

CRS Report for Congress

Received through the CRS Web

Legislative Proposals: Selected Considerations for Their Development

Updated August 6, 2003

Richard Beth and James V. Saturno
Specialists in American National Government
Government and Finance Division

Christopher M. Davis
Analyst in American National Government
Government and Finance Division

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Summary

This report identifies a variety of considerations that may be addressed in developing a legislative proposal. Its first part identifies some general questions that may at the outset clarify the purpose of the proposal: What is the bill's purpose? What actions, and what class of persons, would it regulate? What agency or authority would implement it?

The second part looks at matters that may raise obstacles to successful consideration of a legislative proposal. Constitutional considerations include: What constitutional power of Congress would the bill carry out? (An appendix briefly lists these powers.) Are the activities to be carried on consistent with constitutional restrictions? Are arrangements for appointing and removing officials consistent with the President's constitutional authority? Is any delegated authority subjected to appropriate standards and free from impermissible congressional review? Are requirements that Congress receive information consistent with executive privilege? Would the law constitute a bill of attainder, *ex post facto* law, or uncompensated taking of property? What is congressional intent on preempting state and local authority? Are the means provided for imposing any sanctions consistent with due process requirements? Should the bill include provisions on severability?

Substantive considerations include: How do the bill's provisions relate to existing law in the same policy area? How do they comport with existing law that regulates the activities of government generally? When should the law take effect? What provisions for judicial review and congressional oversight may be appropriate? Does the bill include, if appropriate, authorizing language or "sunset" provisions? Should it contain any findings or statement of purpose?

Budgetary and funding considerations include: Does the bill include spending or taxes? Does it include authorizations? Does it provide contract or debt authority? Does it provide entitlement authority? Does it deal with the budget process? Will it require a cost estimate? Does it establish or expand any unfunded intergovernmental mandates?

Considerations related to procedure include: Does the bill contain any congressional approval or disapproval provisions? Would any of its provisions operate as rules of the House or Senate? Does it require establishing any expedited procedures or similar rulemaking provisions? Does it contain private provisions of prohibited kinds or establish a commemoration?

Contextual considerations include: To what committee might the bill be referred? Might it require multiple referral? Are there alternative proposals on the same subject, including companion bills in the other chamber? How may likelihood of action be affected by the timing of its introduction?

Contents

Formulating the Concept of Legislation	1
Introduction	1
Basic Considerations	2
What Purpose Does the Bill Intend to Achieve or Promote?	2
What Actions, and What Class of Persons, Would the Bill Regulate? ..	2
What Agency or Authority Would Implement or Enforce the Activities Prescribed?	2
How Should the Functioning of the Implementing Authority Be Regulated?	3
What Means of Action, Including the Power to Issue Regulations, Should Be Available for Implementing and Enforcing the Bill? ..	3
Additional Considerations	4
Constitutional Considerations	4
What Constitutional Power of Congress Does the Bill Propose to Carry out?	4
Are the Activities to be Carried on Under the Bill Consistent with Constitutional Restrictions on the Powers of the Federal Government?	4
Are Arrangements for Appointment and Removal of Officials Consistent with the President’s Constitutional Authority?	5
Is Any Delegation of Authority Subjected to Appropriate Standards and Left Free from Impermissible Congressional Review?	5
Are Requirements That Congress Receive Information Consistent with Executive Privilege for Confidential Communications?	6
Would the Law Constitute a Bill of Attainder, Ex Post Facto Law, or Uncompensated Taking of Property?	6
What Is Congressional Intent with Respect to Federal Preemption of State and Local Authority?	6
Are the Means by Which Any Sanctions May Be Imposed Consistent with Due Process Requirements?	6
If Any Provisions of the Bill Raise Serious Questions of Constitutionality, Should it Include Provisions on Severability? ..	7
Substantive Considerations	7
How Does the Bill Relate to Existing Law in the Same Policy Area? ..	7
How Do the Bill’s Provisions Comport with Existing Law That Regulates the Activities of Government Generally?	8
When Should the Law Take Effect?	8
What Provisions for Judicial Review and Congressional Oversight Are Appropriate?	8
Should the Bill Include Authorizing Language or “Sunset” Provisions to Limit the Duration of the Activities Authorized? ..	9
Should the Bill Contain Any Findings or Statement of Purpose?	9
Budgetary and Funding Considerations	9
Does the Bill Include Spending or Taxes?	10
Does the Bill Include Any Authorizations?	10
Does the Bill Provide Contract or Debt Authority?	11

Does the Bill Provide Entitlement Authority?	11
Does the Bill Deal with the Budget Process?	11
Will the Bill Require a Cost Estimate?	12
Does the Bill Establish or Expand Any Unfunded Intergovernmental Mandates Whose Consideration Might Be Subject to a Point of Order?	12
Considerations Related to Procedure	12
Should the Bill Include Any Congressional Approval or Disapproval Provisions? If So, Can They Meet Constitutional Requirements?	12
Would Any Provisions of the Bill Operate As Rules of the House or Senate?	13
Does the Bill Require Establishing Any Expedited Procedures or Similar Rulemaking Provisions?	13
Does the Bill Contain Private Provisions of Prohibited Kinds or Establish a Commemoration?	14
Contextual Considerations	14
To What Committee and Subcommittee Is the Bill Likely to be Referred?	14
Is the Bill Likely to Require Multiple Referral?	15
Are Alternative Proposals on the Same Subject Already Present, Including Companion Bills in the Other Chamber?	15
How May Likelihood of Action on the Bill Be Affected by the Timing of Its Introduction?	15
Considerations Beyond the Scope of the Report	16
Appendix: Powers of Congress	17
General	17
Citizenship and Rights	18
Power of the Purse	18
National Security	19
Foreign Relations	20
Commerce	20
Judicial Process	21
Federal Relations	22
Elections	22
Federal Officers	24
Judicial Branch	24
Legislative Branch	25
Amend Constitution	25

Legislative Proposals: Selected Considerations for their Development

Formulating the Concept of Legislation

Introduction

This report identifies a variety of considerations that may be useful in developing and formulating a legislative proposal. Its chief emphasis is on issues that apply to all legislative measures. It does not generally address questions that bear only on a specific kind of legislation, such as reconciliation or appropriation bills.

For each issue addressed, the report offers only a brief sketch of the nature of the questions involved. Nor is it a comprehensive list of all considerations that might be relevant in developing legislative proposals. In particular, it does not attempt to offer guidance on the actual drafting of legislative language. The Office of the Legislative Counsel offers such guidance.

