

Testimony before the Select Committee on the Modernization of  
Congress  
United States House of Representatives

“Fostering Deliberation in the U.S. House of Representatives”

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February 5, 2020

Chairman Kilmer, Vice-Chairman Graves, and Members of the Select Committee: thank you for the opportunity to testify before your committee. My name is Jim Curry and I am a professor of political science at the University of Utah. In that capacity I study and teach about the U.S. Congress, often with a focus on how rules, procedures, and legislative institutions affect policymaking and legislative action.<sup>1</sup>

I am here today to offer what is likely to be a very different perspective on fostering deliberation and legislative success than you are used to hearing. Among many political scientists, reformers, and former members of Congress, a popular class of proposals for “fixing” Congress is to return to “regular order” legislative processes.<sup>2</sup> In recent years, Congress has moved away from the “regular order,” and has made more frequent use of “unorthodox” or “centralized” processes—those which centralize more decision-making authority in the hands of party leaders, bypass traditional committee processes, close down opportunities for debate and amendment on the floor, and move legislative negotiations behind the scenes. For many, proposals to turn back the clock, in a way, to the way things used to be done—to the “regular order”—are appealing because they imply returning to the less partisan and tumultuous times of the past. But our rosy remembrances of the past are not always what they seem.

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<sup>1</sup>The views expressed are my own and do not represent the University of Utah.

<sup>2</sup>See, e.g., Casey Burgat and Kevin Kosar, “OK, so the House wants to reform itself? Here’s what it should really do,” *Politico*, January 29, 2019 (<https://www.politico.com/agenda/story/2019/01/29/house-government-reforms-000878>); Cliff Stearns and Martin Frost, “Congress must listen to John McCain,” *The Hill*, July 28, 2017 (<https://thehill.com/blogs/congress-blog/politics/344233-congress-must-listen-to-john-mccain>); Lee Drutman, “The House Freedom Caucus has some good ideas on how the US House should operate,” *Vox*, October 20, 2015 (<https://www.vox.com/polyarchy/2015/10/20/9570747/house-freedom-caucus-process-demands>).

As I will discuss below, proposals to return to the regular order are often misguided. The things about Congress and congressional deliberations that reformers wish to change often have little to do with internal congressional processes. In other words, there is little evidence that the move away from the regular order caused the “problems” many identify, and there is even less evidence that a return to regular order would resolve those perceived problems. Moreover, proposals of this type carry risks for Congress’s capacity as a legislative institution and its ability to effectively deliberate. Those risks need closer consideration.

If the regular order is not a solution, then, what does help Congress deliberate? As I will present here, the limitations of regular order processes for fostering deliberations, and the benefits of more “unorthodox” processes, point to several lessons about what makes for high-quality deliberations among members of Congress. In short, processes help Congress deliberate when they: (1) minimize opportunities for obstructionist tactics, (2) enable legislators and key negotiations to speak openly and freely with each other, (3) reduce incentives for legislators to play to the cameras, intense constituencies, or special interest groups, and (4) avoid unnecessarily limiting the universe of policies and issues open to negotiators. At the end of this testimony, I offer some thoughts on a few proposals that might build on these lessons to foster deliberation and legislative success.

## **1 A Note on Definition**

First, a brief note on definition. In this testimony, I will repeatedly refer to “regular order” processes and to “centralized” or “unorthodox” processes. These terms are often used, but their definitions are not always clear. This is what I mean by each term:

*Regular order* refers to an approach to legislating that was once commonplace in the House, but has become less frequently adhered to over time. There is no universally-accepted definition of regular order, but it is probably best described as a formal, sequential process featuring a decentralized division of labor, with committees playing the central role, and with relatively open floor consideration.<sup>3</sup> With regular order, a heavy emphasis is placed on policy development happening in committee, with committees holding hearings on legislation and considering, debating, and amending legislation in open and freewheeling mark-ups. Moreover, under regular order, legislation is only considered on the floor of the House after it has been marked up and reported (favorably) by a committee, and floor processes are expected to be open, with wide-ranging debate and open amending procedures.

*Centralized* and *unorthodox* are terms used to describe approaches to legislating in the

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<sup>3</sup>This definition comes from Sinclair, Barbara. 2016. *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*. 5th ed. Washington, DC: CQ. See, also, Aldrich, John H., and David W. Rohde. 2000b. “The Republican Revolution and the House Appropriations Committee.” *Journal of Politics* 62(1): 1–33; Bendix, William. 2016. “Bypassing Congressional Committees: Parties, Panel Rosters, and Deliberative Processes.” *Legislative Studies Quarterly* 41(3): 687–714; Rohde, David W. 1991. *Parties and Leaders in the Postreform House*. Chicago: University of Chicago Press.

contemporary House (and Senate) that deviate from regular order. These approaches include limiting open committee processes, including mark-ups, or bypassing committee consideration of legislation altogether. They also include closed-down processes on the floor, including the use of closed and restrictive special rules that limit debate and amendment. They also include the movement of deliberations from open and public settings, such as in committee meeting or on the floor, to behind-the-scenes settings. Finally, centralized and unorthodox processes reflect the rising importance and involvement of party leaders in House legislating, from the policy development stages through passage.

