

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

**Frances E. Lee  
Professor, Department of Government and Politics, University of Maryland**

**“Congressional Transparency: A Word of Caution”  
May 10, 2019**

Chairman Kilmer, Vice-Chairman Graves, and Members of the Select Committee: thank you for the opportunity to testify before the committee. My name is Frances Lee and I’m a professor of Government and Politics at the University of Maryland. I am also co-chair of the American Political Science Association’s Presidential Task Force Project on Congressional Reform.<sup>1</sup>

I am here to offer a cautionary note about congressional transparency. To be candid: this is not a comfortable position to be in. Transparency is an important value, as represented by a long tradition of congressional reform. The lack of transparency is associated in the popular imagination with smoke-filled rooms and corrupt bargains that cannot withstand the light of day. Transparency is essential to the democratic process. Professionally, it is important to me, as a political scientist, in conducting research.

But my goal today is to point to some of the unanticipated consequences of prior transparency reforms and to recommend that, as you ponder how to modernize Congress, you consider how transparency negatively affects deliberative processes, at least in certain circumstances. As I will discuss below, transparency burdens deliberation in two key ways: (1) it empowers organized groups to press their demands in the legislative process; (2) it tends to divert congressional discourse outward toward messaging rather than toward problem solving.

Deliberation is the key concern. Congress should make information about policy outcomes as transparent as possible. When Congress enacts legislation, it should not be difficult for Americans to find out what was done and how their representatives voted. Americans should be informed about how taxpayer money is being spent and whether governmental purposes are being achieved. Any innovations in data sharing or search capabilities that make it easier for the public to access this type of information should be of high priority for congressional modernizers.

But public accountability does not require that all aspects of the deliberative process be open to public view. We recognize that presidents need to be able to receive candid advice as they make decisions such that some internal executive branch processes are shielded from outside scrutiny. The concern is, at least in part, the advisors may censor

---

<sup>1</sup> The views expressed are my own and do not represent the University of Maryland or the American Political Science Association.

themselves for fear of later public condemnation for their honest recommendations. By the same token, members of Congress need their own, limited version of “congressional privilege.” Members need to be able to talk frankly among themselves so that they can search for common ground, explore possible solutions, and build trust with one another. Members need to be able to speak candidly with one another without fear that these discussions be used against them, perhaps even out of context, at a later time.

The Constitution itself supports this view. Article I, Section 5 requires Congress to maintain and publish a journal of its proceedings. But it then goes on to state that Congress may except such “parts as may in their judgment require secrecy.” Indeed, even the Constitution itself was negotiated in secret. Both James Madison and Alexander Hamilton later reflected that secrecy had been vital to the 1787 convention’s success in reaching agreement on difficult issues.<sup>2</sup>

Despite secrecy’s recognized value for successful negotiations, Congress has made the legislative process increasingly public since the “sunshine reforms” of the 1970s. Among these reforms were: institution of recorded voting in the Committee of the Whole, electronic voting, open committee meetings, and recorded votes in committee. To this list, one might add C-SPAN coverage of floor proceedings and committee meetings. Despite their many positive consequences, these reforms have had two serious downsides for legislative deliberation.

### Group Influence

Transparency reforms made it easier for lobbyists to monitor and pressure Congress. This was not the reformers’ goal. Opening Congress up was always aimed at making Congress more understandable and accountable to the broader American public, not at empowering interest groups. But transparency’s effect is often precisely contrary to its intended purpose. The broad public simply is not able to monitor congressional activity with nearly the consistency or intensity of organized interests.

Sunshine reforms have proved more useful to lobbyists than to average Americans. Combined with other developments in communications technology, interest groups take advantage of transparency to monitor congressional deliberations in real time. As they seek to push or quash proposals being considered, groups leap into action to mobilize their constituencies throughout the country to tweet, email, fax, write, and call congressional offices. They craft and deploy advertising campaigns aimed at influencing members, their constituents, or election outcomes—or threaten to do so. Ordinary citizens do not and cannot hope to match the capabilities of organized interests in these respects.

