American Federal Government

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8. The Process of Making Law

Chapter Roadmap

In this chapter we will see how the legislative process in the U.S. Federal Government works, the sources of bills, the role of committees, including the House Rules Committee, the importance of agenda control, veto points and veto players, the filibuster and cloture, the President's role in lawmaking, and the fate of most bills.

8.1 An Overview of the Lawmaking Process

> "Laws, like sausages, cease to inspire respect in proportion as we know how they are made" - John Godfrey Saxe, American Poet

The lawmaking process in the United States is complex, but easy to understand. It's complex because there are so many pieces to the puzzle, but easy to understand because every piece is simple.

An important difference between the U.S. and many other countries is that in the U.S. the rank-and-file members of the legislature are actively involved in the writing of the law. In many parliamentary systems, the party leadership (the Prime Minster and her Cabinet) propose the laws, a specialized staff writes the text, in consultation with the Cabinet, and when the Cabinet is satisfied, it submits it to the parliament, where—usually—the party's rank-and-file Members of Parliament duly vote for it. In the U.S., the lawmaking process goes through the congressional committees, where the party leadership has no direct control, and may have limited influence. Members of that committee, no matter how lowly they are ranked, get a direct say in the wording of the bill.

And because each of these legislators represents a particular constituency, one of the most important factors that shapes each one's

perspective on a bill is how the folks back home will view it. The U.S. is unusual in that policies that are national in scope, and sometimes have global effects, are so extensively shaped by local interests. Whether that is a good thing or a bad one, it is something that occurs entirely because of district-based representation: the only people any Representative or Senator truly has to worry about pleasing are his or her own constituents.

All laws have to be completed, from introduction to becoming law, within one term of Congress. This is the 2-year time frame between Congressional elections. After elections in November of even-numbered years, the next term of Congress will begin in early January of the following odd-numbered year, and usually end in late December following the next elections two years later. Any bill that does not get completed in that time frame dies, and must be resubmitted in the next session. If party control of Congress does not change, the resubmission may be pro-forma, and work may pick up where it left off in the preceding Congress. But elections can cause control of the House, the Senate, or both to shift from one party to the other, and every 4 years can cause a change in which party controls the presidency. So the pressure to complete bills in that two-year period can be intense.

In a simplified version, the lawmaking process follows this general path:

1. A Congressmember introduces a bill (the text of a proposed law);
2. The bill goes to a committee, which discusses and votes on the bill.
3. The bill goes before the whole chamber, which debates it and votes on it.
4. The bill is approved by the other chamber.
5. The bill gets sent to the president to get signed into law or vetoed.

That simplified version leaves out a number of steps as well as the natural intrigue of lawmaking, which often is a contest requiring all the skill and expertise, and containing all the drama, of a sporting event. As one scholar has noted,

> Passing legislation has always been a procedural chess game where proponents try to move bills through both chambers while opponents attempt to kill or delay them.[1]

So let's dig deeper into the lawmaking process, looking at each of these 5 steps in more depth.

8.2 The Lawmaking Process in Detail

1. A Congressmember Introduces a Bill

The decision to submit a bill proposing a particular solution to a particular political problem has meaning: the Congressmember has a particular purpose in mind, and most likely a particular constituency she wants to please. So we can ask questions like "Why did the Congressmember submit that particular bill?" "Where did the idea for it come from?" "Is she the only one submitting such a bill?" After all, what seems like a political problem to one person may not be a problem at all to someone else ("Should we require picture IDs to vote?"), and given the nature of politics, "How can I get the government to take money from taxpayers and give it to me" is a political problem just as much as "How can we prevent terrorism"

Bills have several sources, reflecting the varied nature of political interests.

1. First, the bill may actually come from the Congressmember herself. She and her staff may have written the text of the bill, as a response to an issue that she finds important, or that matters greatly to her constituents. The community may find that its water supply is being polluted by an upstream user, and their Representative or Senator—or both—may introduce a bill to tighten pollution standards. This is an important difference between the U.S. and most other countries—in most legislatures individual members do not submit bills, but only respond to bills crafted by the leaders of the party (or parties) that have a majority and control the Parliamentary leadership.

2. The bill may come from the President. Presidents (their staff, really, but at the President's direction) may write bills and send them to their party's leadership in Congress, who will submit them on behalf of the President. Given that the President is the only elected official who represents the whole country, these will tend

to be issues of national importance, rather than local ones (which are more likely to draw the attention of a Representative). But any national problem also affects particular states and localities, so Representatives and Senators may also be submitting bills dealing with the issue the President wants to address.

3. Interest groups also can draft bills, and give them to a supportive member of Congress to submit. For the Congressmember, this can lessen the demands on his staff's time, keep the interest group supportive of him, and allow him to announce to constituents back home that he is supportive of whatever issue the bill promotes.

Sometimes a bill is submitted that is the only one addressing a particular issue or promoting a particular cause, but more often an issue draws multiple competing bills. Almost any issue important enough to get noticed will be noticed by more than one member of Congress, and all those who notice it and think it is important to their constituents will want to submit legislation so they can take credit for doing so. Frequently, therefore, there will be multiple bills about the same issue, competing with each other for space on committee's agendas.

Another way Congressmembers can take credit for supporting an issue is to sign on as a *co-sponsor* of a bill submitted by another member (who is the official sponsor). When the Representative or Senator tells his constituents, "I have sponsored legislation to…" that does not mean he actually drafted and submitted the bill, but may mean only that he has added his name in support to a bill drafted and submitted by another member of his chamber.

Submitting bills can also be a good way to get credit without doing any real work. Constituents do not often closely follow the process of bills through Congress (although through the Library of Congress's Thomas.loc.gov website, you can do so), so their Representative or Senator can gain favor from them simply by announcing that they have introduced legislation addressing a particular problem. They don't need to have any intent of ever putting real legislative effort into the bill—if a citizen happens to ask the fate of the bill, the Congressmember can just blame Congress, or the other party, for not passing it.

