for inappropriate behavior. Second, the Constitution protects members from arrest during and en route to and from sessions of Congress. And third, no member may be questioned by prosecutors, a court, or others about any congressional speech or debate. Members may be arrested and tried for treason, felonies, and breach of the peace, but they cannot be held personally liable by other government officials for their official actions as members of Congress.

Legislative Procedures

With respect to the stages of the legislative process, the Constitution offers little guidance, with a few important exceptions. First, the framers of the Constitution were

careful to provide that each house keep a journal recording its actions (Article 1, Section 5). Further, they required that the votes of individual members on any matter be recorded in the journal upon the request of one-fifth of the members present. A successful request of one-fifth of the members is known as "ordering the yeas and nays." In the Senate, the yeas and nays are taken by having a clerk call out each member's name and record the response by hand. In the House, the yeas and nays have been recorded by an electronic system since 1973.

Second, the framers wanted tax bills to originate in the House. Because the Senate was originally to be selected by state legislatures, with only the House directly elected by the people, it was thought that the initiative for imposing taxes should lie with the House. The Constitution provides that "all bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills." The Senate has used a variety of gimmicks to circumvent this restriction, but the House generally has jealously guarded its constitutional prerogatives and spurned Senate efforts to initiate action on tax bills.

Third, the Constitution requires that "a majority of each [house] shall constitute a quorum to do business" (Article 1, Section 5). In principle, a majority of the members of a house must be present at all times, but like many other rules, this one is not enforced unless a member raises a point of order—that is, unless a member asks the chair for a ruling that a quorum is not present. This is sometimes used as a dilatory tactic. In the Senate, quorum calls have become a routine way to take a time-out—while the clerk calls the roll of senators' names, senators can confer in private or wait for colleagues to arrive. The most important implication of this constitutional provision is that a majority of members must be present and vote on a measure for the vote to count. To prevent absence from being used as an obstructionist ploy, the Constitution further provides that each house "may be authorized to compel the attendance of absent members."

Finally, the framers outlined the process of presidential approval or disapproval of legislation (Article 1, Section 7). After each house has passed a bill, it must be presented to the president, whose options vary depending on whether Congress has adjourned in the meantime. Congress has an opportunity to override a president's veto only if Congress remains in session (see the box below). If Congress adjourns, the president can kill a bill by either vetoing it or taking no action on it (which is known as a pocket veto). Congress may pass a new bill if the president successfully kills a bill.

Constraints on Congressional Power

Although the framers of the Constitution intended Congress to be a powerful policy-making body, they also feared the exercise of that power. This fear produced (1) explicit restrictions on the use of legislative power; (2) a system of three separate institutions that share legislative powers; (3) a system of direct and indirect representation of the people, in Congress and by the presidency; and (4) a Supreme Court that judges the constitutionality of legislation and interprets ambiguities in legislative outcomes. The

result is a legislative process that cannot address certain subjects, is motivated by political considerations, is likely to involve bargaining, and is biased against policy change.

Constitutional Procedures for Presidential Approval or Disapproval of Legislation

If Congress remains in session, the president may sign a bill into law, veto the bill and send it with a statement of his objections back to the house in which the bill originated, or do nothing. If the president vetoes the bill, two-thirds of both houses must vote to approve the bill (and thus override the veto) for it to become law. If he does nothing by the end of ten days (excluding Sundays), the bill becomes law.

If Congress adjourns before ten days, the president may sign the bill into law, veto it, or do nothing. Because Congress has adjourned, it cannot consider overriding a veto, so a vetoed bill will die. Likewise, if the president takes no action by the end of ten days (excluding Sundays), the bill will die. Killing a bill by failing to take action on it before Congress adjourns has come to be known as making a pocket veto.

There have been disputes between Congress and recent presidents about the meaning of a temporary congressional recess. Presidents have argued that they may pocket veto a measure while Congress is in recess for a holiday or another purpose, even though Congress has not adjourned *sine die* (formally adjourned at the end of a two-year Congress). Many members of Congress disagree. Lower courts have ruled against the presidents' position, but the Supreme Court has not written a definitive opinion on the issue.