---

<sup>2</sup> John P. Kaminski, *Secrecy and the Constitutional Convention* (Center for the Study of the American Constitution, Department of History, University of Wisconsin-Madison, 1997).

To successfully negotiate, lawmakers must be able to understand one another's interests and priorities.<sup>3</sup> They need to be able to consider hypotheticals and explore alternatives on the understanding that nothing is agreed to unless everything is agreed to.

The need for secrecy in the negotiation process was a theme that James M. Curry and I heard repeatedly as we conducted a study of legislative deal-making in today's Congress.<sup>4</sup> "Secrecy is very important," explained one staffer we interviewed. Behind closed doors, you can "ask questions like, 'How far are you willing to go?' 'Where do you draw the line?'" Members need frank, off-the-record conversations in which they can explore whether to accept some necessary compromises as part of a larger deal to address a major problem.

For example, in his book on "How Congress Really Works," former Rep. Henry Waxman (D-CA) described a successful bipartisan negotiation with Rep. Thomas Bliley (R-VA) to create the Food Quality Protection Act (FQPA) of 1996. This law established a comprehensive new set of regulations governing pesticides in food. As one might expect, it emerged out of a lengthy negotiation. But in the end, the FQPA was acceptable to farmers, food processors, environmental groups, and consumer advocates. It passed the House and Senate unanimously. Waxman attributes the success of the negotiation to a common commitment to secrecy. He writes that he and Bliley "implicitly trusted one another not to go public, had things not worked out, with the details of what the other had been willing to concede."<sup>5</sup>

In the event that a broader agreement can come together to address a policy problem, lawmakers may be able to win acceptance of the parts of the deal that are less popular with certain constituencies, just as Bliley and Waxman were able to do. But, as Waxman explained: "The only way this type of negotiation can succeed is to tackle the whole problem in one fell swoop so that news of the deal arrives concurrently with the endorsements of all the major interests."<sup>6</sup>

Transparency, however, empowers groups to short-circuit negotiations that might otherwise have succeeded. Partial information disclosed during ongoing negotiations can focus controversy on one element in isolation before a broader deal can come together. As another staffer we interviewed explained:

If a piece of the negotiation gets reported, it'll be seen in isolation from everything else we're trying to do, all the other moving parts. ... Social media will start churning information – all about one little piece. It spreads like wildfire. And all this even before you can have a discussion with the skeptics. By the time

---

<sup>3</sup> Jane Mansbridge and Cathie Jo Martin, *Political Negotiation: A Handbook* (Washington, DC: Brookings Institution Press, 2015).

<sup>4</sup> James M. Curry and Frances E. Lee, "What is Regular Order Worth? Partisan Lawmaking and Congressional Processes," *Journal of Politics* (Forthcoming 2020).

<sup>5</sup> Henry Waxman with Joshua Green, *The Waxman Report: How Congress Really Works*. (New York: Twelve, 2009), p. 137.

<sup>6</sup> *Ibid.*

you can reach them, they've already made up their minds. They're not listening to you.

On the other hand, if a deal can be reached and negotiators emerge unified around a single legislative package, it will become hard to oppose. Instead, everyone can say: "Well, this or that part of it stinks, but at least it solves the overall problem."

Policymaking almost always requires hard choices and the balancing of competing demands. But negotiations conducted in public limit members' negotiating flexibility. It is very difficult for members to move away from talking points or fixed positions in front of cameras.