Two types of consideration are raised. Part one of the report poses some general questions that may need attention when starting to develop any new legislative idea, as a part of clarifying its nature and purpose. Questions of this kind will often assist in defining the intent, approach, and essential features of the proposal.

Part two of the report looks at matters that may raise obstacles to successful consideration of a legislative proposal, especially when attention to such questions during the process of formulation may make it possible to avoid or mitigate such obstacles. The issues covered include considerations relative to

- the Constitution;
- existing law and its normal forms;
- the budget process;
- rules regulating the content and structure of legislation; and
- the procedural context in which legislation is considered.

In contrast with part one, many of the considerations raised by part two are technical, and involve substantial complexity. Often, only a legal or policy specialist would normally have a comprehensive or detailed grasp of their implications in a specific case. These implications, however, need not always be addressed, and may be impossible to address meaningfully, until the outlines of a specific legislative approach are settled. Once basic decisions of the kind suggested by part one of the report are made, attention to issues raised by part two may help to avoid unnecessary technical difficulties, and facilitate successful consideration.

As a legislative idea develops to the point that the basic questions raised by part one can be answered, it may be increasingly useful to consult specialists in drafting and formulating legislation, such as the Office of the Legislative Counsel. These specialists can often provide assistance in identifying pertinent issues of the kinds discussed in part two, and developing appropriate legislative responses.

Basic Considerations

Before attempting to draft specific legislative language, or addressing the more technical questions identified later in this report, it will usually be important to settle on general features of the legislation's intent. Once such questions are clarified, it is possible to produce a concrete draft, and to identify which questions of a more specialized character may be pertinent. The Office of the Legislative Counsel can assist in both of these tasks.

What Purpose Does the Bill Intend to Achieve or Promote?

It may not always be necessary to include an explicit statement of purpose in the text of a legislative proposal. Nevertheless, if the proposal's developers possess a clear sense of its purpose, that understanding may be useful for reducing the legislative concept to concrete terms. It may be desirable to identify the purpose of a proposal by the outcomes, or states of affairs, that the legislation intends to bring about, or at least foster. Sometimes these may be defined negatively, for example, as states of affairs to be avoided or outcomes to be prohibited. Answering these questions may facilitate consideration of appropriate means to the desired ends.

What Actions, and What Class of Persons, Would the Bill Regulate?

Defining the outcome sought by legislation is seldom sufficient to determine the means by which the desired outcome can be attained. It may often be appropriate to identify such means as specific kinds of action to be taken by specific persons. Considering legislative objectives in this light may lead to such questions as to whom the legislation is intended to apply, and who would be included in the class of persons covered by the statute. The class will often be defined by identifying persons who perform specified actions, who fail to perform such action, who are to do specified things, or who are to refrain from doing specified things. To this extent, this question is what forms of action the legislation intends to regulate, direct, govern, or otherwise cover.

It may also be necessary to consider whether the entire range of actions covered can be dealt with by the same set of rules, or if not, what variations, alternatives, exceptions, exemptions, or other special cases should be included in the legislation.

What Agency or Authority Would Implement or Enforce the Activities Prescribed?

Law is, in general, not self-enforcing. If a legislative proposal authorizes or mandates activities by the federal government, it will usually be desirable for the proposal to charge some identified and appropriate entity or agency with carrying out those activities. Similarly, if a proposal regulates actions by nongovernmental

parties, it will normally be useful to charge an agency or authority with responsibility for enforcing the performance of those actions. In either case, the implementing entity will normally be an agency of the federal government or an entity exercising powers delegated from it. Under the Constitution, Congress has virtually plenary power to create, abolish, or alter departments and agencies, to determine their structure, to specify their location in the governmental bureaucracy, and to establish offices of government and the qualifications and terms of officeholders.¹

How Should the Functioning of the Implementing Authority Be Regulated?

Legislation may often more likely be carried into action effectively if it explicitly provides appropriate standards of performance for, and criteria of decision making and action by, the implementing agency. It may also often be important to make explicit whether any specified function is discretionary or mandatory; that is, whether the legislation grants permission to act, or requires action of certain kinds. Congress has broad power under the Constitution to prescribe the decisional process and criteria through which an agency is to carry out its functions.

What Means of Action, Including the Power to Issue Regulations, Should Be Available for Implementing and Enforcing the Bill?

The chances that a statute will be successfully implemented will usually be improved if it provides the implementing entities with adequate and appropriate authorities and means of action. Congress has broad power to determine the means of action that an agency may employ in exercising its authorities. Among other possibilities, an agency may act by

- carrying out functions through its own employees;
- contracting with private organizations for the performance of such functions;
- delegating such functions to other appropriate entities;
- distributing benefits to eligible recipients;
- conditioning the provision of federal funds on appropriate actions by recipients;
- providing other incentives or benefits for compliance with applicable standards;
- making and enforcing administrative regulations; or
- enforcing activities or prohibitions through judicial proceedings, either civil or criminal.

Means of enforcement may, as appropriate, include both sanctions and incentives, carried out either through administrative process or through the courts. When appropriate, legislation may assign penalties for nonperformance or violations. One important question may be whether the agency should have authority to issue

¹ Limitations on the range of alternatives available in this connection are further discussed in the “Constitutional Considerations” section, below.

regulations. It may also be necessary to consider how much of any required regulatory scheme should be included in the statute itself.

Additional Considerations

Constitutional Considerations

Department of Justice attorneys routinely scrutinize reported bills for potential constitutional problems. While the Department of Justice tends to be more sensitive than a court might be, particularly if it perceives legislative encroachments on executive prerogatives, it would be prudent to be aware of the most common areas of potential controversy.

What Constitutional Power of Congress Does the Bill Propose to Carry out?

The Constitution endows Congress with a wide range of specific legislative powers, and empowers it to “make all laws which shall be necessary and proper for carrying into Execution” these powers. It also empowers Congress to legislate to carry out “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”² Both these grants of power have been interpreted broadly, especially during recent times. Yet the statement of these provisions, and of the Tenth Amendment,³ also entails the principle that the legislative powers of Congress are not unlimited, but are confined to those subjects over which the Constitution grants it some specified authority. It may be appropriate to consider specifically what constitutional powers of the three branches of government the legislative proposal is intended to carry out, and what powers of Congress it would be enacted pursuant to.

Rule XIII, Clause 3(d)(1) of the House of Representatives requires that committee reports on legislation specify the constitutional power under which the legislation would be enacted. A brief outline of the powers of Congress established by the Constitution arranged by substantive category appears as an appendix to this report.

Are the Activities to be Carried on Under the Bill Consistent with Constitutional Restrictions on the Powers of the Federal Government?

