

9.1 Congress: Making Laws Under the Contract



Image 9.1 View of Capitol and Surrounding Area

While the Capitol is the natural focus point of Capitol Hill and the workings of Congress, the Capitol complex includes over a dozen buildings, including the House of Representatives office buildings (left), the Senate office buildings (far right), the Library of Congress buildings (lower left), and the Supreme Court (lower right). (Credit: modification of work by the Library of Congress)

Learning Objectives

- Describe the role of Congress in the U.S. constitutional system.
- Define bicameralism.
- Explain the apportionment of seats in the House of Representatives.
- Discuss the three kinds of powers granted to Congress.
- Explain the division of labor in the House and in the Senate.
- Describe the way congressional committees develop and advance legislation.

Chart 9.1 Learning Objectives on Congress

The framers of the *Constitution* intended that Congress would be the cornerstone of the new republic. After years of tyranny under a king, they had little interest in creating another system with an overly powerful single individual at the top. While recognizing the need for centralization through a stronger national government with an elected executive wielding its own authority, they wanted a strong representative national assembly that would use careful consideration, deliberate action, and constituent representation to carefully draft legislation. Article I of the *Constitution* grants several key powers to Congress—overseeing the budget and financial matters, introducing legislation, confirming or rejecting judicial and executive nominations, and even declaring war.

Today, Congress is the most criticized and possibly the most misunderstood institution.

How is the legislative branch structured?

The origins of the U.S. *Constitution* and the convention that brought it into existence are rooted in failure—the failure of the *Articles of Confederation*. After only a handful of years, the states of the union decided that the *Articles* were unworkable, and that the national government needed to be strengthened. To save the young republic, a convention was called, and delegates were sent to assemble and revise the *Articles*. The Congress we recognize today emerged from the controversies and compromises in this convention.

The Great Compromise on Representation

Under the *Articles of Confederation*, the national legislature with limited powers had been made up of a single chamber composed of an equal number of delegates from each of the states. Virginia and other large states felt it would be unfair to continue with this equal distribution of power if significant powers were to be added to the legislature to make laws in new areas. Virginia's delegates proposed a plan for **bicameralism**, or the division of legislators into two separate assemblies. In this proposed two-chamber Congress, states with larger populations would have more representatives in each chamber, since representation would be based on population.

Moreover, under the proposed bicameral, two-chambered system, each chamber would act as a check on the other. Predictably, smaller states like New Jersey disagreed. They issued their own plan calling for retention of a single-chamber Congress with equal representation by state, more state authority, and a relatively weak national government.

A third proposal eventually calmed this storm of debate over allocation of power between large and small states. The Connecticut Compromise, also called the **Great Compromise**, proposed a **bicameral** congress with members apportioned differently in each house.

The upper house, the Senate, would have two representatives from each state. In the lower house, the House of Representatives, representation would be proportional to the population in each state. In the final draft of the U.S. *Constitution*, the bicameral Congress received several additional powers and limitations.

These are outlined in **Article I** ([Appendix B](#)). It describes the minimum age of congresspersons (Section 2), requires that Congress meet at least once a year (Section 4), guarantees members' pay (Section 6), and gives Congress the power to levy taxes, borrow money, and regulate commerce (Section 8).

The bicameral structure requires the two chambers to pass identical **bills**, or proposed legislation. After all the amending and modifying has occurred, the two houses ultimately must agree on the legislation

they send to the president for approval. Passing the same bill in both houses is intentionally difficult. The framers designed a complex and difficult process for legislation to become law.

This challenge serves several important and related functions. First, the difficulty of passing legislation through both houses makes it less likely, though hardly impossible, that Congress will act on emotion or without the necessary deliberation.

Second, the bicameral system ensures that large-scale dramatic reform is exceptionally difficult to pass and that the status quo is more likely to hold. Third, the bicameral system makes it difficult for a single faction or interest group to enact laws and restrictions unfairly favoring it.



The [website of the U.S. Congress Visitor Center](#) contains a number of interesting online exhibits and informational facts about the U.S. government’s “first branch” (so called because it is described in Article I of the Constitution).

Senate Representation and House Apportionment

The Constitution specifies that every state will have two senators who each serve a six-year term. Therefore, with fifty states in the Union, there are currently one hundred seats in the U.S. Senate. Senators were originally appointed by state legislatures, but in 1913 the Seventeenth Amendment allowed senators to be elected by popular vote in each state.

Seats in the House of Representatives are distributed among the states based on population and each member is elected by voters in a specific congressional district. Each state is guaranteed at least one seat in the House.

The Current Congress—Basic Requirements for Office		
	US House of Representatives	US Senate
Total # Members	435	100
Members Per State	1 or more; population based	2 for each; equality based
Term of Office	2 years for a single term	6 years for a single term
Minimum Age	25 years old	30 years old

Chart 9.2 Illustration of Congressional Requirements for Office

Redistricting (redrawing boundaries) occurs every ten years, after the U.S. Census has established how many persons live in the United States and where. The boundaries of legislative districts are redrawn as needed to balance the number of voters in each while still maintaining a total of 435 districts.

Because local areas can see population growth or decline over time, these boundary adjustments are typically needed every ten years. Based on the 2020 census there are six states with only one representative (Alaska, Delaware, North Dakota, South Dakota, Vermont, and Wyoming), whereas the most populous state, California, has fifty-two congressional districts.

Congressional apportionment today is achieved through the *equal proportions method*, which uses a mathematical formula to allocate seats based on U. S. **Census** Bureau population data (counting citizens in each state) gathered every ten years as required by the *Constitution*.

