

# Congressional–Executive Balance in an Era of Congressional Dysfunction

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During my years as a doctoral student in political science at Yale University (1964–69), I had a front-row seat in the US Senate, returning each summer to the staff of Senator E.L. “Bob” Bartlett, Democrat of Alaska. My time in the Senate coincided with my search for a dissertation topic; I soon concluded that what I was observing and experiencing was at odds with what many political scientists were saying about the presidential–congressional balance of power at that time of great governmental activism.

“The President is now the motor in the system,” one of the most eminent declared. “The Congress applies the brakes” (Dahl 1967). I set out to complicate if not refute this generalization, developing case histories for a range of major bills, including both Great Society initiatives and others with predominantly congressional origins. I concluded that the congressional role had often been robust and, moreover, that executive and congressional roles were often cooperative and complementary, hardly to be viewed in zero-sum terms. Unified Democratic control of both houses obviously enhanced President Johnson’s ability to work his legislative will, but it also allowed senators like Warren Magnuson, Phillip Hart, and Ralph Yarborough to advance ideas that they had long nurtured to fruition (Price 1972).

A similar inter-branch dynamic characterized the first two years of Barack Obama’s presidency, but the 2010 elections returned the country to divided government, with the House under the control of an increasingly rightward-leaning Republican Party. The balance of power among the institutions of government was bound to shift, but, again, not necessarily in zero-sum terms. In fact, I will argue that while the subsequent congressional dysfunction and default prompted the executive to compensate, the net result was to make both branches less effectual.

## CONGRESSIONAL DYSFUNCTION AND DEFAULT

It is important to be aware of how one’s political convictions might bias what one perceives and portrays as an active and effective political institution. My dissertation project, in the midst of a uniquely fertile period of progressive policy-making, raised this issue for me years ago. Now, as a House member frequently stymied in the minority party, I must avoid a portrayal that merely reflects my own frustrations. Having said that, I do not hesitate to portray the current House of Representatives as dysfunctional and largely unproductive. The problem is not merely a dearth of liberal enactments. There has been a dearth of moderate or conservative enactments as

well, in areas where the need for some kind of legislation is widely accepted and well-established. There has been basic failure to keep government running reliably and predictably, and to adjust the debt ceiling for obligations already incurred. Moreover, it is not merely progressive Democrats who have found their legislative ambitions blocked; members across the spectrum encounter disincentives and obstacles to the kind of policy and funding initiatives that used to be routine.

The current state of the House traces directly to changes in the configuration of its partisan forces (Price 2016). Three interrelated aspects of this configuration are of primary importance:

- increased *polarization* of both the congressional parties and their electoral bases. This entails both homogeneity within the parties and distance between them;
- the persistent *competitiveness* of the parties in Congress, with each aspiring to control, seeking to take full advantage of any opening provided by the other; and
- the *asymmetrical movement* of one party toward an ideological extreme, that is, the emergence of the Republican Party as what Thomas Mann and Norman Ornstein term an “insurgent outlier” (Mann and Ornstein 2012).

Each of these components has intensified since Republicans gained control of the House in 2011. But all have been years in the making, marked by such landmark events as Newt Gingrich ascending to House leadership in 1989 and his leading most Republicans to reject the bipartisan comprehensive budget agreement of 1990 on the basis of an absolute anti-tax ideology (Price 2004).

Intensified partisanship in its current form has made it increasingly difficult for Congress to enact major policies, to provide reliable annual funding, to achieve inter-branch coordination—in short, to govern. The sharp right ideological turn taken by the Republicans has proved especially problematic, resuscitating anti-governmental views that go back as far as the antifederalist opponents of the US Constitution. The “Tea Party” variant that has leveraged the GOP since 2010 has a hyper-individualistic, libertarian flavor—corrosive of efforts to provide collective or public goods in the form of national policy and, increasingly, of efforts to maintain authority and discipline within the congressional party itself.<sup>1</sup>

Congress has lurched from crisis to crisis for five years, culminating in the 2015 resignation of Speaker John Boehner. Boehner faced an impossible choice, forced by right-wing members of the Republican conference: if he did what he had

to do to pass a short-term continuing resolution (CR) to avoid a government shutdown—namely, seek Democratic votes to compensate for Republicans voting “no”—then he would immediately face a vote to remove him from the speakership. Boehner would have survived such a vote, but he chose not to put colleagues through the ordeal. Instead, he bought the House and his successor as Speaker, Rep. Paul Ryan (R–Wisconsin), a six-week respite by passing, in addition to the CR, an increase in the debt ceiling and revised two-year budget numbers capacious enough to permit significant revisions of the stalled 2016 appropriations bills. Every Democrat voted for the revised budget, but only 79 of 247 Republicans did so.

