The Shadow Congress

Lawmakers have been striking important deals lately. The lack of fanfare is intentional.

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Getty; The Atlantic

Among American institutions, Congress is at once the most transparent and the most reviled. Its votes, hearings, and debates are broadcast live for anyone to see; inside the Capitol, reporters can walk up to just about any of its 535 members and ask why they voted a certain way, or whether the latest reported scandal is true. Unfortunately for lawmakers, all of this visibility has helped make Congress only slightly more popular among U.S. citizens than Vladimir Putin.

In early January, just one in six Americans said in a Gallup poll that they approved of the job Congress was doing. The 18 percent rating was the lowest for the legislative branch since the end of the Trump administration and a smidge above the 17 percent of U.S. respondents who said they approved of Putin in a separate survey last year.

In the weeks since, however, lawmakers in Washington have gone on something of a bipartisan winning streak. The House overwhelmingly passed legislation to reform the beleaguered U.S. Postal Service. Days later the Senate approved, without a single vote in opposition, a bill proposed in response to the #MeToo movement that bans the use of forced arbitration in workplace sexual-harassment and assault cases. A bipartisan group of senators also announced an agreement on a long-stalled reauthorization of the Violence Against Women Act, likely clearing the way for its passage.

The secret to this outbreak of productivity is, well, a bit of secrecy.

Although these bills would make meaningful changes to American law, none of them has drawn anywhere close to the same amount of attention as the proposals on which Congress has recently floundered—major voting-rights legislation and President Joe Biden's Build Back Better Act. Camera crews weren't staking out the negotiating sessions for the mellifluously named Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, nor was every twist and turn of the debate over postal reform generating headlines and news alerts. Two of the proposals did have celebrity advocates: The former Fox News anchor Gretchen Carlson lobbied for the passage of the arbitration ban, while the actor Angelina Jolie pushed to reauthorize the Violence Against Women Act. But for the most part, the authors of these measures were able to haggle quietly over their details, and that's exactly how they wanted it.

"I like to keep as much of the negotiation and the actual compromise private, because otherwise people are forced to the corners by lobbyists and special-interest groups," Senator Dick Durbin of Illinois, the Senate's second-ranking Democrat and chair of its Judiciary Committee, told me. A longtime advocate for immigration reform, Durbin recalled how the intense scrutiny the issue habitually receives has doomed efforts to pass a comprehensive overhaul under the past four presidents. "Informing the public every step of the way may serve some purpose," he said. "Certainly in a democracy, transparency is a critical part of it. But human nature suggests that many times the toughest negotiations have to be in private."

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Big fights and polarizing causes tend to attract the most attention, and partially because of that spotlight, the bills tied to them tend to be the hardest to pass. Congress therefore gets a reputation for gridlock, because the public hears most often about its highest-profile failures, be it on immigration, gun control, or, more recently, voting rights. But voters have a somewhat mistaken impression of legislative dysfunction. Behind the scenes, the House and Senate have actually churned out an impressive list of bipartisan accomplishments under both Biden and President Donald Trump.

"Congress hasn't been gridlocked for years," Frances Lee, a political scientist who studies Congress at Princeton University, told me. "It just doesn't break through. Anything that happens in a bipartisan way is just treated as not very newsworthy."

The final two-plus years of the Trump administration, for example, began with a government shutdown and featured two presidential impeachments. But they also saw the passage of a major conservation bill, a new trade

agreement, significant criminal-justice reform, and several pandemic-relief packages. Lawmakers banned surprise medical billing and raised the age for purchasing tobacco from 18 to 21. Sometimes Congress does get credit for its successes. The $2.2 trillion CARES Act, passed swiftly after the coronavirus shut down huge portions of the U.S. economy in March 2020, provided some form of relief to nearly every American, as did the $1.9 trillion American Rescue Plan that Congress enacted a year later. (Not coincidentally, Gallup found that Congress's approval rating peaked—at a still dismal 36 percent—around the time it was literally giving cash to most households.) More recently, the passage of a bipartisan infrastructure bill last year was a top story in the news.

Most of the deals that lawmakers do strike, however, slip below the national radar.

Last year, Simon Bazelon and Matthew Yglesias identified this dynamic as the "Secret Congress." Perhaps a better term would be Shadow Congress, borrowing from the label recently affixed to certain "shadow docket" rulings of the Supreme Court. These new bills, after all, are public, but relatively few care to notice. One reason they draw little attention is because the president hasn't been fighting for them, at least not publicly. Biden has spent no time campaigning for the passage of postal reform or the arbitration ban. He's issued only a few statements on the Violence Against Women Act, despite the fact that helping write and pass the original landmark law was one of the president's signature accomplishments as a senator, and something he regularly touted on the 2020 campaign trail.

Contrary to assumptions about the presidential "bully pulpit," Biden's silence might have helped these agreements come together. Lee's research has shown that presidential involvement in an issue tends to increase its partisanship, which in a divided Congress usually lowers its chance of

passage.

The lead Republican co-sponsor of the postal-reform bill, Representative James Comer of Kentucky, told me that he urged the White House to keep quiet about the proposal, and for Biden to refrain from public attacks on the Trump-appointed postmaster general, Louis DeJoy, while negotiations were ongoing. "My message to the White House was 'Go back to the basement,'" Comer said. "Don't talk about the postal-reform bill, because the more you say, the more damage you'll do. Democrats were already going to be supportive of the bill, and the more [Biden] talked about injecting himself into the Postal Service, the fewer Republican votes it was going to get."

The trade-off for Biden is considerable. His own approval ratings are languishing in the low 40s ahead of midterm elections, in which Republicans are poised to sweep away the narrow Democratic majorities in Congress. After the failure of the voting-rights and Build Back Better bills, the president is desperate for legislative victories he can crow about. Yet although Biden might brag about these latest advancements during his State of the Union address on March 1, his hands-off approach and their resultant low profile will limit how much credit he gets. The same is true for Congress. If these bills reach Biden's desk and work as intended, they could help shore up a pillar of American society and bolster protections for victims of domestic violence and sexual misconduct. But their enactment will probably do little to lift the standing of Congress, an institution that does some of its best work when the nation's attention is elsewhere.