

"They write politics, we write government"

CONGRESS

The World's Largest Dysfunctional Family

*"With all this money coming in from both sides, how does anything ever get done?"
"It doesn't. That's the genius of the system." – The Distinguished Gentleman*

When your approval ratings have been hovering between 10 and 20 percent for nearly a decade, you might want to change things up a bit.

Congress does its best to show off its bad side. Constantly failing to make tough but important decisions. Important pieces of legislation consistently left undone. Arcane processes that the public knows better than to understand. Blaming the other side for everything from the failure of the healthcare system to the weather. When they do manage to pass legislation, it is usually convoluted and hated – the screaming and fearmongering from the other side make sure of that.

How we got here is a good question – and one that we'll try to answer. But first, we need to understand what Congress is and what it does.

- How do they get elected in the first place?
- Once they get there, how do they "organize"?
- What does Congress actually do?
- How does Congress exercise power?

How do these people get elected in the first place?

OK, let's start with the basics. There are two Chambers in the US Congress: the House of Representatives (lower Chamber) and the Senate (upper). They are described in the Constitution; you don't have to look long because it's right at the beginning, Article I.¹

The 435 Members of the House of Representatives are up for election every two years. Senators serve 6-year terms, staggered so that equal portions of the Chamber are elected every 2 years.

Representatives are divided among the states on

the basis of population. This is redone every ten years, via a process called apportionment. Each state has two Senators, no matter its population. This leads to legislators in different states representing different numbers of constituents:

State	Population	Representatives	Ratio
Montana	1,005,141	1	1,005,141:1
Rhode Island	1,055,173	2	527,587:1
State	Population	Senators	Ratio
California	38,802,500	2	19,401,250:1
Wyoming	576,412	2	288,206:1

¹ [Here you go](#). I'm continually impressed by the database Cornell's Law School put together. These people must have even more free time than I do.

In any system of representative government, some discrepancy is unavoidable. But our system is especially skewed. Increasing the size of the House would generally improve the “fairness,” up to a point.² In the Senate, giving each state two Senators was a compromise made in 1787 to ensure smaller states would agree to the Constitution. It worked. But today, rural voters, who live in states with smaller populations, have disproportionate power.

Even though they make laws of national applicability, the Constitution explicitly says that each state is in charge of choosing its own Members. Elections in this country are conducted locally, with only minimal national regulation. For the House, each state decides how to split its territory to elect Representatives; this is “redistricting.” In most states, redistricting is done through a partisan process, meaning a political party in control of the state government can gain a large advantage.

Once they get there, how do they “organize”?

There are two political parties in this country.³ Therefore, when a new Congress comes in, one party will have a majority of seats in each Chamber. That party is the majority party, the other is the minority party. In the House, the majority party

chooses a Speaker, who is the head of the House. The Vice President, who might not be a member of the majority party, serves as President of the Senate. This role is mostly ceremonial, except for breaking ties. In both Chambers, each party chooses a Leader, who heads his or her party delegation.⁴ Each party in each Chamber also has a Whip, who assists the Leader in rounding up votes and other

duties. Both parties also have various other officers which differ by Chamber and party.

After each bi-annual election, there are a lot of new Congresspersons in both Chambers. It is traditional to refer to the Congress that will be in place for each two-year period as a distinct numbered entity. For example, “the 115th Congress is currently in session until January 2019.” Under the Constitution, each Chamber makes its own

rules. Many of the rules are codified in an “Organizing Resolution” or “OR.” Usually, it’s the first thing a new Congress does.⁵ In the House, the majority party can include more or less what it wants in the OR. In the Senate, the game is trickier because the OR is generally subject to Unanimous Consent.

An Aside: Grab bag of weird things about the Senate

Cloture: The process required to move a Senate measure to a vote. For many pieces of business, Cloture requires 60 votes.

Filibuster: A Senator is usually permitted to “hold the floor” as long as he or she is physically able. When one does so for a long period, this is a Filibuster.

Nuclear Option: The Senate’s ability to change its rules to allow Cloture with 50 votes for any actions. This could lead to a procedural halt to all business – a big explosion.

Maiden Speech: Historically, Senators do not speak on the floor until a suitable period had passed. The first speech gets a lot of attention. The UK’s parliament does this too.

Webster Desk: First occupied by the famed orator Daniel Webster, it is still occupied by the Senior Senator from New Hampshire.

