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Congressional Lawmaking: A Perspective On Secrecy and Transparency

Walter J. Oleszek
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Congressional Lawmaking: A Perspective On Secrecy and Transparency

Abstract
[Excerpt] Openness is fundamental to representative government. Yet the congressional process is replete with activities and actions that are private and not observable by the public. How to distinguish reasonable legislative secrecy from impractical transparency is a topic that produces disagreement on Capitol Hill and elsewhere. Why? Because lawmaking is critical to the governance of the nation. Scores of people in the attentive public want to observe and learn about congressional proceedings.

Yet secrecy is an ever-present part of much legislative policymaking; however, secrecy and transparency are not "either/or" constructs. They overlap constantly during the various policymaking stages. The objectives of this report are four-fold:

• first, to outline briefly the historical and inherent tension between secrecy and transparency in the congressional process;

• second, to review several common and recurring secrecy/transparency issues that emerged again with the 2011 formation of the Joint Select Deficit Reduction Committee;

• third, to identify various lawmaking stages typically imbued with closed door activities; and

• fourth, to close with several summary observations.

This report will not be updated.

Keywords
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Congressional Research Service

Congressional Lawmaking: A Perspective On Secrecy and Transparency

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CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

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Introduction

"If the work of legislation can be done shrouded in secrecy and hidden from the public," said former Speaker Thomas P. O'Neill, "then we are eroding the confidence of the public in ourselves and in our institution."[1] Open government is essential in a democratic system if Congress is to maintain public support and if its decisions are to gain popular acceptance and legitimacy. Through open chamber and committee proceedings, citizens are better able to evaluate, and hold accountable, the performance of Congress and its Members. In the view of one Senator: "I believe the more people are aware of what we are doing in the Senate and the Congress or in Washington generally, the more accountable we are. The more accountable we are, the better job we will do."[2]

Compared with the White House, the executive branch, and the Supreme Court, the U.S. Congress is the most transparent national governmental institution. The House and Senate are highly visible, permeable, and accessible institutions. As a representative body whose Members are elected to serve and act on behalf of their constituents, Congress should be the most public governing entity. House and Senate floor proceedings, for example, are covered gavel-to-gavel over C-SPAN (the Cable Satellite Public Affairs Network), which also airs many committee hearings and markups and even an occasional conference committee.

Since the 1970s, both legislative chambers have changed their procedures and practices to promote greater transparency.[3] For example, setting aside the aforementioned C-SPAN coverage of the House (since 1979) and Senate (since 1986), the legislature employs technology to make an array of congressional materials (bills, committee reports, floor amendments, etc.) available electronically to the general public. Lawmakers also use a variety of online tools to more effectively engage and communicate with their constituents. House and Senate committees have publicly accessible websites. The House even has a Congressional Transparency Caucus that, among other things, suggests further openness initiatives for the legislative branch. Moreover, given the plethora of contemporary communication outlets (the Internet, cable television, blogs, and so on), people have many "windows" through which to observe the workings of Congress. The ease of sharing information technologically also may create public expectations for more congressional openness and transparency.

The attentive public, in short, has numerous electronic gateways to Capitol Hill. In addition, there are scores of journalists, outside groups, think tanks, and academics who produce a huge amount of information and analysis about Congress. So much material is publicly available about Congress that at least three significant issues merit a brief mention: the accuracy, credibility, and reliability of the material; information overload, given the voluminous amount of legislative

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[1] *Congressional Record*, vol. 116, July 27, 1970, p. 25796. At the time, Representative O'Neill was a member of the Rules Committee. He successfully offered a consequential amendment in the House to the Legislative Reorganization Act of 1970 (P.L. 91-510). His amendment ended the secrecy of Committee of the Whole proceedings by permitting recorded votes on amendments. Prior to the 1970 act, votes in Committee of the Whole were adopted or rejected based on the aggregate vote (200 ayes, 180 nays, for example) without a public tabulation of how each Member voted on these motions.

[2] Senator Charles Grassley, *Congressional Record*, vol. 147, June 23, 2010, p. S5322.

[3] For a brief historical review of secrecy in Congress, see Paul Rundquist, "Secrecy in Congress," in Donald C. Bacon, Roger H. Davidson, and Morton Keller, eds., *The Encyclopedia of the United States Congress*, vol. 4 (New York: Simon & Schuster, 1995), pp. 1774-1776.

materials available to the public, much of which might be irrelevant (that is, distinguishing the wheat from the chaff); and the quality, timeliness, or clarity of the reasons for denying public access to, or the withholding of information about, closed-door legislative activities or meetings. At bottom, it behooves voters, the media, relevant interest groups, and others to hold Congress to high standards of transparency, which includes making legislative materials available online in easily searchable categories. Transparency implies not just increased online access to information, but also the reasoning of the principal actors as to why legislative decisions were made, or not made. Typically, much of this reasoning is made public during House and Senate floor debate, as well as in other venues (committee hearings, press conferences, etc.).

Openness is fundamental to representative government. The basic premise of transparency is that it increases the opportunity for responsive, responsible, and attributable decision making. Yet the congressional process is replete with activities and actions that are private and not observable by the public. As a Senator observed, "A lot goes on unseen on how we operate in this chamber."[4] How to distinguish what might be viewed as reasonable legislative secrecy from impractical transparency is a topic that arouses disagreement on Capitol Hill and elsewhere. Why? Because lawmaking is critical to the governance of the nation. To produce an act of Congress involves Members and many other relevant actors who come together—meeting and talking publicly and privately—to craft policies that they believe promote and serve the national interest.