Keep in mind that the great majority of bills introduced into Congress never pass. There are several reasons for this. First, many are duplicates, as multiple members submit bills addressing the same issue. Second, the political changes a bill proposes just may not have support from a majority. Third, even though bills get distributed among different committees, more bills can be submitted than the committees can address. So this makes it easy to submit a bill and take credit, despite having no intention of following up with a dedicated legislative effort. And it indicates the challenge that can lie before a legislator who *does* intend to devote serious effort to passing a bill they've submitted.

2. The Bill Goes to Committee, Which Discusses and Votes on the Bill

The overwhelming majority of legislative activity takes place in committees, so this is where most of the political intrigue and conflict happens as well. This intrigue begins with the choice of committee assignments for a bill. Technically, the leader of the chamber—the Speaker of the House and the Senate Majority Leader—have authority to determine to which committee a bill is assigned. In practice, with thousands of bills being submitted each year, the chamber leader doesn't often get directly involved but has a person on his or her office staff who does the delegating, which is often done in a non-political manner. But the chamber leader *can* get involved in that decision, if he or she wants to exert influence over the legislation.

Many bills get assigned to multiple committees, in which case there is one primary committee, and all the other committees are secondary committees, with some say on the bill, but not with the power over it that the primary committee has. For example, the "Jobs for America Act," introduced to the House in 2014, was assigned to 9 different committees, as recorded on the Library of Congress's thomas.loc.gov website.

> Referred to the Committee on Ways and Means, and in addition to the Committees on the Budget, Oversight and Government Reform, Rules, the Judiciary, Financial Services, Agriculture, Natural Resources, and Small Business, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

The primary committee for this bill is the Committee on Ways and Means (one of the most important committees, as it has jurisdiction over all bills that raise revenue for the federal government), and the others are secondary committees. The Rules Committee, though, as we will see later, is also a very important one.

In Committee: Agenda Control, Veto Points and Veto Players

Once in committee, authority over actions taken with regard to a bill fall to the Committee's Chairperson, who often assigns the bill to a particular subcommittee. For example, in the House Judiciary Committee, the Jobs for America bill — intended to discourage companies from outsourcing jobs to other countries, and encourage them to bring outsourced jobs back on-shore — was assigned to the Subcommittee on Regulatory Reform, Commercial and Antitrust law. Again, the Committee Chair may have a reasonable choice about which subcommittee to assign a bill to, which gives him some degree of agenda-control as well. Additionally, the Chair may choose to not take any action on the bill at all, neither assigning it to a subcommittee nor scheduling it for any action by the full committee, essentially killing it through intentional neglect, unless she can be pressured into taking action, whether by her party's leadership or by sponsors of the bill. It cannot be overemphasized that committees are the graveyard of legislation: the great majority of bills die in committee. For example, govtrack.us has this reference to the 1999 Defense of the Environment Act.


H.R. 525 (106th): Defense of the Environment Act of 1999

Introduced: Feb 3, 1999 (106th Congress, 1999-2000)
Status: Died (Referred to Committee) in a previous session of Congress

https://www.govtrack.us/congress/bills/106//hr525

To use political science terminology, committees are *veto points*, and committee Chairs are *veto players*. A veto point is any point in the process at which a veto player can use their influence to kill a bill. Being a veto player is an important aspect of *agenda control*, which involves not only getting your own preferred issues on the agenda but keeping others'

preferred issues off it (called "negative agenda control"[2]). This concept is applicable outside of Congress, and even outside of government—all organizations have people who are veto players, and they wield significant political power within their organization.

If the bill is assigned to a subcommittee, agenda control falls to that subcommittee's Chair. The subcommittee Chair also may choose to take no action on a bill, but like the Committee Chair may also be subject to pressure by party leaders or the bill's sponsors. Sometimes there is conflict between party leaders who are trying to hide the bill in a committee or subcommittee to let it die a slow lingering death and bill sponsors who are defying their own party's leadership and trying to force the committee or subcommittee to give serious attention to the bill.

In Committee: Hearings and Markup

If the subcommittee chair schedules the bill for action, two types of activity may occur: *hearings* and *markup*. Hearings involve bringing in people to speak about the bill, both pro and con. These people can be government officials from the executive branch agencies, academic experts, celebrities who've taken on an issue as a cause, and even average citizens invited by a Representative on the subcommittee. Because these hearings are organized by the party in the majority, they are usually skewed toward having more speakers supporting the majority's general position on the bill than the minority's position, sometimes to the almost total exclusion of any speakers invited by the minority.

Markup is the process of arguing over, and revising, the text of the bill. Whatever the bill's author may have originally written, it will almost always be subject to considerable revision. Suggested revisions may take several forms. They may be friendly amendments, designed to clarify the bill's meaning or effects, or to make it more satisfactory to more members of Congress so as to increase its chances of passing. They may be unfriendly amendments, designed to weaken the bill's affects or make it so unsatisfactory that it has no actual chance of passing. And at other times they may be side-issues added in just to buy the supporting votes of other Congressmembers.

Whether friendly or hostile, amendments may be very small, such as changing "and" to "or," or they can be much bigger, substantially revising

an entire section of a bill. At the extreme, an amendment can be a complete replacement of the whole current text of a bill. On extraordinary occasions an amendment consisting of an entirely new bill, addressing a completely different issue, can be substituted for the existing text. This is a way of jumpstarting the legislative process for another bill by hijacking the active status of a bill that is already under consideration.

