



## **WHAT'S A MARKUP?: ANSWERS TO THAT AND OTHER MYSTERIES OF THE LEGISLATIVE PROCESS**

The lexicon of Washington, D.C. may seem like a foreign language to those who live outside its environs, or “outside the Beltway” as Beltway insiders describe the world beyond the borders of the highway that encircles Washington. It is particularly true for those trying to understand Congress and how laws are made.

Scholarly works are available to explain the intricacies of law making. The [House](#) and [Senate](#) each have links to them on their home pages. This fact sheet is for those who need only basic information about the typical steps involved. It is not intended to be comprehensive and the reader is cautioned that there are many exceptions to the myriad rules involved in the process. Anyone needing precise information should refer to the scholarly works mentioned above.

### **U.S. GOVERNMENT BASICS**

The U.S. government has three equal branches:

- the Executive Branch
  - the “White House,” including the President of the United States (POTUS) and his closest advisers plus the “[Executive Office of the President](#),” which includes the Office of Management and Budget (OMB), Office of Science and Technology Policy (OSTP), National Space Council (NSpC), National Security Council (NSC), and many others. The President is in charge of the Executive Branch and the term “**the Administration**” is used to refer to the administration of whoever is President at a particular time.
  - Cabinet-level departments like the Department of State, Department of Defense, Department of Commerce (which includes NOAA), etc., and
  - independent agencies like NASA and NSF.
- the Judiciary
  - the Supreme Court and the federal court system; and
- the Legislative Branch
  - Congress – the House of Representatives and the Senate, and
  - congressional support agencies: the Government Accountability Office (GAO), the Congressional Budget Office (CBO), the Government Publishing Office (GPO), and the Library of Congress and its Congressional Research Service (CRS).

## CONGRESSIONAL BASICS

Congress is a “bicameral” institution meaning that it has two chambers, the House and the Senate.

- The House of Representatives is composed of 435 voting members who are elected every two years representing each State based on the population of the State (so California has more than Wyoming, for example). In addition there are non-voting “delegates” or “resident commissioners” from U.S. jurisdictions including the District of Columbia (D.C.), the U.S. Virgin Islands, Guam, and Puerto Rico. Under the Constitution of the United States, a census must be taken every 10 years to determine the population of each State and therefore the number of members of the House allocated to each.

Most votes in the House are decided based on a majority of those voting for or against something; for most pieces of legislation, to win, one must have at least 218 votes. There are exceptions, of course. Overriding a presidential veto requires a two-thirds vote, for example.

- The Senate is composed of 100 members elected every six years, two from each State. Terms are staggered so that approximately one-third of the Senate is up for election every two years. An individual Senator can stop a vote. The Senate is the “upper chamber” and was structured by our forefathers to be a more deliberative body than the House.

The word “Congress” also refers to the duration of the institution’s meetings. Each Congress lasts two years (the term of a Member of the House) and each of the years is a “session” of Congress. The years 2019-2020 are the **116<sup>th</sup> Congress**. The “1<sup>st</sup> session” is 2019 and the “2<sup>nd</sup> session” is 2020.

The rules of the House and Senate are completely different and the two chambers often seem to be at loggerheads. There is an old saying attributed to former Speaker of the House Tip O’Neil (D-MA<sup>1</sup>) when he was educating a new Democratic member about the ways of the House: “the Republicans are the opposition – the Senate is the enemy.”

## HOW CONGRESS FUNDS THE GOVERNMENT

Under the Constitution, Congress – and only Congress – determines how to spend money collected by the U.S. Treasury. The President requests funding, but Congress decides whether it agrees and passes legislation specifying how money will be spent. The President must sign those bills into law, so compromise is required.