Explicit Restrictions. A list of powers explicitly denied Congress is provided in Article I, Section 9 of the Constitution. For example, Congress may not tax state exports, pass bills of attainder (pronouncing guilt and sentencing someone without a trial), or adopt ex post facto laws (altering the legal standing of a past action). The list of explicit limitations was extended by the 1791 ratification of the first ten amendments to the Constitution—the Bill of Rights. Among other things, the Bill of Rights prohibits laws that abridge freedom of speech, freedom of the press, and the freedom to peaceably assemble (Amendment 1) and preserves the right to a jury trial in certain cases (Amendments 6 and 7). And the Bill of Rights reserves to the states, or to the people, powers not delegated to the national government by the Constitution (Amendment 10).

In practice, the boundary between allowed and disallowed legislative acts is often fuzzy. Efforts by Congress to exercise its powers have often conflicted with individual rights or with powers asserted by the president and the states. The Supreme Court has resolved many ambiguities about where the lines should be drawn around the powers of Congress, but many remain for future court consideration. In some cases, particularly in

the foreign policy realm, the Supreme Court has left the ambiguities to be worked out between Congress and the president.

Separate Institutions Sharing Power. Rather than creating a single legislature that represents the people and determines laws, the framers of the Constitution created three institutions—the House, the Senate, and the presidency—that share legislative powers. Formally, legislation may originate in either the House or the Senate, with the exception of bills raising revenue. The president may call Congress into special session and is required to recommend measures to Congress from time to time. The president's recommendations carry great weight, but the president cannot formally introduce legislation or compel Congress to act on his recommendations. Legislative measures are formally initiated in Congress, and once passed by both houses, they must be sent to the president for approval or veto.

A special arrangement was established for treaties with foreign governments, which also have the force of law. The Constitution (Article II, Section 2) provides that the president "shall have power, by and with the advice and consent of the Senate to make treaties, provided two-thirds of the senators present concur." Thus, the president formally initiates legislative action on a treaty by submitting it to the Senate, and the Senate must approve it by an extraordinary majority. The House is excluded from formal participation. Nevertheless, the House participates in foreign policy making by sharing with the Senate the power to restrict the uses of the federal treasury, to declare war, and to regulate foreign commerce.

Just as the president is an integral part of legislating, the Congress is central to implementing laws. The Constitution obligates the president to "take care that the laws be faithfully executed" and grants to the president the authority to appoint "officers" of the United States. But the Constitution requires that the president's appointees be confirmed by the Senate, allows Congress to establish executive departments by law and to establish means for appointing "inferior" officers of the executive branch, and grants Congress the authority to remove the president or other officers for "treason, bribery, or other high crimes and misdemeanors."

Interdependence, then, not exclusivity, characterizes the powers of the House, Senate, and president.

Direct and Indirect Representation. The framers of the Constitution wanted the government to be responsive to popular opinion, but they also wanted to limit the possibility that some faction could gain simultaneous control of the House, Senate, and presidency and then legislate to violate the rights of others. Only members of the House of Representatives were to be directly elected by the people. Senators were to be chosen by state legislatures, and the president was to be chosen by an electoral college composed of individuals elected in the states. Furthermore, House, Senate, and presidential elections were put on different timetables: The entire House is elected every two years, senators serve six-year terms (with one-third of the seats up for election every two years), and presidents stand for election every four years.

The result was a mix of constraints and opportunities for the legislative players. By providing for direct or indirect election of members of Congress and the president, the framers of the Constitution increased the likelihood that electoral considerations would play an important part in shaping legislative outcomes. Political competition could be expected to motivate much legislative action. But the framers hoped that indirect election of senators and presidents, along with their longer terms of office, would desensitize them to narrow interests and rapid shifts in public opinion. This was considered to be particularly important in the case of treaties and major appointments to the executive agencies and the judiciary, which are left to the president and the Senate.

Concern about the responsiveness of senators to public opinion led to the adoption in 1913 of the Seventeenth Amendment to the Constitution, which provided for direct election of senators. Direct election of senators reduced the difference between the House and the Senate in terms of their link to the electorate, as has the nearly automatic translation of the popular vote into state electoral college votes for president. Nevertheless, because senators represent whole states, presidents are elected nationally, and representatives are selected from small districts regulated by size, along with the differences in term of office, it continues to be likely that the three institutions will have different preferences about public policy. Variations in policy preferences among the players, combined with their procedural interdependence, increase the difficulty of adopting new laws. This bias against change reduces, but does not eliminate, the probability that legislative power will be used to the advantage of a narrow interest and increases the probability that successful legislation will represent a compromise among competing views.