Some simple data show how congressional processes have changed. Figure 1 shows the percent of bills over time that were passed on the floor of the House or Senate that were first reported by a committee. Figure 2 shows the percent of special rules reported by the House Committee on Rules during each congress that were either restrictive (in that they limited amending opportunities) or closed (in that they prohibited all floor amendments). Generally, committee consideration of legislation has become less routine. While bills were once rarely passed through the House without first being reported by a committee, in recent years, 40-50% of bills considered and passed on the floor have done so without first being subjected to traditional committee consideration. On the floor, while special rules were once primarily open in nature, in recent years they are overwhelmingly closed or restrictive. Indeed, during the 114th and 115th congresses (2015-2018), every special rule was either restrictive or closed.

## **2 The False Solution of Regular Order**

A renewed adherence to “regular order” processes is often presented as a solution to three classes of perceived problems with Congress. However, each of these perceived problems is either overstated, not clearly related to the use of specific legislative processes, or both.

### **2.1 Gridlock and legislative productivity**

Congress often struggles with gridlock and stalemate, but the degree to which congressional gridlock has become more common in recent years as Congress has moved away from regular order processes is often overstated. While the number of laws enacted by Congress,<sup>4</sup> and the number of issues on the public agenda successfully addressed by Congress, appear to have declined in recent decades (at least by some metrics),<sup>5</sup> other data suggest Congress has maintained its productivity. First, the decline in the number of laws enacted by Congress is primarily driven by the enactment of fewer commemorative bills.<sup>6</sup> In other words, the

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<sup>4</sup>See, <https://www.govtrack.us/congress/bills/statistics>.

<sup>5</sup>See, Binder, Sarah A. 2014. “Polarized We Govern?” Center for Effective Public Management, Brookings Institution.

<sup>6</sup>See, Lewallen, Jonathan. 2017. *You better find something to do: lawmaking and agenda setting in a centralized Congress*. Doctoral Dissertation, University of Texas, Austin.

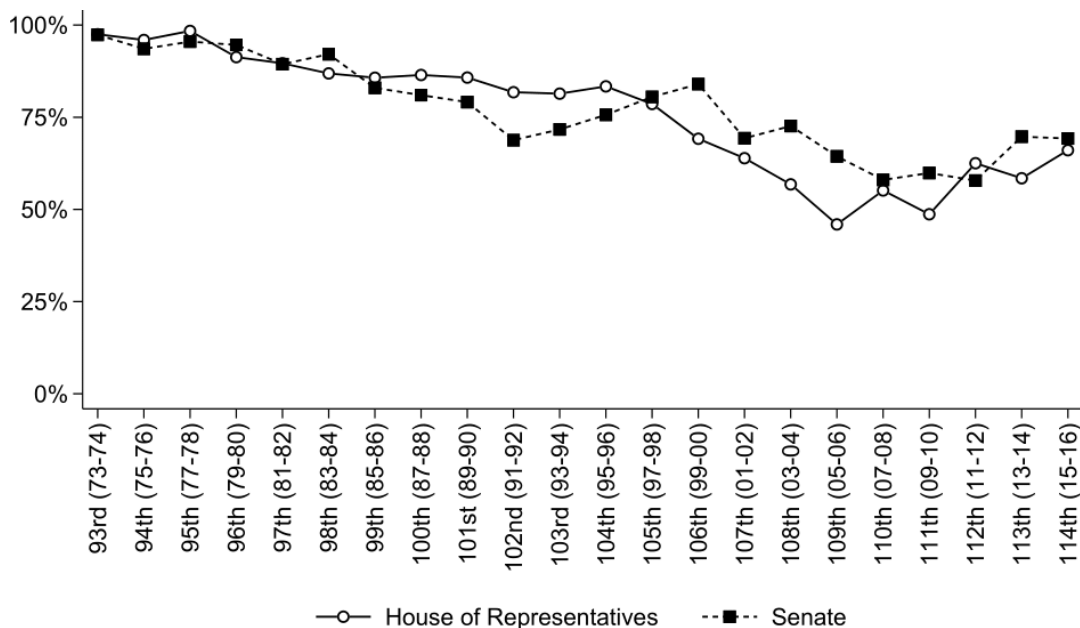


Figure 1: The Percent of Bills Passing the House of Representatives or Senate that were Previously Reported by a Committee in that Chamber. *Source:* The Congressional Bills Project (<http://www.congressionalbills.org/>)

amount of substantive legislation enacted by Congress has not changed that much. Second, even if Congress is passing fewer laws, the number of *pages of new law* enacted by Congress has actually increased since the middle of the 20th century, and has remained relatively steady since the 1980s (see, Figure 3).<sup>7</sup>

Third, the number of “landmark” laws enacted by Congress appears to have stayed relatively flat. While some congresses pass more or fewer laws designated by political scientists as “landmark,” there has been no clear trend over the past 70 years (see, Figure 4 — the dashed line reveals no clear trend over time).<sup>8</sup> Fourth, even congressional parties appear to be no more or less adept at achieving their stated legislative goals today compared to the past. Majority parties in the House and Senate continue to succeed (at some level) on about half of their legislative goals, and there is no clear trend of increasing or decreasing success over time.<sup>9</sup>

<sup>7</sup>See, also, Taylor, Andrew J. 2013. *Congress: A Performance Appraisal*. New York: Routledge.