² Apportionment actually has some really interesting mathematical properties. Wikipedia has an article on [“Apportionment paradox.”](#)

³ The Senate also has one independent, Angus King of Maine. Frankly, I don’t know how to count Bernie Sanders of Vermont; he was elected as a Socialist, but joined the Democratic Party to run for President. Both vote as Democrats, so we are going to call them Democrats.

⁴ The only “her” Leader so far is Nancy Pelosi, D-CA. She is also the only “her” Speaker and only “her” Whip.

⁵ The Senate is going to be weird again. Because most of its members carry over from the previous Congress, some say that it is a “continuous body” and doesn’t need to re-organize with new rules. But it always does.

Since its founding, almost all of the Senate’s business has been conducted via Unanimous Consent. There are two types of Unanimous Consent. “Simple” Unanimous Consent is used for all sorts of mundane procedures, such as waiving reading of the minutes and naming post offices. But, because the Senate rules are so arcane, when they want to get something done, they need to change the rules via a “Unanimous Consent agreement”. These agreements specify the number and type of amendments that can be offered and how the debate will proceed. But they require unanimity. Any Senator – or more likely a small group – can throw a monkey wrench in the process by blocking a Unanimous Consent agreement. In today’s partisan environment, a determined minority could prevent all Unanimous Consent agreements, greatly slowing all Senate business.

One of the major items included in the Organizing Resolution is the makeup of each Chamber’s committees. Each majority party will have a majority of the seats on all of its Chamber’s committees,⁶ as well as all of the committee chairmanships. Although their power waxes and wanes over the years, committees are critical to the operation of both Chambers. It is very difficult to move legislation to a final vote without passing through its relevant committee.⁷ Most bills are written by committee staff, and the provisions are advanced by the committee “markup” process. Because of their power, members of Congress fight to get onto their preferred committees. Committee chairpersons wield enormous authority to shape legislation. Both Chambers and both parties have different procedures to determine committee membership and pecking order, but seniority is a key factor.

House Committees	Senate Committees
Agriculture	Agriculture, Nutrition and Forestry
Appropriations	Appropriations
Armed Services	Armed Services
Budget	Banking, Housing and Urban Affairs
Education and the Workforce	Budget
Energy and Commerce	Commerce, Science and Technology
Ethics	Energy and Natural Resources
Financial Services	Environment and Public Works
Foreign Affairs	Finance
Homeland Security	Foreign Relations
House Administration	Health, Education, Labor and Pensions
Judiciary	Homeland Security and Governmental Affairs
Natural Resources	Judiciary
Oversight and Government Reform	Rules and Administration
Rules	Small Business and Entrepreneurship
Science, Space and Technology	Veterans Affairs
Small Business	
Transportation and Infrastructure	
Veterans’ Affairs	
Ways and Means	
Joint Economic	
Joint Library	
Joint Printing	
Joint Taxation	
Special / Select Committees	
Intelligence	Aging
Benghazi	Ethics
	Indian Affairs
	Intelligence

Historically, there have been a surprisingly large number of Organization Resolutions involving high drama.⁸ I’ll tell just one story: the Senate’s 2001-2003 session.

Before the 2000 election, Republicans held 54 Senate seats to 46 for the Democrats. In the 2000 election, Republicans lost four Senate seats (along with the popular vote for President). When the Senate began its session on January 3, 2001, it consisted of 50 Democrats and 50 Republicans. The Vice Presidential Inauguration was more than two weeks later, so Democrat Al Gore held the tie-

⁶ Except Ethics, which is always split evenly, but with the Majority Party still holding the chairmanship.

⁷ This is the [Discharge Petition](#).

⁸ Well – my definition of high drama may be different from yours.

breaking Senate vote. Democrats therefore had de facto 51 to 50 control until January 20th, when the situation would reverse. The Senate would therefore need to be organized and then re-organized, which could only happen with consent of both parties. What emerged was a power-sharing arrangement: the two parties would have equal representation on all committees, *unless the partisan makeup of the Senate were to change.*

Well, that's just asking for trouble. In May/June 2001, Senator Jim Jeffords of Vermont left the Republican Party, becoming an independent and caucusing with the Democrats. Under its own terms, the Organizing Resolution power-sharing arrangement ceased to exist. But, the 51 Democrats couldn't unilaterally pass a new OR, as doing so would require 60 votes. What happened was another compromise: Democrats were acknowledged as the Majority Party in the Chamber and on committees, while Republicans received guarantees as to how the Chamber would be run. This is a different world than we have today: I can't picture either party being willing to share power, when the only motivation is a functioning Senate.⁹

What does Congress actually do?