The Bill of Rights (Amendments I through X of the Constitution), as well as certain other constitutional provisions, prohibit or restrict Congress from enacting

² Article I, Section 8, clause 18. U.S. Congress, *The Constitution of the United States of America: Analysis and Interpretation*, prepared by the Congressional Research Service, Johnny H. Killian, George A. Costello, co-editors, 103rd Cong., 1st sess., S.Doc. 103-6 (Washington: GPO, 1996), p. 339. (Hereinafter cited as *The Constitution Annotated*.)

³ *Ibid.*, p. 1509.

legislation of certain kinds.⁴ These include especially those that would abridge basic civil liberties or impair rights to due process in judicial proceedings (discussed further at a later point of this section). They also restrict Congress from legislating in areas or ways that would lie beyond the powers granted to it by the Constitution, or that would infringe on powers and rights retained by the states or the people. Legislation trespassing on any of these restrictions would be subject to being found unconstitutional by the federal courts.

Are Arrangements for Appointment and Removal of Officials Consistent with the President’s Constitutional Authority?

All “principal” officers of the United States, for example, department heads, judges, and ambassadors, must be appointed by the President with the advice and consent of the Senate. Congress can vest the appointment of inferior officers in the President with the advice and consent of the Senate, in the President alone, in department heads, or in the courts.⁵ Congress cannot vest the appointment power in Congress or congressional officials unless the appointee will be performing purely advisory, investigative, informative, or ceremonial functions. Nor can Congress limit the President’s appointment power by making him select from a short list. The President must have the opportunity to reject the proffered names and ask for more names. Congress may limit the President’s power to remove executive officials “for cause,” but it may not vest the removal authority in itself or its officers.

Is Any Delegation of Authority Subjected to Appropriate Standards and Left Free from Impermissible Congressional Review?

Congress may delegate any authority it has under Article I, Section 8, as long as the delegation is accompanied by some standard that constrains the discretion of the delegee. Congress cannot condition a delegation of authority by making its exercise subject to veto or cancellation by any exercise of legislative power short of the passage of a new law. But Congress can require that an action be reported to it before it takes effect, and delay the effectiveness of the action for a specified period of time (as further discussed below, such requirements may be coupled with “expedited procedures” for congressional action responding to such reports).

In many areas, Congress may not delegate substantive federal authority to private parties unless there is some final say by an executive branch official. Under some circumstances, Congress may delegate authority to private persons to engage in prosecutorial actions on behalf of the government, or may subject an agency to binding arbitration. It is not a violation of the appointments clause to vest a state official with federal enforcement functions.

⁴ Bill of Rights, Amendments I-X, in *The Constitution Annotated*, pp. 969-1518. Also see esp. Constitution, Article I, Section 9, *ibid.*, pp. 344-359.

⁵ Constitution, Article II, Section 2, *The Constitution Annotated*, pp. 469, 507-520.

Are Requirements That Congress Receive Information Consistent with Executive Privilege for Confidential Communications?

Congress may require that agencies provide it with specified categories of information, either broadly or particularly defined, on a periodic or specifically defined occasional basis. At some point, however, such requirements may impinge on “executive privilege,” which may protect from disclosure some communications between the President and his closest advisors, especially with respect to national security, diplomatic, or military affairs.

Would the Law Constitute a Bill of Attainder, Ex Post Facto Law, or Uncompensated Taking of Property?

Congress may not enact legislation that inflicts punishment on a person without a judicial trial (bill of attainder), or that takes private property for public use without just compensation. Nor may Congress enact any law that makes criminal an act that was innocent when done, or that increases the punishment for a crime already committed (*ex post facto* law).⁶

What Is Congressional Intent with Respect to Federal Preemption of State and Local Authority?

Federal statutes, so long as they are themselves constitutional, may preempt state and local laws. They may do so explicitly, or the courts may hold them to have done so implicitly. Specific language addressing the intended scope of presumption extent can aid interpretation.

Statutes may also give federal agencies authority to promulgate rules that have the effect of preempting state and local laws and regulations. Recent Supreme Court cases indicate, however, that the congressional intent for such preemptive effect must be clear and evident on the face of the statute or from the legislative history of the enactment. It cannot simply be implied.

Are the Means by Which Any Sanctions May Be Imposed Consistent with Due Process Requirements?

Provisions of laws that would impose criminal or civil sanctions for particular conduct must meet minimal standards of due process. For one thing, the definition of the proscribed activity cannot be so vague as to fail to give a person notice that jeopardy will ensue. Also, the persons potentially subject to criminal or civil sanction must be accorded procedures necessary to assure that the constitutional protections against illegal searches and seizures, the right to a fair trial and legal counsel, etc., are safeguarded. Some constitutional procedural protections are applicable to civil enforcement settings as well.

⁶ Constitution, Article I, Section 9, clause 3, *The Constitution Annotated*, pp. 346-352. Constitution, Amendment V, *ibid.*, pp. 1273, 1369-1395.

If Any Provisions of the Bill Raise Serious Questions of Constitutionality, Should it Include Provisions on Severability?

In some cases when the federal courts have held a provision of law unconstitutional, they have concluded that Congress would not have enacted the remainder of the statute if they had known that the invalidated provision could not be carried into effect. In such cases they have determined that the separate provisions of the statute should not be treated as severable from one another, so that invalidation of the unconstitutional provision had the consequence of invalidating the entire statute. In other cases they have reached the contrary conclusion, that Congress would have intended the remainder of a statute to continue in effect even if the provision under consideration were to be held invalid as unconstitutional. In such cases they have treated the different provisions of the statute as severable, and continued to enforce the remainder of the statute even while invalidating the unconstitutional provision.

Judicial decisions on severability can by these means substantially alter the effect of decisions on constitutionality. To determine severability, the courts place weight on provisions of the statute itself declaring congressional intent about whether the invalidation of one provision should place the remainder of the statute out of effect. If the developers of a legislative proposal are aware of any potential doubts about the constitutionality of any of its provisions, therefore, they may find it desirable to place such a statement in the language of the legislation.

Substantive Considerations

Considerations advanced by this section may often be resolved by appropriate drafting of specific legislative language. On such issues, the Office of Legislative Counsel may frequently be able to offer suitable resolutions.

How Does the Bill Relate to Existing Law in the Same Policy Area?