Markup is the official approach to shaping legislation, but work takes place outside the conference room as well. The members of the majority may not want to begin official markup on a bill until they have reached agreement on what they want it to say. And just because they are all members of the majority does not mean that they will all agree, so these legislative battles are often fierce and aggressive. For example, in passing the Affordable Care Act (Obamacare), conservative Democrats in the Committee on Energy and Commerce withheld their support for their own party's bill until they had bargained with the Committee Chair, the Speaker of the House, and the White House Chief of Staff for changes that would reduce the cost of the bill. Only then did the Committee officially begin to do markup.[3]

In Committee: From Subcommittee to Full Committee

If the subcommittee comes to agreement on a bill, meaning a majority votes in favor of it after markup, it goes back to the parent committee. (Alternatively, the bill may never have gone to a subcommittee, but been kept at the full committee level by the committee Chair.) At this point the committee Chair once again has agenda control, and may choose to bring the bill to the committee's attention, to schedule it to be heard after work on some other bill is concluded, or may, as noted before, ignore it and try to let it die of neglect. If the bill is put on the committee's agenda and actively addressed, there may be more hearings, and there will usually be more markup, where once again the bill's author may be forced to fight valiantly to preserve their preferred version of the bill, or, if the bill was substantially changed in subcommittee, fight to return the bill to a more satisfactory version. They may also have to accept more changes to gain the votes of more committee members.

3. The Bill Goes Before the Whole Chamber, Which Debates It and Votes on It

> Each House may determine the rules of its proceedings,
> (U.S. Constitution, Article 1, §5)

If a bill gets approved by committee, it goes before the full chamber. (I.e., a bill from the House Foreign Relations Committee goes to the floor of the House, and a bill from the Senate Foreign Relations Committee goes to the floor of the Senate). At this point agenda control shifts to the party leaders in that chamber, who have the authority to determine when—or if—a bill will scheduled for debate by the whole chamber. If they do not schedule it, the bill still may die, despite having made it through committee, or—rarely—it may be forced onto the schedule for debate if enough members of the chamber sign a petition.

Up to this stage, the legislative process has been pretty much the same in each chamber: committees are committees, whether in the House or Senate. But once a bill is out of committee, there are important differences between the two chambers. In the House each bill has a set of debate rules attached to it by the House Committee on Rules, while in the Senate there is unlimited debate and the potential to filibuster.

<u>The House: Varying Rules for Debate as Set by the House Committee on Rules</u>

In the House, and only in the House, each bill has a set of rules attached to it by the House Committee on Rules that determine the procedure for debate on the floor of the House. The Rules Committee's membership is controlled by the Speaker of the House, and the ability to set the rules of debate give the Rules Committee immense power over the fate of bills. The rules for debate specify how much time will allotted for debating a bill on the floor of the House (even as little as zero, although that is rare. The time available for debate is normally divided equally between the parties, and the time available to each party is doled out in carefully controlled allotments among the party's members who want to speak—a Representative may get no more than two minutes to speak, unless he can get another member to donate some of his or her time.

The Rules Committee will also normally choose either a "closed" or "open" rule for offering amendments on the floor of the House. A *closed rule* means no amendments can be offered, while an *open rule* allows amendments to be offered. The Committee may also at times designate a *complex rule*, which will specify certain amendments that may be offered.

Imagine you are the author of the bill, and you are satisfied with its form coming out of committee. Would you prefer 1) rules limiting debate to just an hour and restricting possible amendments to it, or 2) rules allowing many hours of debate and a large number of amendments to be offered? If you said 1, you've made a wise legislative choice, and you just have to hope the Rules Committee sees it your way.

The House Rules Committee has one other special power that can have momentous impact on legislation, the *self-executing* rule. A self-executing rule states that once the rules resolution is passed, specific language for a bill shall be considered to have been approved. This is a way of amending a bill through the back door. Although this is a non-traditional way to amend legislation is has become more common in recent years.

> This tool is now frequently used to avoid direct votes on measures that would be controversial if discussed individually or are too significant to risk being held up by the traditional legislative process…it provides an opportunity incorporate eleventh-hour changes into a bill in order to attract the floor votes necessary for passage.[4]

This method of legislating has increased the already substantial power of the Rules Committee, and as the Speaker of the House appoints the members of the Committee, it increases the power of the House leadership to shape legislation and — when convenient for them — bypass some of the difficulties of the legislative process.

The Senate: Unlimited Debate, the Filibuster, and Cloture

The Senate has no committee that sets rules for debate. Instead it has a tradition of *unlimited debate*. When a bill is being debated the debate continues until 3/5 of the Senate (60 of the 100 senators) votes to impose *cloture,* that is, to end debate and move to a final vote. Additionally, the time available for any member to speak is not limited or controlled by their party leaders: whoever has the floor has the floor as long as they can continue speaking.

This makes possible the *filibuster*, in which a Senator or group of senators holds the floor in debate as long as they can manage, in an attempt to keep a bill from coming to a vote. This way they hope to either block a final vote on a bill, or at least delay the vote until the bill's

supporters agree to make changes satisfactory to those opposing it. The word filibuster probably derives from the Dutch word for pirate, "*vrijbuiter*," which translates directly into English as "freebooter," and in its Spanish and French variations is *filibustero* and *flibustier*, one of which seems to have been the source of the modern term,[5] and which suggests the practice has been viewed as a way of "pirating," or hijacking the legislative process.

Since 1900, there have been 9 filibusters by individual senators that lasted over 10 hours each. Three of those lasted for over 20 hours, with the record being held by South Carolina Senator Strom Thurmond's 24 hour and 18 minute filibuster in a failed attempt to prevent passage of the 1957 Civil Rights Act. In 1964, a group of Southern senators collectively filibustered for 75 hours against another Civil Rights Act, but also failed to prevent its passage.