### Timelines

The U.S. fiscal year is October 1 – September 30. Under the 1974 Budget Act, the President is required to send his budget request to Congress on the first Monday in February (that date can change if Congress agrees). The House and Senate each have an Appropriations Committee divided into 12 subcommittees with various jurisdictions. Congress is supposed to pass all 12 appropriations bills by September 30 and there are intermediate dates by when certain actions are supposed to be completed as detailed in a Congressional Research Service (CRS) [report](#). That rarely happens on time, however. Instead, Congress often passes one or more “Continuing Resolutions” (CRs) to provide temporary funding while it

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<sup>1</sup> Members of the House and Senate often are shown with letters like this after their names. The first letter refers to their political party: D is Democrat, R is Republican, and I is Independent. The letters after the hyphen refer to their state based on the Postal Service abbreviations. Speaker O’Neil was a Democrat from Massachusetts (D-MA).

continues to debate appropriations bills. A CR usually funds a department or agency at its previous year’s level and new programs cannot begin, although “exceptions” can be provided if a compelling case is made that something new must proceed apace. Exceptions are rare, but not impossible. If Congress fails to pass an appropriations bill for some or all government agencies, they must stop work. Another CRS [report](#) explains government shutdowns. A large portion of the government, including NASA, was shut down for 35 days, from December 21, 2018 to January 25, 2019, the longest in history, because of a dispute over funding for President Trump’s border wall.

## Authorization versus Appropriation

Congress deals with budgets in two ways: authorizations and appropriations. Conceptually, authorizing committees – like the House Science, Space and Technology Committee and the Senate Commerce, Science and Transportation Committee – have more detailed knowledge about a department or agency than an appropriations subcommittee. The authorizing committees conduct oversight of government activities and are supposed to pass authorization bills for most departments and agencies. Authorization bills provide policy direction, authorize (permit) agencies to start new programs, and recommend funding. They do not, however, actually provide any money. Only appropriations bills provide money (see below). As a practical matter, few authorization bills actually pass. The Department of Defense is the only department that reliably gets an authorization bill passed every year. NASA went many years without an authorization, but Congress did pass multi-year NASA authorization bills in 2000, 2005, 2008 and 2010. The funding provisions expire at the end of the period to which the bill applies (2013 in the case of the 2010 NASA Authorization Act), but policy provisions remain in force unless repealed or replaced by subsequent legislation. The most recent NASA authorization act was a one-year bill for FY2017 (the 2017 NASA Transition Authorization Act).

**Money is provided only in appropriations bills.** Conceptually, appropriators do not have the same level of detailed knowledge of agency programs as authorizers, and have a broader view of the federal budget and its competing demands. Strictly speaking, appropriators are not allowed to appropriate more money than has been authorized, although they may appropriate less. Congress may pass an authorization bill recommending \$20 billion for an agency, but also pass an appropriations bill approving \$17 billion for that agency. The agency gets \$17 billion. Appropriators are not allowed officially to include policy provisions in their bills, although in reality they do and since so few authorization bills pass Congress, the appropriations bills become de facto policy for budget-related matters.

Department/Agency	Authorizing Committees	Appropriations Subcommittee(s)
Dept. of Defense	House and Senate Armed Services	Defense Military Construction-VA
Intelligence Community	House and Senate Special Committees on Intelligence	Defense
NASA, NOAA, NSF	House Science, Space & Technology Senate Commerce, Science, and Transportation	Commerce-Justice-Science
Dept. of Transportation, FAA Office of Commercial Space Transportation	House Science, Space & Technology Senate Commerce, Science, and Transportation	Transportation-HUD

## TYPICAL STEPS FOR MAKING A BILL INTO LAW

Bills that become law must pass both the House and the Senate and be signed by the President. Bills must be passed in the Congress in which they are introduced (i.e., all legislation dies at the end of a Congress if it has not passed).

Step 1: A bill is introduced in the House by a Member of Congress (also called a Representative, or a Congressman or Congresswoman) or in the Senate by a Senator. It may be drafted by the Member or Senator (often with input from lobbyists or other stakeholders) or may be something that the Administration requests to be introduced in which the case the words “by request” appear on the bill. In some cases, especially appropriations bills, draft bills may move through committee and are not formally introduced until they are reported from the full committee.

Bills are given an alphanumeric designation based on the type of legislation and whether it is in the House or Senate. In the House, most bills of interest to this readership will begin with H.R., standing for House of Representatives, followed by a number. In the Senate it is S. followed by a number. There are other types of legislation – House Resolutions (H. Res.), House Concurrent Resolutions (H. Con. Res.), House Joint Resolutions (H. J. Res.) and their Senate counterparts.

