

# The Making of Our Nation's Laws



 **NJLM** New Jersey State League  
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**F**rom the simple phrasing of Article I, Section I of our Constitution—"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."—there has grown a complex, elastic and evolving legislative process. Through turmoil and crisis, it has met the needs of generations of Americans for over two centuries. It has become part of our National legacy, and, as such, it is worth understanding.

By design, this analysis will focus on the mechanics of the process and tends to ignore the fact that the mechanism is moved and shaped by human beings. Like all of us, they are governed alternately by their heads, their hearts, their appetites or, more usually, by some shifting, liquid compound of the three. An understanding of the people who use this process is at least as important as a knowledge of the process, itself. But that is, for now at least, beyond our scope. Here, then, is a brief outline of the process through which the will of the people can become the law of the land.

**I. Ideas for legislation** can come from any source. A constituent or a group of constituents can petition a member of Congress to introduce a bill. Organizations can seek sponsorship to advance their interests. During the 20th Century, the "executive communication" became a fertile source for legislative proposals. With this, the head of a Federal department or agency will transmit a draft proposal to the Speaker of the House and the President of the Senate for consideration. And, of course, the Members themselves can conceive a need for action.

## **II. The legislative process formally begins**

with the introduction, in either the House or the Senate, of a proposal in one of four forms—a bill, a joint resolution, a concurrent resolution or a simple resolution. By far, the most common form in both Houses is the bill. Likewise, the most common House of origin is the House of Representatives. Accordingly, this analysis will focus on a House of Representatives bill.

## **III. A House bill (H.R. ###) is introduced**

when it is signed by a Member (or a Delegate or the Resident Commissioner from Puerto Rico) and placed in "the hopper"—a wooden box located to the side of the Speaker's rostrum. In the House, the bill is no longer actually read—even by title. It is entered in the Journal and printed in the Congressional Record. It is assigned a number, by the Clerk, and referred to the appropriate committee or committees, by the Speaker with the assistance of the Parliamentarian. One Committee will be specified as the primary Committee. A copy of the bill is sent to each Committee Chair and the clerk of each Committee enters it on the committee's calendar. (A Senate bill (S. ###) is introduced either by a Senator handing it to a clerk or through the more formal process, when a Senator will rise to introduce and make a statement about the bill from the floor. If any Senator objects to the introduction, it is formally postponed until the next day.)

**IV. Committee consideration** is probably the most important part of the process. The committees provide the most intense scrutiny of a bill and, in the committees, the public will be given the opportunity to be heard. Currently, the House has 19 standing committees and two select committees. The Senate has 17 standing committees and four special, select or other committees. There are also four joint committees, including members from both Houses, on Printing, Taxation, the Library of Congress and the Economy. These select and joint committees exercise administrative and oversight responsibilities and have no legislative jurisdiction. Due to the volume and complexity of their work, standing committees often subdivide into subcommittees. There are currently 68 subcommittees in the Senate and 97 in the House.

**V.** The first step in Committee or, more usually, subcommittee consideration involves a **formal request to the relevant Executive Branch department or agency for a report** on the proposal. Often, a request for analysis is also sent to the General Accounting Office—Congress' own audit, evaluation and investigative arm. Prior to submission to the requesting committee, Executive Branch reports are reviewed by the White House Office of Management and Budget, to ensure consistency with the President's program. These reports are given serious study by the Committee or subcommittee members and their staffs, but are in no way binding on them.

**VI.** The most usual second step is taken when the Committee or subcommittee holds one or more **public hearings** on a measure. These hearings give interested parties the opportunity to explain their positions on each proposal. The committees, through the Chair, also have the power to issue subpoenas to require the production of both testimonial and documentary evidence. Each Committee or subcommittee member must, and staff members may, be given a specified period of time to question any witness. Public notice is provided prior to all hearings by publication in the Daily Digest portion of the Congressional Record. Individual written notice may be provided to interested parties, at the discretion of the Chair. Most, except for the meetings of the Committee on Standards of Official Conduct in the House and the Ethics Committee in the Senate, are open to the public, though the committee can vote in open session to close a hearing. Transcripts are always made and, except for closed sessions, are rapidly made available for public inspection. Complete transcripts are often printed and distributed by the committee offices.

**VII.** After all hearings are complete, the committee or subcommittee will schedule what is known as a **"markup"** session. After the views of all members are considered, a vote is taken to determine the fate of the bill. In the case of a subcommittee, the members can vote to report the bill favorably to the full committee, with or without amendment, to report the bill unfavorably, or to report the bill without recommendation. The subcommittee may also suggest that the full committee "table" it—postpone action indefinitely. The full committee, as we will see, has more power, but tends to exercise fewer options.