When the Senator who is filibustering yields the floor, a cloture vote can be called, to end debate and move to a final vote. As noted above, it takes 60 votes to impose cloture, which means a minority of 41 out of 100 senators can block a bill from ever being voted on. Unless a supermajority of 60 senators is willing to allow a bill to pass, it cannot come to a vote. That doesn't mean all bills pass with at least 60 votes. A senator can vote "yes" on imposing cloture. ending debate and allowing the bill to come to a vote. and still vote "no" on the bill itself. But as long as 41 senators are unwilling to accept a loss on the final vote, they can keep debate open and block a final vote; so a bill could have enough votes to *pass*, but not enough votes to ever get the chance to pass. To put this in political science terms, this is another veto point, and senators who filibuster are attempting to be veto players. They don't always succeed, but even if they fail to block a bill from passing, they can take credit with their constituents for their effort.

<u>Change in the Filibuster: An Important Key to Understanding the Senate</u>

Understanding the Senate today requires understanding how the filibuster has changed over the years, as the Senate has revised filibuster rules. For example the rule allowing cloture was not introduced until the 20th century, and when it was enacted the number was set at a 2/3 majority, but then decreased to 3/5 in in 1975, which makes it easier to end debate.

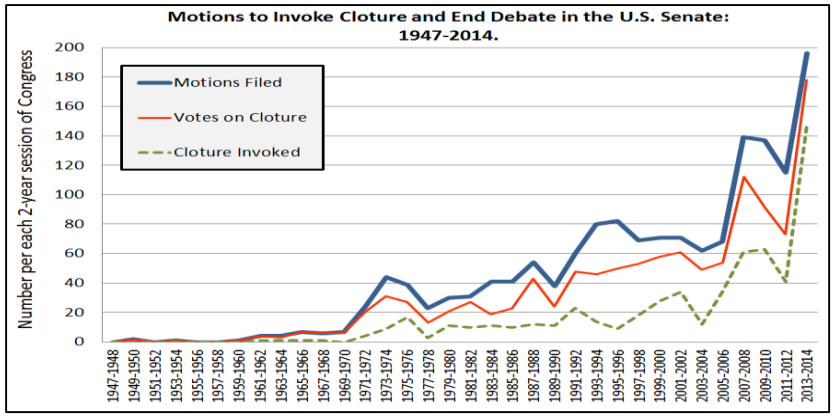
But most significantly, in the same year the Senate changed the rules to make filibustering much easier.

Traditionally, to filibuster a senator had to hold the floor and actually continue speaking. Because the Senate allowed only one bill to be considered at a time on the floor of the Senate, the filibuster blocked all other bills that were waiting to come to the floor. This was part of what gave the filibuster its power—those who were impatient to get to other bills might agree to not have a vote on the bill being filibustered just to end the roadblock. But by requiring the filibustering senator to go through the effort of standing (no sitting allowed) and speaking continuously for hours, they limited the filibuster to cases where senators felt strongly enough about the issue to make such an effort, and filibusters often failed because not enough senators were willing to contribute to such an effort. (There is a collective action problem here: For those senators who oppose an issue, a filibuster that blocks a bill from coming to a vote is a collective benefit, but those unwilling to contribute by speaking for hours are free-riding on the efforts of those who will make that effort.)

In the 1970s the Senate changed the rules to allow for a "two track" legislative process. This means the Senate can have multiple bills on the floor at the same time, and if one is being filibustered they will just set it aside and work on one of the other bills. They also no longer require the filibustering senator to hold the floor and speak continuously—all they have to do is notify the Senate Majority Leader that they are filibustering, and unless or until the Majority Leader can round up 41 votes to impose cloture, the filibuster continues with no more actual effort on the part of the filibustering senator (except, perhaps, trying to persuade enough Senators to *not* vote for cloture.

This has resulted in an explosion in the use of the filibuster, simply because it is so much easier to use now. The chart below tracks this increase. It doesn't show filibusters themselves, since that information is not recorded (it is sometimes an informal process that leaves no official record), but it does show the number of 1) motions to invoke cloture (motions to have a vote on ending debate), 2) the number of actual cloture votes held, and the number of times cloture is invoked (the number of *successful* cloture votes). The uptick at the beginning of the 1970s, as the rules changed, is noticeable. More recently there is another sharp increase

that began in the early 2000s, which is attributable to a greater partisan divide in Congress, where the parties are less willing to try to compromise with each other. This one chart demonstrates the increasing difficulty of passing legislation through the Senate.



http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm
Figure 8.1

Remember that the Framers of the Constitution wanted to limit the power of government, so they divided the powers between the states and the central government (federalism), further separated the powers of the central government into three branches (separation of powers), and then divided the legislative branch into two chambers of equal power (symmetric bicameralism) to ensure that the legislative process would be slow and deliberative. And on top of all that the Senate has used its Article 1, §5 authority to determine its own rules of proceeding to allow a minority to block legislation. To understand the legislative process in the U.S., one has to understand these ways in which it is structured so as to make it much easier to *block* legislation than to pass it.

4. The Bill Must Be Approved by the Other Chamber.

No bill can be sent to the President to be signed into law until both chambers have passed precisely the same bill. If the President signed one chamber's version, that would mean some elements of the law would not have passed through both houses of Congress, which would violate the

Constitution. But with both houses of Congress working on similar bills, even if they begin with identical versions (as they sometimes do), by the time each chamber does its own markup and amending of the bill, they normally have versions that are not the same. For example, a bill to reform a federal welfare program might have the House writing different eligibility requirements for recipients than the Senate does; or a bill to provide subsidies for nuclear power research might have more money allocated by one house than by the other.

These conflicting bills are worked out through a process of negotiation and compromise. Let's say the Senate has passed a bill, and the House is now considering the Senate's version. The House has three options. First, it can then take up the bill and pass it as is, with no changes, generally without going through the committee process, and even if a similar bill is already in (or even already has been passed by) a House committee.