Step 2: The House or Senate parliamentarian “refers” the bill to the appropriate committee(s) of jurisdiction. For the sake of brevity, we will assume a single committee for this discussion, but bills may be referred to more than one.

Step 3: The committee usually refers the bill to one of its subcommittees.

Step 4: The subcommittee and/or full committee holds one or more **hearings** to obtain information.

Step 5: If the subcommittee wants to move the legislation forward, it may hold a “**markup**” – a meeting where the Members or Senators literally “mark up” the bill by offering amendments that modify the existing language. Think of this being done by hand with a red pencil and the term “markup” becomes self explanatory.

Step 6: The subcommittee forwards the bill, as amended, to the full committee.

Step 7: The full committee may then hold another markup and report the bill, as amended, to the House or Senate. A written report may be submitted explaining why the committee did what it did. It is designated with a report (“Rept.”) number that begins with the number of the Congress. “H. Rept. 116-12” is the 12<sup>th</sup> House report of the 116<sup>th</sup> Congress. “S. Rept. 116-26” is the 26<sup>th</sup> Senate report of the 116<sup>th</sup> Congress. If there were many amendments, a “**clean bill**” with a new number may be reported.

Step 8: If the leadership of the House or Senate wants to proceed with the legislation, it must “**go to the floor**” meaning to the floor of the House or Senate chamber for consideration by the full body.

In the House, the bill normally goes first to the **Rules Committee** where that committee decides on the length of time that debate is permitted, how many and what kinds of amendments may be offered, whether points of order are allowed or waived, etc. The Rules Committee reports the bill to the House in the form of a House Resolution (H. Res.) – “**the rule**” – which is acted upon by the House before the bill itself is put forward. Often there is debate on the rule, which can be voted down although it does not happen very often. Once the rule is adopted, debate on the bill

begins. Sometimes bills are brought to the House floor under “**suspension of the rules**” which, as the term implies, means that regular rules are not applied. Instead, a two-thirds vote of the House is required to win passage. This approach is typically used with non-controversial bills.

In the Senate, advance agreement on length of time and permitted amendments etc. may be made by the Majority and Minority Leaders and brought to the floor as a unanimous consent agreement. The Majority Leader can try to bring a bill to the floor without such an agreement, but others may force a “**cloture**” vote where 60 Senators must agree that the bill should be debated.

On major pieces of legislation, the Administration often sends Congress a Statement of Administration Policy (SAP) stating what it does or does not like about the bill. SAPs are usually made public on the White House Office of Management and Budget’s (OMB’s) website.

Step 9: If the bill passes one chamber, it is sent to the other chamber for consideration. The other chamber may consider the bill de novo, or it may have a similar bill already on its agenda. In the latter case, it may either pass its own bill with its own bill number, or move to “**strike all after the enacting clause and insert in lieu thereof**” its text into the other chamber’s bill and then pass that bill.

Step 10: When the other chamber passes the bill, it is unlikely to be identical to what was sent over. The two chambers must then reach agreement on a compromise text. One method is to name a “**conference committee**” composed of members of each chamber appointed for that purpose. In practice, the committee may never meet face to face. Usually a “**conference report**” is submitted to the House and Senate that will have either a House or Senate report number to provide details on how money is to be spent or on policy matters.

In lieu of a conference committee, one chamber may pass an amended version of the bill and send it back to the originating chamber and continue this back and forth until agreement is reached.

Conference committees have become exceedingly rare and the back-and-forth process is used instead to reach a final compromise. The relevant committees issue a “joint explanatory statement” instead of a conference report.

Step 11: The compromise version of a bill must be sent back to both the House and Senate for passage and cannot be changed. If the House or Senate does not agree, the bill must return to the conference committee or into the back-and-forth process for further consideration.

Step 12: Once the final bill has passed both chambers, it is sent to the President for signature. If the President does not agree with the bill, he can veto it. Congress can override a veto by a two-thirds vote of both the House and the Senate.

Step 13: If the President signs the bill, it is sent to the Federal Register so that a “Public Law” number can be assigned. P.L. 116-18 is the 18<sup>th</sup> Public Law of the 116<sup>th</sup> Congress, for example.