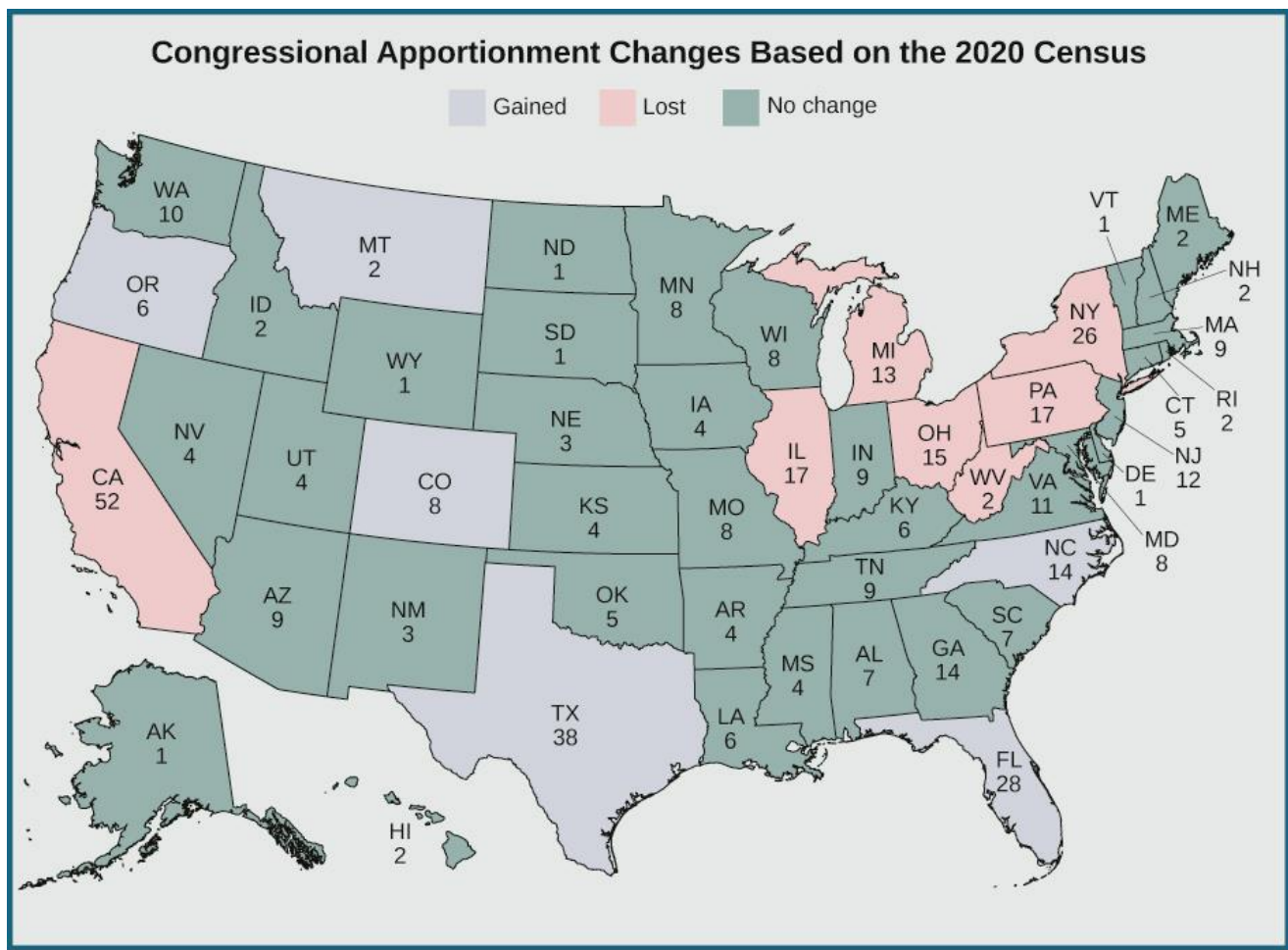


Chart 9.3 Map of Congressional Apportionment From 2020 Census

Although the total number of seats in the House of Representatives has been capped at 435, the apportionment of seats by state may change each decade following the official census. In this map, we see the changes in seat reapportionment that followed the 2020 Census. (Credit: OpenStax included image)

At the close of the first U.S. Congress in 1791, there were sixty-five representatives, each representing approximately thirty thousand citizens. As the territory of the United States expanded the population

requirement for each new district increased as well. Adjustments (**reapportionment**) occurred, but the House of Representatives roster continued to grow until it reached 435 members after the 1910 census. Ten years later with the 1920 census and urbanization changing populations across the country, Congress failed to reapportion membership. An agreement was reached in 1929 to permanently cap the number of seats in the House at 435. Two remaining problems in the House are the size of each representative's **constituency**—the body of voters who elect him or her—and the status of Washington, DC. George Washington advocated for 30,000 people per elected member to retain effective representation in the House. However, today the average number of citizens in a congressional district now tops 700,000. This is arguably too many for House members to remain in touch with the people. Further, the approximately 675,000 residents of the federal district of Washington (District of Columbia) do not have voting represent. Like those living in the U.S. territories, they merely have a non-voting delegate.^[4] Demographically speaking, Congress as a whole is still imbalanced and remains largely white, male, and wealthy. For example, more than half the U.S. population is female while only 26 percent of Congress is. Congress is also overwhelmingly Christian.

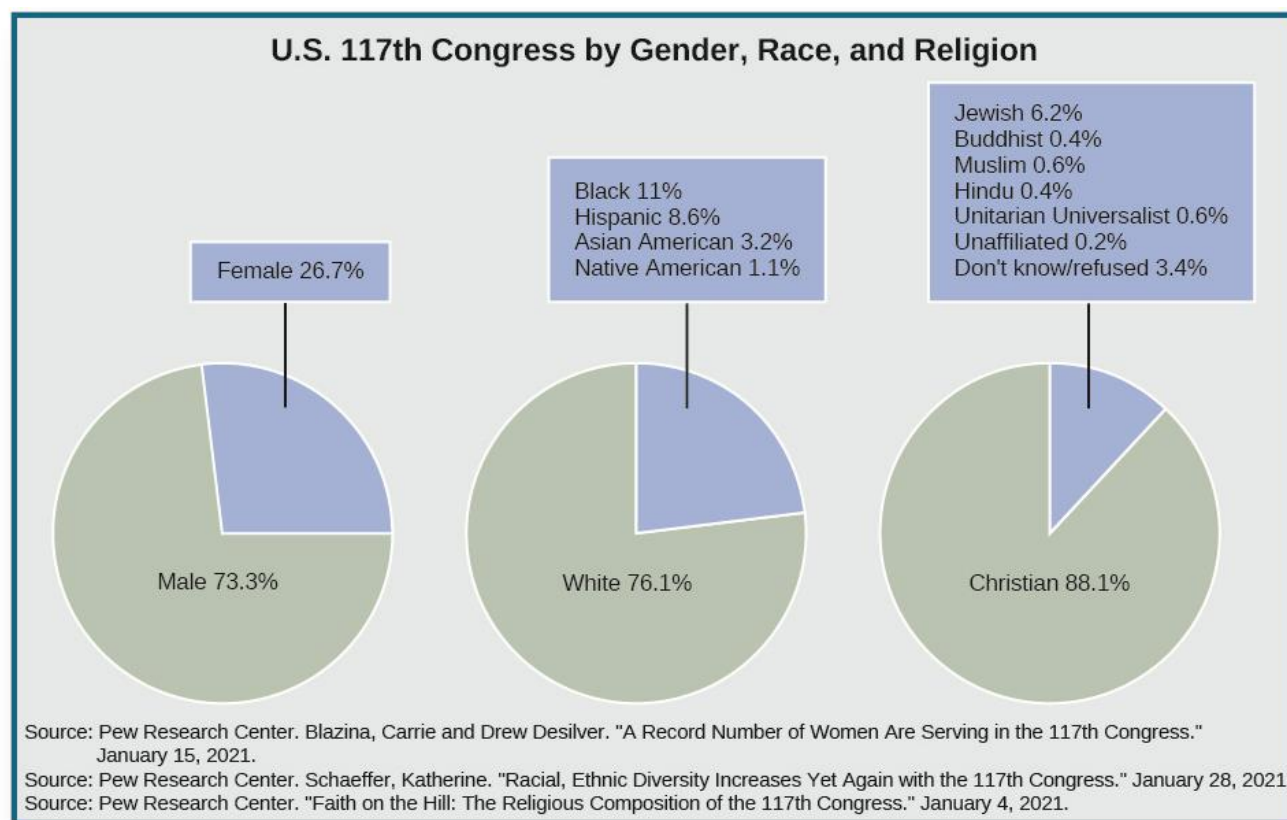
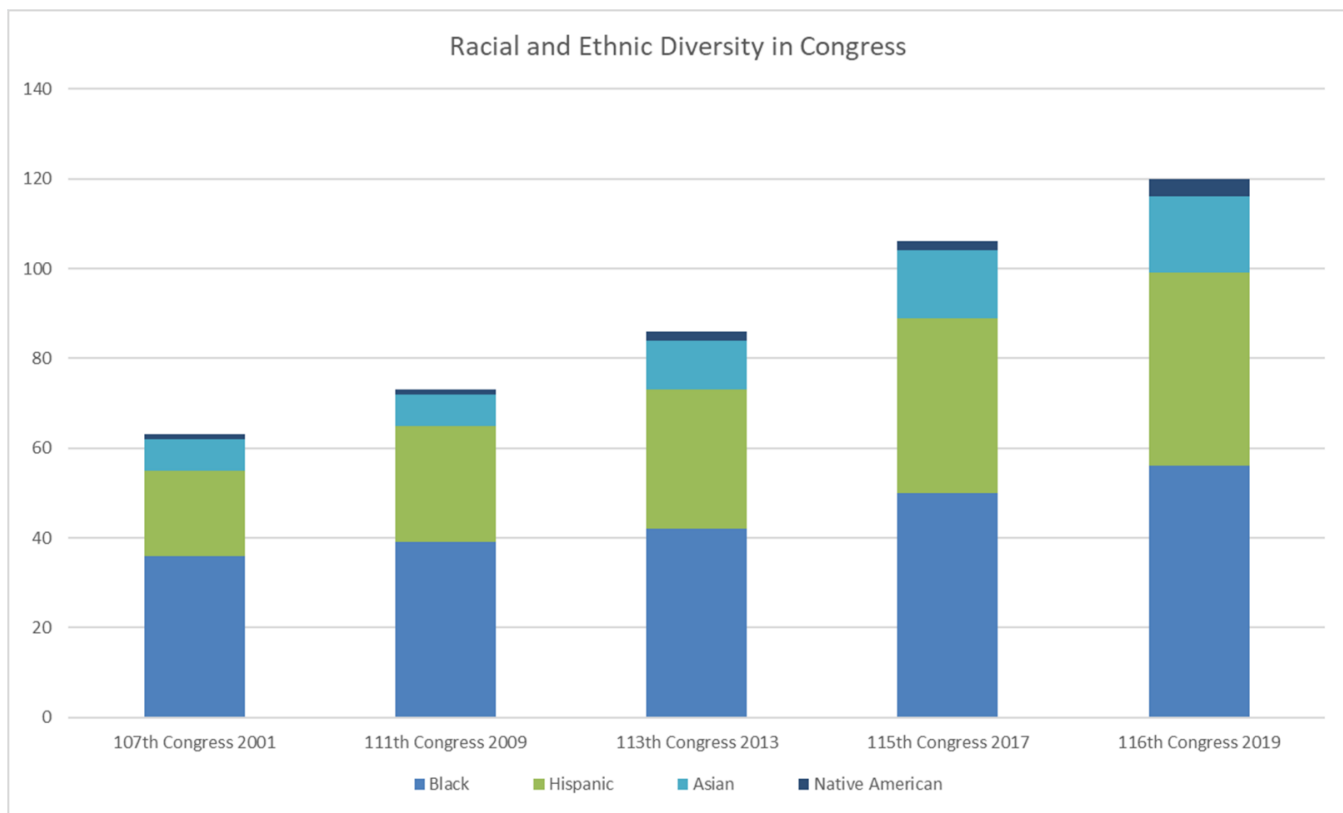


