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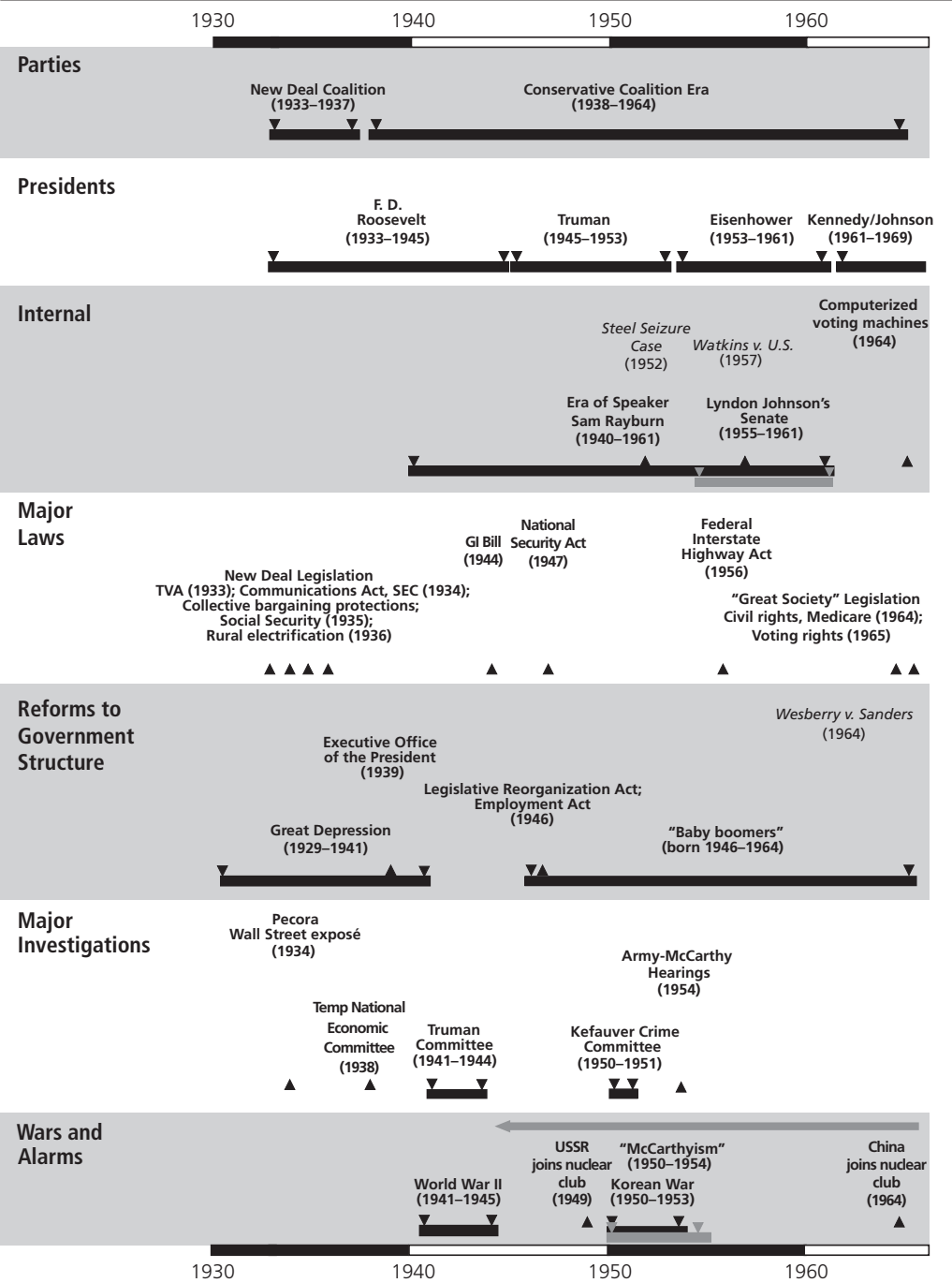
# CONGRESS AND ITS MEMBERS

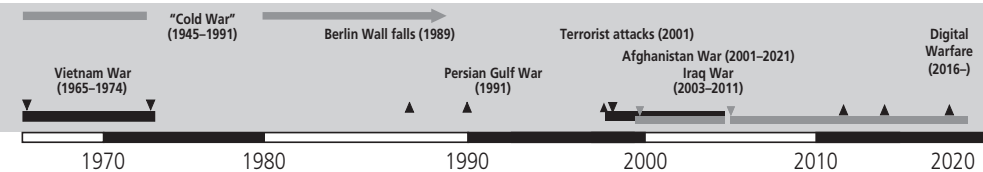
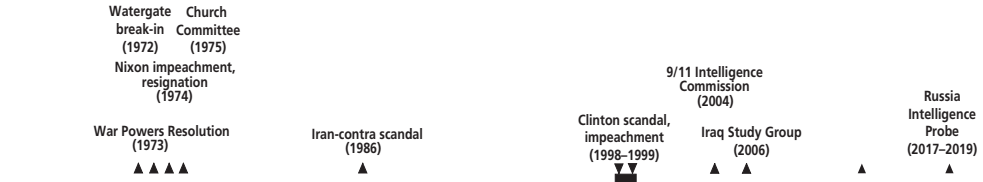
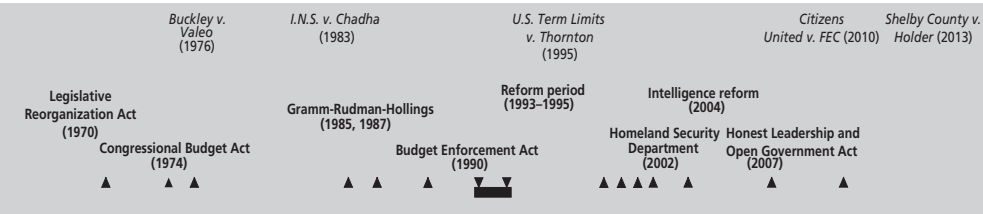
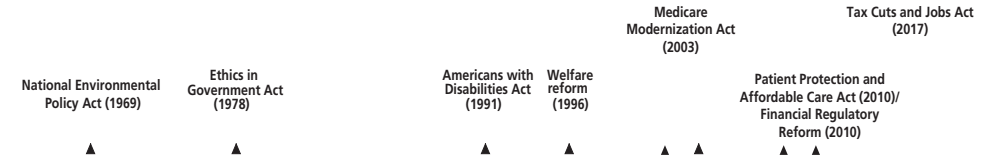
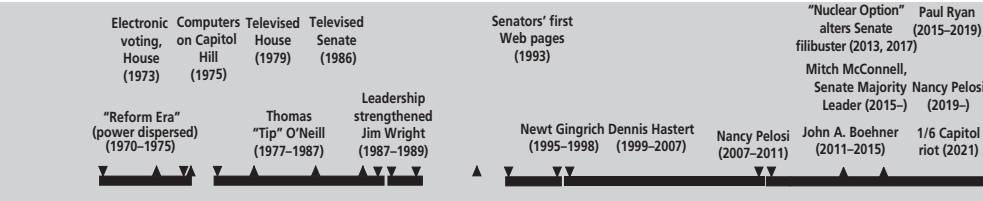
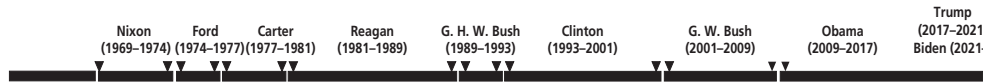
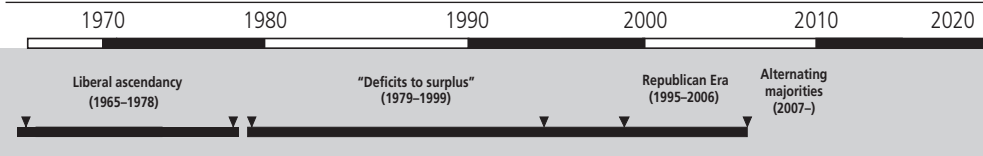
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# **Congress and Its Members**

18th Edition

*For Janet, Mark, and Eric*

—W. J. O.

*For Emery and Beverly*

—F. E. L.

*For Sam and Lea*

—E. S.

*For Jill, Louise, and Henry*

—J. M. C.

# Congress and Its Members

18th Edition

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# PREFACE

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As authors of the eighteenth edition of a book that first appeared in 1981, we are perforce believers in the maxim that in politics six months is a long time and four years practically a lifetime. Events of recent years surely bear out this wisdom. The roller-coaster reversals of government and politics require frequent updates of any text on the U.S. Congress that aims to be both current and comprehensive.

The 2020 elections brought unified Democratic control of the House, Senate, and White House to Washington, D.C. The Democratic victory concluded a two-year period of divided control characterized by bitter partisan controversy, including the first impeachment trial of President Donald J. Trump. Yet the 116th Congress (2019–2021) also featured far-reaching bipartisan successes, most notably enactment in March 2020 of the \$2.2 trillion CARES Act responding to the coronavirus pandemic. Passed without opposing votes in either chamber, the CARES Act represented one of the boldest social welfare initiatives in U.S. history, providing an unprecedented level of income support to millions of Americans.