Judicial Review and Statutory Interpretation. The constitutional provisions empowering Congress and setting limits on legislative power are enforced by the federal courts. Since 1803, when the Supreme Court issued its opinion in *Marbury v. Madison,* the federal courts have assumed the power to review the acts of Congress and the president and determine their constitutionality. This power of judicial review gives the courts, and ultimately the Supreme Court, the final authority to judge and interpret the meaning of the Constitution. The courts' interpretations of the Constitution serve to limit the policy options that can be considered by Congress and the president. For example, the Supreme Court's interpretation of the freedom of speech provision of the First Amendment bars policies restricting how much of her own money a candidate for elective office can spend on her campaign.

In addition, the federal courts interpret the meaning of laws passed by Congress—statutory interpretation. Individuals, organizations, and governments that are disadvantaged by executive branch interpretations of laws often file suit in federal courts. The courts are asked to resolve ambiguities or conflicting provisions in statutes. For guidance about congressional intentions, the courts rely on congressional committee reports, the records of floor debate, and other sources on the legislative history of a statute. Court interpretations are often anticipated by legislative players and subsequently shape the legislative language employed by these players.

The powers of judicial review and statutory interpretation are exercised by federal judges who themselves are partially dependent on the legislative players. The Constitution provides that the president appoint judges to the Supreme Court with the consent of the Senate and that Congress may establish federal courts below the Supreme Court. Congress also has required that lower court judges be nominated by the president and confirmed by the Senate. But to protect federal judges from the influence of presidents and members of Congress, the Constitution insulates them from potential sources of presidential and congressional manipulation by granting them life terms (although they may be removed by Congress for treason, bribery, or other high crimes and misdemeanors) and preventing Congress and the president from reducing their salaries. The effects of these provisions are discussed in Chapter 11.

Congressional Development

Since the ratification of the Constitution, the United States has been transformed from a small, agrarian nation with little significance in international affairs to the world's largest industrial power and sole military and political superpower. The most rapid changes occurred during the industrial revolution of the late nineteenth century, when industry was transformed by new technologies, many new states were added to the union, modern political parties took form, and federal policies gained greater significance. These conditions changed public demands on members of Congress, who in turn changed their expectations of their institution. By the early twentieth century, many features of the modern Congress had taken form.

The Constitution provided only limited guidance to the House and Senate concerning how they should organize themselves. The House, according to the Constitution, shall elect a Speaker to preside, whereas the vice president shall serve as the Senate's president. The Senate is also authorized to elect a president pro tempore (or "pro tem") to preside in the absence of the vice president. And the Constitution requires that the House and Senate pass legislation by majority vote. But the Constitution says nothing about how legislation is to be prepared for a vote. Instead, it grants each house the authority to establish its own rules. Since their origin in 1789, the two houses of Congress have each accumulated rules, procedural precedents, and informally accepted practices that add up to their own unique legislative process. Because both houses evolved in the same political environment but each is empowered to establish its own rules, the two houses have developed similar but not identical legislative processes.

The modern Congress is characterized by committees and parties that organize nearly all of its activities. Nearly all legislation passes through one or more committees in each house. Members of those committees take a leading role in writing the details of bills, dominate floor debate on those measures, and represent their house in conference committee negotiations with the other house. Parties appoint members to committees, give order to floor debate, and are given proportional representation on conference committees. The majority party in each house takes the lead in setting the agenda. But the

Constitution is silent on the role of parties and committees in Congress. Both were created to meet the political needs of the members.

Parties

At the turn of the twenty-first century, we now assume that the presiding officer of the House, the Speaker, will be the leader of the majority party and will be responsible for setting the legislative agenda of the House. Similarly, we assume that the Senate's majority leader will set the agenda for that house. But in the early Congresses, no formally recognized party leaders existed. In fact, it took nearly a century for the House to develop something like its modern party-based leadership structure, and the Senate took even longer. The Constitution, of course, is silent on the role of parties in Congress. Congressional parties developed only gradually, as parties outside Congress formed to compete in elections. Politicians and others seeking to get elected or to elect others have always taken the lead in forming political parties. Congressional party organizations have formed among newly elected members of the same party or, as has happened a few times, when sitting members form new parties to compete for reelection. They have varied in strength and influence as the degree of consensus about policy goals and political strategies has varied among their members.