Second, instead of just agreeing to the Senate's bill, the House can pass it but with amendments. The bill then returns to the Senate, which can either accept the House's amendments and pass the bill, or it can amend the House's amendments (such an amendment is called a *first-order amendment*). The bill then returns to the House, which can accept the bill as amended or amend the Senate's amendments of the House amendments (these amendments are called *second-order* amendments). The rules of both houses prohibit further amendment of amendments, except when one of them decides to waive their own rules[6] (since each chamber makes its own rules, there is nothing that can prevent them from waiving their own rules whenever they find it convenient to do so).

The most important issue to understand here is not the terminology about first and second order amendments, but to understand that getting to an agreement between both chambers is a process, and that process can involve a bill ping-ponging back and forth between the two chambers several times. During this time, there is generally informal negotiation occurring between the two chambers as each tries to figure out what the other will accept. And as with all negotiations, each side wants to give up less than the other side does. So some of the negotiations will involve bluffing. For example, if the House has approved $1 billion in spending on a project, and the Senate has approved $1.5 billion, and a senator suggests compromising at $1.3 billion, the House member may say, "There is no way the House will accept that much spending on this

program." The Senator, then, has to try to determine whether the Representative is sincere or is bluffing. That is to say, congressional negotiations are not fundamentally different from any other types of negotiations, and we should not be surprised to find a good amount of gamesmanship involved.

Third, if agreement appears difficult to reach, particularly in the case of complex bills where there can be disagreements about many different elements of the bill, the two chambers will normally appoint a conference committee. This is a temporary committee composed of both Representatives and Senators, normally those most interested in the bill and a representative of each chamber's leadership, who job is to find a compromise on the disputed parts of the bills. Depending on how complex the issues are and how far apart the two sides are, this could occur quickly or it could drag on for a considerable amount of time. And as with any congressional legislative process, not all of the negotiation will take place in the conference room—legislators will talk one-on-one or in small groups, in their offices, during lunch, or wherever they find it convenient to meet.

<u>In the End, There Are no Rules</u>

While there is a standard procedure for passing legislation, in the end we should remember that legislation is a political contest, a battle between opposing sides, and sometimes the normal procedures are apt to get stretched to the limit, if not broken. For example, in enacting the Affordable Care Act (Obamacare), multiple Senate committees spent months drafting bills, both in a long process of negotiation between members of both parties, and with representatives of the President as well as representatives of the health insurance and pharmaceutical industries. Then Senate Majority leader Harry Reid drafted a bill—no doubt taking into account all that had been settled in previous negotiations—and made it an amendment that replaced the entire text of a wholly unrelated bill that had been sent to the Senate by the House; one to offer tax credits to military veterans buying their first homes. Those tax credits had been already added to another bill, passed, and signed into law two weeks earlier, so nobody objected to the hijacking of this other bill.[7]

5. The Bill Gets Sent to the President to Be Signed into Law or Vetoed.

Every bill that gets passed by both House and Senate is then sent to the President, who has several options.

1. The President can sign the bill, and it becomes effective law.
2. The President can veto the law (the final veto point in the process) in which case Congress can enact the law over the veto by re-passing it (with no changes) if they can muster up a 2/3 majority in each chamber. This is called the *veto override*.
3. The President can ignore the bill, and it will become effective law after 10 days, not counting Sundays. The Framers of the Constitution inserted this provision to ensure that presidents could not just ignore bills and leave them in limbo forever; if they want to stop a bill from becoming law, they must take action by vetoing the law.
4. Because all bills must become law by the end of the session of Congress, if less than 10 days remain in that session, not counting Sundays, a president can ignore the bill and it will not become law. This is called the *pocket veto*.

But all of this makes it sound as though presidents don't get involved until the end of the process. In truth, presidents are often actively involved in the lawmaking process. Their involvement begins with trying to build public support for policy proposals, particularly in their election campaigns and the annual State of the Union address, as well as "going public" with efforts to persuade citizens to let Congressmembers know they support the President's policies. Presidents also submit bills and negotiate regularly with key lawmakers, mostly through aides, whether members of the White House Staff or representatives from executive branch agencies, but also sometimes directly. It has been said that there are no strong men in the Oval Office, indicating that when the President invites legislators to meet with him to discuss an issue, he gains an advantage just by having the home court advantage of hosting the meetings in the world's most recognizable office.

All of these actions are designed to shape or block legislation. If a president can persuade Congress to quit working on a bill due to his veto threat, then he doesn't ever have to formally cast the veto. Presidential support or opposition is one of the most significant factors in determining whether a bill successfully passes Congress. Because of separation of

powers, the President is not part of the legislature, but nonetheless presidents have enough influence on legislation that presidential scholar Clinton Rossiter declared that among the roles of the presidency was the role of "Chief Legislator."[8] At all times during the legislative process, even if the President is not actively involved the specter of his potential to block legislation shapes Congress's activity.

8.3 How a Bill Does *Not* Become a Law: Asian Carp and Closure of the Chicago Area Waterway

As noted above, most bills die in committee. If the several thousand bills introduced in each legislative session, only a few dozen to a few hundred become law. Some of those others are never intended, or at least not expected, to become law; legislators submit them just to look good to their constituents, but don't put much effort into them because they know that under the current circumstances they can't pass, and in some cases they surely have no sincere interest in passing them. But some bills go nowhere despite having real support, and this case study about the efforts of the Michigan Congressional delegations effort to legislate a solid barrier closure of the Chicago Area Waterway to prevent the spread of Asian Carp demonstrates why a bill that has sincere support even from some members of the congressional majority can still fail. In a nutshell, it's all about who supports it, who opposes it, and what positions the supporters and opponents occupy in the relevant committee and leadership structures.