Chart 9.4 Pie Charts Illustrating Congressional Demographics



Credit: Pew Research Center, at [pewresearch.org](https://www.pewresearch.org); "Growing racial and ethnic diversity in Congress," 7 February 2019

Chart 9.5 Bar Graph Illustrating Racial and Ethnic Diversity in Congress

What powers does Congress possess?

Congressional powers can be divided into three types: **enumerated**, **implied**, and **inherent**.

An **enumerated power** is a power explicitly stated (written) in the Constitution. An **implied power** is one not specifically detailed in the Constitution but inferred as necessary to achieve the objectives of the national government. An **inherent power**, while not enumerated or implied, must be assumed to exist as a direct result of the country's existence.

Article I, Section 8, of the U.S. *Constitution* details the enumerated powers of the legislature. These include the power to levy and collect taxes, declare war, raise an army and navy, coin money, borrow money, regulate commerce among the states and with foreign nations, establish federal courts and bankruptcy rules, establish rules for immigration and naturalization, and issue patents and copyrights. The

Constitution includes other powers such as the ability of Congress to override a presidential veto with a two-thirds vote of both houses (Article II, Section 7, in the case of the veto override).

The first enumerated power, to levy taxes, is quite possibly the most important power Congress possesses. Without it, enumerated, implied or inherent powers would be largely theoretical. Along with the appropriations (money) power, taxation gives Congress what is known as "the power of the purse."

Some enumerated powers invested in the Congress specifically serve as checks on the other branches of government. These include Congress’s sole power to introduce legislation, the Senate’s final say on many presidential nominations and treaties signed by the president, and the House’s ability to impeach or

formally accuse the president or other federal officials of wrongdoing (the first step in removing the person from office; the second step, trial and removal, takes place in the U.S. Senate).