Both secrecy and transparency suffuse the lawmaking process. The two are not "either/or" constructs; they overlap constantly during the various policymaking stages. The objectives of this report, then, are four-fold: first, to outline briefly the historical and inherent tension between secrecy and transparency in the congressional process; second, to review several common and recurring secrecy/transparency issues that emerged again with the 2011 formation of the Joint Select Deficit Reduction Committee; third, to identify various lawmaking stages that typically include closed door proceedings; and fourth, to close with several summary observations.

Secrecy and Transparency: An Overview

Legislative secrecy has clearly declined over the decades, but it has been part of the policymaking process from Congress's very beginning, and it remains an integral aspect of the lawmaking process. The Framers—who drafted the U.S. Constitution in closed meetings—even included a secrecy provision in that document. Article I, Section 5, states, "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy." Moreover, when "the first Senators gathered in New York for their first session [in 1789], they seemed to take it for granted that they would meet behind closed doors."[5] Not until 1794 did the Senate end its closed-door policy.[6] From the First Congress, a

[4] Senator Christopher Dodd, *Congressional Record*, vol. 156, July 13, 2010, p. S5775.

[5] Roy Swanstrom, *The United States Senate, 1787-1801, A Dissertation On the First Fourteen Years of the Upper Legislative Body* (Washington, DC: GPO, 1985), p. 238. This Ph.D. dissertation was published as a Senate document (99-19), 99th Cong., 1st sess.

[6] Not until 1929 did the Senate provide for open sessions for the consideration of nominations. In addition, communications from the President to the Senate with respect to treaties "shall be kept secret 'until the Senate shall, by their resolution, take off the injunction of secrecy'," which is typically accomplished by unanimous consent. Floyd M. Riddick and Alan S. Frumin, *Senate Procedure, Precedents and Practices* (Washington, DC: GPO, 1992), pp. 1299-1300. Each chamber today has, on occasion, deliberated in secret session, such as impeachment trials in the Senate or the consideration of classified information in the House.

House visitor's gallery enabled the public to observe that chamber's proceedings, but, "[u]p to and during the War of 1812, secret sessions of the House were held often."[7]

An early dispute between confidentiality and transparency occurred in the House in 1793. The previous year the House had adopted a rule requiring the chamber to be cleared of all persons, except lawmakers and the Clerk, so the membership could receive confidential communications from the President. Members disagreed about the need to invoke this rule. On one side were those who disapproved of the rule and urged the galleries to be kept open to the public. The points they raised still resonate today:

> [S]ecrecy in a Republican Government wounds the majesty of the sovereign people; that this Government is in the hands of the people; and that they have a right to know all the transactions relative to their own affairs; this right ought not to be infringed incautiously, for such secrecy tends to injure the confidence of the people in their own Government.[8]

In reply, proponents of closing the galleries to the public contended that just "because this Government is Republican, it will not be pretended that it can have no secrets....To discuss the secret transactions of the Government publicly, was the ready way to sacrifice the public interest."[9] The result of the debate was that the galleries were cleared of the public for these communications.

Like so many other debates about principles or values (liberty versus security, duties versus rights, for example), there are few, if any, inviolable criteria to suggest that openness is always to be preferred to confidentiality or secrecy. As Senator Everett McKinley Dirksen, the legendary Republican leader, stated, "I am a man of fixed and unbending principle, and one of my principles is flexibility."[10]

Importantly, the historical trend has been to promote heightened openness and transparency in both chambers. Few would deny the significance of this development in informing the country and holding public officials accountable for their actions and decisions.

President Barack Obama emphasized similar sentiments: "A democracy requires accountability, and accountability requires transparency."[11] On the other hand, the president's former director of communications modified the President's statement, suggesting that there is a distinction between making a decision public and revealing the private negotiations that led to that decision. As the director noted:

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[7] Wm. Holmes Brown and Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* (Washington, DC: GPO, 2003), p. 440. Recorded votes in the Committee of the Whole House on the state of the Union, the major amending forum in the House, were virtually secret until passage of the Legislative Reorganization of Act of 1970. Prior to the 1970 act, Members who voted in the Committee of the Whole were not recorded by name; instead, only vote totals (e.g., 200 ayes, 150 nays) on amendments were provided in the *Congressional Record.*

[8] *Annals of Congress*, vol. 4, December 27, 1793, p. 150.

[9] Ibid.

[10] Roger H. Davidson et al., *Congress and Its Members,* 13th ed. (Washington, DC: CQ Press, 2012), p. 279.

[11] Quoted in Jeremy Koulish, "The State of State Budget Transparency," *State Tax Notes*, June 29, 2009, p. 1045. For a broader perspective, see Marc Ambinder, "Obama's Secret Problem," *National Journal*, November 12, 2011, p. 63.

> For us, transparency has never meant that we put our internal decision-making on display. We didn't during the campaign. We try not to do it here [in the White House]. Transparency is what the decision is, and why it was made. The process by which it was arrived at is not central.[12]

As in the White House, transparency is not an "all or nothing" proposition, something that is appropriate at all times in the House and Senate and for every conceivable legislative action or circumstance. Secrecy has its place in Congress, especially in building winning coalitions behind the scenes through "horse trading" and other means.[13] Persuasion is typically more effective in private than in a public setting. Although "secrecy" carries a negative connation, for more than 200 years it has been recognized by numerous legislative practitioners as essential to the conduct of congressional business. (Less value-laden words for secrecy—setting aside the aforementioned "confidential"—might be "private," "privileged communication," "executive session," "in confidence," or "off-the-record.")