Asian Carp: Invasion and Response

The 50,000 non-native species that have invaded the United States impose costs of nearly $150 billion per year,[9] and have large negative effects on the Great Lakes. Invasive species now "dominate the food webs of the Great Lakes [causing] profound ecological and economic impacts."[10] Asian carp, voracious feeders whose diet overlaps extensively with native fish, were introduced into the U.S. in the mid-20th century to control vegetation and improve water quality in aquaculture ponds. In recent years they have successfully outcompeted native species in many areas of the upper Mississippi River basin, [11] accounting in some areas for 95% of the local biomass.[12] The effects of Asian carp are not only ecological, but

human, as fishermen lose access to favored species and the now-famous jumping carp (the Silver carp species) can cause physical harm to boaters and damage to their equipment. The carp have established themselves in the Chicago Area Waterway (CAW), and now threaten to invade the Great Lakes. [13]

Historically the Mississippi River basin and the Great Lakes basin were separate watersheds, but in Illinois this separation is breached by the Illinois and Chicago Rivers, part of the CAW. The Chicago River once ran only in the Great Lakes Basin, emptying into Lake Michigan. But because it carried waste and sewage into the lake, which was also the source of the city's drinking water, in 1900 the city dug the Chicago Sanitary and Ship Canal between the Chicago River and the Des Plaines River to the West, which joins the Kankakee River to form the Illinois River, eventually emptying into the Mississippi. This engineering feat reversed the flow of the Chicago River,[14] and also created a permanent water link between the basins. This water link enables shipping between the Mississippi and the Great Lakes, with an positive economic impact for Chicago of at least $1.3 billion per year.[15] But it also provides a route for species to move between the two watersheds. The Army Corps of Engineers, which manages the CAW, has installed electrical barriers to block the carp but their effectiveness remains questionable. While no actual carp have been found in Lake Michigan, beyond the barriers, Asian carp DNA has been found.[16]

The risk has alarmed residents of the Great Lakes region, and is particularly threatening to the commercial and sport fishing industries, whose value is estimated at $7 billion per year (considerably greater than the value to Chicago of the CAW).[17] Opposition to the carp is centered in Michigan, the only state that lies entirely within the Great Lakes watershed. In 2009 doubts about the effectiveness of the electric barriers led Michigan to sue Illinois in the U.S. Supreme Court, seeking closure of the CAW by means of a solid barrier, which would could block shipping as well as fish.[18] The value of the CAW to Illinois' economy creates a strong incentive for the state to resist this closure. As most of Illinois' waters are in the Mississippi basin, already invaded by Asian carp, closing the waterway would provide them with almost no benefit. The Supreme Court rejected the lawsuit, and the following year Michigan, joined by Wisconsin, Ohio, Minnesota and Pennsylvania, sued the Army Corps

Engineers, seeking "emergency action to block Asian carp from entering Lake Michigan."[19,20] This lawsuit was also unsuccessful.[21]

The "Stop Asian Carp Act": Poor Prospects for Legislative Success

In March of 2011, following the failure of these lawsuits, Michigan's Democratic Senator Debbie Stabenow and Republican Congressman Dave Camp submitted identical bills in the U.S. Senate and House of Representatives. Titled the "Stop Asian Carp Act," the bills would require the Army Corps of Engineers to permanently close the water link between the Mississippi and the Great Lakes. But like most bills that are submitted in Congress, Stabenow and Camp proposals had almost no chance of being enacted into law. First, the issue lack broad-based support as reflected by it co-sponsors. Second, supporters were poorly positioned to pursue it while the opposition was well-positioned to stop it. Third, the House was dominated by environmentally un-friendly Republicans. And fourth, the President could not be expected to provide support.

Lack of Broad-based Support

Congressmembers can attach their names to bills as cosponsors and consideration of who the cosponsors are reveals important information about a bill's prospects for passage. The House bill had 26 cosponsors, but 14 of those were from Michigan. Every member of the Michigan delegation was a co-sponsor, regardless of party, demonstrating the seriousness of the issue in that state. But there were only 12 other co-sponsors, all of them from Great Lakes states and all but one a Democrat in the Republican-majority House. Importantly, no member of the Illinois delegation chose to cosponsor the bill. In the Democratic-majority Senate the bill had only 7 cosponsors, again all from Great Lakes states and all Democrats. Only one of Illinois' senators, Dick Durbin, signed onto the bill.

With every cosponsor representing a Great Lakes state, the issue clearly had little, if any, national political salience. This does not mean that no one from outside those states would vote in favor of it but it shows that out-of-region congressmembers don't perceive any electoral benefits by publicly demonstrating support for the issue. This suggests that the supporters of the Bill cannot expect much voluntary support from them

but would need to engage in a substantial amount of bargaining and vote-trading.

But noticeably, not even all Great Lakes states were represented in the sponsorship: No Wisconsin, Indiana, or Pennsylvania Congressmembers joined the bill. The lack of sponsorship from the Indiana and Pennsylvania delegations may be easily explainable. Both states have minimal Great Lakes shoreline, and the region of Indiana that borders Lake Michigan is tightly integrated into the Chicago region economic structure. In other words, each state has comparatively little to gain from keeping Asian carp out of the Great Lakes, and Indiana likely has much to gain from keeping the shipping channels open. The absence of sponsorship from Wisconsin is more puzzling. Wisconsin has more Great Lakes shoreline than any state but Michigan; four of their ten Congressmembers are Democrats, who in general are more supportive of environmental regulation than are Republicans; Wisconsin was one of the states that joined Michigan's lawsuit against the EPA; and Wisconsin's Secretary of the State Department of Natural Resources testified in favor of closing the waterways before the House Transportation and Infrastructure Subcommittee on Water Resources and the Environment.[22] So despite the lack of cosponsors from Wisconsin we can expect that there would be some support from the Wisconsin delegation if the bill had come to the floor of either chamber for a vote. But whether the Representatives from Illinois and Pennsylvania would support the bill is more doubtful.