Early Foundations. Groups of members have collaborated to influence policy outcomes from the beginning. By the time of the Third Congress, shifting coalitions within the legislature had settled into polarized partisan groups, which began making organized efforts to get like-minded individuals elected. These groups were at first led by opposing cabinet officers in the Washington administration (Jefferson and Madison versus Hamilton). For a generation, the parties remained groups of elites, largely members of Congress and executive branch officials who shared party labels—at first, Republicans and Federalists. The congressional and presidential elections of 1800 initiated a period of Republican dominance that lasted until 1824. During that period, when the Federalist party faded away, members had clear party affiliations and gradually developed party caucuses to coordinate party activities. But there were still no formal party leadership posts in the House or Senate.[9]

Speaker Henry Clay (R-Kentucky) was an effective leader, largely by force of personality, during his six nonconsecutive terms (the first starting in 1811). Remarkably, Clay gained the speakership, during his first term, which reflects as much on the weakness of the position as on Clay's popularity among his colleagues. But party factionalism, and sometimes assertive presidents, kept Speakers relatively weak; indeed, small shifts in the balance of power among factions often led to the election of a new Speaker.[10] After Clay, strong personalities and factional leaders served as informally recognized leaders in both houses. Speakers enjoyed the power to make committee assignments, but this was insufficient to provide a foundation for party leadership, since the most coveted committee assignments were promised in advance during the multicandidate contests for the speakership itself.

The Senate did not have party leadership positions at all, except for caucus chairmen, whose duties and powers amounted to little more than presiding over caucus meetings.

Strong regional leaders, like John C. Calhoun (D-South Carolina), Clay, and Daniel Webster (Whig-Massachusetts), tended to dominate the Senate without holding formal leadership positions. But the first steps toward more party-based control of the chamber were taken in the middle of the nineteenth century. Conflict over control of standing committees led the parties in 1845 to rely on caucus meetings to prepare committee lists, and in 1847 the Democrats created a "committee on committees" to coordinate the task of making committee assignments for the party. In late 1859, the new Republican party formed its own committee on committees.[11]

Party Government. The Civil War was an important turning point in the organization of the parties in Congress. Republicans became the dominant party during the war and began to use task forces and steering committees to coordinate the work of the House and Senate. After the war, the two major parties—now the Republicans and the Democrats—settled into broad regional divisions, with the Republicans powerful in the Northeast and the Midwest and the Democrats dominating the South. House Speakers during the 1860s and 1870s were not particularly strong, but they were the leaders of their parties.

In small steps at first, under Speaker Samuel J. Randall (D-Pennsylvania) in the late 1870s, and then in a tidal wave in the early 1890s, under Speaker Thomas Brackett Reed (R-Maine), rulings of the Speaker and new House rules gave the Speaker more power to prevent obstructionism and allowed House majorities to act. These changes, stimulated in part by intensifying partisanship on major issues, firmly established party-based governance in the House. For the next two decades, House decision-making was highly centralized and under the control of the majority party's leader, the Speaker. Speakers Reed and "Uncle Joe" Cannon so firmly controlled the flow of legislative business that they were known as "czars." By the end of the first decade of the twentieth century, the press referred to Cannon's heavy-handed style as "Cannonism."[12]

In the Senate, too, party leaders gained some longevity in the late 1800s, and party organizations became ever more polarized. No formally recognized leader was granted or assumed authority comparable to the powers of Speaker Reed and his successors, however. Before the late 1890s, neither Senate party elected a leader within the Senate, although both parties had caucus chairmen who served as mere presiding officers. Leadership existed in the Senate during this time, to be sure, but it was an informal leadership that some senators assumed because of their ability and their activities, not by being elected to official party positions. Neither Nelson Aldrich (R-Rhode Island) nor Arthur Pue Gorman (D-Maryland), the Republican and Democratic senators who, in the 1890s, assumed primary responsibility for setting their parties' agendas, helping to shape legislative strategies, and building coalitions, was elected specifically to be his party's leader. Gorman served as Democratic caucus chairman, whereas Aldrich was a member of his party's steering committee. These were significant positions, but Gorman's and Aldrich's stature as leaders existed independent of these offices.[13]