The ensuing weeks saw progress on important fronts, but hardly enough to declare the fever broken. Reauthorization of the Export-Import Bank, long blocked by far-right Republicans, was brought to the floor and passed under a Discharge Petition, the first successful use of this device since 2002 and one of only four in the rule’s history. The Elementary and Secondary Education Act, which had expired in 2007, was finally reauthorized. A five-year highway and transit authorization was also approved—seven years overdue, after 15 short-term extensions, and still underfunded because of the failure to raise fuel taxes or otherwise provide a long-term revenue source.

Finally, the omnibus appropriations bill for 2016 was approved on December 18, 316–113, with 95 Republicans and 18 Democrats in opposition. This vote was seen as a good omen by many in both parties but, looking back on my first year as ranking Democrat on the Transportation-HUD Appropriations Subcommittee, I was well aware of how far short the result fell from what a fully restored budget and appropriations process might have produced. Nor was it

of House operations—a trend visible in the leadership of both parties but recently subject to a fierce backlash from dissident Republicans.

There is no question a corrective to the Democrats’ parcelling out of power to committee barons was needed. I can remember working with the Whip operation soon after coming to Congress to amend bills on the fly which had been reported by committees poorly attuned to our caucus as a whole. It was telling that when Democrats returned to power in 2007 after 12 years of Republican control, few called for a return to the previous degree of decentralization.

This is not to say, however, that the Gingrich-Hastert era offers a model worthy of emulation. I and others vigorously criticized its excesses and abuses (Price 2006; Mann and Ornstein 2006). One of the disputed practices—requiring approval of a “majority of the majority” before a matter could be brought to the floor—had to be set aside by Speaker Boehner to pass the 2015 continuing resolution and the revised budget resolution for 2016, as well as earlier critical measures such as Hurricane Sandy aid and the 2013 tax measure to avoid the “fiscal cliff.” But such violations of the so-called “Hastert Rule” linger long in the memories of far-right Republicans.

Increased centralization has not been kind to the committee system. Both as a student of Congress and as a member, I have been disinclined to regard leadership strength and committee vitality in zero-sum terms. Effective party and committee leadership can reinforce each other, producing both a better legislative product and a smoother route to passage. But in the modern House, such positive examples are increasingly hard to come by.

I came to the House in 1987 with a fresh recollection of the phenomenon of policy entrepreneurship that had attracted my attention as a Senate aide and as a political scientist.

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certain how much of an omen the omnibus represented. “This deal is not the start of a new era of cooperation between congressional Democrats and Republicans,” predicted budget expert Stan Collender. “It’s only a temporary truce because of common interests at the moment. The war will restart and intensify next year on all other issues” (Kapur 2015). Might the respite the new Speaker had enjoyed be extended? One conservative member expressed his doubts: “[M]ost people understand that [the omnibus deal] wasn’t [Ryan’s] idea; this was something he inherited, so I think we’re giving him the benefit of the doubt. Next year it’s on him. It’s on his watch” (DeBonis and Snell 2015).

**INSTITUTIONAL EFFECTS**

Besides producing crises and breakdowns with some regularity, intensified partisanship has also had lasting effects on how the institution works. For example, the Gingrich “revolution” of 1994 produced a marked increase in the centralization

of House operations—a trend visible in the leadership of both parties but recently subject to a fierce backlash from dissident Republicans. For years I was able, at the beginning of each Congress, to identify several initiatives that I intended to pursue, on my own committee and others, and often to achieve a respectable rate of success. I also remember free-wheeling markups on the Banking Committee, frequently forming cross-party coalitions to pass amendments. All of that is much rarer now, exacting real costs in terms of the engagement and initiative of individual members and the quality and legitimacy of the institution’s legislative output.

A second consequence of today’s hyper-partisanship has been the erosion of Congress’ constitutional prerogatives and of its role vis-à-vis the executive. These developments particularly affect and concern me as a member of the Appropriations Committee, which has increasingly been swamped by partisan forces in and beyond the House.

Historically, Appropriations has displayed restrained partisanship—both in its internal operations and in the deference it has received in the House—by virtue of its

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institutional role of exercising the “power of the purse” and holding the executive, of whichever party, accountable. The Homeland Security bills I helped assemble in 2012 and 2013, as ranking Democrat on that subcommittee, reflected that tradition. But both were then blown up on the House floor by incendiary amendments on immigration that made continued bipartisan support impossible. Republican leaders tried to fend off the amendments, but once they were offered, almost all Republicans supported them—a striking indication of the party’s move to the right, against which appropriations bipartisanship did not stand a chance (Ornstein 2013).