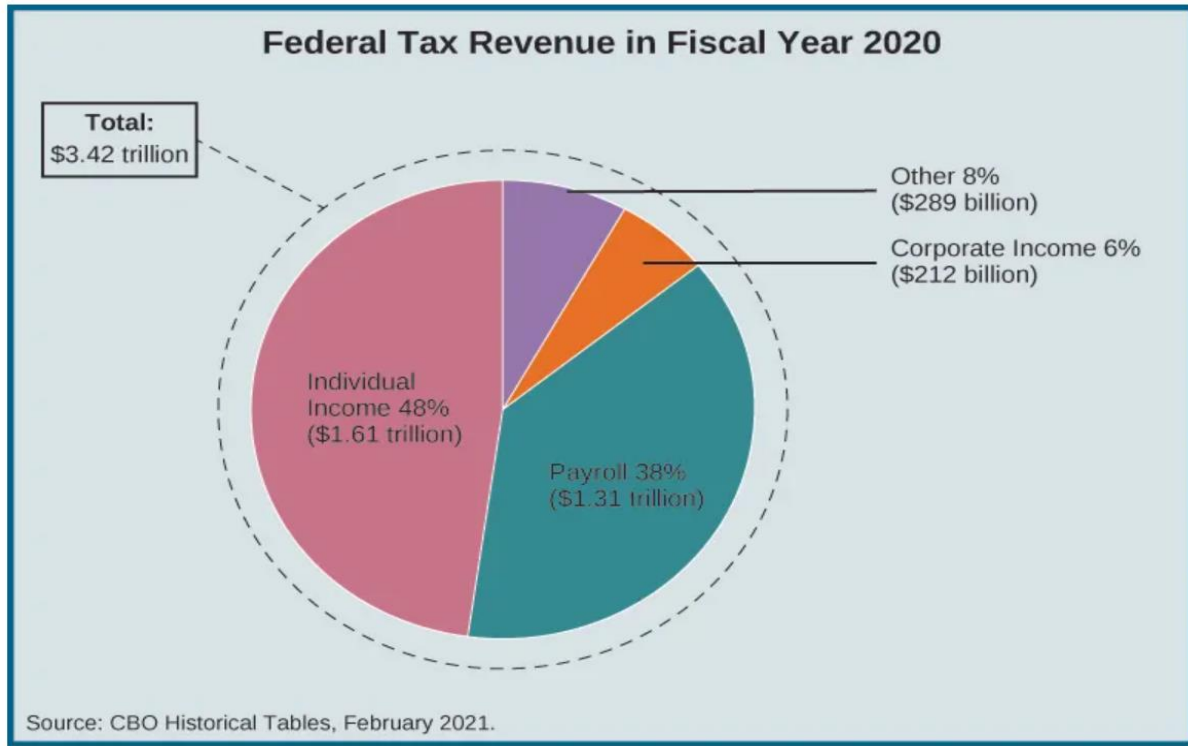


Chart 9.6 Pie Chart Illustrating Federal Tax Revenue for 2020

Each of these powers also grants

Credit: Congressional Budget Office: Nonpartisan Analysis for the U.S. Congress, “Revenues in 2020.” Revenues received by the federal government in 2020 totaled \$3.42 trillion, of which \$1.6 trillion was receipts from individual income taxes.

Congress **oversight** of the actions of the president and his or her administration—that is, the right to review and monitor other bodies such as the executive branch.

Even though the *Constitution* outlines specific enumerated powers, most of the actions Congress takes on a day-to-day basis are not actually included in this list. The *Constitution* not only gives Congress the power to make laws but also gives it some general direction as to what those laws should accomplish. The “**necessary and proper clause**” directs Congress “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.” Laws that regulate banks, establish a minimum wage, and allow for the construction and maintenance of interstate highways are all examples.

Today, the overwhelming portion of Congress’s work involves **implied powers** granted by the necessary and proper clause.

Finally, Congress’s **inherent powers** are unlike either the enumerated or the implied powers. Inherent powers are not only *not* mentioned in the Constitution, but they do not even have a convenient clause in the Constitution to provide for them. Instead, they are powers Congress has determined it must assume if

the government is going to work at all. These powers are deemed so essential to any functioning government that the Framers saw no need to spell them out. Such powers include the power to control borders of the state, the power to expand the territory of the state, and the power to defend itself from internal revolution or coups. These powers are not granted to the Congress, or to any other branch of the government for that matter, but they exist because the country exists.

In the twentieth century, the power struggle between the Congress and the president really began.

As the country grew larger and more complex the assumption that government needed to assert regulatory power grew. Further, the president's powers expanded as commander-in-chief in the realm of foreign policy.

The twin disasters of the Great Depression in the 1930s and World War II, which lasted until the mid-1940s, provided President Franklin D. Roosevelt with a powerful platform to expand presidential power. His popularity and resultant ability to be elected four times allowed him to greatly overshadow Congress. Congress attempted to restrain the power of the presidency through the Twenty-Second Amendment to the Constitution which limits a president to only two full terms in office.^[2] Although this limitation is significant it has not held back the tendency for the presidency to assume increased power.

How is Congress structured or organized?

Not all the business of Congress involves bickering, political infighting, government shutdowns, and Machiavellian maneuvering. Congress does get real work done. Traditionally, it does this work in a very methodical way.

Party Leadership



Image 9.2 Senate Majority Leader Schumer and Speaker Kevin McCarthy of the U.S. House (Credit: senate.gov and house.gov)

The party leadership in Congress controls the actions of Congress. Leaders are elected by the two-party conferences in each chamber—the House Democratic Conference and House Republican Conference.

House conferences meet regularly and separately not only to elect their leaders but also to discuss important issues and strategies for moving policy forward.

The most recent election for speaker was held January 3-7, 2023, at the start of the 118th Congress, two months after the 2022 House elections in which

the Republicans won a slim four seat majority. Due to a division within the House Republican Conference no one received a majority of the votes on the first ballot, necessitating an additional round of balloting for the first time since 1923. After offering multiple concessions to the group of Republicans opposing

him, Kevin McCarthy was elected Speaker after 15 rounds of voting.^[3] McCarthy then became the **Speaker of the House** (the only House officer currently mentioned in the *Constitution*).

The *Constitution* does not require the Speaker to be a member of the House.

The Speaker is the presiding officer, the administrative head of the House, the partisan leader of the majority party in the House, and an elected representative of a single congressional district. Since 1947, the holder of this position has been second in line (after the vice president) to succeed the president in an emergency. The Speaker serves until his or her party loses a majority of seats or until he or she is voted out of the position or chooses to step down.

The Speaker wields significant power, such as the ability to assign bills to committees and decide when a bill will be presented to the floor for a vote. The Speaker also rules on House procedures, often delegating authority for certain duties to other members.

He/she appoints members and chairs to committees, creates **select committees** to fulfill a specific purpose and then disband, and can even select a member to be speaker *pro tempore*, who acts in the Speaker's absence. Finally, when the Senate joins the House in a joint session the Speaker presides over these sessions because they are usually held in the House of Representatives.

Speaker McCarthy conceded some of the power of the speaker to obtain his leadership position. For example, he named to the Rules Committee, which controls the debate on the floor of the House, members who are not particularly loyal to him.

Overall, many analysts believe that the change in legislative procedures to which McCarthy agreed made him a less powerful Speaker than previous speakers.^[4]

Below the Speaker, the majority and minority conferences each elect two leadership positions arranged in hierarchical order. At the top of the hierarchy are the floor leaders of each party. These are generally referred to as the majority and minority leaders.

The **minority leader** has a visible if not always a powerful position. As the official leader of the opposition, he or she technically holds the rank closest to that of the Speaker, makes strategy decisions, and attempts to keep order among the minority party's members.

The **majority leader** also has considerable power and historically is in the best position to assume the speakership when the current Speaker steps down.

Below these leaders are the two party's respective **whips**. A whip's job, as the name suggests, is to whip up votes and otherwise enforce party discipline. Whips make the rounds in Congress, telling members the position of the leadership and the collective voting strategy, and sometimes wave various carrots and sticks in front of recalcitrant members to bring them in line. The remainder of the leadership positions includes a handful of chairs and assistantships.

U. S. Senate Leadership

The Senate also has majority and minority leaders and whips, each with duties very similar to their counterparts in the House. However, the Senate does not have a Speaker. The duties and powers held by the Speaker in the House fall to the **majority leader** in the Senate.

The Senate's president is the elected vice president of the United States, although he/she may vote only in case of a tie. Apart from this and very few other exceptions, the president of the Senate does not actually operate in the Senate. Instead, the *Constitution* allows for the Senate to choose a **president pro tempore**—usually the most senior senator of the majority party—to preside over the Senate. Despite the title, the job is largely powerless.

The real power in the Senate is in the hands of the majority leader and the minority leader. The majority leader is the chief spokesperson for the majority party, but unlike in the House he/she does not run the floor alone.

Because of the traditions of unlimited debate and the **filibuster**, the majority and minority leaders often occupy the floor together to keep things moving along. At times, their interactions are intense and partisan, but for the Senate to get things done, they must cooperate to get the sixty votes needed to run this super-majority legislative institution.