A multitude of groups all pursuing their own self-interest can also overburden legislative negotiations. Initiatives get bogged down as various groups seek to attach their favored provisions to a legislative vehicle. As one staffer who helped negotiate the Medicare Access and CHIP Reauthorization Act (MACRA) of 2015 told my coauthor and me: "I know transparency is good, but it's very difficult with an issue like health care. There are so many interested parties on the outside. There is so much money involved: 15,000 lobbyists who want to be involved." Another staffer said, "Once K Street knows you have a train leaving the station, they have umpteen things they want to get on it." The MACRA was bipartisan legislation that finally succeeded in addressing a problem (the "doc fix") that Congress had patched up with short-term fixes more than a dozen times previously. The staffers involved said that secrecy facilitated their success because they were able to protect the legislative vehicle from attracting too many varied provisions important to lobbyists.

Members need some degree of insulation from pressure group politics in order to be able to consider the merits of the issues and to do what they think is good public policy. As Princeton scholar Douglas Arnold put it in a classic text: "Open meetings filled with lobbyists and recorded votes . . . serve to increase the powers of special interests, not to diminish them."<sup>7</sup>

### Messaging Politics

A second effect of transparency is that it turns congressional deliberation outward. Deliberating in public encourages members to direct their attention toward external audiences and constituencies rather than to engage directly with other members.

Congressional transparency creates a version of the famous "observer effect" in which observing a behavior changes the behavior being observed. Transparency gives members incentives to use the legislative process to score political points against their opponents in front of broader audiences, rather than to focus on communicating with other members. In committee and on the floor, members continually propose amendments not in an effort

---

<sup>7</sup> R. Douglas Arnold, *The Logic of Congressional Action* (New Haven: Yale University Press, 1990), p. 275.

to improve legislation but instead to put their opponents on the wrong side of public opinion.

After the reforms of the 1970s established recorded voting in the Committee of the Whole and electronic voting in the House, the number of roll-call votes skyrocketed.<sup>8</sup> Making it easy to force votes led members to call for more of them. Members began to demand more recorded votes on amendments designed to embarrass their opponents. Repetitive votes on hot-button issues were taken not to advance congressional deliberation but for use in election campaigns. Opening up the process did not just allow the public a view of what was happening in Congress. It altered strategic behavior in Congress in fundamental ways.<sup>9</sup>

Message politics has become an even greater preoccupation for Congress since the 1994 elections and the end of the seemingly permanent Democratic majority of the 20th century Congress. As competition for majority control of Congress intensified, an increasingly large share of floor debate and recorded votes has been aimed at communicating messages to broader constituencies. When majority control of Congress is continually “in play,” congressional transparency fuels an environment of continuous partisan confrontation as the party out of power seeks to retake control and the party in power seeks to drive a narrative making the case for its continued majority status.<sup>10</sup>

Contemporary members of Congress regularly refer to “message” or “messaging” bills, “message votes,” “message amendments,” and “show votes.” Message votes stand out from other votes because their goal is communication, not lawmaking. Former Sen. Olympia Snowe offers a more detailed definition:

Much of what occurs in Congress today is what is often called “political messaging.” Rather than putting forward a plausible, realistic solution to a problem, members on both sides offer legislation that is designed to make a political statement. Specifically, the bill or amendment is drafted to make the opposing side look bad on an issue and it is not intended to ever actually pass.<sup>11</sup>

In a context where few members represent swing districts, transparency tends to result in more members toeing the party line and adhering to partisan talking points. Consider, for example, what senators said as they emerged from the Senate’s bipartisan retreat behind the closed doors of the old Senate Chamber in the summer of 2013 to discuss a possible change to the Senate’s filibuster rule to break the deadlock on judicial appointments. “There was no rancor at all,” said Senator John Boozman (R-AR) of the closed-door

---

<sup>8</sup> Steven S. Smith, *Call to Order: Floor Politics in the House and Senate* (Washington, DC: Brookings Institution Press, 1989).

<sup>9</sup> John A. Lawrence, *The Class of '74: Congress After Watergate and the Roots of Partisanship* (Baltimore: Johns Hopkins University Press, 2018).

<sup>10</sup> Frances E. Lee, *Insecure Majorities: Congress and the Perpetual Campaign* (Chicago: University of Chicago Press, 2016).