The Budget Control Act (BCA) enacted in 2011 as Republicans threatened default on the nation’s debt, has turned such episodes into a systemic threat. The BCA mandated draconian “sequestration” cuts in appropriated spending if efforts to reach a comprehensive budget agreement foundered—a failure guaranteed by Republican anti-tax ideology. Budget resolutions written at sequestration levels have not only made bipartisanship impossible; they have made appropriations impossible. The process has almost totally broken down, requiring short-term budget deals if omnibus appropriations bills are to be stitched together, usually well into the fiscal year. All of this greatly devalues Appropriations, both as a productive place to work and as a bastion of congressional strength.<sup>2</sup>

A third consequence of intensified partisanship is a dramatic decline in the bipartisan capacity that has historically strengthened Congress in a number of areas—transportation and agriculture, for example, as well as appropriations. But its effects are greatest in fiscal policy, where leaders must face unpleasant realities and take on political adversity. This was done in the bipartisan budget agreement of 1990, despite Newt Gingrich’s defection, and the comprehensive budget bill of 1993. The latter was enacted early in the Clinton administration with Democratic heavy lifting alone, and the electoral consequences of 1994 were disastrous for our party—thus confirming the maxim that bipartisan cover is generally required for such politically perilous endeavors.

These comprehensive budget plans helped create the roaring economy of the 1990s and a federal budget that was not only balanced but generated sizable surpluses. Despite the power of this example, no such “grand bargain” is now remotely in sight. President Obama and Speaker Boehner seemed inclined to work toward such an agreement in 2011 until it became clear that Boehner’s conference would never agree. The best Congress has managed subsequently are the modest budget agreements of 2014–15 and 2016–17, which did little more than stave off sequestration.

The comparison to the 1990s is striking. Our challenges, including the future of our entitlement programs and the need to raise revenue commensurate with necessary expenditures, are even more difficult. But because of intensified partisanship and the sharp right turn of the Republican Party, our capacity to take on these challenges is far weaker. Thus we languish, failing to address the real drivers of the deficit while falling short of the investments in our people and economic capacity that a great country should make.

While I have mainly focused on the House, this picture of congressional dysfunction and default includes the Senate as well. In general, the filibuster and other non-majoritarian features of Senate operations have erected formidable obstacles to legislative action, even in periods of unified party control. At the same time, the Senate Republican Conference has not been leveraged by its right wing to the same degree as the House Conference, and the Senate has a stronger—if currently strained—tradition of cross-party cooperation. Centralizing trends have not been as pronounced in the Senate as in the House; Senators generally have seen fewer changes in their committee environments, but they were less dependent on committees to structure their legislative opportunities and incentives in the first place.

The results have been mixed. The Senate led with a compromise to avert a “fiscal cliff” in 2013 and passed a comprehensive, bipartisan immigration reform bill in 2014. But the Senate has been even more disabled than the House by the budget impasse; it passed only a handful of appropriations bills from 2011 onward, whether under Democratic or Republican leadership. While intensified partisanship has been most vividly on display in the House, the same trends are present in the Senate and have produced a similar result.

#### THE EXECUTIVE RESPONSE

During the first two years of the Obama presidency, with unified Democratic control of the executive and legislative branches and a large backlog of anticipated and promised policy initiatives, the focus was on formulating and passing major legislation, particularly economic recovery measures and health care and financial services reform. The reversal of House control in 2011 brought this mostly cooperative process to a halt and threw into sharp relief the array of tools possessed by the executive that impinge on congressional functions – ranging from executive orders, presidential memoranda, signing statements, and legislative waivers, to claims of executive privilege and prerogative, bypassing Congress through recess appointments, and so forth. Such tools were bound to become relatively more important and far more controversial under conditions of divided party control and sharp polarization.

President Obama’s utilization of these tools has often represented an attempt to defy congressional obstruction or to compensate for congressional inaction. In 2011, after the debt ceiling debacle, he initiated a “We Can’t Wait” campaign that featured 45 executive actions in areas such as home mortgage refinancing, tax credits for hiring veterans, liberalized student loan repayment requirements, prescription drug shortages, and automobile fuel efficiency standards. “Whenever and wherever I can take steps without legislation to expand opportunities for more American families,” he declared in his 2014 State of the Union address, “that is what I am going to do.”