The Committee System

With 535 members in Congress and a seemingly infinite number of domestic, international, economic, agricultural, regulatory, criminal, and military issues to deal with at any given moment, the two chambers must divide their work based on specialization.

Congress does this through the committee system. Specialized committees (or subcommittees) in both the House and the Senate are where bills originate and most of the work that sets the congressional agenda takes place. Committees are roughly approximate to a bureaucratic department in the executive branch. There are well over two hundred committees, subcommittees, select committees, and joint committees in the Congress.

The core committees are called **standing committees**, set up by subject area. There are twenty standing committees in the House and sixteen in the Senate.

Standing & Permanent Select Committees	Standing & Permanent Select Committees
House of Representatives	Senate
Agriculture	Agriculture, Nutrition, and Forestry
Appropriations	Appropriations
Armed Services	Armed Services
Budget	Budget
Education and Workforce	Health, Education, Labor and Pensions
Energy and Commerce	Commerce, Science, and Transportation
Ethics	Ethics (select)
Natural Resources	Energy and Natural Resources
Financial Services	Finance
Foreign Affairs	Foreign Relations
Homeland Security	Homeland Security and Governmental Affairs
Intelligence (select)	Intelligence (select)
Judiciary	Judiciary
Rules	Rules and Administration
Small Business	Small Business and Entrepreneurship
Veterans' Affairs	Veterans' Affairs
Transportation and Infrastructure	Environment and Public Works
Ways and Means	Banking, Housing, and Urban Affairs
Oversight and Government Reform	Indian Affairs (select)
Science, Space, and Technology	
Small Business	

Chart 9.7 Lists of House and Senate Committees

Members of both parties compete for positions on various committees. They are typically filled by majority and minority members to roughly approximate the ratio of majority to minority members in the respective chambers, although committees are chaired by the majority party. Committees and their chairs have a lot of power in the legislative process, including the ability to stop a bill from going to the floor (the full chamber) for a vote. Indeed, most bills die in committee. But when a committee is eager to develop legislation, it takes several methodical steps. It will reach out to relevant agencies for comment on resolutions to the problem at hand and even hold hearings with experts to collect information. In the Senate, committee hearings are also held to confirm presidential appointments. Next the committee meets to discuss amendments and legislative language.

Finally, the committee will send the bill to the full chamber with a committee report. The report provides the majority opinion supporting the bill, a minority view to the contrary, and estimates of the proposed law's cost and impact.

Four types of committees exist in the House and the Senate. The first is the **standing**, or permanent, committee. This committee is the first call for proposed bills, fewer than 10 percent of which are reported out of committee to the floor. The second type is the **joint committee**. Joint committee members are appointed from both the House and Senate to explore key issues such as the economy and taxation. However, joint committees have no bill-referral authority whatsoever—they are informational only. A **conference committee** reconciles different bills passed in both the House and Senate. The conference committees are appointed on an ad hoc (temporary) basis when a bill passes the House and Senate in different forms. **Ad hoc, special, or select** committees are temporary committees set up to address specific topics. These types of committees often conduct special investigations.

Members of Congress bring to their roles different backgrounds, interests, and levels of expertise, and try to match these to committee positions. For example, House members from states with large agricultural interests will seek positions on the Agriculture Committee. Senate members with a background in banking or finance may seek positions on the Senate Finance Committee. Members can request these positions from their chambers' respective leadership, and the leadership also selects the committee chairs.

Committee chairs are very powerful. They control the committee's budget and agenda, choosing when the committee will meet, when it will hold hearings, and whether it will consider a bill at all. A chair can convene a meeting when members of the minority are absent or adjourn a meeting when things are not progressing as the majority leadership wishes. Chairs can hear a bill even when the rest of the committee objects.

They do not hold these powerful positions indefinitely, however. In the House, rules prevent committee chairs from serving more than six consecutive years and from serving as the chair of a subcommittee at the same time. A senator may serve only six years as chair of a committee but may, in some instances, also serve as a chair or ranking member of another committee.

Because the Senate is much smaller than the House, senators hold more committee assignments than House members. There are sixteen standing committees in the Senate, and each position must be filled. In contrast, in the House, with 435 members and only twenty standing committees, committee members have time to pursue a more in-depth review of a policy. House members historically defer to the decisions of committees, while senators tend to view committee decisions as recommendations, often seeking additional discussion that could lead to changes.



Take a look at the [scores of committees](#) in the [House](#) and Senate. The late House Speaker Tip O'Neill once quipped that if you didn't know a new House member's name, you could just call him Mr. Chairperson.

QUESTIONS TO CONSIDER

1. Briefly explain the benefits of a bicameral system.

[Show Answer](#)

Two chambers in the legislature may make the process slower, but it may also make it more deliberative, careful, and cautious about the people's best interests.

2. How does a conference committee differ from a joint committee?

[Show Answer](#)

conference reconciles bills passed by both houses to make them match; joint committees have members of both chambers to consider bills, which may streamline the process a bit

3. What is the difference between implied and enumerated powers of Congress?

[Show Answer](#)

enumerated is specifically written, and implied is hinted at by the language of the Constitution but not specific allowing for a bit of elasticity in the power that Congress may use

TERMS TO REMEMBER

apportionment—the process by which seats in the House of Representatives are distributed among the fifty states

bicameralism—the political process that results from dividing a legislature into two separate assemblies

bill—proposed legislation under consideration by a legislature

conference committee—a special type of joint committee that reconciles different bills passed in the House and Senate so a single bill results

constituency—the body of voters, or constituents, represented by a particular politician

enumerated powers—the powers given explicitly to the federal government by the *Constitution* to regulate interstate and foreign commerce, raise and support armies, declare war, coin money, and conduct foreign affairs

implied powers—the powers not specifically detailed in the U.S. *Constitution* but inferred as “necessary and proper” to achieve the objectives of the national government

inherent powers—the powers neither enumerated nor implied but assumed to exist as a direct result of the country's existence

joint committee—a legislative committee consisting of members from both chambers that investigates certain topics but lacks bill referral authority

majority leader—in the House, the majority leader serves under the Speaker of the House, in the Senate, the majority leader is the functional leader and chief spokesperson for the majority party

minority leader—the party member who directs the activities of the minority party on the floor of either the House or the Senate

oversight—the right to review and monitor other bodies such as the executive branch

president *pro tempore*—the senator who acts in the absence of the actual president of the Senate, who is also the vice president of the United States; the president *pro tempore* is usually the most senior senator of the majority party

select committee—a small legislative committee created to fulfill a specific purpose and then disbanded; also called an ad hoc, or special, committee

Speaker of the House—the presiding officer of the House of Representatives and the leader of the majority party; the Speaker is second in the presidential line of succession, after the vice president

standing committee—a permanent legislative committee that meets regularly set up by subject area

whip—in the House and in the Senate, a high leadership position whose primary duty is to enforce voting discipline in the chambers and conferences

1. There are six non-voting delegations representing American Samoa, the District of Columbia, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. While these delegates are not able to vote on legislation, they may introduce it and are able to vote in congressional committees and on procedural matters. [\[1\]](#)
2. David M. Jordan. 2011. *FDR, Dewey, and the Election of 1944*. Bloomington: Indiana University Press, 290; Paul G. Willis and George L. Willis. 1952. "The Politics of the Twenty-Second Amendment," *The Western Political Quarterly* 5, No. 3: 469–82; Paul B. Davis. 1979. "The Results and Implications of the Enactment of the Twenty-Second Amendment," *Presidential Studies Quarterly* 9, No. 3: 289–303. [\[2\]](#)
3. Debusmann, Bernd and Matt Murphy (7 January 2023) "Kevin McCarthy elected US House Speaker after 15 round of voting," BBC News.
4. Bushard, Brian. (7 January 2023) "Kevin McCarthy's Concessions: Here's What He Gave Up to Win House Speakership," Forbes.