Provisions of legislation that conflict with existing law may, if enacted, have the effect of superseding and overriding that existing law. To what extent they do so, and with what effect, may depend on their specific relation to that existing law. For example, new legislation may have such effects because it explicitly alters the previous law; because it implicitly conflicts therewith; or perhaps also because it bears some even more indirect relation thereto. Particularly when the relation is one of conflict, uncertainty about potential effects may often be reduced if the new legislation explicitly specifies how it intends to affect existing law. It may make such a specification by identifying the points at which it would amend, repeal, or otherwise alter that existing law, and the ways in which it would do so. Such an approach may also reduce potential subsequent difficulties of interpretation and implementation. (For additional information, see CRS Report RS20614, *How Bills Amend Statutes*, by Richard S. Beth.)

How Do the Bill's Provisions Comport with Existing Law That Regulates the Activities of Government Generally?

The provisions of a bill may implicitly require activities to be carried out in a fashion that may inadvertently conflict with, or may be affected in unexpected ways by, various provisions of existing general legislation. Among many others, for example, there are potentially pertinent general statutes that regulate

- government personnel;
- procurement;
- “sunshine” requirements for public participation;
- the operation of advisory commissions; and
- requirements and procedures for judicial review or enforcement.

Frequently, a consideration of particular importance may be whether authority to issue regulations is granted consistently with general statutes governing regulatory processes.

Often it may be requisite to consider how the purposes of the bill may best be achieved consistently with these mandates of general legislation. Sometimes, on the other hand, it may be appropriate to provide for exceptions to the generally applicable laws. In all such cases it may be necessary to consider explicitly, and to provide explicitly for, the relation between the activities contemplated by the legislation and general law regulating such matters.

When Should the Law Take Effect?

Federal laws generally take effect from the date of their enactment, unless their provisions specify some other effective date. Sometimes it may be desirable to provide a later effective date, such as where a transition period from previous law to the new one may be needed. In such cases it may also be desirable to provide explicit transition rules to facilitate required adjustments by persons affected. Legislation taking effect during a current fiscal year may also raise problems related to applicable spending caps, as discussed further by the section on budget process.

What Provisions for Judicial Review and Congressional Oversight Are Appropriate?

The effectiveness with which legislation furthers its intended purposes may be enhanced not only by including performance standards and decision making criteria, but by providing for suitable review and oversight of the implementing agency's performance under those standards. Congress possesses constitutional power to determine whether agency decisions shall be subject to judicial review, and the extent and nature of that review. Generally, in the absence of provision to the contrary, the presumption is that agency action will be subject to judicial review pursuant to the Administrative Procedures Act.⁷

⁷ 5 U.S.C. 704.

Congress also possesses powers of oversight and investigation of government activities, which are necessary to permit it to ascertain whether its intent is being properly carried out, and to determine whether further legislation may be necessary. However, the likelihood that functions directed by law will be performed effectively may be increased if the legislation explicitly provides suitable mechanisms for oversight and review by appropriate organs of Congress. Among others, these may include requirements for reporting, consultation, and sunseting.

Should the Bill Include Authorizing Language or “Sunset” Provisions to Limit the Duration of the Activities Authorized?

Some activities of government, such as specific projects or actions directed toward a specific situation, may reach a natural termination or completion. Others are inherently more general, and may potentially continue indefinitely. Legislation typically contains provisions authorizing the appropriation of specific maximum amounts of funds for specified fiscal years (or other periods), especially for activities of indefinite duration whose performance requires spending. Implications of such language are discussed further by the section on budget process issues.

Legislation may also authorize a program or activity itself only for a specific period, a form of limitation known as a “sunset” provision. Provisions of this kind require advocates to seek reauthorization if the activity is to continue beyond the initially authorized period. The sunset provisions build into subsequent legislative action an opportunity for review and modification, but also an additional workload requirement for Congress. They may tend to prevent the indefinite perpetuation of activities that may at some point prove inadequate or inappropriate. On the other hand, their presence may necessitate a renewed legislative struggle simply in order to ensure that worthwhile public purposes may be pursued without interruption. Often it may be prudent to make sure that the legislation specifies the duration of the authorized activity in some way appropriate to the nature of that activity.

Should the Bill Contain Any Findings or Statement of Purpose?

A statement of the purposes of the legislation, or of circumstances that make it expedient, may be useful for advancing sympathetic understanding of its aims and ends. It may also help to clarify the purposes and conditions of the legislation during the process of subsequent interpretation. Such interpretation may be required not only in the judicial process, but also in the processes through which the applicable authorities implement the legislation. Thus, a statement of purpose may help insure that the legislation will be implemented in ways that effectively reflect its intent. Such a statement may also serve as a standard for subsequent review and oversight when Congress evaluates the success of the policy.

Budgetary and Funding Considerations

Considerations raised by this section may affect most legislation that involves raising or spending public funds, including those that only authorize such spending. Many of the issues identified by this section arise from requirements of the

Congressional Budget Act,⁸ often operating as congressional rules; others, from the standing rules of the two Houses. The sources of these requirements are identified throughout the section where appropriate.

Does the Bill Include Spending or Taxes?

When drafting legislation it is important to ask whether it includes spending or taxes because, for the most part, rules of each chamber require budgetary matters to be considered separately from other legislative measures. Specifically, House Rule XXI, clause 4, effectively prohibits any bill not reported by the Appropriations Committee (except for private claims) from containing appropriations.

House Rule XXI, clause 5(a), effectively prohibits any bill not reported by the Ways and Means Committee from including tax or tariff provisions, although other types of federal receipts may be under the jurisdiction of other committees.

The Senate possesses no general prohibition against appropriations in a legislative measure. Senate Rule XV, however, provides that it shall not be in order to consider a committee amendment not within the jurisdiction of the committee proposing such an amendment. Since Senate Rule XXV establishes that “Appropriation of the revenue for the support of the Government” is within the jurisdiction of the Appropriations Committee, no other committee may report an amendment making appropriations. For similar reasons, the rule prevents any committee other than the Finance Committee from reporting committee amendments concerning tax or tariff provisions. Also, Article I, Section 7 of the Constitution requires that “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”⁹

Does the Bill Include Any Authorizations?

Authorizations can provide authority both for agencies to act and for appropriations to provide funding. Accordingly, it is important for legislation to identify the type of authority being granted. If a bill provides a general authority for the agency to act, without further elaboration or limitation, such language would also implicitly authorize an indefinite level of appropriations for the life-span of the provision. A bill may also provide either a general authorization for appropriations tied to an agency’s mission, or authorizations only for specified purposes or items. In the latter case, the authorized level of appropriations may also be limited to a specific dollar amount or duration. Finally, the authorization may limit the activities of the agency, or the level of appropriations, to only what the bill explicitly provides for. Such an authorization may conflict with existing law; if so, it may be appropriate explicitly to repeal or amend that existing law.