Understandably, the secrecy/transparency clash continues because people disagree over when, whether, why, or how much secrecy is appropriate in the lawmaking process. Some people advocate perfect transparency; others emphasize the value of private legislative meetings. Two prominent individuals—President Woodrow Wilson and Robert Luce, House Member (1919-1935; 1937-1941) and noted political science author—set out in bold relief sharply divergent perspectives on transparency versus secrecy in congressional proceedings. The issue they address is whether secrecy (confidentiality) is acceptable in legislative assemblies. Wilson emphasized that any secrecy in legislatures is simply unacceptable. Luce challenged that assertion, calling it impractical and impolitic. He stressed the value of confidentiality in legislative deliberations.

Woodrow Wilson

> The light must be let in on all processes of lawmaking…. As soon as the Legislature meets, a bill embodying that [promised] legislation is introduced. It is referred to a committee. You never hear of it again. What happened? Nobody knows what happened. I am not intimating that corruption creeps in; I do not know what creeps in. The point is that not only we do not know, but it is intimated, if we get inquisitive, that it is none of our business. My reply is that it *is* our business, and it is the business of every man in the State; we have a right to know all the particulars of that bill's history. There is not any legitimate privacy about matters of government. Government must, if it is to be pure and correct in its processes, be absolutely public in everything that affects it. I cannot imagine a public man with a conscience having a secret that he would keep from the people about their own affairs.[14]

> There are private [lawmaking] processes. Those are processes that stand between the things that are promised them, and I say that until you drive all things into the open, you are not connected with your government; you are not represented; you are not participants in your government. Such a scheme of government by private understandings deprives you of representation; deprives the people of representative institutions. It has got to be put into the heads of legislators that public business is public business.[15]

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[12] Ken Auletta, "Non-Stop News," *The New Yorker*, January 25, 2010, p. 41.

[13] Recall the oft-quoted adage attributed to German Prime Minister Bismarck that neither lawmaking nor sausage-making should be observed by the public.

[14] Woodrow Wilson, *The New Freedom* (New York: Doubleday, Page and Co., 1918), pp. 125-126.

[15] Ibid., p. 131.

Robert Luce

> It may, of course, be said that the public ought to hear every argument addressed to that judgment, whether or not addressed by an outsider or by a fellow member. But is not that purely fanciful? Would it be suggested that no legislator ought ever to converse with a fellow member or anybody else about any measure in hand, unless a reporter were within hearing? Nothing short of that would disclose the particulars of every bill's history, which Mr. Wilson says we have a right to know. The contention is wholly unpractical, and not justified by any rule of conduct in the daily relations of life.[16]
>
> Universal experience tells us that in all manner of conference and deliberations, we reach results more speedily and satisfactorily if those persons directly involved are alone. Behind closed doors compromise is possible; before spectators it is difficult.[17]
>
> Legislators are neither cowards nor tricksters because they deliberate in private. They are but using in the public business those methods that have been found most efficacious and salutary in all the other relations of life. Those methods are based on the characteristics of human nature. He who would quarrel with them should not rest until he has changed human nature.[18]

The divergent views of Wilson and Luce about secrecy and transparency surfaced again when the Joint Select Committee on Deficit Reduction, established by the 112th Congress, began its work.

Secrecy vs. Transparency: The Joint Select Committee on Deficit Reduction

In August 2011, President Obama signed the Budget Control Act (BCA) into law (P.L. 112-25). The statute created a 12-member, bipartisan Joint Select Committee on Deficit Reduction. In the wake of soaring deficits and debt, the Joint Committee—dubbed the "supercommittee" by the press—was granted large authority to recommend by November 23, 2011, cuts in federal spending in the $1.2 trillion to $1.5 trillion range over 10 years. The joint panel could have proposed even more (or less) in fiscal savings. Its recommendations would have been considered in the House and Senate under expedited procedures that limited debate and prevented amendment.[19]

Given the joint panel's historic assignment, many lawmakers and others urged the joint panel to conduct all of its deliberations in public. "Some argue you can't have" a completely transparent

[16] Robert Luce, *Legislative Procedure* (Boston: Houghton Mifflin Co., 1922), pp. 150-151.

[17] Ibid., p. 151.

[18] Ibid.

[19] On November 21, 2011, the co-chairs of the Joint Committee reported that the panel could not reach an agreement to reduce the deficit by at least $1.2 trillion over the next decade. See, for example, Jonathan Nicholson et al., "Deficit Panel Throws in Towel on Reduction Talks, Calls for Congress to Build on Its Work," *Daily Report for Executives*, November 22, 2011, p. G-5; Janet Hook and Naftali Bendavid, "Deficit Panel Folds Its Tent," *Wall Street Journal*, November 22, 2011, p. A1; Lori Montgomery and Paul Kane, "Debt Panel Admits Defeat," *Washington Post*, November 22, 2011, p. A1; and Jennifer Steinhauer et al., "With Collapse of Panel's Work, Battleground Shifts to the Automatic Cuts," *New York Times*, November 22, 2011, p. A16.

process, a House lawmaker stated. "I think we need to have that."[20] A House party leader underscored the importance of transparency for securing Member support:

> [The joint panel's recommendation] cannot be a product of secrecy. They may want to narrow issues that will be made ... but that has to be done in a public way .... In order for our members to embrace [the recommendation], they have to know more about it and know why it has come to the place that it has.[21]

Outside groups also weighed in on the issue. Six days after the President signed the BCA into law, 16 organizations (e.g., the Sunlight Foundation, the Center for Responsive Politics, and the Project on Government Oversight) wrote to the bipartisan House and Senate leadership urging them to ensure that the joint panel conduct its deliberations in public. They also proposed 16 ways to make the joint committee's work public, such as "Make the committee's report public 72 hours prior to the final vote. Also publish working drafts (including the chairman's mark) and amendments online."[22]