So after fundraising, getting themselves elected and organizing, Congress sometimes does things.

Congress is the Legislative branch of the Federal Government. That means that it writes bills and determines which bills become law. The areas in which Congress has power to legislate are specified in Article I of the Constitution:¹⁰

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States...

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...

To establish Post Offices and post Roads...

To constitute Tribunals inferior to the supreme Court...

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy...

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States...

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Note the last one: "make all Laws which shall be necessary and proper." This is known as the "Elastic Clause" because it gives Congress the ability to stretch its own power with only a vague guideline. The specifically named items are Congress's "Enumerated Powers." But fights over exactly what is within Congress's power have been going on for

⁹ To make the 107th Senate session even stranger: in 2000, Missouri Democratic Governor and Senate candidate Mel Carnahan was killed in a plane crash one month before the election – too late to remove his name from the ballot. He went on to win the election anyway. Missouri's new Governor (who was previously Mel Carnahan's Deputy) appointed Carnahan's widow, Jean Carnahan, to the seat. The law in Missouri said that she would hold the seat until the November 2002 election. She lost to

Republican Jim Talent, who took immediately, before the new Congress started. This returned the Senate back to 50-50, with the GOP VP as tie-breaker. No, they did not re-re-organize; maybe they were just worn out. Sen. Paul Wellstone (D-MN) was also killed in a plane crash during that session. And it handled 9/11 aftermath and most of the lead up to the Iraq War.

¹⁰ Edited by me, for length. Full version many places, like the [Constitutional Center](#).

200 years. I doubt we will have a definitive answer soon.

In order to be sure they remain on the “good” side of the Constitutional line, Congress often tries to tie legislation to Enumerated Powers. For example, the Supreme Court validated the Constitutionality of the ACA’s Individual Mandate based on Congress’s power to collect taxes. “Regulate commerce between the states” is also a broad power where Congress often tries to find safe harbor.¹¹

Now, normally, this would be where I tell you how a bill becomes a law. But somebody already did that better than I could ever hope to.¹²



Maybe we can fill in the blanks a bit.

For a bill to become a law, it needs to be approved by both Chambers of Congress – with identical language. Bills can be started – “introduced” – in either Chamber.¹³ It will then go to one or more committees – where it can be amended. Then to the whole Chamber – “the Floor” – where it can be amended. If passed, it gets sent to the other

¹¹ For example, the Supreme Court has not liked arguments that gun regulations are related to economic activity, even if the underlying law specified such a rationale. See [United States v. Lopez](#) and [Printz v. United States](#) (J. Thomas in concurrence, specifically)

¹² [The Simpsons](#) gave Schoolhouse Rock a run for their money.

Chamber and assigned to committee – where it can be amended. Then, it might face changes on the Floor of that Chamber. So it is very likely that the two bills will have some differences. There are two ways to handle this situation.

The classical way to resolve differences is in a Conference Committee. When differing versions of a bill are passed, a Conference only happens if both Chambers want it to. A Conference Committee is a group of Members of both Chambers, that exists solely to negotiate between two versions of a bill. Each Chamber can instruct its conferees as to what changes to the bill they are willing to accept, but these instructions are not binding. If a majority of the Committee members of each Chamber are able to agree on a compromise, then the Conference issues a “report”. Theoretically, a Conference report needs to be “between” the House and Senate versions of the bill. For example, if the House wants to spend \$100 on a new aircraft carrier and the Senate \$200, then the conference report can’t spend \$300. But when the disagreement isn’t quantitative, it is more difficult to enforce this rule. When a report is issued, the compromise bill must be passed again by both Chambers. A Conference report cannot be amended, but it is not guaranteed to be voted on.¹⁴

If they don’t want to go through the formality of a Conference, they can play “Congressional Ping-Pong.”¹⁵ Here’s how that works. Let’s say that the House passes a bill and sends it to the Senate. The Senate amends the bill and passes said amended version. Rather than go to Conference, they could “ping-pong” the bill back to the House. The House can either: agree to the Senate’s amendments,

¹³ In theory, all bills with respect to money need to start in the House. In practice, it’s easy to get around this. For instance, the Senate could take a House bill, amend out the entire bill and add whatever they want.

¹⁴ [Congressional Research Service](#) talking about the Conference process.