⁸ Titles I through IX of the Congressional Budget and Impoundment Control Act of 1974, P.L. 93-344, 88 Stat. 298 as amended.

⁹ For additional information on this subject, see CRS Report RL31399, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*, by James V. Saturno.

Does the Bill Provide Contract or Debt Authority?

In answer to concerns about the proliferation of “backdoor” funding mechanisms, the Congressional Budget Act limited the use of contract authority and debt authority as means of financing federal programs. Section 401(a) of the Congressional Budget Act requires that bills which provide authority “to enter into contracts under which the United States is obligated to make outlays,” and “to incur indebtedness ... for the repayment of which the United States is liable,” be effective for any fiscal year only to the extent provided in appropriation Acts.

Does the Bill Provide Entitlement Authority?

The Congressional Budget Act defines entitlement authority as the authority “to make payments (including loans and grants), the budget authority for which is not provided in advance by appropriations Acts, to any person or government if, under the provisions of the law containing such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by such law.”¹⁰ Although legislation can alter the formulae for entitlement programs, which can, in turn, increase the projected level of expenditures, Section 401(b) of is designed to limit such increases. It also requires that increases in entitlement spending not be effective prior to the beginning of the “fiscal year which begins during the calendar year in which such bill or resolution is reported.”¹¹ It further provides that increases which will become effective during a current fiscal year be limited to the level allocated under Section 302(b) by the committee of jurisdiction pursuant to the most recent budget resolution, or be subject to referral to the Appropriations Committee (for a period not to exceed 15 days).¹²

Does the Bill Deal with the Budget Process?

Section 306 of the Congressional Budget Act prohibits any bill or amendment from dealing with matters within the jurisdiction of the Budget Committee in either chamber unless it is reported by the Budget Committee (or is an amendment to a bill reported by the Budget Committee). Besides jurisdiction over budget resolutions and reconciliation bills, House Rules grant the Committee jurisdiction over “the congressional budget process, generally.” They also gave it jurisdiction over the “establishment, extension, and enforcement of special controls over the Federal budget, including the budgetary treatment of off-budget Federal agencies and measures providing exemption from reduction under any [sequester order].”¹³ In the Senate, jurisdiction over legislation concerning the budget process is similarly granted to the Budget Committee (jointly with the Governmental Affairs Committee) by a standing order of August 4, 1977. In addition, when drafting legislation that deals with the budget process, it is advisable to consider whether the proposed

¹⁰ Section 401(c)(2)(C). *House Rules Manual*, p. 918

¹¹ Section 401(b)(1). *Ibid.*, p. 915.

¹² Section 401(b)(2). *Ibid.*, p. 916.

¹³ House Rule X, clauses (1)(d)(3)

legislation would be subject to points of order established by the Congressional Budget Act.¹⁴

Will the Bill Require a Cost Estimate?

House Rules and the Congressional Budget Act require that reports for bills providing new spending authority, new budget authority, new credit authority or changing revenues or tax expenditures include a cost estimate prepared “after consultation with the Director of the Congressional Budget Office.” The Congressional Budget Act also requires the Director of the Congressional Budget Office “to the extent practicable,” to prepare a similar cost estimate “for each bill or resolution of a public character reported by any committee.”

Does the Bill Establish or Expand Any Unfunded Intergovernmental Mandates Whose Consideration Might Be Subject to a Point of Order?

If a bill imposes enforceable duties on state, local, or tribal governments, or increases the costs that such governments must bear in order to discharge such duties, then it establishes an intergovernmental mandate. If the costs of such mandates established by the bill and not to be funded by the federal government exceed \$50 million, then consideration of the bill may be subject to a point of order. (Mandates relating to certain subjects, such as social security or protections against discrimination, are exempt from these strictures.) This point of order also applies against a conference report, and a similar point of order applies against an amendment or motion whose adoption would take the total unfunded intergovernmental mandates contained in a bill over the \$50 million threshold. Instead of resorting to these mechanisms, however, especially in the House, if a measure contains unfunded intergovernmental mandates above the prescribed level, sponsors or committees of jurisdiction often seek to reformulate the terms of the legislation to eliminate the potential point of order.

The Senate may waive these points of order by a majority vote. The House may not waive such a point of order by the terms of a special rule for considering the bill (or such a special rule would itself be subject to a point of order), but instead settles such a point of order by a vote on whether to consider the bill despite the point of order.

Considerations Related to Procedure

Should the Bill Include Any Congressional Approval or Disapproval Provisions? If So, Can They Meet Constitutional Requirements?

Some laws authorize the executive to take action of a specified nature only if Congress enacts further legislation approving the action; they may provide for Congress to consider such legislation pursuant to presidential or other executive request. Other measures require the executive to notify Congress of certain proposed

¹⁴ For additional information on budget points of order, see CRS Report 97-865, *Points of Order in the Congressional Budget Process*, by James V. Saturno.

actions, and permit the action only if Congress does not disapprove it by further legislation (the “legislative veto”). *I.N.S. v. Chadha* (1983) established that Congress may provide for such subsequent approval or disapproval only through further lawmaking, and not through simple or concurrent resolutions. Congressional disapproval through lawmaking will normally be effective only if each House can assemble the two-thirds majority requisite to override a veto, but requiring subsequent congressional approval through lawmaking makes any use of the powers granted by the legislation contingent on additional positive action by Congress. Another possibility is to require the executive to notify specified congressional committees before taking a specified action, and then wait a specified period before doing so, thus permitting the committees the opportunity to initiate measures to block the proposed action.

To facilitate congressional action on measures providing the requisite approval or disapproval, laws of this kind often provide that such measures be considered under expedited procedures, discussed at a later point of this section.

Would Any Provisions of the Bill Operate As Rules of the House or Senate?

Provisions of law that operate as procedures governing House or Senate consideration of specified legislation are called “rulemaking provisions.” The Constitution empowers each House of Congress to make its own rules; statutes, by contrast, require the concurrence of both houses and (unless Congress overrides a veto) the President. Each House may accordingly amend or repeal its rules by its own action alone, but a statute normally can be amended or repealed only by a further statutory enactment. Statutes containing rulemaking provisions therefore customarily include a statement declaring that those provisions:

- are enacted as an exercise of the rulemaking power of the respective houses, and
- accordingly, are subject to change or repeal, insofar as they pertain to either house, through further action by that house individually.

Especially in the House of Representatives, the presence in proposed legislation of rulemaking provisions may increase the likelihood of a referral to the Committee on Rules, which has jurisdiction over House Rules.