<sup>11</sup> Olympia J. Snowe, “The Effect of Modern Partisanship on Legislative Effectiveness in the 112th Congress,” *Harvard Journal on Legislation* 50 (1, 2013): 21-40.

session attended by 98 senators. “I think if the American people were watching, the whole tone would have been different. It’s different when the TV cameras are on. That might be part of the problem.”<sup>12</sup> Public settings are simply less conducive to setting aside differences and negotiating a deal.

These themes surfaced in our interviews with congressional staff negotiators, as well. When negotiations unfold in public view, issues “get tribalized in the media,” explained a longtime staffer. “If you can keep things out of the view of the public that’s the best way to actually do something.” Today, “the politics of each party’s base” makes it impossible to engage in a give and take. Exploratory offers get interpreted as capitulations.

The same type of messaging politics also occurs in congressional committees. When Congress attempts to follow “regular order” committee processes, it often just becomes an opportunity for messaging, even when the underlying bill itself is not controversial. According to one staffer, if “you try to work through an open mark-up or something, the bill gets weighed down in partisan attacks and nothing happens.” Faced with these prospects, congressional leaders instead often opt for tightly managed, less transparent processes. Legislation just gets negotiated behind the scenes and then ratified in formal settings. As one staffer concluded, “When the other side isn’t really trying to legislate through the process but is just putting up these partisan gotcha amendments, you have to move on. You have to close it down.”

An audience changes the nature of congressional deliberation. The opening up of the process fosters messaging politics and contributes to the harsh partisanship characteristic of the contemporary Congress.

### Unanticipated consequences

One of the unanticipated consequences of transparency reforms has been to divert congressional negotiation to other settings where the doors can be closed. Many confidential settings not governed by sunshine requirements certainly still exist in Congress, such as: party caucuses, party leadership offices, committee pre-meetings, and other private bargaining sessions including informal “gangs.”<sup>13</sup>

Of these confidential settings, party leadership offices have emerged as most important. Major legislation in the contemporary Congress is regularly negotiated in party

---

<sup>12</sup> Quoted in Ed O’Keefe and Jenna Johnson, “No Filibuster Deal, but Senators Agree They Should Meet More Often.” *Washington Post*, July 15, 2013.

<http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/15/no-filibuster-deal-but-senators-agree-they-should-meet-more-often/>.

<sup>13</sup> Walter J. Oleszek, “Congressional Lawmaking: A Perspective on Secrecy and Transparency,” Congressional Research Service Report, R42108, November 30, 2011.

leadership offices.<sup>14</sup> Party leaders convene and host meetings of key players, selected at the leader’s discretion, where a great deal of policy gets worked out. “Complete and total transparency makes it very hard to negotiate and have conversations,” a staffer said. “It’s impossible to have a quiet, candid conversation except at the leadership level.” Meanwhile, if congressional leaders often appear overly secretive, it is because they often feel they have to be.

In such informal settings, members can have the kind of frank, internal conversations—away from pressures from organized interests—that are so often necessary for successful legislation. Negotiations conducted in leadership offices do not take full advantage of the expertise that committees have. They tend to minimize the influence of rank-and-file members who have little influence over which issues are discussed in such settings and whose views are represented. But in a Congress that has been so opened up to public view, leadership offices are private venues in which it is easier to conduct negotiations.

Past generations of congressional reformers had hoped that institutional reforms would improve public esteem for Congress as an institution. But today’s more transparent Congress has not improved its standing with the broad public. Public approval of Congress is lower today than it was in the 1970s.<sup>15</sup> According to Gallup polling, only about 1 in 5 Americans approves of Congress. Public approval of the institution hasn’t exceeded 30% since 2007. Indeed, some research suggests that the very transparency of the legislative process drives down public esteem for the institution.<sup>16</sup> The more transparent the legislative process is, the more the public dislikes Congress. There is good data backing up the old nostrum that people prefer to not see how the sausage gets made.