The leaders of the House's Transparency Caucus introduced legislation (H.R. 2860) requiring, among other things, the public disclosure of meetings that joint panel members and staff had with lobbyists; the campaign contributions received by panel members; and the availability online of the joint committee's report and proposed legislative language 72 hours before the vote occurred on the panel's deficit reduction plan. As a co-founder of the Transparency Caucus stated, "The super committee has been given unprecedented power to make unprecedented decisions, and we must call for unprecedented transparency."[23] Various Senators wrote to the joint panel urging it to adopt a sunshine rule "that would require any meeting of the committee with a quorum of members to be public and televised."[24] Still another Senator emphasized that the American people "have come to expect openness and transparency in the legislative process. I am not aware of any situation where a legislative committee responsible for matters of such profound sweeping importance operates in secret."[25]

On the other hand, a co-founder of the Transparency Caucus acknowledged during an interview with a journalist that the joint panel would meet in secret. "You know it; I know it," he said. "There comes a point at which even transparency says that the deliberation process … is going to ultimately, at some point, be private."[26] Bolstering the co-founder's view were various explanations as to why secrecy can be essential to congressional deliberations. One is the contention that special interests exercise such huge influence in the legislative process that they could block and frustrate the work of the joint panel if it met in public. "The reason people want a public forum is so that nothing happens," exclaimed former Senator Judd Gregg of New Hampshire. "That's the bottom line here [for] the interest groups on the hard right and the hard

[20] Rosalind S. Helderman, "Debt Committee Secrecy Worries GOP Freshmen," *Washington Post*, November 2, 2011, p. A6.

[21] Mike Lillis, "Democratic Angst Increases Over Secretive Supercommittee Process," *The Hill*, November 9, 2011, p. 3.

[22] The groups' letter to the leadership can be found on the various websites of these organizations. The Project on Government Oversight's (POGO) website is http://www.pogo.org.

[23] Steven T. Dennis, "Openness Urged for Debt Panel," *Roll Call*, September 8, 2011, p. 3.

[24] Ibid.

[25] Robert Pear, "Many in Both Parties Want a Window Into the Deficit Reduction Panel's Work," *New York Times*, October 11, 2011, p. A17.

[26] Daniel Newhauser, "Issa Won't Push for Deficit Panel Transparency," *Roll Call*, October 11, 2011, p. A-22.

left," he said.[27] Too much transparency might produce gridlock instead of policy success. Conversely, too little transparency could provoke sufficient public criticism and opposition to doom the product fashioned in secrecy.

Among other reasons why private legislative meetings could benefit the public interest are these: they could enhance fruitful and serious negotiations; allow lawmakers to raise creative or "trial balloon" ideas without worry of public condemnation or ridicule; prevent time-wasting partisan grandstanding, encouraged by the presence of cameras; and permit Members to engage in frank and bipartisan negotiations without worry that they could be castigated by partisan commentators for subverting their party's principles. Lawmakers would likely have needed to spend considerable time defending themselves against such attacks. Moreover, research by some political scientists suggests that most voters subscribe to the oft-quoted adage that, like sausage-making, lawmaking is not something they care to observe. As a scholar explained,

> These Americans would much rather have Congress do its work behind closed doors so long as their representatives are not being bought by special interests and so long as the public has the opportunity to learn about decisions, the reasons for and against them, and why their representatives decided what they did.[28]

Views on transparency versus confidentiality often hinge on what people believe is a reasonable balance between the two, especially when the array of issues being dealt with is complex, controversial, and politically charged. Two members of the joint panel provided their perspective on this matter. A House Democratic member of the Joint Committee put it this way: "In this polarized environment, it's important for [there to be] some opportunity for Members to have an exchange of views [in private]. If we get to the point where we're marking something up, that will obviously be in public."[29] Private discussions among panel members were a reasonable way to try to find common ground on a deficit reduction plan. A GOP Senator on the panel indicated that there would be a mix of open and closed meetings, a two-track approach. One track would involve closed-door discussions and negotiations among panel members. The other track would permit non-panel lawmakers and outsiders to present publicly their ideas for deficit reduction. "I think there needs to be a good balance here where people have input, people feel like it's a transparent process, but we also are able to have a candid [private] exchange with" our joint committee colleagues.[30]

Sensitive to the openness concerns of their colleagues and others, the Joint Committee adopted rules that imposed (in Rule V, "Public Access and Transparency") a number of requirements for transparency in the panel's proceedings. They included

> 1. (a) The Joint Select Committee shall establish and maintain a publicly available website, and shall make its publications available in electric form thereon. Such publication will include final Committee transcripts and hearing materials as available.

[27] Stephen Dinan, "Debt Panel Trade-Off: Openness vs. Efficacy," *Washington Times*, August 24, 2011, p. A4.

[28] Quoted in Dinan, "Debt Panel Trade-Off: Openness vs. Efficacy, p. A4. The political scientist was Elizabeth Theiss-Morse who, along with her co-author (John R. Hibbing), wrote *Stealth Democracy* (New York: Cambridge University Press, 2002).

[29] Newhauser, "Issa Won't Push for Deficit Panel Transparency," p. A-22.

[30] Dinan, "Debt Panel Trade-Off: Openness vs. Efficacy," p. A4.

> (b) Not later than 24 hours after the adoption of any amendment to the report of legislative language, the Co-Chairs shall make the text of each amendment publicly available in electronic form on the Joint Select Committee's website.
>
> (c) Not later than 48 hours after a record vote is completed, the information described in clause 2(b) of rule III[31] shall be made publicly available in electronic form on the Joint Select Committee's website.
>
> 2. Each hearing and meeting of the Joint Select Committee shall be open to the public and the media unless the Joint Select Committee, in open session and a quorum being present, determines by majority vote that such hearing or meeting shall be held in closed session. No vote on the recommendations, report or legislative language of the Joint Select Committee, or amendment thereto, may be taken in closed session.
>
> 3. To the maximum extent practicable, the Joint Select Committee shall—
>
> (a) provide audio and video coverage of each hearing or meeting for the transaction of business in a manner that allows the public to easily listen to and view the proceedings; and
>
> (b) maintain the recordings of such coverage in a manner that is easily accessible to the public.