Does the Bill Require Establishing Any Expedited Procedures or Similar Rulemaking Provisions?

Expedited procedures, colloquially known as “fast track” procedures, are provisions designed to help ensure consideration of a specified kind of measure provided for or required pursuant to a general statute (such as the Trade Act or the Arms Export Control Act). Such procedures are examples of the “rulemaking provisions” just discussed, and are often provided for the consideration of the congressional approval or disapproval measures discussed at an earlier point of this section.

Provisions frequently appearing in expedited procedure statutes include requirements that

- the measure specified be automatically introduced;
- the committee of referral be automatically discharged after a specified time;
- motions to consider the measure be privileged;
- debate of the measure be limited;
- amendments be prohibited (which facilitates concurrence with action of the other chamber); and
- such actions take place within a specified period.

Proper crafting of such provisions can help ensure that they will achieve the desired effects, and that they are consistent with, and enforceable in relation to, established general rules of procedure. The provisions appropriate for each chamber may differ.

Does the Bill Contain Private Provisions of Prohibited Kinds or Establish a Commemoration?

Rules of both chambers prohibit receiving or considering a private bill to pay claims that could be settled under the Tort Claims Act, to correct a military or naval record, or to construct a bridge. House rules prohibit the introduction or consideration of any bill designating a specified period of time to commemorate any person, event, or purpose. A bill containing provisions of either kind would be returned to the Member introducing it, and if the House received any commemorative measure from the Senate, it would be unable to take the measure up, except presumably by unanimous consent.

Contextual Considerations

To What Committee and Subcommittee Is the Bill Likely to be Referred?

A bill's prospects for favorable consideration may be enhanced if referred to a committee that is familiar with the issues addressed, has a record of active involvement with those issues, and is not severely distracted by other workload. Also, if sponsors of the bill sit on the committee of referral, especially in leadership positions, they may be well placed to take actions that may enhance the likelihood that the committee will take up the measure. It is sometimes possible to draft a bill to emphasize specific policy concerns that will enhance the likelihood of referral to one rather than another committee.

These considerations may be relevant not only for the bill's referral to committee, but also for its potential referral by the committee to subcommittees. They may also be pertinent not only to the referral of the bill in the initial chamber of introduction, but to that of companion legislation in the other chamber.

Is the Bill Likely to Require Multiple Referral?

Especially in the House, if a bill touches on the jurisdiction of more than one committee, it may be referred to committees in addition to the primary committee for consideration of portions within the jurisdiction of those committees respectively. A House Rule adopted in the 108th Congress allows the Speaker of the House, in extraordinary circumstances, to refer legislation to more than one committee without designating one committee as primary. (In the Senate, measures are sometimes multiply referred by unanimous consent or pursuant to standing unanimous consent agreements.) Similar divisions of responsibility may occur at the subcommittee level.

A multiply referred measure must be reported by each committee involved before it can be considered on the floor, although sometimes provision is made for automatic discharge of remaining committees within a fixed time if the one, especially the “lead committee,” reports. Some evidence suggests that measures referred to more than one committee are less likely to traverse the legislative process successfully, because they are subject to the need for concurrence from multiple perspectives. Bills can sometimes be drafted so as to reduce the likelihood of such referrals.

Are Alternative Proposals on the Same Subject Already Present, Including Companion Bills in the Other Chamber?

Whether other bills addressing the same issue have been introduced in one chamber may affect the likelihood that the chamber will actively consider that issue, as well as which bill it will likely take as a vehicle for the purpose. Also, if alternative proposals on the same subject are present, their substance may indicate issues that bills in that area may need to address, and the range of means for doing so.

Companion bills in the other chamber may also affect the likelihood that Congress will successfully pursue the legislative process on the issue. Sometimes, sponsors of a bill in one chamber will give consideration to whether to arrange for simultaneous introduction of a companion bill in the other.

How May Likelihood of Action on the Bill Be Affected by the Timing of Its Introduction?

Introduction of a measure at the beginning of a Congress maximizes the time during which the committee of referral has the opportunity to take it up. On the other hand, a measure introduced early in a Congress may escape attention, because of the volume of bills being introduced at that point. Late in the second session of a Congress, by contrast, committees may be forced to concentrate on completing action on legislation they have already initiated; too little time may remain for a committee of referral to fit a bill introduced at that point onto its agenda. Yet measures are sometimes introduced at that point not with the expectation of immediate enactment, but as a trial balloon or to prepare the ground for more substantial action by the subsequent Congress.

Considerations Beyond the Scope of the Report

There are many considerations pertinent to the formulation and development of legislative proposals that lie beyond the scope of this report, and some of them beyond the proper scope of CRS engagement. For example, because it limits itself to the initial formulation of legislative proposals, the report makes no attempt to address all considerations that may arise at a later stage of legislative consideration. These could include such matters as the contents required for committee reports on bills, and the rules that govern the process of amendment by committees and on the floor.

This report also gives no attention to considerations of political strategy and the building of support for a proposal. For instance, it has not considered what features of the bill might promote its being selected as a vehicle for addressing the issue, in preference to other bills (in either the same or the other chamber) taking similar or contrasting approaches to the same subject. It has not examined the possible effects of how cosponsors are to be sought, nor when it might be desirable to seek assignment of a special or distinctive bill number. It has ignored the potential effect on the likelihood that the bill will be scheduled, considered, or enacted, of positions taken (either in the chamber of introduction or the other house) by leadership, by pertinent committees, or by groups of Members involved with the issue holding particular political or ideological views. Similarly, it has avoided addressing the potential impact of views taken by the President, by the prospective implementing agency, and by pertinent organized interests, or the possibility of ascertaining such views in advance.

Finally, the approach of this report has assumed that the bill under discussion is introduced with the intent of securing its enactment. The considerations raised above, therefore, may not always be pertinent to bills introduced for other purposes. Such purposes might include

- “position-taking” to respond to concerns important to a constituency;
- fostering familiarity with and interest in a policy proposal so as to promote the possibility of legislation at some later time; or
- countering (or provoking) doubts about currently popular alternatives in the same issue area.

Appendix: Powers of Congress

Section 8 of Article I of the Constitution lists subjects on which Congress is empowered to make law. Other provisions of the Constitution, including several amendments, also expressly grant Congress the power to make laws in a specified area. Pursuant to the “necessary and proper” clause of the Constitution, referenced below, Congress may also make laws regulating the exercise of powers granted to other branches of government. This appendix lists constitutional powers of Congress not in the sequence they appear in the Constitution, but by policy area. Where appropriate, it also notes explicit limitations placed by the Constitution on any power or group of powers.