Although the Democrats enjoy unified control of the 117th Congress (2021–2023), their margins are extraordinarily slim. The Senate is evenly divided, but the tie-breaking vote of the vice president gives Democrats majority control. House Democrats have the slimmest margin of any majority party since 2001. Even so, Democrats have been determined to use their full control of the levers of government to achieve major departures. Their first noteworthy success came with the passage of a massive \$1.9 trillion economic recovery bill; the legislation passed with no Republican votes. Democrats then turned their attention to an ambitious agenda on voting rights, immigration, infrastructure, and policing, each of which was expected to be highly controversial and to test the party's ability to secure the necessary votes for enactment.

These legislative battles unfold against the backdrop of a looming midterm election in which control of both chambers will once again be up for grabs. The two most recent periods of unified control for Democrats—under Bill Clinton in 1993–1994 and Barack Obama in 2009–2010—each proved brief, ending with an overwhelming rebuke in their first midterm. President Trump faced a similar setback in the 2018 midterm, which also brought the return of a divided government. Indeed, divided government has been the typical condition since 1980, with opposing parties controlling the White House and at least one chamber of Congress nearly 75 percent of the time.

The precarious fortunes of recent presidents and congressional majorities are a reminder of the pervasive pluralism of the U.S. political system, with its diverse



viewpoints and interests. Presidents and congressional leaders see their perceived mandates collide with the founders' intricate "auxiliary precautions" for preventing majorities from winning quick or total victories. Not the least of the system's attributes is what we call the "two Congresses": Congress is both a conduit for localized interests and a maker of national policy.

In this edition, we discuss new developments and fresh research on nearly every aspect of Congress. When the first edition of this book came out, political scientists were still seeking to explain the decline of party unity in Congress. Today, the strength of partisanship and party leaders is the most salient reality of Capitol Hill. Congress is a vortex of the so-called permanent campaign, in which electioneering is interlocked with the process and content of lawmaking. Individual incumbents work tirelessly for reelection, and just as importantly, the two parties engage in an all-out battle to win or maintain majority control of each chamber. We record shifts in party leaders, the committee system, floor procedures, and the Capitol Hill community. Complex, interdependent relationships with presidents, bureaucrats, and the courts put Congress at the center of the entire federal government.

In the midst of fundamental political change, there remain underlying constants in Congress's character and behavior. Most important is the dual nature of Congress as a collection of career-minded politicians and as a forum for shaping national policy. We employ the two-Congresses theme to explain the details of congressional life as well as scholarly findings regarding legislators' behavior. Colorful personalities and interesting events are never in short supply on Capitol Hill. We strive to describe recent developments and trends; more important, we try to place them in broader historical and conceptual contexts.

These are troubling times for those of us who believe in representative democracy. True, Congress has, with varying levels of success, absorbed astonishing changes in its membership, partisan control, structural and procedural arrangements, and policy agendas. Yet Congress has all too often retreated from its constitutional mandate to initiate national policy and oversee government operations. Its prerogatives are under siege from executive decision-makers, federal judges, and elite opinion-makers, who constantly belittle its capacities, ignore its authority, and evade its scrutiny. In January 2021, Congress literally came under siege as a mob attempted to stop the certification of the electoral vote count in the 2020 presidential race. Congress, in short, faces challenges on all sides. Lawmakers themselves are to blame for reinforcing disdain of the institution, and for substituting partisan allegiance for independent judgment and critical thinking. Today's Congress all too often falls short of the founders' vision as the "first branch of government"—for reasons that this book explains.

This edition, like its predecessors, is written for general readers seeking an introduction to the modern Congress, as well as for college or university students taking courses on the legislative process or national policymaking. We try to present accurate, timely, and readable information, along with insights from

scholars and practitioners. Although wrapped around our core theme, the book's chapters are long on analysis. We make no apologies for this. Lawmaking is an arduous, complicated business; those who would understand it must master its details and nuances. At the same time, we hope to convey the energy and excitement of the place. After all, our journalist friends are right: Capitol Hill is the best beat in town.

## DIGITAL RESOURCES

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This text includes an array of instructor teaching materials designed to save you time and to help you keep students engaged. To learn more, visit [sagepub.com](https://www.sagepub.com) or contact your SAGE representative at [sagepub.com/findmyrep](https://www.sagepub.com/findmyrep).

## ACKNOWLEDGMENTS

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This edition marks the passing of our longtime collaborator, Roger Davidson. Roger, along with Walter Oleszek, wrote the first edition of *Congress and Its Members* in 1981. Together, they developed the "Two Congresses" framework that has guided our understanding of the institution over the past four decades. A premier authority on Congress and American politics, Roger was the author of numerous important books and articles. His scholarly legacy endures. But we are very sad to say goodbye to him and will greatly miss his friendship, keen insights, and sense of humor. Acknowledging their decades-long collaboration, Walter Oleszek adds a personal note: "Roger Davidson was a terrific colleague, friend, and scholar. It was my good fortune to work closely with Roger for several decades as we staffed various House and Senate reform committees, traveled together to different countries to discuss parliamentary practices, and worked closely on legislative projects during Roger's time at the Congressional Research Service. His passing is a great loss to me but pales in comparison to that of his wife, Nancy, and their two sons. His long-lasting legacy to them, and so many others, is Roger's exemplary scholarship. It's a treasure trove of books and articles that will continue to inform the engaged citizenry as well so many others—students, teachers, scholars, friends, and, of course, the co-authors of this new edition."

We have incurred more debts to friends and fellow scholars than we could ever recount. We thank especially our colleagues at the Congressional Research Service and elsewhere: Christina Bailey, Christopher Davis, C. Lawrence Evans, Louis Fisher, William Heniff Jr., Gary C. Jacobson, Emery Lee, Megan Lynch, Jennifer Manning, Elizabeth Rybicki, James Saturno, Jim Thurber, and Donald Wolfensberger. The views and interpretations expressed in this book are in no way attributable to the Congressional Research Service. Sam Trachtman provided valuable research assistance.

Our friends at CQ Press deserve special appreciation. We thank Scott Greenan for keeping us on track as we revised the book to reflect the most recent developments. Talia Greenberg offered skilled and probing editorial assistance. Veronica Stapleton Hooper supervised the book's production. And we thank Lauren Younker for providing photo research.

We gratefully welcome our new co-author, James Curry, who has contributed substantially to this edition, broadening our vision and enriching the book's content.

Our deep appreciation for our families, for their love and support, cannot be fully expressed in words. As a measure of our affection, this book is dedicated to them.

—Walter J. Oleszek  
*Fairfax, Virginia*

—Frances E. Lee  
*Washington, D.C.*

—Eric Schickler  
*Berkeley, California*

James M. Curry  
*Salt Lake City, Utah*

# ABOUT THE AUTHORS

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**Roger H. Davidson** was professor emeritus of government and politics at the University of Maryland and served as visiting professor of political science at the University of California, Santa Barbara. He was a senior fellow of the National Academy of Public Administration. During the 1970s, he served on the staffs of reform efforts in both the House (Bolling-Martin Committee) and the Senate (Stevenson-Brock Committee). For the 2001–2002 academic year, he served as the John Marshall chair in political science at the University of Debrecen, Hungary. His books include *Remaking Congress: Change and Stability in the 1990s*, co-edited with James A. Thurber (1995), and *Understanding the Presidency*, 7th ed., co-edited with James P. Pfiffner (2013). Davidson was co-editor with Donald C. Bacon and Morton Keller of *The Encyclopedia of the United States Congress* (1995).

**Walter J. Oleszek** is a senior specialist in the legislative process at the Congressional Research Service. He has served as either a full-time professional staff aide or consultant to many major House and Senate congressional reorganization efforts beginning with the passage of the Legislative Reorganization Act of 1970. In 1993 he served as policy director of the Joint Committee on the Organization of Congress. A former adjunct faculty member at American University, Oleszek is a frequent lecturer to various academic, governmental, and business groups. He is the author or co-author of several books, including *Congressional Procedures and the Policy Process*, 11th ed. (2020), and *Congress Under Fire: Reform Politics and the Republican Majority*, with C. Lawrence Evans (1997).

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**Eric Schickler** is Jeffrey & Ashley McDermott Professor of Political Science at the University of California, Berkeley. He is the author of three books that have won the Richard F. Fenno Jr. Prize for the best book on legislative politics:

*Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* (2001), *Filibuster: Obstruction and Lawmaking in the United States Senate* (2006, with Gregory Wawro), and *Investigating the President: Congressional Checks on Presidential Power* (2016, with Douglas Kriner; also a winner of the Richard E. Neustadt Prize for the best book on executive politics). His book *Racial Realignment: The Transformation of American Liberalism, 1932–1965* was the winner of the Woodrow Wilson Prize for the best book on government, politics, or international affairs published in 2016, and is co-winner of the J. David Greenstone Prize for the best book in history and politics from the previous two calendar years. He is also the co-author of *Partisan Hearts and Minds*, which was published in 2002.