As is common for many House and Senate committees, the Joint Select Committee could hold pre-hearings or pre-markups that were closed to public observation.[32]

Private Proceedings and Discussions on Capitol Hill

Many people are likely to agree that the public's business on Capitol Hill requires a measure of secrecy and confidentiality. How much is certainly debatable, and, as noted earlier, Congress has taken numerous actions to open its proceedings to public observation. Congress has made scores of legislative materials, documents, and reports available online to the public, and Members have numerous ways to communicate effectively and openly with their colleagues and constituents. In addition, the legislative branch is covered by a large press corps. In today's open and Internet era, "secret" does not mean what it used to on Capitol Hill.

Still, everything that involves the actions and activities of the legislative branch is not absolutely public. Accordingly, many individuals would likely agree that some measure of confidentiality is justifiable in the congressional process. A few examples—broadly tracking various lawmaking stages—illustrate selectively where confidentiality is a common occurrence in the business and work of the legislative branch. They include the following:

[31] Rule III, clause 2(b), stated, "the result of each record vote taken by the Joint Select Committee, including a description of the amendment, motion, order, or other proposition, the name of each member voting for and voting against such amendment, motion, or order, or other proposition, and the names of the members of the Joint Select Committee present but not voting."

[32] On September 8, 2011, at the Joint Committee's organizational meeting where its rules were adopted, the two co-chairs (Representative Jeb Hensarling and Senator Patty Murray) had a colloquy specifically on this point. They both affirmed that House and Senate practices allowed consultation on a committee to occur in private settings.

Development of Legislation

Members introduce legislation for a variety of reasons, such as addressing a problem, accommodating constituency interest, offering innovative policy approaches, or laying claim to an idea. The process of transforming an idea into appropriate legislative language is typically an interactive, behind-the-scenes process. For example, to minimize policy and jurisdictional conflicts and to ensure broad agreement among the three House committees responsible for drafting legislation to implement President Obama's major overhaul of the health care system, House leaders "launched lengthy closed-door meetings among the chairmen of the three panels—Education and Labor, Energy and Commerce, and Ways and Means—plus the chairmen of the three respective subcommittees that handle health issues."[33] Other pertinent pre-introductory examples of secrecy in developing legislation are the following:

- Members and their staff consult privately with numerous individuals and groups about their proposals for new federal programs or activities.
- Confidential drafts of the legislation are prepared by attorneys in the House or Senate Office of Legislative Counsel; there are often multiple drafts of bills as staff aides and Members review the accuracy, effect, and import of the legislative language.[34]
- Research and review will be undertaken by various individuals and groups to ensure that the proposed bill is constitutional and avoids unintended consequences. The research and review findings are likely to remain confidential.
- Staff aides and others may spend considerable time behind closed doors devising an attractive title for their bill, such as the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism).[35]
- Before a measure's formal introduction in the House or Senate, Members may solicit the reaction of various groups, selected colleagues, or other relevant actors or entities. These reactions may never see the light of day.

All of this and more can be part of the pre-introductory process that affects the content of legislative measures. And this process—in whole or in part—is closed to public observation. Members want to revise and revamp their measures in private without journalists, special interests, or constituents challenging every word change or every legislative draft. A Member's rough draft of legislation is often perfected in private.

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[33] Richard E. Cohen and Brian Friel, ""The Big Lift,"" *National Journal*, July 4, 2009, p. 28.

[34] Note that under the Speech and Debate Clause of the U.S. Constitution (Article I, section 6), "for any speech or debate in either House," Senators and Representatives "shall not be questioned in any other Place." An ancient legislative privilege, the Speech and Debate Clause provides lawmakers immunity from most civil and criminal lawsuits relating to their conduct of legislative business. Decisions by the U.S. Supreme Court involving the Speech and Debate Cause indicate that it covers more than debate on the House or Senate floor. The Court's holdings provide Members absolute protection when introducing and voting on bills and resolutions, preparing and submitting committee reports, acting at committee hearings and meetings, and conducting investigations and issuing subpoenas. Todd Tatelman, a former CRS attorney, provided the author with background information on the Speech and Debate Clause.

[35] Emily Poe, "All In the Name," *Roll Call*, September 20, 2011, p. 27.

Referral of Legislation

Measures that are introduced in the House or Senate are referred to the appropriate committee(s) of jurisdiction by the House or Senate Parliamentarian, as the case may be. Members and staff aides often meet with these officials in private, prior to a bill's formal introduction, to discuss which committee(s) is likely to receive the measure. Artful drafting, for example, can influence the reference of a measure to a committee favorably disposed to the legislation rather than one likely to take no action at all on the measure. As a Senate Parliamentarian stated, "A great deal of our time in the office is spent advising staff on what to include or what to delete if in fact they have a preference in terms of committee referral."[36] These are private discussions.

Committee Activities

Today, the key formal committee policymaking stages—hearings, markups, and reports—are typically open to the public. In fact, House and Senate rules require that hearings and meetings be open to the public, but there are certain limitations stipulated in these rules. For example, Senate Rule XXVI identifies six reasons or circumstances when a committee can vote to close a session to the public. They include (1) national security issues or the confidential conduct of the nation's foreign relations; (2) internal staff management; (3) an unwarranted invasion of the privacy of an individual or exposing a person to public contempt; (4) the disclosure of law enforcement agents or information that could hinder a criminal investigation or prosecution; (5) the revelation of trade secrets; and (6) the exposure of matters required to be kept confidential under other provisions of law or government regulations.