The list does not set forth the full constitutional statement of each grant of power. Instead, it includes only a brief identification of each power, with a citation to the pertinent constitutional provision. Except for a few instances related to significant and enduring constitutional controversies or interpretations, it offers no interpretation of the extent or meaning of the powers cited.

General

- “Provide for ... the general Welfare of the United States.” *Article I, Section 8, clause 1.*
- Make all laws “necessary and proper” for executing the enumerated powers of Congress. *Article I, Section 8, clause 18.*
- Make all laws “necessary and proper” for executing “all other powers” granted by the Constitution. *Article I, Section 8, clause 18.*

The “necessary and proper” clause is sometimes referred to as the “elastic clause,” because of the breadth of activities it may cover. Among other things, it includes power to establish governmental offices and agencies, and to determine and alter their structure, institutional location, and other characteristics.

The “supremacy clause” (Article VI, clause 2) provides that federal laws, so long as they are constitutional, take precedence over conflicting provisions of state constitutions and laws.

LIMITATION:

- *Powers that the Constitution does not “delegate[] to the United States ..., nor prohibit[] to the States, are reserved to the States ... or to the people.” Amendment X.*

Citizenship and Rights

- Enforce national and state citizenship of all “persons born or naturalized in the United States and subject to the jurisdiction thereof.” *Amendment XIV, Section 1.*
- Prevent states from abridging “the privileges or immunities of citizens,” or denying to any person “the due process of law” or “the equal protection of the laws.” *Amendment XIV, Section 1.*

Courts have interpreted both the “due process clause” and the “equal protection clause” broadly, the former so as to apply most of the Bill of Rights to the states. See Amendment V under “Judicial Process,” below.

- Enforce prohibition against “slavery or involuntary servitude, except as a punishment for crime.” *Amendment XIII.*
- Regulate naturalization. *Article I, Section 8, clause 4.*

LIMITATIONS:

- *May not abridge freedom of speech or press. Amendment I.*
- *May not prohibit free exercise of religion. Amendment I.*
- *May establish no religion. Amendment I.*
- *May not abridge right of peaceable assembly or of petition for “redress of grievances.” Amendment I.*
- *May not infringe the right to “keep and bear arms.” Amendment II.*
One line of interpretation limits this right to the collective right of the people to maintain a militia.
- *Rights “retained by the people” are not limited to those enumerated. Amendment IX.*
- *May grant no titles of nobility. Article I, Section 9.*

Power of the Purse

- Impose and collect taxes and other revenues. *Article I, Section 8, clause 1.*

LIMITATION: House must originate revenue bills. Article I, Section 7.

LIMITATION: “Duties, Imposts, and Excises” must be “uniform throughout the United States.” Article I, Section 8.

LIMITATION: May not tax exports from any state. Article I, Section 9.

LIMITATION: Except for the income tax, any “direct tax” must be proportional to state population, as determined by the census. Article I, Section 9, clause 4; Amendment XVI.

- Lay and collect taxes on incomes. *Amendment XVI.*
- Make appropriations, without which “no money shall be drawn from the Treasury.” *Article I, Section 9.*
- Borrow money. *Article I, Section 8, clause 2.*
- Pay “Debts ... of the United States.” *Article I, Section 8, clause 1.*
- Regulate the required periodic public statement of public receipts and expenditures. *Article I, Section 9.*
- Consent before any state may charge duties on its imports and exports necessary for it to execute its inspection laws. *Article I, Section 10.*
- Consent before any states lay “tonnage duties.” *Article I, Section 10.*

National Security

- Provide for the “common defence.” *Article I, Section 8, clause 1.*
- “Raise and support Armies.” *Article I, Section 8, clause 13.*
- “Provide and maintain a Navy.” *Article I, Section 8, clause 14.*

LIMITATION: Appropriations for the armed forces must be for two years or less. Article I, Section 8, clause 13.

- “Declare War.” *Article I, section 8, clause 11.*
The extent of the power granted by this clause has remained controversial. The President is Commander in Chief, wages war, and has committed troops without a declaration of war.
- Make rules regulating the U.S. armed forces. *Article I, Section 8, clause 14.*

LIMITATION: Soldiers may not be quartered in private houses during peacetime without the owner’s consent. Amendment III.

- Make laws regulating any quartering of troops in private houses during wartime. *Amendment III.*
- Establish and regulate the militia, and make rules to govern them when called up in federal service. *Article I, Section 8, clause 16.*

LIMITATION: States retain authority to appoint officers of the militia and to train it in accordance with congressional regulations. Article I, Section 8, clause 16.

- Provide for calling up the militia to execute federal laws, “suppress Insurrections and repel Invasions.” *Article I, Section 8, clause 16.*
- Give consent before any state can engage in war, unless “actually invaded” or in imminent danger thereof. *Article I, Section 10.*
- Permit a state to keep troops or warships during peacetime. *Article I, Section 10.*
- “Define and punish” piracy, felonies on the high seas, and “Offenses against the Law of Nations.” *Article I, Section 8, clause 10.*
- Authorize privateer operations against enemy shipping (“Letters of Marque and Reprisal”). *Article I, Section 8, clause 12.*
- “Make Rules concerning Captures on Land and Water.” *Article I, Section 8, clause 12.*

Foreign Relations

- Give advice and consent to treaties (*Senate; requires two-thirds vote*). *Article II, Section 2.*

Commerce

- Regulate interstate and international commerce. *Article I, Section 8, clause 3.*

Increasingly during this century, this “interstate commerce clause” has been interpreted to cover wide ranges of economic activity.

LIMITATION: May not favor one state over another when regulating commerce. Article I, Section 9.

- Issue money and regulate its value. *Article I, Section 8, clause 5.*
- Punish counterfeiting. *Article I, Section 8, clause 6.*
- Establish postal services. *Article I, Section 8, clause 7.*

- Establish laws on bankruptcy. *Article I, Section 8, clause 4.*
- Establish patent and copyright law. *Article I, Section 8, clause 8.*
- “Fix the standard of weights and measures.” *Article I, Section 8, clause 5.*
- Take private property for public use, but only with compensation. *Amendment V.*

Judicial Process

- “Declare the punishment of Treason.” *Article III, Section 3.*

LIMITATION: “No Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.” Article III, Section 3.