**James M. Curry** is Associate Professor of Political Science at the University of Utah. He is co-author of *The Limits of Party: Congress and Lawmaking in a Polarized Era* (2020); author of *Legislating in the Dark: Information and Power in the House of Representatives* (2015); and winner of the Alan Rosenthal Prize, the E. E. Schattschneider Award, and the Carl Albert Award. His research appears in the *Journal of Politics*, *Perspectives on Politics*, and *Legislative Studies Quarterly*, among other outlets. He received his Ph.D. in Government and Politics from the University of Maryland, and he previously worked on Capitol Hill in the offices of Rep. Daniel Lipinski and the House Appropriations Committee.





Rep. Eliot Engel, D-N.Y., presides at a 2020 House Foreign Affairs Committee hearing with Secretary of State Mike Pompeo.

UPI/Alamy Stock Photo



New York congressional candidate Jamaal Bowman campaigns in the Bronx the day before his primary election win on June 22, 2020.

Stephanie Keith/Getty Images

# 1

## THE TWO CONGRESSES

“I’m a Black man who was raised by a single mother in a housing project,” said Jamaal Bowman, the day after being declared the winner of the Democratic primary in New York’s Sixteenth Congressional District. “That story doesn’t usually end in Congress. But today, that 11-year-old boy who was beaten by police is about to be your next representative.”<sup>1</sup> Bowman, a forty-four-year-old middle school principal, had just defeated Rep. Eliot Engel, age seventy-three, chair of the House Foreign Affairs Committee.

Few had expected this outcome. Engel was a sixteen-term veteran of the U.S. House of Representatives who had not faced a competitive election in decades. Bowman was a political novice who had never before run for public office. Only two months before the election, an internal poll placed Engel’s support at 43 percent and Bowman’s at 13 percent.<sup>2</sup> Engel had backing from most of the Democratic Party establishment. He was endorsed by former New York senator and presidential candidate Hillary Clinton; New York Governor Andrew Cuomo; and the highest-ranking African American members of the House of Representatives, including Democratic Caucus Chair Hakeem Jeffries, N.Y.; Majority Whip Jim Clyburn, D-S.C.; and Financial Services Chair Maxine Waters, D-Calif. But in the end, Bowman prevailed with a decisive electoral margin of nearly 15 percentage points.

Although surprising, the outcome of this 2020 Democratic primary race highlights fundamental truths about political representation. The work of Congress is conducted not only in Washington, D.C. but also in states and districts hundreds or thousands of miles away. On Capitol Hill, Engel was well known for his work on international human rights and his support for traditional foreign policy alliances, especially NATO. But back home his ties to constituents had frayed. Engel, with a second home in D.C.’s suburbs in Maryland, had lost visibility in his district, a problem exacerbated by the 2020 coronavirus pandemic.



Engel's district, covering parts of the Bronx and Westchester County, was one of the hardest-hit areas in the pandemic, including the town of New Rochelle, the epicenter of New York's first outbreak. But unlike most members of Congress, who largely stayed in their constituencies during the crisis, Engel quarantined in Maryland and did not return to his district for months on end.<sup>3</sup> Engel then compounded his problems with a gaffe that seemed to encapsulate an out-of-touch incumbent. At a social justice event in the Bronx amidst the summer's anti-police brutality protests, Engel, asking organizers for a chance to speak, was picked up on a hot microphone saying, "If I didn't have a primary, I wouldn't care."<sup>4</sup>

Bowman took advantage of Engel's vulnerabilities, running an energetic campaign. With traditional campaigning not possible amidst the pandemic, Bowman looked for new ways to be relevant. As an educator, he reached out to assist parents making the transition to home schooling. Due to restrictions on in-person campaigning, the campaign reportedly made a million phone calls.<sup>5</sup> "Our opponent was nowhere to be seen, so that became a more pronounced campaign message as time went on," recollected one of Bowman's top campaign advisers.<sup>6</sup> He outraised his opponent by tapping small donors, despite Engel's substantial fund-raising advantages as an established incumbent and committee chair.<sup>7</sup> No one could question Bowman's roots in the district. He was born and raised in New York City, and his first job after finishing his undergraduate degree was as an elementary school teacher in the South Bronx. He would go on to found and lead a Bronx public middle school.

Bowman launched his bid for Congress in 2019 with a focus on racial and economic justice, a message that resonated with the events of the summer of 2020. "Coming into the campaign, we felt that structural racism, institutional racism, institutional classism, institutional sexism, and militarism are the evils that continue to plague American society generally," he said.<sup>8</sup> His campaign struck a deeper chord after the killing of George Floyd by a Minneapolis police officer in May 2020, followed by the nationwide protests against police brutality. His fiery demands for broad-scale social change spoke powerfully to the moment. Bowman himself was a visible presence at protests in his district. His personal story of having been physically attacked by police as a child reinforced his message. In early June, Bowman won endorsements from progressive leaders Bernie Sanders, I-Vt., and Alexandria Ocasio-Cortez, D-N.Y.

Bowman waged a campaign on an unapologetically progressive platform: Medicare for All, addressing economic inequality and criminal justice reform. These progressive policy stances helped to distinguish him from his rival's more mainstream positions and burnished his image for courageous, fresh leadership. After the election, pundits and politicians debated whether his victory signaled a broader leftward shift among Democratic voters. But it is clear that Bowman's victory was based on more than his issue positions. "This is about deep, authentic relationships," Bowman explained on CNN. "You have to run your race in your district in response to the needs of the people in your district. And if you're

responding to their needs, and if you're building relationships and making connections and doing everything you have to do, then you should be able to win your race."<sup>9</sup> Bowman's district roots, accessibility, and personal history all bolstered his authenticity as a local representative.

The Engel/Bowman primary illustrates the central themes of this book. No matter how much members of Congress distinguish themselves as lawmakers or Beltway insiders, they also have to distinguish themselves in the eyes of local constituents. There is no question that Engel was an influential lawmaker, but a successful representative cannot rest on laurels won in Washington. Ambitious potential challengers back in the district are always on the lookout for early signs of weakness. For this reason, lawmakers must win and continually renew bonds of trust with their constituents. These bonds rest on constituents' sense of connection to their representatives. Representatives must maintain personal relationships and open lines of communication. Constituents may not always understand the details of national policy debates, but they know whom they trust—and whom they doubt.

## THE DUAL NATURE OF CONGRESS

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Eliot Engel's surprising defeat underscores the dual nature of Congress. Members of Congress must continually inhabit two very different but closely linked worlds, attempting to strike a difficult balance between them. In Engel's case, there was, on the one hand, New York's Sixteenth Congressional District, a diverse, majority-minority district encompassing parts of both the working-class Bronx and mostly white, wealthy Westchester County, as well as suburban areas like Mount Vernon and Yonkers. On the other hand, there was the world of Washington policy making, where Engel had cultivated a reputation as a stalwart supporter and congressional leader of a center-left, neo-liberal interventionist foreign policy.<sup>10</sup> The tensions between the two highlight the dual character of the national legislature—Congress as a lawmaking institution and Congress as an assembly of local representatives.

In this sense, there are two Congresses. One is the Congress of textbooks, of "how a bill becomes a law." It is Congress acting as a collegial body, performing constitutional duties, and debating legislative issues that affect the entire nation. This Congress is a fascinating arena in which all of the forces of U.S. political life converge—presidents, cabinet members, career bureaucrats, activists, lobbyists, policy wonks, military leaders, and ambitious political entrepreneurs of every stripe. This Congress is more than a collection of its members at any given time. It is a mature institution with a complex network of rules, organizations, and traditions. Norms mark the boundaries of the legislative playing field and define the rules of the game. Individual members generally must accept Congress on its own terms and conform to its established ways of doing things.

A second Congress exists as well, and it is every bit as important as the Congress portrayed in textbooks. This is the representative assembly of 541 individuals (100 senators, 435 representatives, 5 delegates, and 1 resident commissioner). This Congress includes men and women of many different ages, backgrounds, and routes to office, all doing what is necessary to maintain political support in their local constituencies. Their electoral fortunes depend less on what Congress produces as a national institution than on the policy positions they take individually and the local ties they build and maintain. “As locally elected officials who make national policy,” observes Paul S. Herrnson, “members of Congress almost lead double lives.”<sup>11</sup>

The two Congresses are, in many ways, separated by a wide gulf. The complex, often insular world of Capitol Hill is far removed from most constituencies, in perspective and outlook as well as in miles. Lawmaking and representing are separate tasks, and members of Congress recognize them as such. Yet these two Congresses are bound together. What affects one affects the other—sooner or later.