## HYPOTHETICAL EXAMPLE

*(The following is completely hypothetical and is not meant to suggest that such an agency be created! Bill, report and public law numbers were invented for the purpose of this exercise using the 116<sup>th</sup> Congress as the example. The texts and status of actual pending legislation in the 116<sup>th</sup> Congress and links to Public Laws are available through the “Congress.gov” website operated by the Library of Congress: <http://congress.gov>.)*

The Administration wants a bill authorizing creation of and funding for a mythical Asteroid Detection and Warning Agency. It asks a Member of the House to introduce the bill by request. S/he introduces the bill and it is designated H.R. 14892. It is referred to the House Science, Space and Technology Committee, which refers it to the Space and Aeronautics Subcommittee. The subcommittee holds one or more hearings and then marks up the bill and forwards it to the full committee. The full committee holds a markup and reports the bill to the House with a report designated H. Rept. 116-3456. The bill is sent to the Rules Committee, which sends it to the House with a rule (H. Res. 11) allowing one hour of debate equally divided and controlled by the Chair and Ranking Member<sup>2</sup> of the House Science, Space and Technology Committee, 10 amendments are allowed to be considered under the five minute rule, and all points of order are waived. The House debates the bill and the amendments, ultimately passing the bill as amended.

The House sends the bill to the Senate, which already has been considering its own authorization bill for this mythical agency, S. 6666, which was reported from the Senate Commerce, Science and Transportation Committee with S. Rept. 116-4444. The Senate brings up S. 6666, debates and amends it. The Senate then passes H.R. 14892 after striking all after the enacting clause and inserting in lieu thereof the text of S. 6666 as amended.

Two versions of H.R. 14892 now exist, the one passed by the House and the one passed by the Senate. The House and Senate each appoint conferees to reach a compromise. Discussions are held, which may or may not include a face-to-face meeting. The conference committee reports its agreement in H. Rept. 116-3456, establishing the mythical agency and authorizing funding for three years: Fiscal Year 2020, \$10 million; FY2021, \$12 million; and FY2022, \$15 million.

The compromise version of H.R. 14892 is brought to the floors of the House and the Senate, each of which approves it. The bill is sent to the President, who signs it, and it becomes Public Law 116-807 (P.L. 116-807).

The mythical agency and its activities are now established in law and funding is authorized for three years. No funding has yet been appropriated, however, so no funding is actually available for the agency to operate.

The new mythical agency is determined to be within the jurisdiction of the Commerce-Justice-Science (CJS) subcommittees of the House and Senate Appropriations Committees. Those subcommittees have already been told how much money each may spend (their “302(b)” allocations, referring to a section in the 1974 Congressional Budget Act that established this process) for the upcoming fiscal year. Funding is

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<sup>2</sup> Committees are chaired by someone from the party in control of the chamber. The highest ranking person on the committee from the other party is called the “Ranking Member.” Democrats control the House and Republicans control the Senate in the 116<sup>th</sup> Congress, so all House committee Chairs are Democrats and Ranking Members are Republicans. In the Senate, committee Chairs are Republicans and Ranking Members are Democrats.

appropriated one fiscal year at a time (although agencies may be given two or more years to spend the money, hence the phrase “two year money” for example).

The subcommittees each hold hearings on the new mythical agency. Since additional budget allocations were not provided, they must weigh funding for the new mythical agency against the needs of other agencies within their jurisdiction. The House Appropriations Committee reports its hypothetical CJS bill, H.R. 14896, accompanied by a hypothetical H. Rept. 116-6456, appropriating \$8 million for the new mythical agency for FY2020. After passing through the Rules Committee, the House approves the legislation. The Senate Appropriations Committee reports its hypothetical version of the bill, S. 7777 in its hypothetical S. Rept. 116-5555, appropriating \$7 million for FY2020. The Senate passes the bill.

A conference committee is appointed where agreement is reached on \$7.5 million and reported to the House and Senate in the hypothetical conference report, H. Rept. 116-8496. The conference version of the bill is passed by the House and Senate and is signed into law by the President, becoming hypothetical P.L. 116-906.

The mythical agency is now established with \$7.5 million in funding for FY2020. It has no money for FY2021 or FY2022 since appropriations are for only one year, although Congress may have provided that the \$7.5 million could be spent over a two-year time period.