

The Hard Truth of Writing Laws

Writing laws demands technical and legal skills that are extremely difficult to learn while juggling all the other demands lawmakers face.

By Lee Hamilton

When Congress hurriedly passed its first multi-billion dollar relief bill in the wake of Hurricane Katrina, only a handful of legislators were actually present. The measure was written by a few people, almost certainly not members of Congress themselves, and then passed by “unanimous consent.” Most of our elected representatives were not even in Washington.

Knowing this, you might be tempted to think of it as yet one more example of how little input the rank and file enjoy on Capitol Hill these days. My own thoughts, however, run in a different direction: I’m impressed that they got it done so quickly.

NOT AS SIMPLE AS WE THINK

If you’re like most people, you probably imagine that when your representative has an idea for a new law, he or she sits down, writes it up—maybe using some legalese here or there—and sends it off for consideration. If only it were that easy.

In truth, drafting legislation is an immensely complex task with which most members of Congress—I hope this won’t shock you—feel uncomfortable. This is because it demands technical and legal skills that are extremely difficult to learn while juggling all the other demands that members face.

To begin with, the entire bill must relate to the appropriate section of the U.S. Code. Then, since it almost always affects existing law in some way, it must address the particulars of each law it will change, which means that every addition, change or deletion in existing law must be spelled out in detail. And all this must be done in specific language with legislative terms of art that have evolved over the past two centuries of American law-making. So entire offices in the



House and Senate are filled with highly expert legislative drafters. It’s no surprise that legislative aides who are adept at bill-writing are highly prized on Capitol Hill, or that mistakes creep into hastily drafted legislation and produce consequences that no one intended.

NOW FOR THE HARD PART

Yet the technical aspects of writing legislation are only the beginning of the challenges it presents. Congress is not like an operating room, or a “clean room” at a semiconductor plant, where all outside influences are shut out. If anything, it’s just the opposite. It feels sometimes like a seething cauldron of egos, home-state concerns, grand designs, political strategies, and elbow-jabbing interests. And all of them are focused on one thing: the specific language that goes into the bills that affect them.

This makes sense, of course. Billions of dollars and matters of high principle rest on the placement of a comma, the use of “and”

vs. “or,” the precise description of a geographic area, the inclusion or absence of a crop, a business or a group of people. Legislators know that lobbyists, constituents, the White House and their colleagues are all looking over their shoulder at the language that goes into a bill. This is, after all, where the rubber meets the road, where all the lofty rhetoric and fine ideals get translated into concrete action.

This is why writing legislation can often be excruciatingly difficult and take a long time. Politics is the art of the possible—and of building a majority—and when verbal agreements or unspoken understandings suddenly take shape on the page, many issues and divisions that before might have seemed manageable take on a reality that demands attention. Words matter, and how they are used can make a huge difference.

Judges and bureaucrats often complain about fuzzily written laws that leave a lot of room for interpretation, but that is frequently the price of getting a bill passed; the vaguer the language, the more likely it is to garner the votes it needs. There is a cost to this, of course: the less clarity in legislation, the less clarity in the law, which in turn gives judges and bureaucrats greater leeway to interpret the law.

Yet legislation is how Congress addresses the most difficult public policy issues of the day. For every knotty problem—every funding decision, every intractable social problem, every political controversy or economic dilemma—someone has to translate human thought into painstaking language that, ideally, produces a solution.

Every once in a while, as it demonstrated by its immediate response to Katrina, Congress can do this quickly. But we shouldn’t be surprised if, for the most part, it demands extraordinary skill on the part of someone far removed from the public arena, and asks for our time and patience as well.

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