To be sure, there are many other committee matters that take place behind closed doors. For example, decisions to hold hearings and their timing are decided by the committee or subcommittee chair, perhaps in consultation with other panel members. Who should testify, how many should testify, and in what order are also matters determined in private. Once committee leaders decide to conduct hearings, then chamber and committee rules require that the date, time, place, and subject matter of any hearing be announced at least one week in advance of the commencement of the hearing.

The steps leading to the committee amendment stage, called "markup," are also typically suffused with private discussions among committee leaders, professional staff aides, party leaders, and other relevant actors. An important topic for consideration is what should be the markup vehicle: for example, the bill as introduced and referred to the panel, a subcommittee-prepared committee print, or a document developed by the chair, called the "chair's mark." These informal discussions and meetings surrounding "the mark" are not subject to public observation. (Sometimes, as noted earlier, there are private pre-hearing and pre-markup sessions that occur before a committee meets in public to conduct its official business.)

Chamber Consideration

Scheduling of legislation for floor action is the prerogative of the Speaker of the House and the Senate majority leader. House and Senate rules and practices influence how these leaders carry out this responsibility; however, each largely determines if, when, and in what order measures or

[36] "Senate Parliamentarian Can Control Course of Bills," *C-SPAN Update*, January 14, 1990, p. 6.

matters are taken up in their chamber. Numerous factors influence their decisions, such as the pressure of national and international events; bicameral considerations; whip counts; policy and political considerations; the administration's preferences; statutory requirements; impending deadlines; and the need to act on "must pass" legislation. Discussions about these and other scheduling matters involve private meetings and talks among numerous relevant actors.

Once measures or matters reach the floor, they are generally open to debate and amendment. Recall that C-SPAN provides gavel-to-gavel coverage of floor proceedings. However, C-SPAN cameras are not covering private discussions in or near the chamber about who should speak on the bill, when, or in what order. Nor are the cameras broadcasting the closed strategy sessions among party leaders, committee members, and other influential legislators about how to strengthen (or weaken) measures through the amending process, if amendments are permitted to the legislation.

Resolving Bicameral Differences

It is quite common, especially on major and controversial legislation, for the House and Senate to pass different versions of the same bill. The Constitution requires, however, that before measures can be sent to the President for signature or veto, they must pass each chamber in identical form. The most well-known of the bicameral resolution devices is the conference committee, sometimes called the "third house of Congress," where conferees from the House and Senate meet to hammer out an accord (the conference report).

From 1789 until the mid-1970s, with only a handful of exceptions, conference committees met in secret. In 1975, both chambers adopted rules requiring open conference meetings unless a majority of the conference members from either chamber voted in public to hold secret sessions. Two years later, the House strengthened the openness requirement by adopting a rule requiring the full House to authorize its conferees to vote to close a conference. On several occasions, C-SPAN has televised conference committee meetings.

Notwithstanding the aforementioned mid-1970s rule changes, House and Senate conferees regularly meet informally and privately to identify ways to reconcile inter-chamber disagreements. As a Senator stated in a comment made to a colleague,

> The Senator knows when we started the openness thing we found it more and more difficult to get something agreed to in conferences, it seemed to take forever. So what did we do? The Senator knows what we did. We would break up into smaller groups [and meet privately] and then we would ask our chairman ... to see if he could not find his opposite number on the House side and discuss this matter and come back and tell us what the chances would be of working out various and sundry possibilities.[37]

The top negotiators for each chamber may even be invited to the White House to discuss administration goals for the conference. Private bargaining sessions can involve Members, staff aides, lobbyists, and other actors. Worth noting is that informal private negotiations and strategy meetings regularly take place even before a conference committee is formally constituted. Further, when the two chambers employ the exchange of amendment procedure (the so-called

[37] Senator Russell Long, *Congressional Record*, vol. 132, February 20, 1986, p. 2524.

ping pong approach) to resolve their differences on legislation, the compromise amendment might be negotiated in secret by each chamber's party and committee leaders.

Presidential Consideration

The Constitution grants the President a qualified veto over legislation sent to him by Congress. Because vetoes are difficult to override—a two-thirds vote of each chamber is required—the President is a major actor in determining the fate of measures. Presidents and lawmakers recognize this reality and seek periodically to practice the politics of differentiation through the veto, particularly during times of divided government. A veto fight with Congress may suit a President who wants to highlight how his views differ from the other party's. For its part, Congress may deliberately send the President a measure that the legislative proponents want him to veto, so they can use the issue on the campaign trail—a "winning by losing" strategy. These political/electoral strategies are crafted behind-the-scenes with neither reporters nor cameras present in the room.

Summing Up

Although Congress is the most open branch of the federal government, there are numerous occasions when secrecy and confidentiality serve strategic, political, policy, institutional, and electoral objectives. Several have already been noted, but there are many more. To cite several more: congressional party leaders are chosen in secret party caucuses at the start of each new Congress; the policy committees of each party meet privately; numerous informal groups (the Republican Study Committee or the Blue Dogs, for instance) convene in closed session; the respective party caucuses in each chamber meet in secret; party leadership strategy sessions occur in secret; and House and Senate party leaders meet periodically behind closed doors. The list goes on. In one of the most controversial and historic events in American political history—the impeachment and acquittal of President William Jefferson Clinton—there were innumerable secret and confidential discussions and meetings that occurred in the House, Senate, and White House.[38]

The contemporary Congress conducts much of its business in public, perhaps more so than ever in its over 200-year history.[39] Many factors account for this ongoing pattern of growing legislative transparency, such as the communications revolution, an aggressive and competitive media, a better educated and more attentive citizenry, and reform-minded lawmakers who strive to further open their institution to public observation. Yet secrecy and confidentiality remain durable features of the congressional process. Why? At least three factors are important to reemphasize.