## VIII. Final Committee action

occurs at full committee hearings. Reports are made by subcommittees. Here, bills are read by section and members may offer germane amendments. At the conclusion of this process, the committee will usually vote to either report the bill favorably or table it. The committee may decide to report the bill, as is, or to report a "clean bill." A clean bill is a new piece of legislation, which incorporates all amendments. This is usually sponsored by the committee chair and referred back to the committee, which then reports it favorably. If the amendments are extensive, the committee may decide to report the original bill with one "amendment in the nature of a substitute." The option to table a bill has made rare committee action to report a bill unfavorably or without recommendation.

**IX.** Next, the committee staff prepares **a report on the bill.** This includes a description of the purpose and scope of the bill and a section by section analysis of its provisions. With notice, any member can file supplemental, minority or additional comments, which are included as a part of the committee's report. The report also includes a record of votes on the bill and on any amendments offered to the bill. It must include a committee estimate of the bill's impact on the Federal Treasury and a comparison of that estimate with any estimates provided by the Executive Branch. If the bill imposes an unfunded mandate on state, local or tribal governments, an estimate of their costs must be prepared by the Congressional Budget Office. Finally, the report must include specific provisions dictated by statute and by the Rules of the House, as well as a statement citing the specific Constitutional provisions empowering Congress to enact each particular section of the bill. The report is filed with the Clerk or Secretary of the appropriate House, assigned a number and sent to the Government Printing Office for, what else, printing. The final report is probably the single most important part of the legislative history of a law. It will be used by courts, the Executive Branch and the general public as a guide to the intent of the Congress.

**X.** Now, let's examine the wonderful world of **Congressional calendars.** Akin to the way the railroads ran prior to the division of our globe into time zones, not only does each House have its own calendars, the Senate has two and House has five. But before we praise our Senators for their apparent scheduling economy, be aware that the Senate's Legislative Calendar is divided into no

less than seven parts. While the Executive Calendar, which pertains to actions relating to the Senate's "advise and consent" power, is composed of a mere four sections. For us, for now, the most important is the General Orders section of the Senate Legislative Calendar, which lists, in sequence, all measures eligible for Senate floor consideration. There are four key calendars in the House: The Union Calendar; or, more officiously, the "Calendar of the Committee of the Whole House on the state of the Union," lists all bills raising, appropriating or expending revenue. The House Calendar lists all other "public" bills. The Private Calendar, lists private bills. And the Corrections Calendar, which is formed when the Speaker takes a bill from either the Union or House Calendar, lists non-controversial, bipartisan bills designed to address specific problems with federal rules, regulations or court decisions.

**XI. Floor action** need not follow any calendar. Some measures are just more urgent than others. A measure can be brought up for floor consideration by Unanimous Consent, if the majority and minority floor and committee leaderships have no objections. A special resolution or "Rule" can be obtained from the Committee on Rules, which has specific jurisdiction over resolutions relating to the order of business in the House. Any Member may present the Clerk with a written Motion to Discharge a Committee, if, after 30 days from referral, that Committee has not considered a bill or resolution. The motion is placed in the custody of the Journal Clerk. Members may sign the motion, while the House is in session. If a majority of Members sign the motion, any signer may move that the House proceed to

consider. On Mondays and Tuesdays of each week and during the last six days of a session, the Speaker can entertain a Motion to Suspend the Rules to move a bill to immediate consideration. On Wednesday of each week, called Calendar Wednesday, unless dispensed with by unanimous consent or a two-thirds vote, each standing committee is called in alphabetical order. At that time, the committee can call for consideration of any bill that it had previously reported, from either the Union or House Calendar. So-called "Privileged Matters" can also supercede the normal order of business.

**XII.** Debate occurs as the House meets in the **"Committee of the Whole."** Motions and amendments are considered and debated at this point. The majority and minority each appoint a floor manager. Time for debate is divided equally between them. And they apportion time among their members. The debate is principally governed by Jefferson's Manual, which he developed during his tenure as President of the Senate (Vice President of the U.S.) from 1797 to 1801 and by the rules and precedents of the House. After general debate, the bill is given Second Reading, during which germane amendments are offered and considered, on a section by section basis.

**XIII.** After consideration of each section for amendment, **the Committee of the Whole "rises"** and reports the bill, with adopted amendments, to itself, reconvened as the House. After "the previous question" is moved and ordered, the Speaker asks, "Shall the bill be engrossed and read a third time?" If the answer is in the affirmative, the bill is read by title only and voted for passage.



**XIV.** If passed, the enrolling clerk prepares the **engrossed copy** of the bill, as passed. This is the point at which a bill technically becomes “An Act.” It is, then, sent over to the Senate, where the Parliamentarian, in the name of the Senate President, refers it to the appropriate committee, as provided for in the Rules of the Senate.