While other environmentally oriented legislators would almost certainly vote in favor, the bill does not naturally have a broad-based constituency cutting across multiple regions or across party lines. Support for it would have to be built in a piecemeal fashion by engaging in vote-trading or adding in specific elements to benefit likely supporters. An issue like this, where a small group is very passionate and a larger group is only mildly concerned or even indifferent, is tailor-made for allowing non-passionate legislators to extract payments for their support. For example, to try to placate opposing Illinois legislators, the bill includes a clause allowing the Army Corps of Engineers to include in its study issues of flooding, waste and stormwater infrasctructure in Chicago, and ways to either replace barge traffic through alternative transportation modes or develop means of moving shipping through the waterway without aiding the movement of invasive species. The question is whether supporters of

the bill would have the capacity to provide the necessary benefits to gain those votes.

Lack of Sponsors on Relevant Committees

In the Senate the bill was assigned to the Committee on Environment and Public Works. But while this is the appropriate committee for such a bill, only one cosponsoring senator sat on that committee, New York's Kirsten Gillibrand, who as one of the Senate's most junior members was not yet very influential. Nor was she a subcommittee chair, with the potential to at least guide it through that level.

The Senate bill did have two potential advantages. First, the Senate had a Democratic majority, so if the bill did manage to make it through committee it would presumably have a chance of passing the full Senate. Second, cosponsor Dick Durbin was the Majority Whip, the second highest ranking Democrat in the Senate, and from that leadership position he could be influential in shepherding the bill to passage if it made it out of committee. But there are many Democratic-sponsored bills that will never see passage even in the Democratic-controlled Senate, and many of those also have Democratic leaders as at least nominal cosponsors.

If prospects in the Senate seemed marginal, they were nearly non-existent in the House, where the Democrats were in the minority (and where the majority is much more dominant than in the Senate). The House bill had a multiple referral, being sent to both the House Committee on Transportation and Infrastructure (whose jurisdiction includes navigation and ports as well as marine environmental protection) and to the Committee on Natural Resources (which has jurisdiction over fisheries and wildlife). In each House Committee the bill was further assigned to subcommittees. In the Transportation and Infrastructure Committee it was assigned to the Subcommittee on Water Resources and the Environment, and in the Natural Resources Committee, the bill had a further multiple referral to two subcommittees, the Subcommittee on Water and Power and the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affair.[23] At the time this case study was written no further action had been scheduled.

The only cosponsor of the bill in the Transportation and Infrastructure Committee was Michigan Representative Candice Miller, who also sat on the Water Resources subcommittee. As a Republican she was in the

majority so she was positioned to have some influence on moving the bill forward. However, because she was the only cosponsor in the parent committee, she was necessarily the only one on the subcommittee as well. On the other side of the issue, the Transportation and Infrastructure Committee had three Illinois members, including Democratic Representative Dan Lipinski, whose district straddles the Chicago Sanitary and Ship Canal, an important link in the Chicago Area Waterway. Lipinski did support creation of the electric barrier in the waterway,[24] but the canal's economic importance to his district was substantial, and he could be expected to fight closure of it vigorously. Indeed, his support for the electric barrier may primarily have been a defensive maneuver intended to forestall demands for complete closure. The two Illinois Republican members of the Committee were from outside the CAW region, but as Republicans and representatives from Illinois they would most likely put economic and state interests above environmental and out-of-state interests.

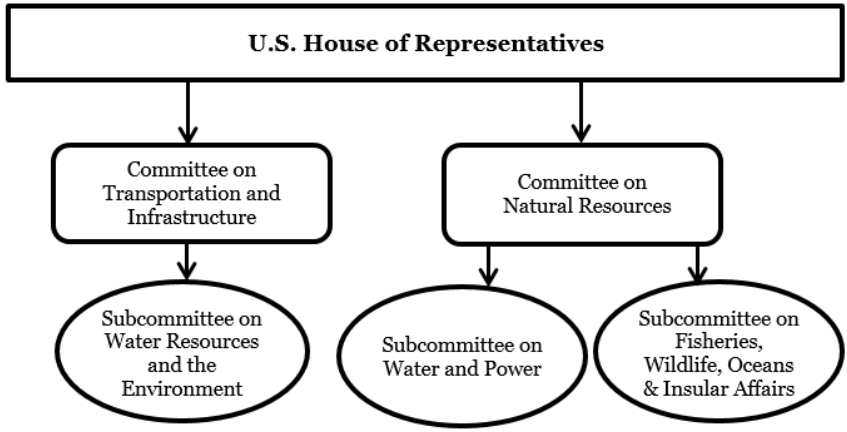


Figure 8.2

Chapter Summary

The lawmaking process is complex. In fact this account, as long as it is, does not even cover all the possible variations in the process. What you should know in general after reading this chapter is that;

1. each chamber makes its own rules, and modifies or suspends them at its own convenience to get bills passed;
2. most of the formal activity of legislation takes place in committees;
3. lawmakers negotiate informally outside the committee process;
4. sometimes the committees are circumvented by congressional leadership;
5. the president is deeply involved;
6. it's a conflictual process requiring negotiation and bargaining between the two parties, between members of the same party, between the two houses of Congress, and between Congress and the Presidency;
7. in the end it's about winning, not about how you play the game, because constituents don't reward their Senators and Representatives for playing fair, but for delivering — or at least announcing their support for — legislation that's popular back home;
8. success depends on having sponsors and supporters of a bill in the right committees, and having the support of those people in veto positions.

What to Take Away from this Chapter
(those points you might you get tested on)

1. What are the sources of bills
2. What are Congressmembers' motivations for submitting bills?
3. What is agenda control, and why is it important?
4. What is a veto point, and what are veto players?
5. What is committee jurisdiction?
6. What is the role of committees in the legislative process?
7. What are hearings?
8. What is markup?

9. What is the fate of most bills?
10. How are the House and Senate similar in legislative process, and how do they differ?
11. What is the role of the House Committee on Rules?
12. What are open rules, rules, closed rules, complex rules, and self-executing rules.
13. What is the filibuster, and how has it changed over time?
14. What is cloture?
15. How do the House and Senate resolve difference in their versions of a bill?
16. What is the President's role in lawmaking?