<sup>8</sup>“Landmark” laws are those identified by David Mayhew as among the most major enactments by Congress every two years. See, Mayhew, David R. 2005. *Divided we Govern: Party Control, Lawmaking, and Investigations, 1946-2002*, Second Edition. New Haven, CT: Yale University Press. Updated data are found at: <http://campuspress.yale.edu/davidmayhew/datasets-divided-we-govern/>.

<sup>9</sup>On this, see, Curry, James M. and Frances E. Lee. 2019. “Non-Party Government: Bipartisan Law-making and Party Power in Congress.” *Perspectives on Politics* 17(1): 47-65.

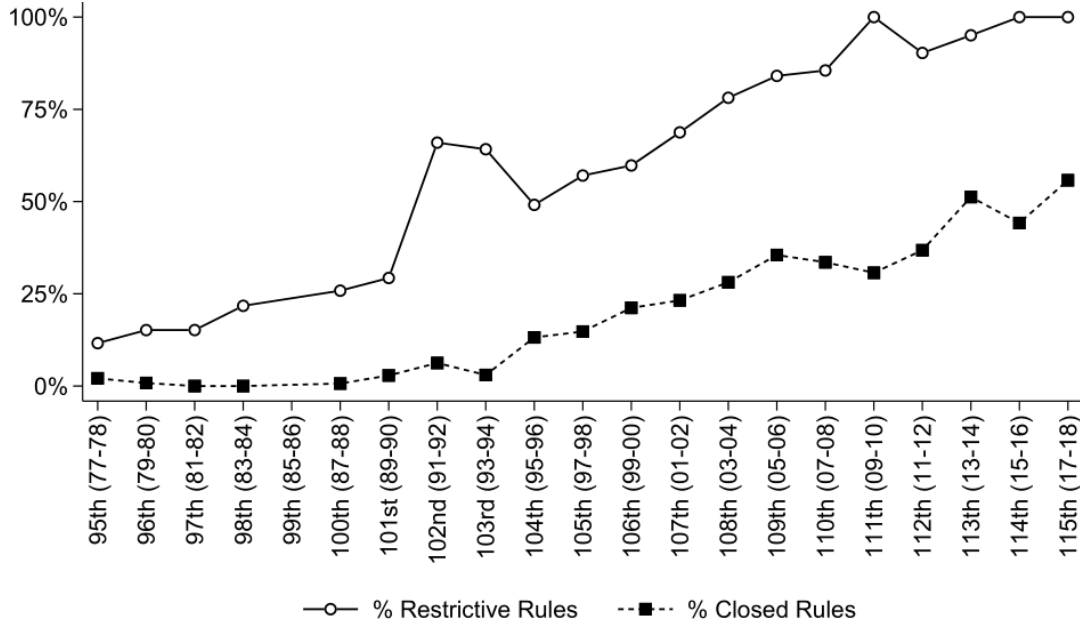


Figure 2: The Percent of Special Rules Reported by the House Committee on Rules that were Restrictive or Closed Rules. *Source:* House Committee on Rules Survey of Activity Reports

A crisis of gridlock in Congress is not as apparent as it is often portrayed. But even if gridlock has become more commonplace, any connection between gridlock and a move away from regular order processes is entirely unproven. No research or scholarship on Congress has directly connected changes to congressional processes to increases in gridlock.

## 2.2 Partisanship and party conflict

Partisanship and party conflict have clearly been on the rise in Congress over the last several decades. Party unity on roll-call votes has reached all-time highs, as has the frequency of votes that sharply split the parties. This rise in party polarization and party conflict in Congress has been tied to various factors, including partisan sorting, a southern party realignment, campaign finance, and a more competitive national political environment.<sup>10</sup> Declining use of regular order processes is not one of the established causes.

Nevertheless, it is often asserted that the use of regular order processes encourages bipar-

<sup>10</sup>For a review of this subject, see, Barber, Michael J., and Nolan McCarty. 2015. "Causes and Consequences of Polarization." In *Solutions to Political Polarization in America*, ed. Nathaniel Persily. New York: Cambridge University Press, 15-58. On competitive two-party politics and party conflict, see, Lee, Frances E. 2016. *Insecure Majorities: Congress and the Perpetual Campaign*. Chicago: University of Chicago Press.