## Legislators’ Tasks

The duality between institutional and individual duties permeates legislators’ daily activities and roles. As Speaker Sam Rayburn, D-Tex., once remarked, “A congressman has two constituencies—he has his constituents at home, and his colleagues here in the House. To serve his constituents at home, he must also serve his colleagues here in the House.”<sup>12</sup>

No problem vexes members more than that of juggling constituency and legislative tasks. For maintaining local connections, members know that there is no substitute for being present in their states and district. Congressional calendars allow for lengthy recesses, termed district work periods, and most legislative weeks are scheduled from Tuesday to Thursday. “I can tell you based on my experience . . . that time spent in our districts is not ‘time off,’” observed Rep. Rob Bishop, R-Utah.<sup>13</sup> On average, between 2010 and 2020, Congress was in session for 101 days a year, about one out of every three days.<sup>14</sup> Members spend much of the rest of their time at home among their constituents.

Reelection is the paramount operational goal of members of Congress. As a former representative put it, “All members of Congress have a primary interest in getting reelected. Some members have no other interest.”<sup>15</sup> After all, politicians must win elections before they can achieve any long-range political goals. “[Reelection] has to be the proximate goal of everyone, the goal that must be achieved over and over if other ends are to be entertained,” David R. Mayhew observed in *Congress: The Electoral Connection*.<sup>16</sup>

Individual legislators vary in how they balance the twin roles of legislator and representative. Some legislators devote more time and resources to lawmaking while others focus almost entirely on constituency tending. With their longer terms, some senators stress voter outreach and fence-mending during the two years

before reelection and focus on legislative activities at other times. Yet senatorial contests normally are more competitive and costlier than House races, and many senators now run for reelection all the time—like most of their House colleagues.<sup>17</sup> Most senators and representatives would like to devote more time to lawmaking and other Capitol Hill duties, but the press of constituency business is relentless.<sup>18</sup>

## Popular Images

The notion of two Congresses also conforms to the average citizen's perceptions. The public views the U.S. Congress differently from the way it sees individual senators and representatives. Congress, as an institution, is perceived primarily as a lawmaking body. It is judged mainly on the basis of citizens' overall attitudes toward politics, policy processes, and the state of the Union. Do people like the way things are going or not? Do they feel that Congress is carrying out its duties effectively? Are they optimistic or pessimistic about the nation's future?

In contrast with their expectations of Congress as a whole, citizens view their legislators in great part as agents of local concerns. People judge individual legislators by yardsticks such as communication with constituents, their positions on prominent issues, service to the district, and home style (the way officeholders present themselves in their districts or states). In judging their senators or representatives, voters ponder questions such as, "Is the legislator trustworthy? Does the legislator communicate well with the state (or district) by being visible in the constituency and offering timely help to constituents? Does the legislator listen to the state (or district) and its concerns?"<sup>19</sup>

The public's divergent expectations of Congress and its members send conflicting signals to senators and representatives. Congress, as a whole, is judged by the processes it uses and the policies it adopts (or fails to adopt), however vaguely voters understand them.<sup>20</sup> But individual legislators are regularly nominated and elected to office on the strength of their personal qualities, the positions they take, and their constituency service. In response to this incongruity, officeholders often adopt a strategy of opening as much space as possible between themselves and those other politicians back in Washington.

## The Constitutional Basis

Congress's dual nature—the dichotomy between its lawmaking and representative functions—is dictated by the U.S. Constitution. Congress's mandate to write the nation's laws is found in Article I of the Constitution. By contrast, Congress's representational functions are not specified in the Constitution, although these duties flow from the constitutional provisions for electing senators and House members.

It is no accident that the Constitution's drafters devoted the first article to establishing the legislature and enumerating most of the government's powers. Familiar

with the British Parliament's prolonged struggles with the Crown, the authors assumed the legislature would be the chief policy-making body and the bulwark against arbitrary executives. "In republican government, the legislative authority necessarily predominates," observed James Madison in *The Federalist Papers*.<sup>21</sup>

Although in the ensuing years the initiative for policy making has shifted many times between the legislative and executive branches, the U.S. Congress remains virtually the only national assembly in the world that drafts, in detail, the laws it passes instead of simply debating and ratifying measures prepared by the government in power.

The House of Representatives was intended to be the most representative element of the U.S. government. House members are elected directly by the people for two-year terms to ensure that they do not stray too far from popular opinion. As Madison explained, the House should have "an immediate dependence on, and an intimate sympathy with, the people."<sup>22</sup> For most representatives, this two-year cycle means nonstop campaigning, visiting, and looking after constituents.

The Senate was initially one step removed from popular voting. Some of the Constitution's framers hoped the Senate would temper the popular passions expressed in the House, so under the original Constitution, state legislatures selected senators. But this original vision was ultimately overruled in favor of a Senate that, like the House, directly expresses the people's voice. In 1913, the Seventeenth Amendment to the Constitution was adopted, providing for direct popular election of senators. Although elected for six-year terms, senators must stay in close touch with the electorate. Like their House colleagues, senators typically regard themselves as constituency servants. Most have transformed their office staffs into veritable cottage industries for generating publicity and handling constituents' inquiries.

Thus, the Constitution and subsequent historical developments affirm Congress's dual functions of lawmaker and representative assembly. Although the roles are tightly bound together, they nonetheless impose separate duties and functions.

## Back to Burke

On November 3, 1774, in Bristol, England, the British statesman and philosopher Edmund Burke set forth in a speech the dual character of a national legislature. The constituent-oriented parliament, or Congress, he described as

a Congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates.

The parliament of substantive lawmaking he portrayed in different terms. It was

a deliberative assembly of one nation, with one interest, that of the whole—where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole.<sup>23</sup>

Burke preferred the second concept and did not hesitate to let his voters know it. He would give local opinion a hearing, but his judgment and conscience would prevail in all cases. “Your faithful friend, your devoted servant, I shall be to the end of my life,” he declared. “A flatterer you do not wish for.”<sup>24</sup>

Burke’s Bristol speech is an enduring statement of the dilemma legislators face in balancing their two roles. Burke was a brilliant lawmaker. (He even sympathized with the cause of the American colonists.) But, as might be said today, he suffered from an inept home style. His candor earned him no thanks from his constituents, who turned him out of office at the first opportunity.

Burke’s dilemma applies equally on this side of the Atlantic. U.S. voters tend to prefer their lawmakers to be delegates who listen carefully to constituents and follow their guidance. During an encounter in Borger, Texas, an irate Baptist minister shouted at then-representative Bill Sarpalius, D-Tex., “We didn’t send you to Washington to make intelligent decisions. We sent you to represent us.”<sup>25</sup> Sarpalius was later defeated for reelection.

Representing local constituents is not the whole story, of course. Burke’s idea that legislators are trustees of the nation’s common good is still extolled. In a 1995 decision, U.S. Supreme Court Justice John Paul Stevens noted that, once elected, members of Congress become “servants of the people of the United States. They are not merely delegates appointed by separate states; they occupy offices that are integral and essential components of a single national government.”<sup>26</sup>

Many talented individuals seek public office, often forgoing more lucrative opportunities in the private sector, precisely because they believe strongly in a vision of what government should do and how it should do it. For such legislators, winning office is a means to a larger end. It is reasonable to assume that elected officials “make an honest effort to achieve good public policy.”<sup>27</sup>

Burke posed the tension between the two Congresses so vividly that we have adopted his language to describe the conceptual distinction that forms the crux of this book. From Burke, we have also drawn the titles for Part II, “A Congress of Ambassadors,” and Part III, “A Deliberative Assembly of One Nation.” Every member of Congress, sooner or later, must come to terms with Burke’s dichotomy; citizens and voters will also have to form their own answers.

## THE TWO CONGRESSES IN COMPARATIVE CONTEXT

A look around the world reveals that most democracies differ from the United States in how they elect legislators. Members of Congress are selected using the oldest form of elected democratic representation: a plurality vote within geographic constituencies. By contrast, most other advanced democracies elect legislative representatives under systems of proportional representation (PR), a more recent innovation in democratic institutions. Many varieties of PR are in use, but

compared with the U.S. electoral system, these systems tend to tie legislators more closely to their political parties than to local constituencies. In this way, PR systems somewhat alleviate the difficult trade-offs that members of Congress face as they attempt to balance national lawmaking with attention to local constituencies.

PR systems rest on the basic principle that the number of seats a political party wins in the legislature should be proportional to the level of support it receives from voters. If a political party wins 40 percent of the vote overall, then it should receive about 40 percent of the seats. In other words, these systems explicitly assume that political parties are more important than geographic locales to voters' values and political interests.<sup>28</sup> Most commonly in these systems, the parties put lists of candidates before the electorate. The number of a party's candidates to be seated in the legislature from those lists then depends on the percentage of voters supporting that party in legislative elections. To a greater extent than is true of members of the U.S. Congress, candidates elected in PR systems thus serve as representatives of their party's policy goals and ideological commitments.