[38] See Peter Baker, *The Breach: Inside the Impeachment and Trial of William Jefferson Clinton* (New York: Scribner, 2000).

[39] To be sure, there have been contemporary Congresses where openness on various measures was not the order of the day. For example, hearings and markups by committees on certain bills were bypassed or the floor amendment stage was not completely open.

Facilitate Legislative Negotiation

"Legislation is hard, pick-and-shovel work," remarked Representative John Dingell, and it often "takes a long time to do it."[40] Part of what makes lawmaking hard work is the difficulty of mobilizing multiple winning coalitions at numerous lawmaking stages. With 535 independently elected lawmakers who represent diverse geographical areas and hold divergent partisan and ideological preferences, policy conflicts and disputes are inevitable, and accommodations and bargains often hard to reach. Major and consequential acts of Congress are typically the products of scores of big and small compromises. As former Senator Alan K. Simpson exclaimed, "You cannot legislate without compromise."[41] Lawmakers determine for themselves whether they are willing to compromise. "There are some things one cannot compromise," remarked Senator Robert C. Byrd.[42]

The broad point is that putting together winning coalitions to pass legislation for a nation of more than 300 million people is arduous work. And the practical reality is that much of that work occurs in secret. Away from the spotlight of the media and the watchful eyes of lobbyists, it is usually easier for opposing sides to reach agreements that each views as "win/win" rather than "win/lose." Regularly, lawmakers—party and committee leaders, minority party members, rank-and-file legislators—participate in closed negotiating sessions to discuss ways to accomplish their policy and political objectives. Closed-door meetings and discussions are sometimes the only way for lawmakers to find the common ground necessary to create national policies. As one lawmaker stated, "What is representative democracy about if it does not entail the accommodation of different points of view?"[43]

Promote Candor and Frankness

Confidential meetings promote deliberations among participants who might be reluctant or unwilling in a public setting to raise their concerns, issues, or problems with legislative proposals. Why? One key reason: lawmakers may be hesitant to challenge proposals or raise new ideas in public that could potentially cause them embarrassment back home or be used against them in the next campaign. Private discussions minimize or eliminate Member concerns about negative repercussions that might flow from expressing agreement (or disagreement) with the conventional view or the political wisdom of the moment.

Closed-door sessions encourage a freer, less inhibited exchange of ideas among lawmakers. These sessions can suggest who is really for or against a bill and the intensity of their commitment; what political or electoral "carrots and sticks" might be employed to win the support of wavering lawmakers; how to bridge fundamental political or ideological disagreements; what "message strategy" might be developed to rally public support for the legislation; how House or Senate rules and precedents could be employed to foil (or expedite) a bill's passage; or what approaches might resolve intraparty, interparty, or legislative-executive branch disputes. Lawmakers could

[40] Margaret Kriz, "Still Charging," *National Journal*, December 6. 1997, p. 2462.

[41] Claudia Dreifus, "Exit Reasonable Right," *New York Times Book Review*, June 2, 1996, p. 26.

[42] Helen Dewar and Eric Pianin, "For Byrd, Getting His Way Is Part of Senate Tradition," *Washington Post*, June 24, 1993, p. A6.

[43] Lee H. Hamilton, "We Need To Embrace Compromise, Not Insult It," The Center on Congress at Indiana University, May 16, 2011, p. 1. See Congress_Newsletter@listserv.Indiana.edu.

raise and consider some of these matters in various public settings. It seems probable, however, that there would be reluctance to put everything on the table and say what one really believes about an issue, individual, group, or party. Congress, in brief, would likely find it quite difficult to craft and enact priority legislation absent private meetings and discussions.

A Sanctuary for Freer Deliberation

Today's Congress functions in a political environment much different from that of the 1950s. Two examples make the point. First, the number of major interest groups during the 1950s could almost be counted on a person's fingers. Second, the Congress of the 1950s received relatively little publicity in the press or on the radio (television was still in its infancy). Contemporary developments have transformed both conditions.

As for special interest representation, the nation's capital is filled with lobbying groups and associations. There are scores of industry associations, public affairs lobbies, single-interest groups, and many other advocacy organizations. Special interest groups are major policymaking players. They provide lawmakers with information and analysis, drafts of bills and amendments, campaign contributions, and get-out-the-vote efforts. Many interest groups also are informally affiliated with one party or the other, and their demands for "loyalty make it difficult for lawmakers to compromise."[44] Ironically, some of the sunshine reforms of the 1970s had the unintended consequence of strengthening the role of special interests. As Political Scientist R. Douglas Arnold recounts:

> Legislators have discovered the strengths and weaknesses of specific procedures by trial and error. Open meetings, open rules, unlimited recorded votes seemed like good ideas when they were proposed, and they were backed by Common Cause and others who sought to reduce the power of special interests. Unfortunately, these reforms were based on a faulty understanding of the mechanisms that allow for citizens' control. We now know that open meetings filled with lobbyists, and recorded votes on scores of particularistic amendments, serve to increase the power of special interests, not diminish them.[45]

As for the media, during the 1950s, 1960s, and 1970s, most Americans received their news—and many still do—from the three major broadcast networks (ABC, CBS, and NBC). Major media changes came with the advent of cable television, the Internet, blogs, YouTube, and more. Today, people can select from scores of around-the-clock news sources and public affairs programming. The proliferation of media means that people can choose to listen to and watch news programs that suit their political predilections. As one analyst noted, "People are increasingly picking their media on the basis of partisanship. If you're a Republican and conservative, you listen to talk radio and watch the Fox News Channel. If you're liberal and Democratic, you listen to National Public Radio and watch the *News Hour* on the public broadcasting system."[46] What these contemporary media developments mean for lawmakers is often greater difficulty in mobilizing the public consensus and support required to win enactment of consequential policy proposals.