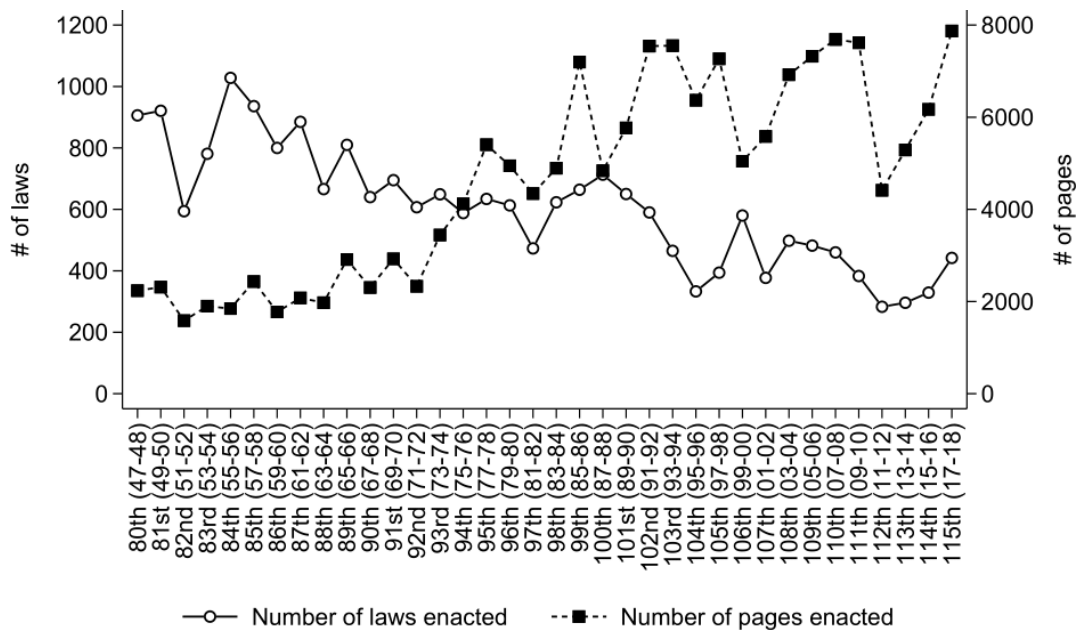


Figure 3: The Number of Laws and Pages of New Law Enacted by Congress. *Source: Vital Statistics on Congress*, Brookings Institution (<https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/>)

tisanship and compromise, and that their non-use engenders partisanship and party conflict.<sup>11</sup> Earlier political science scholarship contributed to this view. Research on Congress in the mid-20th century described regular order committee and floor processes as helpful in resolving legislative conflicts and developing consensus.<sup>12</sup> Contemporary theories of congressional party power contribute to this view, as well. These theories present centralized and unorthodox processes as tools of partisan majorities, used to ram through partisan laws.<sup>13</sup>

However, the evidence backing these scholarly claims is nonexistent. Generally, there is no evidence that the use of regular order processes produces more bipartisanship, or that more unorthodox legislative processes produce more partisan outcomes. Research I have

<sup>11</sup>See, e.g., Kaplan, Thomas, and Robert Pear. 2017. “Secrecy Surrounding Senate Health Bill Raises Alarms in Both Parties.” *New York Times*, June 15; Stearns, Cliff, and Martin Frost. 2017. “Congress Must Listen to John McCain.” *The Hill*, July 28.

<sup>12</sup>See, Fenno, Richard F. 1962. “The House Appropriations Committee as a Political System: The Problem of Integration.” *American Political Science Review* 56(2): 310–24; Polsby, Nelson W. 1975. “Legislatures.” In Fred I. Greenstein and Nelson W. Polsby, eds., *Handbook of Political Science*. New York: Addison-Wesley.

<sup>13</sup>See, e.g., Aldrich, John H., and David W. Rohde. 2000b. “The Republican Revolution and the House Appropriations Committee.” *Journal of Politics* 62(1): 1–33; Cox, Gary W., and Mathew D. McCubbins. 2005. *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives*. New York: Cambridge University Press.