¹⁵ Officially called “amendment exchange.” [CRS has a lengthy](#) piece discussing the various avenues.

passing the bill; disagree, killing the bill (at least temporarily); or, agree, but with more amendments. If it is the latter, the House could ping-pong it right back to the Senate. Fortunately, there is a limit: three ping-pongs. But they can also get around this limit, if they want to.¹⁶

I plan to have more on Congressional procedure in later Volumes, but this is a good foundation. But it doesn't really answer the big question.

How does Congress exercise its power?

Passing laws is a great way to generate a paper trail. Occasionally, a post office gets renamed or we agree to designate a holiday related to some sports team winning a championship. It seems like the Executive and Judicial branches get to have all the fun: conduct war, appoint Cabinet officers, interpret the law, put people in jail or make them pay fines. But Congress has two key ways to make sure its voice is heard: money and executive oversight.¹⁷

Whatever other branches want to do, they can't do it without money. Congress controls – or at least can control – the money. Coming in, Congress directly controls the Tax Code. On the way out, Congress controls the Budget and Appropriations processes, which determine how the money gets spent. In its budget, Congress creates an overview of tax and spending priorities for each fiscal year. Then, twelve appropriations bills must be passed, each one determining the funding for its specific area of the government. Appropriations bills can direct spending down to a very granular level. In the process, Congress can also prevent money from being spent in any area it chooses. Needless to say, the committees involved in taxation and spending – Budget, Ways and Means, Finance and Appropriations – are some of the most desirable

¹⁶ For instance, they could take a different bill and use the previous trick of amending it by replacing the entire bill with what they want in it. Or, even easier, they could just waive the three ping-pong rule.

¹⁷ It also “controls” the Judiciary in the sense that it determines the size and makeup of the Federal courts. In

assignments. Members can wait a decade or more to get these seats – if they ever do.

A lot of Congressional activity is oversight – usually of the executive branch. Interestingly, Congress's oversight power is not mentioned in the Constitution; it is an implied power. The first formal recognition of this power – at least that I'm aware of – is the [Legislative Reorganization Act of 1946](#), almost 175 years after Congress first sat in session. The Watergate Committee, Truman Committee and House Un-American Activities Committee¹⁸ – these were all oversight activity, not legislative.

As it's been construed, Congress's oversight power is expansive. They can subpoena documents and witnesses, both from private citizens and the executive branch. Contempt of Congress is a crime that gets referred to a grand jury under the jurisdiction of the US Attorney for the District of Columbia. When they call – you need to show up and need to tell the truth. However, most oversight power is vested in the Committees, where the majority party always has the most seats. So, in practice, only the majority party in each Chamber of Congress has the power to investigate. At its ultimate end, Congress's oversight power leads to the ultimate penalty: impeachment, the power to remove nearly anyone from their Federal office including, of course, the President.

The Senate has two other significant roles specified by the Constitution. First, all treaties with foreign nations must be approved by two-thirds of the Senate. This includes things like peace treaties and trade agreements.¹⁹ Second, the Senate must “advise and consent” to various Executive branch appointments. As the Executive and Judicial branches have grown over the last 200 years, the number of positions requiring Senate confirmation

practice, they don't really use this as a policy-setting mechanism.

¹⁸ And the Benghazi Committee, which amazingly still exists.

¹⁹ There are some exceptions to the two-thirds rule for trade agreements.

has increased far beyond what the Framers likely envisioned.²⁰ An enormous amount of the Senate's time is spent confirming appointments.

This is just a start of our thinking about Congress. The list of topics we have not even mentioned is as distinguished as its Congress's members. We haven't discussed cloture, regular order, motions to recommit or the fast-tracking of trade agreements. We'll come back to them another time.

Congress is as complex as any government program. The rules are endless, frequently unwritten, and full of exceptions. And they can be suspended at almost any time and in almost any manner. May we all exist in organizations that make their own rules.

Existing reporting on the day-to-day of Congressional activity is weak. I won't quote the common statistics about how few Americans can name their member of Congress, because it's sad. There is a reason why the average American doesn't know more about Congress – they are never shown what their member of Congress really does. All they hear is endless bickering, dueling press releases and news conferences, or grandstanding to an empty Chamber on CNN.

Even if this was a cursory overview, hopefully it serves as a base for what you read next, both here and elsewhere. When we talk about gerrymandering, or campaign finance, or the appropriations process – it all must be understood in the context of the basic operation of Congress.

²⁰ I believe [this is the official document](#) naming Senate confirmable positions. If you don't want to open, trust

me, it's 50 pages long. [Wikipedia has](#) what appears to be the same data in a more legible format.