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9.2 Congress: What does legislative procedure look like?



Image 9.3 Congressional Hearing

Congressional hearing where service chiefs testify on risks of sequestration. (Credit: Amaani Lyle, American Forces Press Service / Published November 07, 2013; <http://www.af.mil/News/Article-Display/Article/467469/service-chiefs-testify-on-risks-of-sequestration/>)

Learning Objectives

- Explain the steps in the classic bill-becomes-law diagram.
- Describe the modern legislative processes that alter the classic process in some way.
- Explain the three theories of representation that members of Congress consider when voting on issues.

Chart 9.8 Learning Objectives on Legislative Process

A dry description of the function of congressional leadership and the many committees and subcommittees in Congress may suggest that the drafting and amending of legislation is a finely tuned process refined over time.

However, committees are more likely to kill legislation than to pass it. The last few decades have seen a dramatic transformation in the way Congress does business. Creative interpretations of rules and statutes have turned small loopholes into the large gateways through which much congressional work now gets done.

The Classic Legislative Process

The traditional process by which a bill becomes a law is called the classic legislative process. First, legislation must be drafted, or written language developed to accomplish the intent of a proposed law.

Theoretically, anyone can do this. Successful legislation is often drafted by entities outside of Congress, such as think tank or advocacy groups, or the president. However, Congress is not obligated to read or introduce this draft of legislation, and only when a draft of legislation is officially sponsored by a member of Congress (**bill introduction**) can it hope to become law. Even the president must rely on legislators to introduce his or her legislative agenda.

Technically, bills that raise revenue, like tax bills, must begin in the House. This exception is encoded within the Constitution in Article I, Section 7, which states, “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.” Yet, despite the seemingly clear language of the Constitution, Congress has found ways to bypass this rule.

Once legislation has been proposed the majority leadership consults with the parliamentarian about which committee to send it to. Each chamber has a parliamentarian (adviser, typically a trained lawyer), an expert on the complex chamber rules. While Congress typically follows their advice it is not obligated, and the parliamentarian has no power to enforce their rules interpretation. Once a committee has been selected, the committee chair is empowered to move the bill through the committee process as they see fit. The chair can refer the bill to one of the committee’s subcommittees.

Whether at the full committee level or in one of the subcommittees, the next step is to hold a **legislative hearing** on the bill. If the chair declines a hearing, this amounts to killing the bill in committee. The hearing provides an opportunity for the committee to hear and evaluate expert opinions on the bill. Experts may include officials from the agency that would be responsible for executing the bill, the bill’s sponsors from Congress, and industry lobbyists, interest groups, and academic or business experts. Typically, the committee will also accept written statements from the public concerning the bill in question. For many bills, the hearing process can be very routine and straightforward; however, for some bills the hearing process can be quite contentious.



Check out this video which shows Sen. Ted Cruz in a vigorous debate about climate change with Sierra Club President, Aaron Mair. This testimony occurred on October 7, 2015 and can be found at https://www.cruz.senate.gov/?p=press_release&id=2469. See the video [Senate hearing on climate change](#).

Next the bill enters the **markup stage**. This is an amending and voting process. In the end, with or without amendments, the committee or subcommittee will vote. If the committee decides not to advance the bill at that time it is tabled. **Tabling a bill** typically means the bill is dead, but with an option to bring it back up for a vote again. If the committee decides to advance the bill it is printed and goes to the chamber, either the House or the Senate. For example, assume that a bill goes first to the House (although the reverse could be true, and, in fact, bills can move simultaneously through both chambers). Before it reaches the House floor, it must first go through the House Committee on Rules.

This committee establishes the rules of debate, such as time limits and limits on the number and type of amendments. After these rules have been established, the bill moves through the floor, where it is debated, and amendments can be added.

Once the limits of debate and amendments have been reached, the House holds a vote. If a simple majority, 50 percent plus 1, votes to advance the bill, it moves out of the House and into the Senate.

This flexibility for speaking in the Senate gave rise to a unique tactic, the **filibuster**. The word “filibuster” comes from the Dutch word *vrijbuit*, which means pirate. The name is appropriate, since a senator who launches a filibuster virtually hijacks the floor of the chamber by speaking for long periods of time, preventing the Senate from closing debate and acting on a bill. After the Civil War, the use of the filibuster became much more common. Eventually, in 1917, the Senate passed Rule 22, which allowed the chamber to hold a **cloture** vote to end debate. To invoke cloture, the Senate required a two-thirds majority.

This rule change, however, did not stop the use of filibuster by those seeking to preserve racial segregation and prevent the expansion of civil rights for African Americans. Groups of dedicated southern Democrat senators used the filibuster to prevent the passage of anti-lynching legislation on multiple occasions during the first half of the twentieth century. Later, when faced with the 1964 Civil Rights Act, southern Democrat senators staged a fifty-seven-day filibuster to try and kill it. The momentum of the nation was against them. The bill passed over their obstructionism because of bipartisan support of both Republicans and Democrats.

In 1975, the Senate further weakened the **filibuster** by reducing the number needed for cloture from two-thirds to three-fifths, or sixty votes, where it remains today (except for Presidential Cabinet and sub-cabinet appointees and judicial nominations for which only fifty-one votes are needed to invoke cloture). Moreover, filibusters are not permitted on the annual **budget reconciliation act**. It was the Budget Reconciliation Act of 2010 which was used to achieve passage of healthcare legislation known as “Obamacare” when supporters of the legislation could not invoke cloture requiring 60 votes.