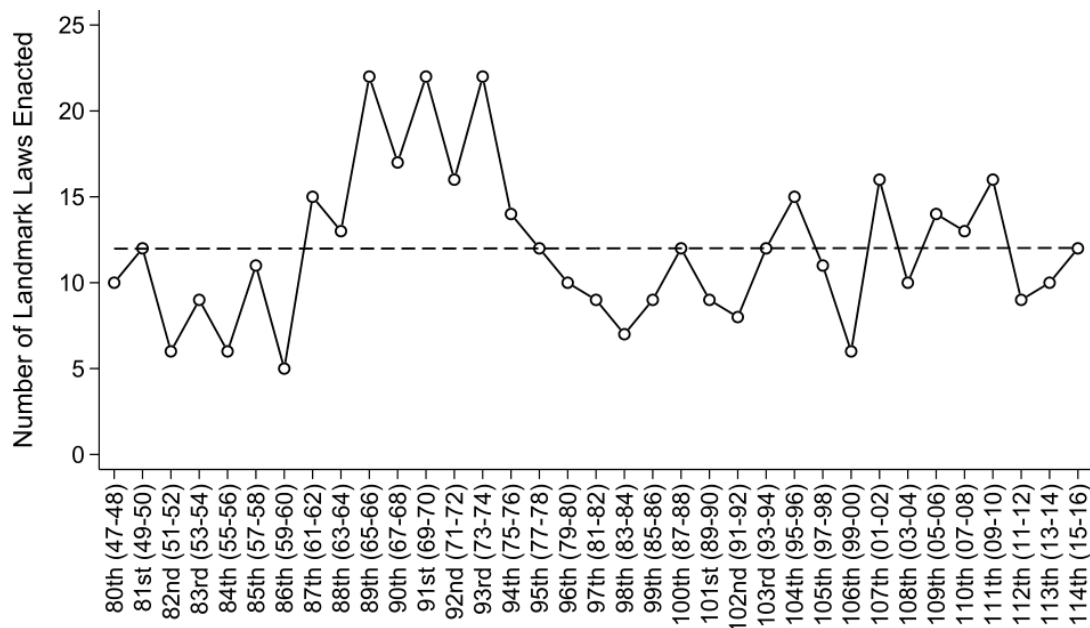


Figure 4: The Number of “Landmark” laws Enacted by Each Congress. (The dashed line is the over-time trend.) *Source:* <http://campuspress.yale.edu/davidmayhew/datasets-divided-we-govern/>

done with Frances E. Lee finds that the use of traditional committee processes, open floor proceedings, or other aspects of the “regular order” are not leading indicators of whether or not major laws enacted by Congress engender bipartisan support or result in party-line votes. Congress sometimes bypasses regular order processes to enact partisan laws. However, and even more frequently, unorthodox processes are used to advance and pass overwhelming *bipartisan* policy proposals.<sup>14</sup>

Various examples are illustrative. Some of the most partisan and controversial laws passed over the past decade were subject to many of the regular order processes that reformers prefer. The Affordable Care Act was the subject of over 30 congressional hearings during the 111th Congress and was marked up by three House committees and one Senate committee. In general, the development of the ACA followed a very traditional committee process, but failed to gain bipartisan support even at the committee level.<sup>15</sup> The Dodd-Frank Wall Street reform act similarly was the subject of over 80 congressional hearings during the 111th Congress and was marked up by committees in both the House and Senate. But Dodd-Frank also failed to gain bipartisan support, even in its early stages.

<sup>14</sup>See, Curry, James M. and Frances E. Lee. 2020 [forthcoming]. “What is Regular Order Worth? Partisan Lawmaking and Congressional Processes.” *Journal of Politics* 82(2).

<sup>15</sup>While the legislative process on the ACA became quite unorthodox in later stages, unshakable party conflict had taken hold much earlier during the development of the legislation.

Other recent legislative efforts that featured open and freewheeling floor processes likewise failed to result in the kind of bipartisan compromise reformers suggest will naturally follow from an adherence to the regular order. Open floor processes can result in chaos, and amendment opportunities can be used to score political points rather than substantively influence the legislation. Consider, H.R. 1 (112th Congress), an omnibus appropriations package considered under an open rule. Rather than resulting in a productively deliberative process, the bill was subject to hundreds of amendments over four days of nearly continuous floor consideration. Many of these amendments were for messaging purposes, including dozens of limitation amendments intended to force members of Congress to take difficult votes. In the end, all of this “deliberation” ended in an almost perfect party line vote on passage.<sup>16</sup>

In other cases, open floor processes can result in substantive changes to legislation that add to the partisan rancor, or even imperil the legislation’s prospects for passage. Consider, H.R. 5055 (114th Congress), an energy and water spending bill, which went down in defeat largely because of an open process. Bowing to pressure to open up the process, the House leadership permitted Representative Sean Maloney (D-NY) to offer his amendment to ban federal contractors from discriminating based on sexual orientation or gender identity.<sup>17</sup> The amendment passed 223–195, drawing support from forty-three Republicans. But the amendment was a poison pill. Democrats were still unwilling to support the underlying appropriations measure and voted overwhelmingly against the final package. Many Republicans, opposed to the LGBT protections language, also turned in opposition. The bill failed 112–305.<sup>18</sup>

Meanwhile, many bills considered under unorthodox processes reflect bipartisan deal-making and pass on broadly bipartisan votes. For example, nearly every omnibus spending deal to avert a government shutdown in recent years was negotiated behind the scenes among a smaller number of key legislators in each party, and each one passed with a bipartisan majority. Legislation ending the fiscal cliff standoff of 2011–12 was also negotiated behind closed doors without any traditional process but was enacted by a cross-party coalition.

Simply put, nothing about regular order necessitates bipartisan cooperation, and nothing about more unorthodox processes precludes it.