Legislators in PR systems face fewer dilemmas about how to balance local constituency politics with national party platforms. Indeed, some PR systems, such as those in Israel and the Netherlands, do not tie representatives to local geographic constituencies at all; legislators represent the entire nation. Other countries, such as Austria and Sweden, elect multiple representatives from regional districts. Such districts are not captured by a single party on a winner-take-all basis. (This is the system used in the United States, where each constituency has only one representative.) Districts in which more than one political party enjoys a meaningful level of voter support will elect representatives from more than one party, with each legislator representing those voters who supported his or her party. Some countries, such as Germany, Italy, and New Zealand, use a mixed system, with some representatives elected in individual geographic constituencies and others drawn from party lists to ensure proportionality. In all "PR" cases, citizens and legislators alike recognize that the system is primarily designed to ensure that voters' party preferences are proportionally represented.

Members of the U.S. Congress, by contrast, officially represent all residents of their geographic constituency—a difficult task. The constituents grouped within congressional districts often have little in common. Indeed, constituencies can be very diverse in terms of race, class, ethnicity, religion, economic interests, and urbanization. Describing his own constituency, Representative Bowman termed it "a tale of two districts": "In one part of the district, you have incredible wealth. In the other part of the district, you have the highest number of WIC recipients of any congressional district in the country" (referencing a federal nutrition assistance program).<sup>29</sup> The largest states are microcosms of the whole nation. Some constituencies are narrowly divided in terms of partisanship and ideology, forcing representatives to cope with continual local controversies about their stances on national issues. Some members of Congress face the challenge of representing constituents who lean toward the opposing party.



In attempting to represent their whole state or district, some senators and House members attempt a “lowest common denominator” form of representation, de-emphasizing their party affiliation and their opinions on controversial national issues. Instead, they advertise their accessibility to constituents; focus on narrow, localized concerns; and dodge hot-button questions whenever they can.<sup>30</sup> This strategy is most appealing to members representing swing or cross-pressured states and districts. But, to an important extent, the U.S. system of representation encourages a focus on parochial matters among lawmakers generally. Members see themselves, at least to some degree, as attorneys for their constituencies.

Even though the U.S. system of representation does not recognize the importance of political parties in the way that PR systems do, members of Congress have nevertheless become far more closely tied to their parties in recent decades. Lawmakers vote with their parties far more reliably than they did in the decades spanning the 1950s through the 1980s. The sources of this increased partisanship are many, but it has corresponded with an increasingly partisan ideological polarization in the activist base of both political parties. “The American public has become more consistent and polarized in its policy preferences over the past several decades,” writes Alan I. Abramowitz, “and this increase in consistency and polarization has been concentrated among the most politically engaged citizens.”<sup>31</sup> At the same time, the politically engaged public has also sorted itself into more ideologically coherent political parties, with fewer liberals identifying with the Republican Party and fewer conservatives identifying with the Democratic Party.<sup>32</sup> Consequently, few voters split their tickets today by voting for one party’s presidential candidate and another party’s congressional candidate. These trends have reduced the cross-pressures that members face as they attempt to balance their roles as constituency representatives and national policy makers. More members can cooperate with their national party leaders without endangering the support of an electoral majority in their constituency. At the same time, a body of members responding to this more polarized activist base may have a harder time engaging in genuine deliberation and crafting workable legislative compromises.

All members must constantly cultivate the local roots of their power as national legislators. Yet Congress is one body, not two. The same members who attempt to forge national legislation in committee and on the floor must rush to catch planes back to their districts, where they are plunged into a different world of local problems and personalities. The same candidates who sell themselves at shopping centers also shape the federal budget or military weapons systems in the nation’s capital. The unique character of Congress arises directly from its dual role as a representative assembly and a lawmaking body.

## DIVERGENT VIEWS OF CONGRESS

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Congress is subject to intense scrutiny, as the huge array of books, monographs, blogs, and articles devoted to it attest. Many of its features make Congress a favorite object of scholarly attention. For one thing, it is relatively open and accessible,



so it can be approached by traditional means—journalistic stories, case studies, normative assessments, and historical accounts. It is also amenable to the analytic techniques of social science. Indeed, the availability of quantitative indicators of congressional work (floor votes, for example) permits elaborate statistical analyses. Its rule-governed processes allow it to be studied with sophisticated formal models. And Congress is, above all, a fascinating place—the very best location from which to view the varied actors in the U.S. political drama.

Writers of an interpretive book on the U.S. Congress thus can draw on a multitude of sources, an embarrassment of riches. In fact, studies of Congress constitute a vast body of literature. This is a mixed blessing because all of this information must be integrated into a coherent whole. Moreover, scholarly writing is often highly detailed, technical, and theoretical. We have tried to put such material in perspective, make it accessible to all interested readers, and use illustrative examples wherever possible.

Meanwhile, a gaping chasm exists between this rich scholarly literature and the caricature of Congress prevalent in the popular culture. Humorists from Mark Twain and Will Rogers to Stephen Colbert, Trevor Noah, Jimmy Kimmel, and Samantha Bee have found Congress an inexhaustible source of raw material. Citizens tend to share a disdain toward the legislative branch—especially at moments of furor over, say, ethics scandals or difficult legislative fights. When legislators are at home with constituents, they often reinforce Congress's poor image by portraying the institution as out of touch with reality. As Richard F. Fenno puts it, members “run *for* Congress by running *against* Congress.”<sup>33</sup>

The picture of Congress conveyed by the media is scarcely more flattering. Journalistic hit-and-run specialists perpetuate a cartoon-like stereotype of Congress as “a place where good ideas go to die in a maelstrom of bureaucratic hedging and rank favor-trading.”<sup>34</sup> News magazines, editorial writers, and nightly news broadcasts regularly portray Congress as an irresponsible and somewhat disreputable gang, reminiscent of Woodrow Wilson's caustic description of the House as “a disintegrated mass of jarring elements.”<sup>35</sup> A common refrain is that today's Congress is a “broken” institution where little happens save partisan bickering.

To comprehend how the two Congresses function—both the institution and individual members—popular stereotypes must be abandoned and the complex realities examined. Citizens' ambivalence toward the popular branch of government—which goes back to the beginnings of the Republic—says something about the milieu in which public policy is made. We believe we know our subject well enough to understand why Congress works the way it does, yet we try to maintain a professional, scholarly distance from it.

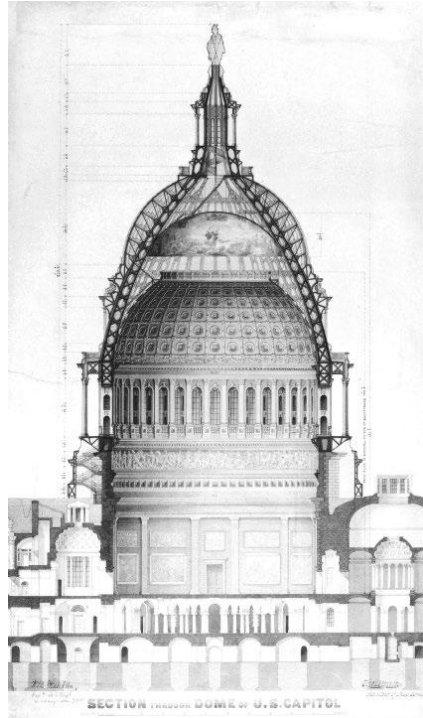
According to an old saying, two things should never be viewed up close: making sausages and making laws. Despite this warning, we urge readers to take a serious look at the workings of Congress and form their own opinions. Some may recoil from what they discover. Numerous flaws can be identified in members'

personal or public behavior, in their priorities and incentive structures, and in lawmaking processes generally. Recent Congresses especially have displayed troubling tendencies, including rushed legislation, extreme partisanship, frequent gridlock, and abdication of legislative power to the executive branch.<sup>36</sup>

Yet careful observers will also discover much behavior in Congress that is purposeful and principled and many policies that are reasonable and workable. We invite students and colleagues to examine with us what Congress does and why—and to ponder its values and its prospects.



MANDEL NGAN/AFP via Getty Images



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Thomas Ustick Walter

The United States Capitol Dome was constructed more than 150 years ago from a design by architect Thomas U. Walter. The Dome recently underwent a major renovation to restore its original grandeur, which had been gradually eroded by age and weather. Just as the physical appearance of the Capitol has undergone many changes over the years, the institutions of Congress have developed over many decades as members have adapted to new challenges and opportunities.

# 2

## EVOLUTION OF THE MODERN CONGRESS

The First Congress met in New York City in the spring of 1789. Business couldn't begin until April 1, when a majority of the fifty-nine House members finally arrived to make a quorum. Members then chose Frederick A. C. Muhlenberg of Pennsylvania as Speaker of the House. Five days later, the Senate achieved its first quorum, although its presiding officer, Vice President John Adams, did not arrive for another two weeks.