"Aldrichism" was sometimes paired with Cannonism in the press, but the absence of rules limiting debate or amendments prevented the majority party from changing Senate rules to bolster the authority of its leaders and control the Senate. As a result, minority-

party obstructionism was not overcome, as it was in the House. Any change in the rules that disadvantaged the minority party could be filibustered—that is, the minority could prevent a vote on a proposal to change the rules by refusing to conclude debate. Efforts by Aldrich and others to limit filibusters were themselves filibustered. Consequently, the ability of even the strongest majority party leaders to bring legislation to a vote was severely constrained by the possibility of a filibuster (see Chapter 3).[14]

Senate party organizations, which held regular caucus meetings in the decades after the Civil War, developed some important internal committees at the turn of the century. Steering committees (often called committees on the order of business) had been used on an ad hoc basis since the 1870s, but they became regular standing committees in the 1890s. The steering committee was used by the majority party to determine the order in which legislation would be brought to the floor.

The Twentieth-Century Pattern. In the first decade of the twentieth century, a fragmenting Republican party altered congressional party politics for decades to come. Republican reformers in and out of Congress challenged Cannonism and Aldrichism. In 1910, a coalition of insurgent Republicans and minority-party Democrats forced changes in House rules that substantially reduced the power of the Speaker. The Speaker was stripped of the chairmanship of and power to make appointments to the Rules Committee, which controlled resolutions that put important bills in order on the floor. In the next Congress, with a new Democratic majority, the Speaker's power to make committee assignments was turned over to a party committee.[15]

In the Senate, with few formal chamber or party rules relating to leadership, the fading of Aldrichism was more gradual than was the revolt against Cannon. By the time the Democrats had gained a majority in 1913, no leader dominated either party. At a time when his party and the new president, Woodrow Wilson, wanted firmer Senate leadership, John Kern filled this power vacuum, becoming the first officially recognized majority leader in the Senate. Soon afterward, the Republicans created the position of minority leader, and both parties appointed "whips" to assist the top leaders in managing their parties' business on the floor.[16]

For decades, neither House Speakers nor Senate majority leaders enjoyed the level of influence that Speaker Cannon and Senator Aldrich had possessed at the turn of the century. Committees became more important, as neither party, when in the majority, seriously challenged committee decisions. With a few short-lived exceptions, top party leaders fell into a pattern of supporting and serving the needs of committees more than trying to lead them.

Committees

Members of the first Congresses were influenced by their experiences in the Continental Congress and in their colonial and state legislatures. They devised mechanisms to allow congressional majorities to fully express their will, while maintaining the equality of all legislators. They preferred that each chamber, as a whole, determine general policy through discussion before entrusting a subgroup of the

membership with the responsibility of devising detailed legislation. Because legislators feared that committees with substantial policy discretion and permanence might distort the will of the majority, House committees in the first eight or nine Congresses usually took the form of special or select committees that dissolved when their tasks were completed.

Early Foundations. The House took the lead in developing the foundations of a standing committee system. By 1810, the House had created ten standing committees for routine policy areas and for several complex policy areas requiring regular investigation. The practice of referring legislation to a select committee gradually declined thereafter.

In its formative years, the Senate used select committees exclusively on legislative matters; it created only four standing committees to address internal housekeeping matters. A smaller membership, more flexible floor procedures, and a much lighter workload—with the Senate always waiting for the House to act first on legislation—permitted the Senate to use select committees in a wider variety of ways than did the House and still maintain full control over legislation. But beginning in 1806, the Senate adopted the practice of referring to the same committee all matters relating to the subject for which the committee had originally been created, creating implicit jurisdictions for select committees.

In the fifty-year period before the Civil War, the standing committee systems of both houses became institutional fixtures. Both houses of Congress began to rely on standing committees and regularly increased their number. In the House, the number of standing committees increased from ten to twenty-eight between 1810 and 1825 and to thirty-nine by the beginning of the Civil War. The Senate established its first major standing committees in 1816, when it created twelve. It added ten more by the Civil War.