### **2.3 Poor-quality lawmaking**

The declining use of regular order and committee-led processes is also argued to result in poorer-quality laws. The logic here is that traditional committee-led policy development

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<sup>16</sup>The bill passed 235–189 (roll call no. 147, 1st session, 112th Congress) without any Democratic members voting in favor of passage and just three Republicans opposed.

<sup>17</sup>Lindsey McPherson, “In Reversal, House Backs LGBT Anti-discrimination Measure,” *Roll Call*, May 25, 2016.

<sup>18</sup>Lindsey McPherson, “House Rejects Spending Bill After Gay Rights Measure Added,” *Roll Call*, May 26, 2016.



results in better bills and laws, and that centralized processes result in sloppy, contradictory, or poorly-considered legislation. The problem with this assertion is that, to date, there is no systematic evidence supporting it.<sup>19</sup> There are no studies showing that bills considered using more regular order processes, more committee processes, or more open floor processes are better drafted or represent better policy. Nor is there any evidence that legislation has become less well drafted or of lower quality over time as regular order processes have become less commonly used.

Moreover, this perspective connecting regular order to legislative quality ignores the drawbacks of committee-led and regular order policymaking processes. While today many fret the evils of centralized and unorthodox processes, it was not that long ago the decentralized and committee-led nature of Congress served as a focal point for criticism. Scholarship in earlier eras disparaged committees as preference outliers<sup>20</sup> that used their considerable power to advance narrow interests over general interests, and develop ‘cozy little triangles’<sup>21</sup> among special interest groups, committees, and federal agencies. The seniority system that accompanied the committee-led Congress was likewise viewed as problematic, allowing powerful committee chairmen to dominate action under their jurisdictions and often acting contrary to majorities in their own party or in the Congress.<sup>22</sup> Many of the institutional reforms that begot a centralization of power and process in Congress, and a move away from regular order processes, were put in place as a response to these perceived problems with strong committee power and committee-led policymaking.<sup>23</sup>

In sum, regular order is often cast as a solution to a series of perceived problems with the contemporary Congress that are either (1) overstated, (2) unrelated to the use of specific legislative processes, and (3) both. The House should consider other means of promoting deliberation.

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<sup>19</sup>There is one study of incidences of legislative error in Senate drafting, but it does not demonstrate that centralized or unorthodox processes relate to more frequent errors (Lewallen, Jonathan. 2016. “Legislative Error and the ‘Politics of Haste’.” *PS: Political Science & Politics* 49(2): 239-43).

<sup>20</sup>See, e.g., Adler, E. Scott, and John S. Lapinski. 1997. “Demand-Side Theory and Congressional Committee Composition: A Constituency Characteristics Approach.” *American Journal of Political Science* 41(3): 895-918; Hall, Richard L. and Bernard Groffman. 1990. “The Committee Assignment Process and the Conditional Nature of Committee Bias.” *American Political Science Review* 84(4): 1149-66.

<sup>21</sup>See, e.g., Lowi, Theodore. 1969. *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority*. New York: W.W. Norton.

<sup>22</sup>See, e.g., Jones, Charles O. 1968. “Joseph G. Cannon and Howard W. Smith: An Essay on the Limits of Leadership in the House of Representatives.” *Journal of Politics* 30(3): 617-46.

<sup>23</sup>See, Rohde, David W. 1991. *Parties and Leaders in the Postreform House*. Chicago: University of Chicago Press; and Schickler, Eric. 2001. *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress*. Princeton, NJ: Princeton University Press, pp. 189-239.

### **3 What Promotes Deliberation, Compromise, and Legislative Action in the Contemporary Congress?**

What do we know about what enables quality deliberations, negotiations, and successful legislative action in Congress? Here, I will make two interrelated points. First, we know that open and regular order processes sometimes hinder, rather than help, deliberations, especially in the current political climate. Second, we know that unorthodox processes can promote better discussions and better deliberations, and aid the development and passage of legislation.

These conclusions are drawn primarily from research I have conducted with Frances E. Lee. This research, which will be published later this year as part of a book (*The Limits of Party*, University of Chicago Press<sup>24</sup>) and as an article (“What is Regular Order Worth?”<sup>25</sup>), draws on in-depth interviews with long-time members of Congress and high-level congressional staffers to understand when, under what conditions, and why Congress sidesteps regular order processes and instead turns to unorthodox processes.<sup>26</sup> We find that unorthodox processes help deliberations and negotiations because they can move negotiations out of the view of cameras and lobbyists, and because they are often more efficient and flexible than regular order processes.

Regular order processes worked effectively in the mid-twentieth century in large part because the political environment of that era was so different, featuring muted party conflict, large and long-lasting Democratic Party majorities in the House, and less zealous party bases. The political environment today, with intense partisanship and party conflict, small chamber majorities, and intense two-party competition for control of the House (and Senate) results in a very different legislative dynamic.

Much of what is relayed below comes directly from our soon to be published research.