Questions to Discuss and Ponder

1. In a political structure like the United States, with symmetric bicameralism and a president with veto power, passing legislation is very difficult. Even when a majority of the public supports a bill, opponents may be in the position to stop it. But this does sometimes prevent bills from being rushed through to quickly, without enough thought. In a unicameral parliamentary system with veto authority outside the legislature, a simple majority of only one chamber is sufficient to pass legislation. They can act more efficiently when they need to, but may also pass bills without sufficient consideration of them. Which system do you think is, on the whole, better? Why?

2. How heavily involved do you think presidents should get in lawmaking, given that it is primarily Congress's responsibility and authority? Should Congress take the lead and tell Presidents to keep their noses out of it, or should Presidents make every effort they can to push their preferred policies through the legislative process?

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[1] Cannan, John. 2013. "A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History." *Law Library Journal* 105(2): 131-173.

[2] Gailmard, Sean, and Jeffery A. Jenkins. 2007. "Negative Agenda Control in the Senate and House: Fingerprints of Majority Party Power." *The Journal of Politics* 69(3): 689-700.

[3] Cannan, supra.

[4] Cannan, p.142.

[5] See the U.S. Senate's website, http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm, and the Online Etymology Dictionary, http://www.etymonline.com/index.php?term=filibuster.

[6] Rybicki, Elizabeth. 2013. "Conference Committee and Related Procedures: An Introduction. *Congressional Research Service*. http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26*2D4Q%3C[3%0A.

[7] Richey, Warrn. 2014. "Did Congress Pass Obamacare the Right Way? Court Dismisses Lawsuit." Christian Science Monitor. July 29. http://www.csmonitor.com/USA/Justice/2014/0729/Did-Congress-pass-Obamacare-the-right-way-Court-dismisses-lawsuit.

[8] Rossiter, Clinton. 1960. *The American Presidency*. New York and Toronto: The New American Library. p.26.

[9] Pimental, David, Lori Lach, Rodolfo Zuniga, and Doug Morrison. 1999. "Environmental and Economic Costs Associated with Non-Indigenous Species in the United States." http://www.news.cornell.edu/releases/jan99/species_costs.html. (Accessed April 5, 20101).

[10] Ricciardi, Anthony, and Hugh J. MacIsaac. 2000. "Recent Mass Invasion of the North American Great Lakes by Ponto-Caspian Species." *Trends in Ecology and Evolution* 15(2): 62-65.

[11] Koel, Todd M., Kevin S. Irons, and Eric Ratcliff. "Asian Carp Invasion of the Upper Mississippi River System." *United States Geological Survey* Project Status Report 2000-05.

[12] Asian Carp Regional Coordinating Committee. 2004-08. "Asian Carp Control." http://www.asiancarp.org/background.asp. (Accessed April 5, 2011).

[13] Chick, John H. and Mark A. Pegg. 2001. *Science* 22(June): 2250-2251.

[14] Hill, Libby. 2000. *The Chicago River: A Natural and Unnatural History*. Lake Claremont Press.

[15] Schwieterman, Joseph P. 2010. "An Analysis of the Economic Effects of Terminating Operations at the Chicago River Controlling Works and O'Brien Locks on the Chicago Area Waterway System." Chaddic Institue for Metropolitan Development. http://las.depaul.edu/chaddick/docs/Docs/DePaul_University_Study_on_Terminating_L1.pdf. (Accessed April 5, 2011).

[16] Saulny, Susan. 2010. "Carp DNA is Found in Lake Michigan." *New York Times*. Jan. 19. http://www.nytimes.com/2010/01/20/science/20carp.html. (Accessed April 6, 2011).

[17] Congressional Research Service. 2010. "Asian Carp and the Great Lakes Region." http://digitalcommons.unl.edu/crsdocs/12/. (Accessed August 14, 2011.)

[18] Belczyk, Jaclyn. 2009. "Michigan Sues Illinois in Supreme Court Over Invasive Fish Species." *Jurist Legal News and Research*. Dec. 23, 2009. http://jurist.law.pitt.edu/paperchase/2009/12/michigan-sues-illinois-in-supreme-court.php. (Accessed April 5, 2005).

[19] Office of the Attorney General. 2010. "Cox Files New Asian Carp Lawsuit Against Obama Administration." July 10. http://www.michigan.gov/ag/0,1607,7-164-46849_47203-240934--,00.html. (Accessed April 5, 2011.)

[20] Hood, Joel. 2010a. "5 States Sue to Keep Asian Carp Out of Great Lakes." WGN. July 19. http://archive.chicagobreakingnews.com/2010/07/asian-carp-michigan-ohio-wisconsin-minnesota-pennsylvania-illinois-great-lakes.html. (Accessed April 6, 2011).

[21] Nelson, Gabriel. 2010. "Supreme Court Again Rejects Injunction in Asian Carp Case." *New York Times*. March 22. http://www.nytimes.com/gwire/2010/03/22/22greenwire-supreme-court-again-rejects-injunction-in-asia-55113.html. (Accessed April 5, 2011.)

[22] Frank, Matt. 2010. "Testimony Before the U.S. House Transportation and Infrastructure Subcommittee on Water Resources and the Environment." Feb. 9. Wisconsin Department of Natural Resources. http://dnr.wi.gov/news/mediakits/pdf/SecFrankTestimony.pdf. (Accessed April 6, 2011).

[23] Library of Congress. 2011. "Bill Summary & Status 112th Congress (2011 - 2012) H.R.892, Committees."

[24] Lipinski, Daniel. 2010. "Lipinski Celebrates Completion of Barrier to Prevent Asian Carp from Reaching Great Lakes." Oct. 9. http://www.lipinski.house.gov/index.php?option=com_content&task=view&id=1326&Itemid=44. (Accessed April 6, 2011).