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[44] Dan Carney, "Transforming the Nation by Fits and Starts," *CQ Weekly*, January 29, 2000, pp. 162-163.

[45] R. Douglas Arnold, *The Logic of Congressional Action* (New Haven, CT: Yale University Press, 1990), p. 275.

[46] Robert J. Samuelson, "Bull Market for Media Bias," *Washington Post*, June 23, 2004, p. A21.

Private discussions and meetings offer lawmakers a "sanctuary" where their opinions and ideas can be raised and vigorously debated without concern about outside political repercussions. Members recognize the value of confidential discussions: they can learn about complex issues, ask questions, and advance opinions and judgments that conflict with status quo preferences—all without worry about being subjected to interest group-sponsored attack ads in their state or district or castigated by various print and media commentators for even considering a deviation from the party line.

Two final points: First, Congress has taken large strides over the decades, as mentioned earlier, to open further its committee and floor proceedings to public observation. For example, a number of new House rules for the 112th Congress (2011-2013) provided greater transparency for House and committee operations, such as requiring committee chairs to "make the text of a measure or matter being marked up publicly available in electronic form at least 24 hours prior to the commencement of the meeting"; obligating the chairs to "make the results of any record vote publicly available in electronic form within 48 hours of the vote"; and strengthening provisions "to ensure that Members and the public have easy [electronic] access to bills, resolutions, and amendments considered in committee and by the House."[47]

Numerous congressional reports and materials are readily available online at various websites—public and private. More openness recommendations are regularly proposed by lawmakers, individuals, and groups. For example, the Sunlight Foundation (a private nonpartisan organization; http://sunlightfoundation.com) has as its mission the promotion of greater transparency in Congress and the federal government through new Internet technologies. For example, its "Open Congress" project brings together "official government data with news and blog coverage, social networking, public participation tools, and more to give [individuals] the real story behind what's happening in Congress."

Second, it is clear that some degree of secrecy and confidentiality is essential to congressional policymaking, particularly with respect to devising legislative strategies and mobilizing winning coalitions on major legislation. It would be quite difficult for party leaders to move their preferred agenda if they could not meet privately with colleagues to try to convince them to support priority legislation. Moreover, it is often the case that private discussions do not remain private for long. Various lawmakers may reveal the gist of what took place in these private sessions or, alternatively, the army of journalists who cover Capitol Hill are skilled at finding out what was discussed and decided behind the closed doors.

Congress, too, has determined that secrecy and confidentiality are appropriate for certain matters. National security and intelligence matters are common examples. The House has a rule that requires Members to take an oath of secrecy before they have access to classified information. House Rule VII and Senate Resolution 474 (96th Congress) address the records of each chamber and their confidentiality. Rule VII, for instance, limits the public availability of certain records. It states that a "record for which a time, schedule, or condition of availability is specified by order of the House shall be made available in accordance with that order." The delay in availability might be as long as 50 years.[48]

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[47] *Congressional Record*, vol. 157, January 5, 2011, p. H13.

[48] For example, House Rule VII, which deals with records of the House, states: "An investigative record that contains personal data relating to a specific living person (the disclosure of which would be an unwarranted invasion of personal privacy), an administrative record relating to personnel, or a record relating to personnel, or a record relating to a (continued...)

Today, Congress operates largely in the sunshine. Ironically, studies have shown that the more open Congress has become, the less the citizenry like what they see, hear, and read about the lawmaking process. Many people dislike the messiness of policymaking: the long debates, the conflicting opinions, the bargains and compromises. As Congress has become more open, the transparency changes "have fanned the flames of public dissatisfaction" with the legislative branch.[49] As two political scientists suggest, people "profess a devotion to democracy in the abstract but have little or no appreciation for what a practicing democracy invariably brings with it."[50] Part of the explanation for these findings is that Congress is not well understood by the average citizen. Congress's size, complexity, and arcane procedures are among the factors that contribute to the public's perplexity with the legislative branch.

To conclude, representative government requires transparency. It is a paramount value in democratic systems if there is to be government of, by, and for the people. As the Preamble to the Constitution of the United States declares, it is "We the People" who constitute the nation's ultimate sovereign authority. Insufficient transparency in the lawmaking process can foster public cynicism and distrust in the "people's branch" and inhibit Congress's responsiveness to the concerns and interests of voters.

Openness, however, is not an absolute principle that always trumps every other value, such as secrecy and confidentiality. Too much secrecy is detrimental to representative government; too little could hinder effective governance. The challenge is finding in particular cases the appropriate balance between transparency and confidentiality, but with openness as the general tendency. As former Representative Lee H. Hamilton put it, Americans "want government to be open. This is not a blanket pronouncement—where national security and defense are concerned, or where congressional negotiators need space to find common ground without being forced to posture for the cameras, there is a place for secrecy. But transparency ought to be the rule."[51]

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hearing that was closed ... shall be made available if it has been in existence for 50 years." House records are sent to the Archivist of the United States for preservation at the National Archives and Records Administration.

[49] John R. Hibbing and Elizabeth Theiss-Morse, *Congress As Public Enemy* (New York: Cambridge University Press, 1995), p. 149.

[50] Ibid., p. 147.

[51] Lee H. Hamilton, "How To Fix Distrust in Government," The Center on Congress at Indiana University, November 9, 2011, p. 2. See Congress_Newsletter@Listserv.Indiana.edu.