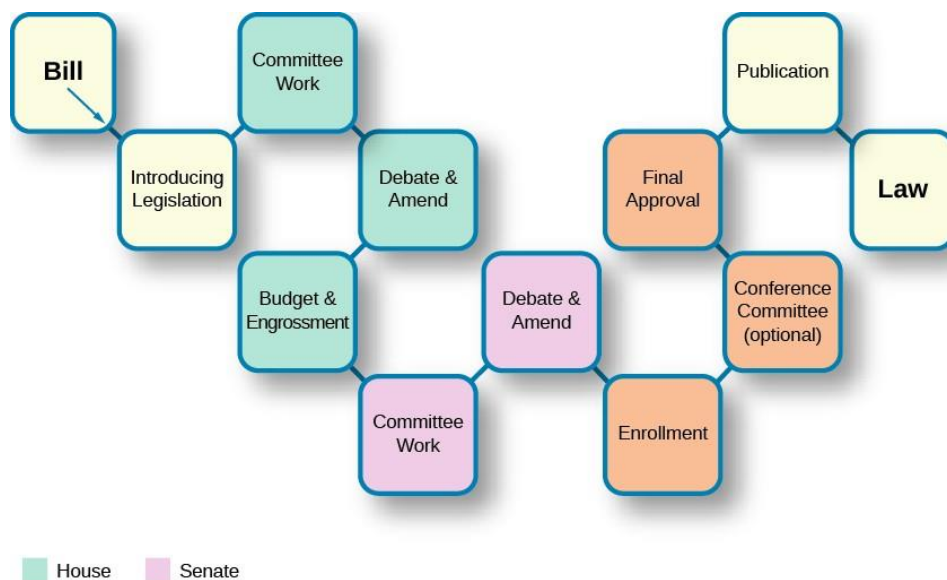


Chart 9.9 How a Bill Becomes a Law

Because both the House and the Senate can and often do amend bills, the bills that pass out of each chamber frequently differ. This presents a problem since the Constitution requires that both chambers pass identical bills. One simple solution is for the first chamber to simply accept the bill that ultimately makes it out of the second chamber. Another solution is for the first chamber to further amend the second chamber's bill and send it back to the second chamber. Congress typically takes one of these two options, but about one in every eight bills cannot be resolved in this way. These bills must be sent to a conference committee that negotiates a compromise both chambers can accept without amendment. Only then can the bill progress to the president's desk for signature or veto. If the president does veto the bill, both chambers must gather a two-thirds vote to override the veto and force the president to sign it. If the two-thirds threshold in each chamber cannot be reached, the bill dies.

The legislative process by which a bill becomes law is long and complicated, but it is designed to ensure that in the end all parties are satisfied with the bill's provisions.



For one look at the classic legislative process, visit [YouTube](#) to view “I’m Just a Bill” from the *ABC Schoolhouse Rock!* series.

Current Legislative Procedure: The Rise of Unconventional Processes

For much of the nation's history, the **classic legislative process** described above was the standard method by which a bill became a law. Over the course of the last three and a half decades, however, changes in rules and procedure have enabled alternate routes. Collectively, these different routes constitute what some political scientists have described as a new and unorthodox legislative process. According to political scientist Barbara Sinclair, the primary trigger for the shift away from the classic legislative route was the budget reforms of the 1970s. The 1974 Budget and Impoundment Control Act gave Congress a mechanism for making large and all-encompassing budget decisions. In the years that followed, the budget process gradually became the vehicle for creating comprehensive policy changes. One large step in this transformation occurred in 1981 when President Ronald Reagan's administration suggested using the budget to push through his economic reforms. This process, for example, was used to pass the Patient Protection and Affordable Care Act (Obamacare) supported by President Barak Obama and tax rate cuts legislation supported by President George W. Bush and President Donald Trump

By attaching the reforms to the budget resolution Congress could force an up or down (yea or nay) vote on the whole package. Such a packaged bill is called an *omnibus bill*.^[1] Creating and voting for an **omnibus bill** allows Congress to quickly accomplish policy changes that would have required many votes and political capital over much time. This and successive similar uses of the budget process appealed to many in Congress. During the contentious and ideologically divided 1990s, the budget process became the common problem-solving mechanism in the legislature, thus laying the groundwork for the way legislation works today.

In an era of concern over budget deficits, the use of the omnibus bill legislation has frequently become an annual occurrence to accomplish the passage of the Federal Budget.^[2] Rather than passage of thirteen separate appropriation bills through the classic legislative process involving development through committees—these annual budget bills are “bundled” and passed as a single bill.

An important characteristic feature of modern legislating is the greatly expanded power and influence of the party leadership over the control of bills, especially for the large, bundled omnibus bills. One reason for this change was the heightened partisanship that stretches back to the 1980s and is still with us today. With such high political stakes, the party leadership is reluctant to simply allow the committees to work things out on their own. Moreover, the problem of overlapping committee jurisdictions for some categories of complex legislation, such as healthcare has led to increased use of omnibus legislation controlled by the leadership of either the House or the Senate.^[3]

In the House, the leadership uses special rules to guide bills through the legislative process and toward a particular outcome. Uncommon just a few decades ago, these now widely used rules restrict debate and options, and are designed to focus the attention of members to party priorities and agendas.

The practice of **multiple referrals**, with which entire bills or portions of those bills are referred to more than one committee, greatly weakened the different specialization monopolies committees held primarily in the House but also to an extent in the Senate. With less control over the bills, committees naturally reached out to the leadership for assistance. As a testament to its increasing control, the leadership may sometimes avoid committees altogether, preferring to work things out on the floor. And even when bills move through the committees, the leadership often seeks to adjust the legislation before it reaches the floor.

The Two-Track Procedure and the Virtual Filibuster

Another feature of the modern legislative process, exclusively in the Senate, is the application of the modern filibuster. Unlike the traditional filibuster, in which a senator took the floor and held it for as long as possible, the modern filibuster rule adopted in 1970 is a perversion of the cloture rules adopted to control the filibuster. The new procedure allows senators to request cloture (file a cloture motion) before any bill can get a vote or is even debated on the floor, rather than requiring a cloture motion only to stop a Senator or group of senators from monopolizing the time of the Senate and stopping all other legislation from being considered.

Under the **“two-track” provision** of the rule, once a cloture motion is filed concerning some bill, the majority leader can adjust the Senate agenda to allow the “filibustered” bill to remain pending, while other legislative matters are handled. The notable side effect of this change was that by no longer bringing Senate business to a complete halt, or requiring senators to actually talk continuously on the Senate floor, this new form of filibuster (known as the **virtual filibuster** or **silent filibuster**) became politically easier on important pieces of legislation and thus their numbers increased rapidly.

The virtual filibuster and the two-track system have had the effect of increasing the number of votes needed for an important bill to advance from a simple majority of fifty-one to a super majority of sixty. The effect is to give the Senate minority great power to obstruct if it is inclined to do so, such as when partisanship is high as it has been frequently.

As a result, the contemporary Senate has morphed into a 60-vote requirement institution rather than a majority rule body with regards to important legislation.

Guiding Principles for Representatives	
Approach	Description of Approach
Delegate Approach	mirror opinion of your district you are the voter's agent
Trustee Approach	use your best judgement follow your conscience exercise trust
Party Delegate Approach	implement your party's views assume votes were for your party

Chart 9.10 Various Approaches to the Job of Legislator

Representation Theory: How should a member of Congress vote?

Congress represents the people of the United States. Members serve their constituents, the people who live in the district from which they are elected. Ultimately, members of Congress must please their constituents if they want to stay in office and be re-elected. There are three theories of representation that our elected representatives might consider as they determine how they should undertake their responsibilities. These three theories are: 1) delegate representation, 2) trustee representation, and 3) party delegate representation.^[2]

Under the **delegate theory of representation**, the elected member of Congress views themselves as an agent of their constituents and believes they should precisely mirror public opinion in the district regardless of personal viewpoint. According to this theory, a representative is to always follow the majority viewpoint of those who elected them and vote accordingly.

At the 1787 Constitutional Convention, there was some discussion of the benefits of giving instructions to elected representatives.

Members of Congress who follow the **trustee theory of representation** have an entirely different view of their role. They interpret that responsibility as an exercise of trust that the constituents have placed in them. They are to use their best judgement and follow their own conscience on the correct policy when they are asked to vote. Under trustee theory, the elected representative is not obligated to follow the views of the district since those who elected them have given them their trust to make the best judgments, subject to eventual voter approval or disapproval at the ballot box.