#### **3.1 Avoiding the pitfalls of transparency**

The reduced transparency of unorthodox processes can help with deliberations. Regular order processes can make it easier for opponents to obstruct, and they can also make it harder for a bill’s proponents to engage in meaningful deliberations. Our interview subjects argued that closed-door deliberations can help lawmakers find common ground and compromise because they enable members of Congress to share their perspectives

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<sup>24</sup>Full citation: Curry, James M. and Frances E. Lee. 2020 [forthcoming]. *The Limits of Party: Congress and Lawmaking in a Polarized Era*. Chicago: University of Chicago Press.

<sup>25</sup>Full citation: Curry, James M. and Frances E. Lee. 2020 [forthcoming]. “What is Regular Order Worth? Partisan Lawmaking and Congressional Processes.” *Journal of Politics* 82(2).

<sup>26</sup>See, also, Curry, James M. and Frances E. Lee. 2019. “Congress at Work: Legislative Capacity and Entrepreneurship in the Contemporary Congress.” In *Can America Govern Itself?* Eds. Frances E. Lee and Nolan McCarty. New York: Cambridge University Press.

more freely, and understand the perspectives of others.<sup>27</sup>

In particular, our interviewees emphasized how closed-door deliberations can insulate lawmakers from lobbyist pressure and from hardline constituencies who are hostile to any compromise. Regular order processes—including committee markups and open floor debate—allow well-financed interest groups to monitor the proceedings and use their clout to influence reelection-minded legislators.<sup>29</sup> These efforts can bog down a legislative effort. As one of our interviewees put it, to make a deal, “you need the back-room discussions outside the view of the lobbyists, even if that’s sacrilege to the open-government people.”

Centralized processes also enable Congress to mute pressures from the parties’ activist bases, who can make it difficult for negotiators to agree to any concessions. A zealous party base can spur lawmakers to react negatively to a potential deal as, “Hyperpartisans on both sides will turn everything into a wedge.” When negotiations unfold in public view, issues “get tribalized in the media,” but, “if you can keep things out of the view of the public, that’s the best way to actually do something.” Today, lawmakers find it difficult to engage in give-and-take when exploratory offers can be interpreted as capitulations. “Complete and total transparency makes it very hard to negotiate and have conversations,” one staffer told us.

Behind-the-scenes processes allow negotiators to explore opportunities, float ideas, and address sensitive issues with confidence that their counterparts will not leak the details. Negotiators often “need to have a theoretical discussion” to ascertain whether any agreement is possible. They also need the freedom to reverse course.

Generally, deliberations that take place behind the scenes enable legislators to have the kind of frank, honest discussions that are necessary for substantive deliberations, but that may not be possible on camera or in public in today’s politically-charged environment.

### **3.2 Increasing procedural efficiency and avoiding obstructionism**

Unorthodox processes also minimize opportunities for dilatory tactics, and in this way can increase legislative efficiency and improve true deliberations. Regular order processes often fall victim to obstruction and grandstanding. Committee markups and open floor proceedings create opportunities for obstructionists to throw a wrench into the proceedings, causing unnecessary headaches and delays. Many of the individuals we interviewed noted that attempting to move legislation through regular order these days is just untenable, since members of the minority, and sometimes the majority, are inclined to play games. As one told us, “Part of the reason we started doing structured rules [on the House floor] was the Democrats were getting some of their amendments passed, and it would kill the bill because the Democrats still wouldn’t vote for the final bill, but the amendments would kill

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<sup>27</sup>See, also, Warren, Mark E., and Jane Mansbridge. 2015. “Deliberative Negotiation.” In <sup>28</sup>, edited by Jane Mansbridge and Cathie Jo Martin, 141-198. Washington, DC: Brookings Institution Press.

<sup>29</sup>See, also, Arnold, R. Douglas. 1990. *The Logic of Congressional Action*. New Haven: Yale University Press, pp. 275.

Republican support.” Striking a more bipartisan tone, he noted, “A more polarized House of Representatives led to the process breaking down. Both sides were motivated to push gotcha amendments, and it made using an open rule impossible.”

Simply, unorthodox processes remove many of the opportunities for lawmakers to obstruct, delay, or use deliberative processes to score political points. Avoiding committee markups and closing the floor off from debate and amendment makes it hard for members of Congress looking to make trouble to capitalize. While these processes may also limit the input of members of Congress who do wish to substantively engage in legislating, they certainly stop members only interested in delay and obstruction from creating headaches.

### **3.3 Increasing procedural flexibility to engender legislative success**

The flexibility of unorthodox processes also can enable Congress to negotiate broader legislative packages than might otherwise be possible. Several of our interviewees noted that some deals, and some decisions, are just too big for committees to take the lead on, alone. Negotiations and deal-making in committees are inevitably hemmed in by jurisdictional boundaries. Looking for trades and logrolls through which to build legislative support, committees can only work among programs, policies, and funding streams under that committee’s jurisdiction. As one of our interviewees put it, “The committee process chops issues up, making larger negotiations impossible.” With unorthodox processes, including those on which party leaders take a leading role, negotiations can span multiple jurisdictions. As one person we spoke with put it, “Leadership can open up the universe of policy to find the solution, taking into account the whole picture.” In other words, negotiations not hemmed in by committee jurisdictions can allow more possibilities to enter into the deliberations that might otherwise be possible.