- May suspend writ of *habeas corpus*, but only in cases of rebellion or invasion. *Article I, Section 9.*

LIMITATIONS:

- *May not retroactively make actions criminal or increase penalties for criminal actions (an “ex post facto law”). Article I, Section 9.*
- *May not by law inflict punishment on an individual (a “bill of attainder”). Article I, Section 9.*
- *May not provide for searches without warrants based on probable cause. Amendment IV.*
- *May not provide for double jeopardy or compulsory self-incrimination in criminal cases; may not provide for bypassing indictment process in civilian criminal cases. Amendment V.*
- *May not provide for deprivation of life, liberty, or property without due process of law. Amendment V.*
- *May not deprive criminal defendants of rights to speedy, public trial by jury, to know the accusation, to confront and to obtain witnesses, or to legal counsel. Amendment VI.*
- *May not deprive parties to civil suit of right to jury trial. Amendment VII.*
- *May not provide for excessive bail or fines, or for “cruel and unusual punishment.” Amendment VIII.*

Federal Relations

- Admit new states into the Union. *Article IV, Section 3.*

LIMITATION: May form no state from territory of existing states without their consent. Article IV, Section 3.

LIMITATION: May deprive no state of an equal vote in the Senate without its consent. Article V.

- Make laws governing the District of Columbia. *Article I, Section 8, clause 18.*

This power is now delegated to a local government, under federal oversight.

- Make “general laws” regulating how the “public acts, records, and judicial proceedings” of each state “shall be proved” (so that each state may, as required, give “full Faith and Credit” to those of every other). *Article IV, Section 1.*
- Consent before any state may establish any interstate compact or any agreement with a foreign nation. *Article I, Section 10.*
- Implement the constitutional guarantee to each state of “a Republican form of Government.” *Article IV, Section 4.*
- Implement the constitutional guarantee to protect each state against invasion and, upon request, domestic violence. *Article IV, clause 4.*
- Make laws governing federal military facilities and property purchased by the federal government for such facilities. *Article I, Section 8, clause 17.*
- Regulate and dispose of “territory or other property belonging to the United States.” *Article IV, clause 3.*
- “Regulate Commerce ... with the Indian Tribes.” *Article I, Section 8, clause 3.*

This clause is the main source of congressional power to legislate on Native Americans.

Elections

- Direct how the decennial census be taken. *Article I, Section 2.*
- Apportion representatives among the states according to the census. *Article I, Section 2; Amendment XIV, Section 2.*

LIMITATION: “The Number of Representatives shall not exceed one for every thirty thousand.” Article I, Section 2.

- Regulate, or alter state regulations governing, elections for Congress. *Article I, Section 4.*
- Enforce right to vote irrespective of “race, color, or previous condition of servitude.” *Amendment XV.*
- Enforce the right to vote irrespective of sex. *Amendment XIX.*
- Enforce the right of any citizen 18 years of age or older to vote. *Amendment XXVI.*
- Enforce the prohibition against requiring payment of a poll tax in order to vote. *Amendment XXIV.*
- Enforce prohibitions against state abridgement of the right to vote by proportionately reducing the state’s representation in Congress. *Amendment XIV, Section 2.*
- Judge elections, returns, and qualifications of its Members (*each House*). *Article I, Section 5.*
- Determine when electors for President are to be chosen and when they are to vote. *Article II, clause 1.*
- Direct how the District of Columbia shall choose electors, and enforce its right to choose them and their performance. *Amendment XXIII.*
- Choose a President (*House*) and Vice President (*Senate*) from among the leading choices of the electors if none has a majority. *Amendment XII.*
- Direct what is to be done if any of the leading choices of the electors for President or Vice President dies before the House or Senate can elect. *Amendment XX, Section 4.*
- Direct what is to be done if neither a President nor a Vice President has been elected by January 20 after the election. *Amendment XX, Section 3.*
- Confirm the President’s nomination of a Vice President to fill a vacancy in that office. *Amendment XXV, Section 2.*

Federal Officers

- May provide for a body other than the President’s cabinet to act, together with the Vice President, to declare to Congress that the President is unable to discharge his powers and duties. *Amendment XXV, Section 4.*
- Decide that a presidential disability exists (so that the Vice President will act as President) if the Vice President and a majority of the cabinet so declare and the President declares he is not incapacitated (*requires two-thirds vote in each house*). *Amendment XXV, Section 4.*
- Vest the power to appoint “inferior officers” of government in the President, courts, or department heads. *Article II, Section 2.*
- Give “advice and consent” to President’s nomination of federal officers (*Senate*). *Article II, Section 2.*
- Remove officers of executive or judicial branch for “treason, bribery, or high crimes and misdemeanors” (*House impeaches; conviction requires two-thirds vote in Senate*). *Article I, Sections 2 and 3.*

LIMITATION: Impeachment process may result only in removal from, and disqualification for, federal office. Article I, Section 3.

- Consent before any federal official may accept any gift, office, or title from a foreign country or ruler. *Article I, Section 9.*
- Restore rights to hold federal or state office to former federal or state officials who subsequently participated in insurrection. *Requires two-thirds vote. Amendment XIV, Section 3.*

LIMITATION:

- *May require no religious qualification for office. Amendment VI.*

Judicial Branch

- Establish federal courts below the Supreme Court. *Article I, Section 8, clause 9); Article III, Section 1.*
Includes power to establish their jurisdictions.

LIMITATION: May not empower federal courts to judge suits against one state by citizens of another, or by foreign nationals. Amendment XI.

- Regulate and make exceptions to the appellate jurisdiction of the Supreme Court. *Article III, Section 2.*
- Set salaries for federal judges. *Article III, Section I.*

LIMITATION: May not decrease salary for a sitting judge. Article III, Section I.

- Establish geographic districts where local crimes are to be tried. *Amendment VI.*
- Direct where federal crimes not committed within any state shall be tried. *Article III, Section 2.*

Legislative Branch

- Determine its own rules (*each House*). *Article I, Section 5.*
- Choose its Speaker (*House*) or President pro tempore (*Senate*) and other officers (except the President of the Senate). *Article I, Sections 2 and 3.*
- Alter the date for convening its annual session. *Article I, Section 4; Amendment XX, Section 2.*
- Consent before the other house may “adjourn for more than three days” or to any other place (*each House*). *Article I, Section 5.*
- Punish Members for disorderly behavior or (*by two-thirds vote*) expel a Member (*each House*). *Article I, Section 5.*

LIMITATION:

- *No law changing congressional pay may become effective before the following election of Congress. Amendment XXVII.*

Amend Constitution

- Propose amendments to the Constitution (*requires two-thirds vote*). *Article V.*
- Call a convention for amending the Constitution when so requested by two-thirds of the states. *Article V.*
- Determine whether an amendment to the Constitution is to be ratified by three-fourths of the state legislatures or of state conventions. *Article V.*