The expansion of the standing committee systems had roots in both chamber and party needs. A growing workload and regular congressional interaction with an increasing number of executive departments combined to induce committee growth. And the House began to outgrow a floor-centered decision-making process. The House grew from 64 members in 1789 to 241 in 1833, which made open-ended floor debate quite chaotic.

In the House, partisan considerations were also important. Henry Clay transformed the speakership into a position of policy leadership and increased the partisan significance of committee activity. Rather than allowing the full House to conduct a preliminary debate, Clay preferred to have a reliable group of friendly committee members write legislation. The Speaker's control of committee appointments made this possible. And during Clay's era, two procedural changes transformed committees' place in the sequence of House decision-making and further enhanced their value to the Speaker. First, the practice of allowing standing committees to report at their own discretion was codified into the rules of the House in 1822 for a few committees. Second, Clay made referral of legislation to a committee before floor debate the norm. By the late 1830s, after Clay had left the House, all House committees could introduce new

legislation and report it to the floor at will. Preliminary debate by the House came to be viewed as a useless procedure. In fact, in 1880 the House adopted a formal rule that required newly introduced legislation to be referred to committee, which meant that the participation of the full membership was reserved for review of committee recommendations.

Change in the Senate's committee system came at a slower pace. The Senate tended to wait for the House to act first on a bill before it took up a matter, so its workload was not as heavy as the House workload. And the Senate did not grow as quickly as the House. In 1835, the Senate had only forty-eight members, fewer members than the House had during the First Congress. And in sharp contrast to the House, factionalism led senators and their weak party leaders to distrust committees and avoid referral to unfriendly committees. As a result, the Senate's standing committees, with one or two important exceptions, played a relatively insignificant role in the legislative process before the Civil War, and the Senate retained a more floor-centered process.

Party Control. In the half-century after the Civil War, the role of committees was strongly influenced by new issues associated with dramatic growth in the size of the nation, further development of American political parties, and the increasing careerism of members. Both houses had a strong tendency to respond to new issues by creating new committees rather than enlarging or reorganizing existing committee jurisdictions. When dealing with important issues, party leaders often liked the opportunity to appoint friendly members to a new committee within their jurisdiction. And committee chairs, who acquired offices and clerks when they were appointed, resisted efforts to eliminate committees. By 1918 the House had acquired nearly sixty committees and the Senate had seventy-four. Nearly half of them had no legislative or investigative business.

These nineteenth-century developments did not lead to a more decentralized Congress. Because of the stabilization of the two-party system and the cohesiveness of the majority-party Republicans in the late 1800s, majority-party leaders of both houses used the established committee systems as tools for asserting control over policy choices. In the House, the period between the Civil War and 1910 brought a series of activist Speakers who aggressively used committee appointments to stack important committees with friendly members, sought and received new bill referral powers, and gave the Rules Committee, which the Speaker chaired, the authority to report resolutions that set the floor agenda. With these powers, the Speaker gained the ability to grant a right-of-way to certain legislation and block other legislation.

Senate organization in the years after the Civil War was dictated by Republicans, who controlled that chamber for all but two Congresses between 1860 and 1913. The Republicans emerged from the war with no party leader or faction capable of controlling the Senate. Relatively independent committees and committee chairs became the dominant force in Senate deliberations. By the late 1890s, however, elections had made the Senate Republicans a smaller but more homogeneous group, with a coterie of like-minded members ascending to leadership positions. This group controlled the chamber's Committee on Committees, which made committee assignments, and the Steering

Committee, which controlled floor scheduling. These developments made Senate committees agents of a small set of party leaders.

Party dominance did not last, however. After the revolt against Speaker Cannon in 1910, party cohesiveness and party leaders' ability to direct the legislative process declined substantially. With less central coordination and weaker party leaders, the bloated, fragmented committee systems became intolerable. Besides, the more independent members began to acquire small personal staffs in the 1920s and no longer needed the clerical assistance that came with a committee chair. As a result, both houses eliminated a large number of committees, most of which had been inactive for some time. Some formal links between party leaders and committees were broken as well. Because of reforms within the House Republican party organizations and similar policies adopted by the Democrats, the majority leader no longer chaired a major committee, chairs of major committees could not serve on the party's Steering Committee, and no committee chair could sit on the Rules Committee.