Unorthodox processes have other benefits for negotiations and deal-making, as well, especially when it comes to major, high-level deals between the parties on contentious issues. Our interviews indicated that party leaders are often the only members of Congress who have the clout necessary to cut high-level deals. When issues need to be worked out between the House and Senate or with the White House, the task will fall to party leaders in part because they are the only lawmakers willing and able to take the heat for making the tough decisions and agreeing to the trade-offs associated with big legislative deals. This is especially true if the agreed to deal falls short of either party’s preferred outcome, imposes clear costs on specific constituencies, or result in a noticeable increase to the federal deficit.

## **4 Proposals to Consider and Proposals to Avoid**

Our research shows the ways in which unorthodox processes can help with deliberations. However, it is probably unrealistic to expect Congress to take steps to make its processes *more* unorthodox or appear *less* transparent. Nevertheless, reformers can learn from these

benefits of unorthodox processes to try to create more deliberative practices in the House. Unorthodox process help with deliberations and legislative success not because they are unorthodox, but because they help Congress avoid some of the challenges of the contemporary political environment. Specifically, they help because they: (1) minimize opportunities for obstructionist tactics, (2) enable legislators and key negotiations to speak openly and freely with each other, (3) reduce incentives for legislators to play to the cameras or to intense constituencies and groups, and (4) avoid unnecessarily limiting the universe of policies and issues open to negotiators.

Below are two proposals the committee should consider that draw on these lessons:

#### **4.1 Eliminate roll-call votes on amendments in the Committee of the Whole**

One possible reform would be to ban roll call votes on amendments offered in the Committee of the Whole (COW), but enable members to request a roll call on anything adopted in the COW after the bill is reported back to the floor.<sup>30</sup> While this may sound like a radical change, it was standard practice in the House prior to the Legislative Reorganization Act of 1970. Prior to that time, amendments offered in the COW had to be decided by voice vote or teller vote. Since with these forms of voting representatives' individual vote choices are not recorded, the incentive for legislators to offer amendments solely to score political points by making other members take difficult votes is dramatically reduced, and possibly eliminated. With this behavior disincentivized, the House could then allow a more open amending process on the floor without fearing the proceedings will be high-jacked by obstructionists or legislators interested only in playing politics. Amendments that did prove popular in the COW could still be subject to roll-call votes later in the process, but amendments that reach this stage are unlikely to be the kind of messaging amendments offered just to make legislators take embarrassing votes. Instead, they are more likely to be substantive amendments meant to meaningfully shape the policies being considered.

#### **4.2 Create more opportunities for official off-camera meetings and discussions**

The House should also consider ways to enable more members of Congress to more frequently engage with each other in settings where they do not feel pressure to play to the cameras. One possibility is to create more processes by which committees get together just to discuss, debate, or learn more about specific issues, policies, and federal programs. These types of activities are already institutionalized with CODELs, which enable groups of lawmakers to take official trips abroad. There is some evidence, though mostly anecdotal,

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<sup>30</sup>This idea was first suggested to me by Professor Jason M. Roberts (University of North Carolina) during a meeting of the American Political Science Association's Presidential Task Force Project on Congressional Reform.

that these trips help improve relationships among members of Congress that persist back in Washington.<sup>31</sup> Committee CODELS focused on domestic policy may produce similar effects. Simply, taking committee members out of Washington to learn more about specific domestic policies together in bipartisan groups could engender substantive deliberations, debates, and even the building of the kind of relationships and trust often needed among member of Congress for sensitive policy negotiations.

The House could officially sanction (and fund) these activities, making them appear less secretive. Everything could be above board. The trips could be publicly announced by the committees, but not every interaction among the members on the trip would need to be formally recorded, live-streamed, or printed in the *Congressional Record*. Without having to play to the cameras all the time, deliberations are likely to be more substantive and less political. In a way, these trips would be like field hearings, but without the formal hearing processes.<sup>32</sup>

The House could also consider organizing these trips around working groups, issue caucuses, and other entities that do not necessarily conform to committee jurisdictions or limit participation to committee members. Since controversial issues often span multiple committee jurisdictions anyway, getting members to think outside committee boundaries as they engage in these deliberations may also be fruitful.

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<sup>31</sup>A number of stories to this regard are discussed with respect to Senator John McCain and the strong bipartisan relationships he built with other senators.

<sup>32</sup>On field hearings, see, Heitshusen, Valerie, and R. Eric Petersen. 2017. "Field Hearings: Fact Sheet on Purposes, Rules, Regulations, and Guidelines," Congressional Research Service, RS20928.