To conclude: transparency of deliberative processes has not yielded greater institutional legitimacy; indeed, it may even have undermined it. Meanwhile, transparency often imposes direct costs on legislative negotiation.

Going forward, I recommend that Congress consider carefully whether proposed transparency reforms have the potential to burden legislative negotiations. We are now in a position to take stock of prior reforms, and they point to some very significant downsides of transparency.<sup>17</sup> It is not likely that Congress will reverse the sunshine reforms of the 1970s. But as new proposals for more transparency are suggested, I hope that Congress will—as in the words of the Constitution—consider “excepting such parts as may in their judgment require secrecy.”

---

<sup>14</sup> Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*, 5th Edition (Washington, DC: CQ Press, 2016).

<sup>15</sup> Jessica C. Gerrity, “Understanding Congressional Approval: Public Opinion From 1974 to 2014,” in *The Evolving Congress*, U.S. Senate Committee on Rules and Administration, S. Prt. 113-30, 189–216.

<sup>16</sup> John R. Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy* (New York: Cambridge University Press, 1995).

<sup>17</sup> James D’Angelo and Brent Ranalli, “The Dark Side of Sunlight: How Transparency Helps Lobbyists and Hurts the Public,” *Foreign Affairs*, May/June 2019.

**FRANCES E. LEE**  
Professional Summary

**CURRENT POSITION**

Professor, Government & Politics, University of Maryland, 2010-present.

**EDUCATION**

Ph.D., Political Science, Vanderbilt University, 1997.

B.A., English, University of Southern Mississippi, May 1991.

**BOOKS**

- Lee, Frances E. and Nolan McCarty, eds. 2019. *Can America Govern Itself?* New York: Cambridge University Press.
- Lee, Frances E. 2016. *Insecure Majorities: Congress and the Perpetual Campaign.* Chicago: University of Chicago Press.
- Davidson, Roger H., Walter J. Oleszek, Frances E. Lee and Eric Schickler. 2018. *Congress and Its Members.* 16th Edition. Washington, DC: Sage / CQ Press. Prior editions in 2016, 2014, 2012, 2010, and 2008.
- Schickler, Eric and Frances E. Lee, eds. 2011. *The Oxford Handbook of the American Congress.* New York: Oxford University Press.
- Lee, Frances E. 2009. *Beyond Ideology: Politics, Principles and Partisanship in the U.S. Senate.* Chicago: University of Chicago Press.
- Lee, Frances E. and Bruce I. Oppenheimer. 1999. *Sizing Up The Senate: The Unequal Consequences of Equal Representation.* Chicago: University of Chicago Press.

**ARTICLES (PAST 5 YEARS)**

- Curry, James M. and Frances E. Lee. Forthcoming 2020. "What is Regular Order Worth?" *Journal of Politics.*
- Curry, James M. and Frances E. Lee. 2019. "Non-Party Government: Bipartisan Lawmaking and Party Power in Congress." *Perspectives on Politics* 17 (1): 47-65.
- Lee, Frances E. 2018. "The 115th Congress and Questions of Party Unity in a Polarized Era." *Journal of Politics* 80 (4): 1464-73.
- Lee, Frances E. 2016. "Patronage, Logrolls, and Polarization: Congressional Parties of the Gilded Age, 1876-1896." *Studies in American Political Development* 30: 116-127.
- Hinchliffe, Kelsey L. and Frances E. Lee. 2016. "Party Competition and Conflict in State Legislatures." *State Politics and Policy Quarterly* 16 (2): 172-197.
- Lee, Frances E. 2015. "How Party Polarization Affects Governance," *Annual Review of Political Science* 18 (June): 261-282.
- Gimpel, James G., Frances E. Lee and Michael Parrott. 2014. "Business Interests and the Party Coalitions: Industry Sector Contributions to U.S. Congressional Campaigns." *American Politics Research* 42 (6): 1034-1076.