The Modern System. The broad outline of the modern committee system was sketched by the Legislative Reorganization Act of 1946. By 1945, most members shared concerns about the increasing size and expanding power of the executive branch that had come with the New Deal programs of the 1930s and then World War 11. Critics noted that the large number of committees and their overlapping jurisdictions resulted in unequal distributions of work and participation among members, caused difficulties in coordination between the House and the Senate, and made oversight of executive agencies difficult. Committees also lacked staff assistance to conduct studies of policy problems and executive branch activities.

The 1946 act reduced the number of standing committees to nineteen in the House and fifteen in the Senate, by consolidating the jurisdictions of several groups of committees. The standing committees in each house were made nearly equal in size, and the number of committee assignments was reduced to one for most House members and two for most senators. Provisions dealing with regular committee meetings, proxy voting, and committee reports constrained chairs in some ways. But the clear winners were the committee chairs. Most chairs benefited from greatly expanded committee jurisdictions and the addition of more committee staff, which they would direct. And chairs continued to control their committees' agendas, subcommittee appointments, the referral of legislation to subcommittees, the management of committee legislation on the floor, and conference delegations.

Committees appeared to be quite autonomous in both chambers for the next decade and a half. Democrats controlled both houses in all but two Congresses, and during most of the period they were led by two skillful Texans, Lyndon Johnson in the Senate and Sam Rayburn in the House. Committee chairs exhibited great longevity. More than 60 percent of committee chairs serving between 1947 and 1964 held their position for more than five years, including approximately two dozen who served more than a decade. And, by virtue of southern Democrats' seniority, chairs were disproportionately conservative. Southern Democrats, along with most Republicans, constituted a conservative coalition

that used committees to block legislation favored by congressional and administration liberals.

A set of strong, informal norms seemed to govern individual behavior in the 1940s and 1950s. Two norms directly affected committees. First, members were expected to specialize in matters that came before their committees. Second new members were expected to serve an apprenticeship period, during which they would listen and learn from senior members and refrain from actively participating in committee or floor deliberations. These norms emphasized the development of expertise in the affairs of one's own committee and deference to the assumed expertise of other committees. The collective justification for these norms was that the development of, and deference to, expertise would promote quality legislation. By the mid-1960s, new cohorts of members, particularly liberals, proved unwilling to serve apprenticeships and to defer to conservative committee chairs. Many members began to demand major reforms in congressional operations.

A five-year effort yielded the Legislative Reorganization Act of 1970. It required committees to make public all recorded votes, limited proxy votes, allowed a majority of members to call meetings, and encouraged committees to hold open hearings and meetings. House floor procedures were also affected—primarily by permitting recorded teller votes during the amending process and by authorizing (rather than requiring) the use of electronic voting. These changes made it more difficult for House and Senate committee chairs to camouflage their power in legislative jargon and hide their domination behind closed doors. As we will see, however, the reform movement did not end with the 1970 act. Indeed, the act only set the stage for two decades of change in the role of committees in congressional policy making. The developments of the last two decades are discussed in Chapter 7.

Conclusion

Congress's place in the constitutional scheme of representation and lawmaking was shaped by the experience with the Continental Congress and the state governments in the years following the Revolutionary War. The Constitution made Congress more powerful than the Continental Congress had been, but it also limited its power by dividing the policy-making process among the two chambers and the presidency and by imposing explicit constraints on the kind of law that can be made. The Constitution provided only the most rudimentary instructions on how the two houses of Congress were to organize themselves to make law. Gradually, as members struggled to control policy choices and to meet changing demands, a complex arrangement of parties and committees developed. By 1920, Congress had taken its modern form, with a full complement of party leaders and standing committees.

NOTES

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[11] Gerald Gamm and Steven S. Smith, "Emergence of Senate Leadership: 1833-1946," paper presented at the annual meeting of the American Political Science Association, Washington, D.C., August 27-31,1997.

[12] For a summary, see Peters, *The American Speakership*, pp. 52-91.

[13] Gamm and Smith, "Emergence of Senate Leadership: 1833-1946."

[14] On the history of filibusters, see Sarah Binder and Steven S. Smith, *Politics or Principle: Filibustering in the Senate* (Washington, D.C.: Brookings, 1997).

[15] See Peters, *The American Speakership,* pp. 79-93.

[16] Gamm and Smith, "Emergence of Senate Leadership: 1833-1946."