New York City, the seat of government, was then a bustling port on the southern tip of Manhattan Island. Congress met in Federal Hall at the corner of Broad and Wall Streets. The House of Representatives occupied a large chamber on the first floor and the Senate a more intimate chamber upstairs. The new chief executive, George Washington, was still en route from Mount Vernon, his plantation in Virginia; his trip had become a triumphal procession, with crowds and celebrations at every stop. To most of his countrymen, Washington—austere, dignified, the soul of propriety—embodied a government that otherwise was no more than a plan on paper.

The two houses of Congress did not wait for Washington's arrival. The House began debating tariffs, a perennial legislative topic. In the Senate, Vice President Adams, a brilliant but self-important man, prodded his colleagues to decide on proper titles for addressing the president and himself. Adams was dubbed "His Rotundity" by a colleague who thought the whole discussion absurd.

On inauguration day, April 30, Adams was still worrying about how to address the president when the representatives, led by Speaker Muhlenberg, burst into the Senate chamber and seated themselves. Meanwhile, a special committee was dispatched to escort Washington to the chamber for the ceremony. The swearing-in was conducted on an outside balcony in front of thousands of assembled citizens.<sup>1</sup>

Then, a nervous Washington reentered the Senate chamber and haltingly read his inaugural address. After the speech, everyone adjourned to nearby St. Paul's Chapel for a special prayer service. Thus, the U.S. Congress became part of a functioning government.<sup>2</sup>

## ANTECEDENTS OF CONGRESS

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The legislative branch of the new government was untried and unknown, searching for procedures and precedents. And yet, it grew out of a rich history of development—stretching back more than five hundred years in Great Britain and no less than a century and a half in North America. If the architects of the U.S. Constitution of 1787 were unsure of how well their new design would work, they had firm ideas about what they intended.

### The English Heritage

The evolution of representative institutions on a national scale began in medieval Europe. Monarchs gained power over large territories where inhabitants were divided into social groupings, called *estates of the realm*—among them, the nobility, clergy, landed gentry, and town officials. The monarchs brought together the leaders of these estates, not to create representative government but to fill the royal coffers.

These assemblies later came to be called parliaments, from the French *parler*, “to speak.” Historians and political scientists have identified four distinct stages in the evolution of the assemblies of estates into the representative legislatures of today. The first stage saw the assemblies representing the various estates gathering merely to approve taxes for the royal treasury; they engaged in little discussion. During the second stage, these tax-voting bodies evolved into bodies that presented the king with petitions for redressing grievances. In the third stage, by a gradual process that culminated in the revolutions of the seventeenth and eighteenth centuries, parliaments wrested lawmaking and tax-levying powers from the king. In the fourth and final stage, during the nineteenth and twentieth centuries, parliamentary representation expanded beyond the older privileged groups to embrace all adult men and women.<sup>3</sup>

By the time the New World colonies were founded in the 1600s, the struggle for parliamentary rights was well advanced into the third stage, at least in England. Bloody conflicts, culminating in the beheading of Charles I in 1649 and the dethroning of James II in the Glorious Revolution of 1688, established parliamentary influence over the Crown.

Out of the struggles between the Crown and Parliament flowed a remarkable body of political and philosophic writings. By the eighteenth century, works by James Harrington (1611–1677), John Locke (1632–1704), William Blackstone (1723–1780), and the Frenchman Baron de Montesquieu (1689–1755) were the common heritage of educated leaders in North America as well as in Europe.

## The Colonial Experience

European settlers in the New World brought this tradition of representative government with them. As early as 1619, the thousand or so Virginia colonists elected twenty-two burgesses—or delegates—to a general assembly. In 1630, the Massachusetts Bay Company established itself as the governing body for the Bay Colony, subject to annual elections. The other colonies followed suit.

Representative government took firm root in the colonies. The broad expanse of ocean shielding America from its European masters fostered autonomy on the part of the colonial assemblies. Claiming prerogatives similar to those of the British House of Commons, these assemblies exercised the full range of lawmaking powers: levying taxes, issuing money, and providing for colonial defense.<sup>4</sup> Legislation could be vetoed by colonial governors (appointed by the Crown in the eight royal colonies), but the governors, cut off from the home government and dependent on local assemblies for revenues and even for their salaries, usually preferred to reach agreements with the locals. Royal vetoes could emanate from London, but these took time and were infrequent.<sup>5</sup>

Other elements nourished the growth of representative institutions. Many of the colonists were free-spirited dissidents set on resisting traditional forms of authority, especially that of the Crown. Their self-confidence was bolstered by the readily available land, the harsh frontier life, and—by the eighteenth century—a robust economy. The town meeting form of government in New England and the Puritans' church assemblies helped cultivate habits of self-government. Newspapers, unfettered by royal licenses or government taxes, stimulated lively exchanges of opinions.

When Britain decided in the 1760s, following the financially ruinous French and Indian War, to tighten its rein on the American colonies, it met with stubborn opposition. Colonists asked, Why don't we enjoy the same rights as Englishmen? Why aren't our colonial assemblies legitimate governments, with authority derived from popular elections? As British enactments grew increasingly unpopular, along with the governors who tried to enforce them, the locally based legislatures took up the cause of their constituents.

The colonists especially resented the Stamp Act of 1765, which provoked delegates from nine colonies to meet in New York City. There, the Stamp Act Congress adopted a fourteen-point *Declaration of Rights and Grievances*. Although the Stamp Act was later repealed, new import duties levied in 1767 increased customs receipts and enabled the Crown to begin directly paying the salaries of royal governors and other officials, thereby freeing those officials from the influence of colonial assemblies. The crisis worsened in the winter of 1773–1774, when a group of colonists staged a revolt, the Boston Tea Party, to protest the taxes imposed by the Tea Act. In retaliation, the House of Commons closed the port of Boston and passed a series of so-called Intolerable Acts, further tightening royal control.

National representative assemblies in America were born on September 5, 1774, when the First Continental Congress convened in Philadelphia. Every colony except Georgia sent delegates—a varied group that included peaceable souls

loyal to the Crown, moderates such as Pennsylvania's John Dickinson, and firebrands such as Samuel Adams and Paul Revere. Gradually, anti-British sentiment congealed, and Congress passed a series of declarations and resolutions (each colony casting one vote) amounting to a declaration of war against the mother country.<sup>6</sup> After Congress adjourned on October 22, King George III declared that the colonies were "now in a state of rebellion; blows must decide whether they are to be subject to this country or independent."<sup>7</sup>

If the First Continental Congress gave colonists a taste of collective decision-making, the Second Continental Congress proclaimed their independence from Britain. When this second Congress convened on May 10, 1775, many colonists had still believed war might be avoided. A petition to King George asking for "happy and permanent reconciliation" was even approved. The British responded by proclaiming a state of rebellion and launching efforts to crush it. Sentiment in the colonies swung increasingly toward independence, and by the middle of 1776, Congress was debating Thomas Jefferson's draft resolution that "these united colonies are, and of right ought to be, free and independent states."<sup>8</sup>

The two Continental Congresses gave birth to national politics in America. Riding the wave of patriotism unleashed by the British actions of 1773–1774, the Congresses succeeded in pushing the sentiments of leaders and much of the general public toward confrontation and away from reconciliation with the mother country. They did so by defining issues one by one and by reaching compromises acceptable to both moderates and radicals—no small accomplishment. Shared legislative experience, in other words, moved the delegates to the threshold of independence. Their achievement was all the more remarkable in light of what historian Jack N. Rakove describes as the "peculiar status" of the Continental Congress, "an extra-legal body whose authority would obviously depend on its ability to maintain a broad range of support."<sup>9</sup>

Eight years of bloody conflict ensued before the colonies won their independence. Meanwhile, the former colonies hastened to form new governments and draft constitutions. Unlike the English constitution, these charters were written documents. All included some sort of bill of rights, and all paid lip service to the doctrine of separating powers among legislative, executive, and judicial branches of government. But past conflicts with the Crown and the royal governors had instilled a fear of all forms of executive authority. So nearly all of the constitutions gave the bulk of powers to their legislatures, effectively creating what one historian termed "legislative omnipotence."<sup>10</sup>

The national government was likewise, as James Sterling Young put it, "born with a legislative body and no head."<sup>11</sup> Strictly speaking, no national executive existed between 1775 and 1789—the years of the Revolutionary War and the Articles of Confederation (adopted in 1781). On its own, Congress struggled to wage war against the world's most powerful nation, enlist diplomatic allies, and manage internal affairs. As the war progressed and legislative direction proved unwieldy, Congress tended to delegate authority to its committees and



permanent (executive) agencies. Strictly military affairs were placed in the hands of Commander in Chief George Washington, who, at the war's end, returned his commission to Congress in a public ceremony. Considering the obstacles it faced, congressional government was far from a failure. Yet the mounting inability of the all-powerful legislative bodies, state and national, to deal with postwar problems spurred demands for change.