**XV. The Senate** Committee process is similar to that of the House. On the floor, however, most measures advance to debate through a unanimous consent procedure. Then, every offered amendment is considered and disposed of by the Senate.

A bill can, also, be filibustered. Non-germane amendments can be entertained. After final action on all amendments, the bill is ready for engrossment and third reading, which is by title only. The presiding officer then put the question of passage before the Senate. The original engrossed House bill is then returned to the House, together with engrossed Senate Amendments. The House is asked to concur in those amendments.

**XVI.** The House can consider Senate amendments in the Committee of the Whole. If agreed to, the bill is ready for **enrollment** and presentation to the President. If not, a conference to resolve the differences with the other House can be requested.

**XVII.** The New Jersey Legislature does not have a formal conference process to resolve differences between the Houses. But in Congress, the **Conference Committee** process is often the most important phase in the shaping of a new law. The request for a Conference, in the form of a motion, is often made by the Chairman of the Committee that originally had jurisdiction on the matter. If agreed to, a motion to instruct the conferees can be made, at the prerogative of the minority party. However, these instructions are not binding on the conferees. After this, the Presiding Officer will appoint the conferees, technically referred to as “managers.” The majority of the managers must have originally been supporters of the position taken by the House on the matters in question. The Speaker generally follows the recommendations of the Committee Chair regarding

appointments, and, frequently, the conferees are committee members. It is important that the views of the House on its position be fully represented. If the other House agrees to the Conference, its Presiding Officer similarly appoints Conference Committee Members.

**XVIII.** The Conference Committee is often referred to as the “Third House of Congress.” Though they meet together, the managers from the two Houses vote separately. Each group has one vote, determined by the majority vote of its members. So the number of managers each House appoints is immaterial. **The conferees are strictly limited in their consideration to matters of dispute between the two Houses. They cannot reopen sections of the bill that were not different in the versions of the bill agreed to by the Houses.** They cannot add new material that is not germane to or that is beyond the scope of their differences. If the difference is as to a number or an amount, they cannot increase the greater or decrease the lower of the figures in question.

**XIX.** There are generally **four forms of recommendation** possible for a Conference Committee reporting back to their bodies. First, it could be recommended that the House (or Senate) recede from all (or certain of) its amendments. Second, it could recommend that The House (or Senate) recede from its disagreement to all (or certain of) the other body’s amendments and agree, thereto. Third, it could recommend that the House (or Senate) recede from its disagreement to all (or certain of) the other House’s amendments and agree, thereto, with amendments. Or fourth, it could recommend that the House (or Senate) recede from all (or certain of) its amendments to the other body’s amendments or its amendments to the other House’s bill.

**XX.** When a majority of each House’s managers agree, they file a **Conference Committee report** in each of their Houses. The report is accompanied by a detailed explanatory statement. The report is not subject to amendment in either House. In the Senate, it is not subject to debate.

**XXI.** When both Houses have agreed to a bill in identical form, it is ready for enrollment and presentation to the President. The **enrolled bill**, printed on parchment, must reflect precisely the effect of all amendments, either by way of deletion, substitution, or addition, agreed to by both bodies. It is, then, certified by the Clerk of the House or the Secretary of the Senate, depending on the House of origin. After one final review for accuracy, it is signed first by the Speaker of the House and next by the Vice President or by specifically authorized members of the respective Houses.

**XXII.** The enrolled bill is, then, taken to the White House for **Presidential action**. The President has, generally, 10 days to consider the bill. During this time, the President will confer with the pertinent Executive Branch departments and agencies, for their advice and recommendations. If he signs it within that ten-day period, it becomes law. If he fails to sign it and Congress is in session on the tenth day, it becomes law without his or her signature. She or he can veto the bill and return it to House of origin, within the 10 days, with his or her objections. Or, if Congress, by final adjournment (*sine die*), prevents its return, she or he can “pocket veto” the bill by doing nothing. If it is returned to Congress with a veto message, the votes of two-thirds of the full membership of each House are needed to enact the bill over the President’s objections.

**XXIII.** Once enacted, either by Presidential approval, a lapse of ten days or by an override of a veto, the enrolled bill is sent to the Archivist of the United States for **publication**. It is assigned a Public Law number and paginated for inclusion in the Statutes at Large volume for the current Congress. (The first law enacted during the 108th Congress is designated Public Law 108-1.) It is first officially published in pamphlet form as a “slip law.” The Office of the Federal Register, National Archives and Records Administration prepares the slip law, which includes marginal notes detailing, among other things, where it will fit in the United States Code.

And there we are. That’s how a bill becomes a law.



New Jersey State League of Municipalities

Tel: 609.695.3481 Fax: 609.695.0151

[www.njslom.com](http://www.njslom.com)

222 West State Street, Trenton, New Jersey 08608