Despite Republican accusations of presidential overreach, such assumptions of power have broken little new ground, either in the number of executive actions or their strength. In fact, Obama has issued fewer executive orders annually

than any president since Grover Cleveland. Presidents Reagan, Bush (41 and 43), and Clinton significantly exceeded his use of recess appointments (Zeller 2015; Peters and Woolley 2015). He has made more limited use of signing statements—whereby presidents place selective interpretations on a new law and on their obligation to enforce it—than George W. Bush, who faced considerable criticism over the claims he made in such statements. Obama has largely supplanted signing statements with Statements of Administration Policy (SAPs) on pending bills; he has also substantially increased the use of presidential memoranda, “providing orders to administrators to carry out presidential policy goals,” which for the first time began eclipsing executive orders in frequency (Lowande 2014).

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The strength and reach of Obama’s actions also seem well within historic norms. Again, this is a commentary not as much on the modesty of Obama’s usage as on how commonplace such actions have become—with fluctuations in the particular instruments employed—in the modern presidency. Some of Obama’s strongest have been blocked, at least temporarily, by congressional or judicial action. The Executive Order to close the detention facility at Guantanamo Bay has been repeatedly blocked by amendments to appropriations bills denying the funding necessary to carry out the order. In addition to numerous efforts to repeal the Affordable Care Act in full and its individual provisions, the House also passed a resolution allowing the Speaker to take the administration to court over the law’s implementation, challenging spending directives that allegedly overrode Congress’s power of the purse.

Other executive actions met with a more mixed response. When Congress deadlocked over reauthorization of the Elementary and Secondary Education Act (a.k.a. “No Child Left Behind”), the Department of Education began issuing waivers to an unprecedented degree to loosen the law’s requirements and encourage certain educational innovations. Republican congressional leaders objected strongly but in the end did little to interfere, no doubt because governors and education officials of all political stripes welcomed the flexibility the waivers provided.

The 2012 directive to shield from deportation undocumented immigrants who had come to the US as children followed the blocking of the “Dream Act” by Republicans in Congress. Immigration opponents reacted strongly, but their attempts to block implementation through appropriations amendments failed to go beyond the House. Reaction to the 2014 order deferring enforcement for some four million additional immigrants who had relatives in the country legally was far stronger—prompting an attempt to

hold up 2015 appropriations for the Department of Homeland Security unless a prohibition of any funding to carry out the order were added to the bill, a fight that was followed by a protracted attempt by Texas and 25 other states to block the policy in court.<sup>3</sup>

The tools the president can use unilaterally to initiate or modify public policy weigh heavily in the executive–congressional balance of power. But as the Obama experience demonstrates, these initiatives are not taken in a political or institutional vacuum “devoid of any checks by coordinate branches, and levels, of government (Johnson, Gibbons, and Gibson 2010).” And even if such actions could be implemented fully and immediately, that often would be a poor substitute for legislation cooperatively formulated and enacted.

President Obama repeatedly made the same point in defending his No Child Left Behind waivers, deferred action orders for immigrants, and other actions: he greatly preferred comprehensive legislation. The unmistakable implication is that congressional dysfunction and deadlock, far from empowering the president, may weaken and compromise the performance of both branches of government. ■

#### NOTES

1. Asymmetric polarization has also produced escalating instances of “constitutional hardball,” what Jacob Hacker and Paul Pierson characterize as Republican violations of “established norms (without breaking legal restrictions) to gain partisan advantage.” Examples include routinized use of the Senate filibuster to block almost all majority initiatives, the impeachment of President Clinton, resort to mid-decade reapportionments, systematic efforts at voter disenfranchisement, and “hostage taking” related to threats of shutdowns or of default on the national debt. “Confronting Asymmetric Polarization,” in Nathaniel Persily, ed., *Solutions to Political Polarization in America* (New York: Cambridge University Press, 2015), pp. 60–61. The term “constitutional hardball” is borrowed from Mark Tushnet.
2. See David E. Price, “The Twilight of Appropriations?,” *Politico*, September 22, 2013. Another aspect of this institutional weakening is the Republican leadership’s abolition of congressionally-directed appropriations, or “earmarks”. It is not surprising that Republican and Democratic presidents alike tend to favor measures such as the line-item veto or earmark bans, increasing as they do the executive’s discretion and control. It is more remarkable for members of Congress to acquiesce in such a reduction of their constitutional prerogatives and institutional powers.
3. For an argument that the Justice Department’s defense of Obama’s action was “well-reasoned and at times even conservative,” see Walter Dellinger, “It’s Legal: The Underpinnings of the President’s Immigration Plan are Anything but Radical,” *Slate*, November 20, 2014.

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