At the state level, Massachusetts and New York rewrote their constitutions, adding provisions for stronger executives. At the national level, the Confederation's frailty led many to advocate what Alexander Hamilton called a more "energetic" government—one with enough authority to implement laws, control currency, levy taxes, dispose of war debts, and, if necessary, put down rebellions. Legislative prerogatives, Hamilton and others argued, should be counterbalanced with a vigorous, independent executive.

In this spirit, delegates from the states convened in Philadelphia on May 25, 1787, authorized to strengthen the Articles of Confederation. Instead, they drew up a wholly new governmental charter.

## CONGRESS IN THE CONSTITUTION

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The structure and powers of Congress formed the core of the Constitutional Convention's deliberations. The delegates broadly agreed that a stronger central government was needed.<sup>12</sup> But the fifty-five delegates who met in the summer of 1787 in Philadelphia were deeply divided on issues of representation, and more than three months passed before they completed their work. The plan, agreed to and signed on September 17, 1787, was a bundle of compromises. Divergent interests—those of large and small states, landlocked states and those with ports, and northern and southern (that is, slaveholding) states—had to be placated in structuring the representational system. The final result was an energetic central government that could function independently of the states but with limited, enumerated powers divided among the three branches.

### Powers of Congress

The federal government's powers are shared by three separate branches: legislative, executive, and judicial. The separation of powers was not a new idea. Philosophers admired by the framers of the Constitution, including Harrington, Locke, and especially Montesquieu, had advocated the principle. But the U.S. Constitution's elaborate system of checks and balances is considered one of its most innovative features. The failure of the Articles of Confederation to separate governmental functions was widely regarded as a serious defect, as were the all-powerful legislatures created by the first state constitutions. Thus, the framers sought to create a federal government that would avoid the excesses and instabilities that had marked policy making at both the national and state levels.



Article I of the Constitution embraces many provisions to buttress congressional authority and independence. Legislators have unfettered authority to organize the chambers as they see fit and are accorded latitude in performing their duties. To prevent intimidation, they cannot be arrested during sessions or while traveling to and from sessions (except for treason, felony, or breach of the peace). In their deliberations, members enjoy immunity from any punitive action; for their speech and debate, “they shall not be questioned in any other place” (Article I, section 6).

Despite their worries over all-powerful legislatures, the framers laid down an expansive mandate for the new Congress. Mindful of the achievements of New World assemblies, not to mention the British Parliament’s struggles with the Crown, the framers viewed the legislature as the chief repository of the government’s powers. Locke had observed that “the legislative is not only the supreme power, but is sacred and unalterable in the hands where the community have placed it.”<sup>13</sup> Locke’s doctrine found expression in Article I, section 8, which enumerates Congress’s impressive array of powers and sets out virtually the entire scope of governmental authority as the eighteenth-century founders understood it. This portion of the Constitution clearly envisions a vigorous legislature as the engine of a powerful government.

Raising and spending money for governmental purposes stand at the heart of Congress’s prerogatives. The “power of the purse” was historically the lever by which parliaments gained bargaining advantages over kings and queens. The Constitution’s authors, well aware of this lever, gave Congress full powers over taxing and spending.<sup>14</sup>

Financing the government is carried out under Congress’s broad mandate to “lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States” (Article I, section 8). Although this wording covered almost all known forms of taxation, there were limitations. Taxes had to be uniform throughout the country; duties could not be levied on goods traveling between states; and “capitation or other direct” taxes were prohibited, unless levied according to population (Article I, section 9). This last provision proved troublesome when the U.S. Supreme Court held in 1895 (*Pollock v. Farmers’ Loan and Trust Co.*) that it precluded taxes on incomes. To overcome this obstacle, the Sixteenth Amendment, ratified eighteen years later, explicitly conferred on Congress the power to levy income taxes.

Congressional power over government spending is no less sweeping. Congress is to provide for the “common defense and general welfare” of the country (Article I, section 8). Furthermore, “No money shall be drawn from the Treasury, but in consequence of appropriations made by law” (Article I, section 9). This funding provision is one of the legislature’s most potent weapons in overseeing the executive branch.

Congress possesses broad powers to promote the nation’s economic well-being and political security. It has the power to regulate interstate and foreign commerce, which it has used to regulate not only trade but also transportation,

communications, and such disparate subjects as civil rights and violent crime. Congress may also coin money, incur debts, establish post offices, build post roads, issue patents and copyrights, provide for the armed forces, and call forth the militia to repel invasions or suppress rebellions.

Although the three branches supposedly are coequal, the legislature is empowered to define the structure and duties of the other two. The Constitution mentions executive departments and officers, but it does not specify their organization or functions, aside from those of the president. Thus, the design of the executive branch, including cabinet departments and other agencies, is spelled out in laws passed by Congress and signed by the president.

The judiciary, too, is a statutory creation. The Constitution provides for a federal judicial system consisting of “one Supreme Court, and . . . such inferior courts as the Congress may from time to time ordain and establish” (Article III, section 1). Congress determines the number of justices on the Supreme Court and the number and types of lower federal courts. Congress changed the number of justices several times in its first several decades, but the number has been fixed at nine since 1869. The outer limits of the federal courts’ jurisdiction are delineated in Article III, but Congress must also define their jurisdictions through statute. Moreover, the Supreme Court’s appellate jurisdiction is subject to “such exceptions” and “such regulations as the Congress shall make” (Article III, section 2). Congress can also limit the federal courts’ discretion in ways other than altering their jurisdiction. Mandatory minimum sentences imposed by statute, for example, limit judges’ discretion in imposing prison sentences.

Congress’s powers within the federal system were greatly enlarged by the Civil War constitutional amendments—the Thirteenth (ratified in 1865), Fourteenth (ratified in 1868), and Fifteenth (ratified in 1870). The Radical Republicans, who had supported the war and controlled Congress in its aftermath, feared that formerly Confederate states would ignore the rights of formerly enslaved people—the cause over which the war had ultimately been waged. The Civil War amendments were primarily intended to ensure that formerly enslaved people would have the rights to vote, to be accorded due process, and to receive equal protection of the laws. Nevertheless, the language of the Fourteenth Amendment was cast broadly, referring to “all persons” rather than only to “former slaves.” These amendments also authorized Congress to enforce these rights with “appropriate legislation.” As a result, these amendments (and subsequent legislation) greatly expanded the federal government’s role relative to the states. Over time, the Civil War amendments effectively nationalized the key rights of citizenship throughout the United States. Through a long series of Court rulings, state governments were eventually required to respect many of the Bill of Rights guarantees that originally applied only to the federal government.

Congress can also be an active partner in foreign relations and national defense. It has the power to declare war, ratify treaties, raise and support armies, provide and maintain a navy, and make rules governing the military forces—including those governing “captures on land and water.” Finally, Congress is vested with

the power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers” (Article I, section 8).

## Limits on Legislative Power

The very act of enumerating these powers was intended to limit government, for, by implication, those powers not listed were prohibited. The Tenth Amendment reserves to the states or the people all those powers neither delegated nor prohibited by the Constitution. This guarantee has long been a rallying point for those who take exception to particular federal policies or who wish broadly to curtail federal powers.

Eight specific limitations on Congress’s powers are noted in Article I, section 9. The most important bans are against bills of attainder, which pronounce a particular individual guilty of a crime without trial or conviction and impose a sentence, and ex post facto laws, which make an action a crime after it has been committed or otherwise alter the legal consequences of some past action. Such laws are traditional tools of authoritarian regimes.

The original Constitution contained no bill of rights. Pressed by opponents during the ratification debate, supporters of the Constitution promised early enactment of amendments to remedy this omission. The resulting ten amendments, drawn up by the First Congress (James Madison was their main author) and ratified December 15, 1791, are a basic charter of liberties that limit the reach of government. The First Amendment prohibits Congress from establishing a national religion, preventing the free exercise of religion, or abridging the freedoms of speech, press, peaceable assembly, and petition. Other amendments secure the rights of personal property and fair trials and prohibit arbitrary arrest, questioning, or punishment.

Rights not enumerated in the Bill of Rights are not necessarily denied (Ninth Amendment). In fact, subsequent amendments, legislative enactments, judicial rulings, and states’ actions have enlarged citizens’ rights to include the rights of voting, of privacy, and of “equal protection of the laws.”

It should also be noted that the political process itself is a significant limit on the use of government powers, even those clearly granted in Article I, section 8. As Madison noted in *Federalist* No. 51, “A dependence on the people is, no doubt, the primary control on the government.”<sup>15</sup>

## Separate Branches, Shared Powers

The Constitution not only lists Congress’s powers but also sets them apart from those of the other two branches. Senators and representatives, while in office, are prohibited from serving in other federal posts; those who serve in such posts are, in turn, forbidden from serving in Congress (Article I, section 6). This restriction forecloses any form of parliamentary government in which leading

members of the dominant party or coalition form a cabinet to direct the ministries and other executive agencies.