Under the **party delegate theory of representation**, a member of Congress would view their role as implementing the political views of the party when they vote. As a party delegate, a representative should vote according to the ideological viewpoints of the party, notwithstanding what the exact public opinion is within the district or what personal conscience might suggest. Party delegates often justify their

position as being responsive to the majority of the voters who choose their party and its views; and, generally, voters should know what to expect in terms of policy from the party.

Very few representatives follow a single view. For example, a pure delegate perspective is not really possible since voters do not have clear views on all issues. On some issues and corresponding votes, a member of Congress will need to use different guiding principles. However, on issues where there is strongly held local view consistency, it is more likely and probably very appropriate that a member of Congress will follow the delegate approach. That is, they will pay attention to the issues that constituents really care about.

Why follow the trustee approach? Since there are many issues on which constituents have unclear positions, it is logical to assume that voters have put their trust in the representative to exercise best judgement. Moreover, even if constituents have clear views, it would seem to be very appropriate to follow conscience and show leadership on issues if the representative is willing to be subject to voter reaction at the next election.

Consider the Original

British politician Edmund Burke, in his 1774 *Speech to the Electors at Bristol* articulated the principles of trustee representation against the theory that elected officials should be delegates who exactly mirror the opinions of the electorate.

“It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion, high respect [...b]ut his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living [...] They are a trust from Providence [...] Your representative owes you, not his industry only, but his judgment; and he betrays you, instead of serving you, if he sacrifices it to your opinion.”

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Chart 9.11 Excerpt from Edmund Burke

As an elected representative, who is also a member of a political party, it might be common and expected that the basic principles and ideology of the party will guide voting, thus acting as a party delegate. Since representatives are not experts on most issues, following party leaders who advance the party position is appropriate. By accepting the nomination of the party, representatives indicate a strong level of commitment to the party platform and viewpoint. Voters know what to expect from a Democrat or a

Republican; and, therefore, the elected representative should generally have little trouble following the party's beliefs.

Overall, a blend of the three theories is a very common practice of representatives who have received the consent of the majority and are trying to respond to that majority. The blended approach places an emphasis on representatives deliberating and not merely following^[3] public opinion polls. It is also practical since not all voters are issue oriented.

Representing Constituents

Congress members' most important function as lawmakers is writing, supporting, and passing bills. And as representatives of their constituents, they are charged with addressing those constituents' interests.

Historically, this job included what some have affectionately called "bringing home the bacon" but what many (usually those with competing interests) call **pork-barrel politics**. In more formal language, *allocation*, or the influencing of the national budget to help the district or state, can mean securing funds for a specific district's project like an airport, or getting tax breaks for certain types of agriculture or manufacturing.

In ranching, an **earmark** is a small cut on the ear of a cow or other animal to denote ownership. In Congress, an earmark is a mark in a bill that directs some of the bill's funds to be spent on specific projects or for specific tax exemptions. Many a road, hospital, and airport can trace its origins back to a few skillfully drafted earmarks.

This type of representation by a member of Congress, of course, is closely aligned with the delegate theory of representation discussed above.

Relatively few people outside Congress had ever heard of the term before the 2008 presidential election, when Republican nominee Senator John McCain touted his career-long refusal to use earmarks as a testament to his commitment to reform spending habits in Washington.^[4] McCain's criticism of the earmark as a form of corruption cast a shadow over a common legislative practice. As the country sank into recession and Congress tried to use spending bills to stimulate the economy, the public grew more acutely aware of earmarking.

Congresspersons became eager to distance themselves from the practice. But with deadlocks and stalemates becoming more common, some have begun asking for their return. They argue that Congress works because representatives can satisfy their responsibilities to their constituents by making deals. The earmarks are those deals. By taking them away Congress has hampered its own ability to "bring home the bacon."

QUESTIONS TO CONSIDER

1. What is an omnibus bill or omnibus legislation?

[Show Answer](#)

a bill that contains multiple different policy objectives; a packaged bill

2. What theory of representation should a member of Congress follow when voting on issues?

[Show Answer](#)

open to debate, but a blend is common practice

TERMS TO REMEMBER

bill introduction—official sponsorship by a member of Congress of draft legislation which begins the legislative consideration of a proposed bill

budget reconciliation—legislative process that expedites the passage of certain legislation in the United States Senate related to spending, revenue and the federal debt limit; reconciliation provides a process to prevent the use of the filibuster and thereby allows the passage of such bills with simple majority support in the Senate

classic legislative process—traditional or conventional process by which a legislative bill flows through Congress, which generally involves a significant role for legislative standing committees

cloture—a parliamentary process to end a debate in the Senate, as a measure against the filibuster; invoked when three-fifths of senators vote for the motion

constituents—people who geographically live and vote in a House Congressional district or, in the case of the Senate, in the state from which a member of Congress is elected

delegate theory of representation—under this theory a legislator acts as an agent of those who elected the legislator and has primary responsibility to represent the majority view, regardless of their own views

filibuster—a parliamentary maneuver used in the Senate to extend debate on a piece of legislation if possible, or to stop consideration of a bill, typically with the intended purpose of obstructing or killing it

legislative hearing—conducted by either a standing committee or one of its subcommittees in which witnesses are called and information gathered to rewrite, amend, and edit a bill

mark-up stage—the amending and voting process in a congressional committee or subcommittee

multiple referrals—practice with which entire bills or portions of those bills are referred to more than one committee, greatly weakening the power of specialized committees and their chairs

omnibus bill—a packaged bill, usually quite large covering several topics which often does not go through the classic or conventional legislative process

party delegate theory of representation—under this theory a legislator is expected to vote according to the principles and viewpoints of the political party that nominated the legislator

pork barrel politics—“bringing home the bacon” or bringing tax dollars/contracts/etc. to the home district of a member of Congress

tabling a bill—legislative procedural motion taken by a legislative body as a whole or in committee when it decides not to further consider a bill; typically means the bill is dead but with an option to bring it back up for a vote again

trustee theory of representation—under this theory a legislator exercises a trust and uses best judgment and conscience in voting and is not obligated to follow the views of the constituents

two-track provision—U.S. Senate rule, also known as double-tracking, which sets aside consideration of a bill against which one or more senators are filibustering or threatening a filibuster so that other legislation can be considered and voted upon

virtual filibuster/silent filibuster—allows senators to threaten filibuster which results in the bill being set aside and effectively killed unless the bill has the support of 60 votes; sometimes known as a “no-talk” filibuster since senators are no longer required to speak continuously on the floor to obstruct passage of legislation

1. Glen S. Krutz. 2001. *Hitching a Ride: Omnibus Legislating in the U.S. Congress*. Columbus, OH: Ohio State University Press. [?](#)
2. Ibid.
3. Ibid.
4. "Statement by John McCain on Banning Earmarks," 13 March 2008, <http://www.presidency.ucsb.edu/ws/?pid=90739> (May 15, 2016); "Press Release - John McCain's Economic Plan," 15 April 2008, <http://www.presidency.ucsb.edu/ws/?pid=94082> (May 15, 2016). [?](#)

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