Because the branches are separated, some people presume that their powers should be distinct as well. In practice, however, governmental powers are interwoven. Madison explained that the Constitution created not a system of separate institutions performing separate functions but separate institutions that share functions, so that “these departments be so far connected and blended as to give each a constitutional control over the others.”<sup>16</sup>

Historically, presidents, Congress, and the courts have reached accommodations to exercise the powers they share. As Justice Robert Jackson noted in 1952, “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”<sup>17</sup>

## Legislative–Executive Interdependence

Each branch of the U.S. government needs cooperation from its counterparts. Although the Constitution vests Congress with “all legislative powers,” these powers cannot be exercised without the involvement of the president and the courts. This same interdependency applies to executive and judicial powers.

The president is a key figure in lawmaking. According to Article II, the president “shall from time to time give to the Congress information on the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient.” Although Congress is not required to consider the president’s legislative initiatives, the president’s State of the Union address shapes the nation’s political agenda. In the modern era, Congress has “enacted in some form roughly six in ten presidential initiatives.”<sup>18</sup> The Constitution also grants the president the power to convene one or both houses of Congress in a special session.

The president’s ability to veto congressional enactments influences both the outcome and content of legislation. After a bill or resolution has passed both houses of Congress and has been delivered to the White House, the president must sign it or return it within ten days (excluding Sundays). Overruling a presidential veto requires a two-thirds vote in each house. Presidential review might seem to be an all-or-nothing affair. In the words of George Washington, a president “must approve all the parts of a bill, or reject it in toto.” Veto messages, however, often suggest revisions that would make the measure more likely to win the president’s approval. Furthermore, veto threats allow the president to intervene earlier in the legislative process by letting members of Congress know in advance what measures or provisions will or will not receive presidential support. Considering the extreme difficulty of overriding a president’s veto, members of Congress know that White House support for legislation is almost always necessary and so will often incorporate presidential preferences into early drafts of legislation.

Carrying out laws is the duty of the president, who is directed by the Constitution to “take care that the laws be faithfully executed” (Article II, section 3). To this end, as chief executive, the president has the power to appoint “officers of the United States.” However, the president’s appointment power is limited by the requirement to obtain the Senate’s advice and consent for nominees, which has been interpreted as requiring a majority vote in the Senate.<sup>19</sup> The president’s executive power is further constrained by Congress’s role in establishing and overseeing executive departments and agencies. Because these agencies are subject to Congress’s broad-ranging influence, modern presidents have struggled to force them to march to a common cadence.

Even in the realms of diplomacy and national defense—the traditional domains of royal prerogative—the Constitution apportions powers between the executive and legislative branches. Following tradition, presidents are given wide discretion in such matters. They appoint ambassadors and other envoys, negotiate treaties, and command the country’s armed forces. However, like other high-ranking presidential appointees, ambassadors and envoys must be approved by the Senate. Treaties do not become the law of the land until they are ratified by a two-thirds vote of the Senate. Although presidents may dispatch troops on their own, only Congress may formally declare war. Even in a time of war, Congress still wields formidable powers if it chooses to employ them. Congress can refuse to provide continued funding for military actions, engage in vigorous oversight of the executive branch’s military operations, and influence public opinion regarding the president’s leadership.<sup>20</sup>

## Impeachment

Congress has the power to impeach and remove the president, the vice president, and other “civil officers of the United States” for serious breaches of the public trust: treason, bribery, or “other high Crimes and Misdemeanors.” The House of Representatives has the sole authority to draw up and adopt (by majority vote) articles of impeachment, which are specific charges that the individual has engaged in one of the named forms of misconduct. The Senate is the final judge of whether to convict on any of the articles of impeachment. A two-thirds majority is required to remove the individual from office or to remove and also bar the individual from any future “offices of public trust.”

Three attributes of impeachment fix it within the separation-of-powers framework. First, it is exclusively the domain of Congress. (The chief justice of the United States presides over Senate trials of the president, but rulings by the chief justice may be overturned by majority vote.) The two chambers are also free to devise their own procedures for reaching their decisions.<sup>21</sup>

Second, impeachment is essentially political. The structure may appear judicial—with the House resembling a grand jury and the Senate a trial court—but lawmakers decide whether and how to proceed, which evidence to consider, and even what constitutes an impeachable offense. Treason is

defined by the Constitution, and bribery is defined by statute, but the words “high Crimes and Misdemeanors” are open to interpretation. They are usually defined (in Alexander Hamilton’s words) as “abuse or violation of some public trust”—on-the-job offenses against the state, the political order, or the society at large.<sup>22</sup> According to this definition, they could be either more or less than garden-variety criminal offenses. All four presidential impeachments (Andrew Johnson, 1868; Bill Clinton, 1998–1999; Donald Trump, 2019–2020, 2021) were fiercely partisan affairs, in which combatants disputed not only the facts but also the appropriate grounds for impeachment. (In August 1974, Richard Nixon resigned as president given the high certainty he would be impeached by the House and removed by the Senate. Nixon’s decision to resign was made once it became clear that a substantial number of members of his own party supported impeachment.)

Finally, impeachment is a cumbersome, time-consuming process, only suitable for punishing officials for the gravest of offenses. As for presidents and vice presidents, their terms are already limited. Indeed, the 2021 impeachment of President Trump presented the question of whether the Senate would conduct a trial after the president’s term of office. Meanwhile, Congress has many lesser ways of reining in wayward officials. Although impeachments are often threatened, only twenty Senate trials have taken place, and only eight individuals have been convicted. Significantly, all eight who were removed from office were judges, who, unlike executive officers, enjoy open-ended terms of office.<sup>23</sup>

### Interbranch “No-Fly Zones”

Although the constitutional system requires that the separate branches share powers, each branch normally honors the integrity of the others’ internal operations. Communications between the president and his advisers are mostly (though not entirely) exempt from legislative or judicial review under the doctrine of *executive privilege*. Similarly, Article I places congressional organization and procedures beyond the scrutiny of the other branches. This provision was given new meaning in 2007, when the courts determined that a Federal Bureau of Investigation (FBI) search of the office of Rep. William J. Jefferson, D-La., who was under investigation for bribery, had been unconstitutional under the Constitution’s speech and debate clause.<sup>24</sup> The case established a precedent that members of Congress be provided advance notice and the right to review materials before the execution of a search warrant on their congressional offices.

### Judicial Review

The third branch, the judiciary, interprets and applies laws in particular cases when called upon to resolve disputes. In rare instances, this requires the judiciary to adjudicate a claim that a particular law or regulation violates the Constitution. This is called *judicial review*. Whether the framers anticipated judicial review

is open to question. Perhaps they expected each branch to reach its own judgments on constitutional questions, especially those pertaining to its own powers. Whatever the original intent, Chief Justice John Marshall soon preempted the other two branches with his Supreme Court's unanimous assertion of judicial review in *Marbury v. Madison* (1803). Judicial review involves both interpretation and judgment. First, "It is emphatically the province and duty of the judicial department to say what the law is." Second, the Supreme Court has the duty of weighing laws against the Constitution, the "supreme law of the land," and invalidating those that are inconsistent—in *Marbury*, a minor provision of the Judiciary Act of 1789.<sup>25</sup>

Despite the *Marbury* precedent, Congress—not the Court—was the primary forum for weighty constitutional debates until the Civil War. Before 1860, only one other federal law (the Missouri Compromise of 1820) had been declared unconstitutional by the Court (in *Dred Scott v. Sandford*, 1857). Since the Civil War, the Court has been more aggressive in interpreting and judging congressional handiwork. For the record, the Supreme Court has invalidated 182 congressional statutes in whole or in part—the vast majority of these since the start of the twentieth century.<sup>26</sup> This count does not include lower-court holdings that have not been reviewed by the Supreme Court. Nor does it include laws whose validity has been impaired because a similar law was struck down.

## Who Is the Final Arbiter?

Congress's two most common reactions to judicial review of its enactments are not responding at all or amending the statute to comply with the Court's holding.<sup>27</sup> Other responses include passing new legislation or even seeking a constitutional amendment.

Reconstruction laws and constitutional amendments after the Civil War explicitly nullified the Court's 1857 holding in *Dred Scott v. Sandford*.<sup>28</sup> More recently, a great deal of legislative ferment has followed the Supreme Court's ruling in *Citizens United v. Federal Election Commission* (2010),<sup>29</sup> a 5–4 decision that held that the First Amendment protects corporate, union, and nonprofit funding of independent political speech. The Supreme Court does not necessarily have the last word in saying what the law is. Its interpretations of laws may be questioned and even reversed. One study found that 121 of the Court's interpretive decisions were overridden between 1967 and 1990, an average of ten per Congress. The author of the study concluded that "congressional committees in fact carefully monitor Supreme Court decisions."<sup>30</sup> However, as Congress has become increasingly polarized, forging agreements to override important Court decisions has proven elusive.<sup>31</sup>

Nor are the courts the sole judges of what is or is not constitutional. Courts routinely accept customs and practices developed by the other two branches. Likewise, they usually decline to decide sensitive political questions within the province of Congress and the executive.