



How Congress Lost, Part I: The Defeated Congress

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Key Points

- Congress was not intended to be coequal with the other branches of government, as is often claimed today.
- The framers of the Constitution intended for Congress to dominate the other branches because it was where the public will was to be expressed.
- Today's Congress, on the other hand, is dominated by the executive branch, and it hardly reflects the public will.
- Congress's defeat is the result of multiple factors, which will be explored over this series of reports.

Congress was intended to be the most important institution in our national government. This might come as a bit of a surprise. It is common nowadays to think that our government is one of coequal branches. Even members of Congress say this.

A few years ago, I took a group of high school students on a tour of the Capitol, and the introductory video produced for Congress declared Congress a coequal branch. I couldn't believe it. Nothing could be further from the truth, I thought. And, frustrated, I lectured my (rather bemused) students that Congress, of all institutions, should understand its intended role.

But, upon reflection, I had to acknowledge that there is a difference between original intent and current result. And today, it might be *optimistic* to say that Congress is a coequal branch of our government. The more sober assessment is that, of the three branches of government, the legislature has the least preeminence. Insofar as the framers envisioned checks and balances as a vast conflict among the institutions of the state, Congress has lost this fight, despite its substantial constitutional advantages.

The legislative branch's rather pathetic mewling about coequality is perhaps the greatest indication that the battle is over. The president has won. Even the courts claim power over Congress that would have shocked many of the framers.

This series of reports will explain how Congress has become so diminished. The animating impulse is that this downslide is bad for our nation. In a government built on the republican principle that the people should rule, the institution over whose composition the people exercise the most influence should not wield such a diminished amount of governing power. Reforms should be undertaken to fix this sorry situation. But as the explanation for its cause is not a simple one, nor did it happen overnight, reformers would benefit from a careful historical exposition that teases out the hows and the whys of the legislature's defeat. This introductory report will begin this explanation by contrasting the founding vision of Congress with how it behaves today, lay out the argument in brief, and point in the direction of potential reforms.

Congress's centrality in American political life is evident in the geography of Washington, DC. The four quadrants of the capital city all meet at Capitol Hill. The name Capitol Hill itself is a reference to the Capitoline Hill in Rome, where the Romans placed their great temple to Jupiter, the king of the gods. That should say something about the importance of Congress.

Also, compare the Capitol building to the White House. The president's house is plain, simple, and small compared to the kingly palaces of Europe. The Capitol is grand and imposing, and, with its neoclassical features, it gives the sense one is entering a temple.

Congress's importance is evident in the Constitution itself: Article I deals with Congress, Article II with the presidency, and Article III with the courts—a tip-off to how the framers viewed the relative importance of each. Plus, Article I is the longest by far, illustrating once again the relative importance of Congress.

The Constitution's framers reinforced the legislature's importance with two interesting features. First, the president and the courts are not allowed to intervene in the internal matters of the legislature. Second, the legislature can, under certain circumstances, intervene in the affairs of the executive and judicial branches.

Let's think about the immunity of the House and Senate. For starters, the date of elections is set by law, not at the whim of the executive branch, as had been the case with the British Parliament before the Glorious Revolution of 1689 (when the Catholic James II was overthrown in favor of the Protestant William III and Mary II). The state legislatures have authority over the time, place, and manner of elections, but so does Congress itself. Likewise, the president has the power to convene Congress in special circumstances, but he has no right to dissolve it and can adjourn it only when the House and Senate cannot agree on a specific time to adjourn. This was quite a different set of rules from those of the British Parliament; until the end of the 17th century, it could be dissolved by the king whenever he did not like what it was doing. The king had that same power over the colonial legislatures in America. But the framers freed Congress from those constraints and gave it the right to meet when and as it wanted to.

The executive also cannot meddle in the internal affairs of either chamber. Both the House and the Senate have the exclusive right to choose their officers, determine their own rules, judge the qualifications of

members to be seated, and expel members. The president cannot do anything about this. Neither, for that matter, can either chamber meddle in the other's business. Members also receive their salary according to the law, rather than the whim of the president, and they cannot serve simultaneously in the executive and legislative branches.

The salary issue may seem insignificant to us today, but it was important to the framers. The British crown involved itself in parliamentary affairs by effectively bribing members of Parliament with jobs and titles, and the framers wanted to make sure our Congress was truly independent.

Finally, members of Congress are immune from arrest or even questioning based on what they say in Congress, a liberty that has been interpreted broadly to encompass all business that members do in fulfillment of their legislative duties.

In sum, the framers created a Congress that was hermetically sealed from the other branches. Ultimately, Congress is responsible to one entity and one entity only—the people of the United States.

On the flip side, Congress has potentially vast capacities to interfere with the other branches. Consider first the courts, which are the most susceptible to congressional control. The judicial branch is mainly a creation of Congress. The Constitution establishes only the Supreme Court. All inferior courts are created by Congress, and the legislature can reorganize them as it sees fit. Likewise, the size of the Supreme Court is set by Congress, not the Constitution. Today there are nine justices of the Supreme Court, but originally there were five. The Constitution gives the Supreme Court original jurisdiction in certain circumstances but grants Congress the authority to limit its appellate jurisdiction.

To be sure, the framers believed it was important for judges to be independent, rather than mere creatures of Congress or the president. As such, judges maintain important immunities; they are guaranteed tenure for good behavior, and they cannot have their salaries diminished. But of course, the Senate has the power to accept or reject presidential nominees for the judiciary, so it can keep somebody it doesn't like from becoming a judge in the first place. And more broadly, even if Congress does not have the power to meddle with the independence of a single judge, it can redesign the judiciary's structure and in some circumstances the sorts of

cases it hears. Thus, individual judges are independent in any given case they hear, but the judiciary as a system is under the authority of Congress.

While the president has more independence from Congress than the courts, he is far from immune to congressional meddling in his duties. In the modern era, people think the president is the head of government, which is not exactly true. He's the head of *state*, meaning it is his job to receive ambassadors, represent national interests overseas, and generally personify the government in ceremonies. But this does not mean he is the boss of Congress. If anything, Congress has substantial influence over him.

Importantly, the president plays a role in the law-making process, via the legislative veto. This is a big power, no doubt, but it is still limited. A two-thirds majority in both the House and the Senate can override a presidential veto—which means Congress can create laws even when the president objects. And since the president has a duty to take care that the nation's laws are faithfully executed, even if he does not like them, Congress can force him to implement a law he opposed. Congress also has the power to redesign the entire executive branch, since all the cabinet departments are Congress's creations.

No doubt, there are presidential prerogatives that Congress lacks: While Congress has the sole power to declare war, the president is head of the military; while Congress can write the criminal code, the president has the power to grant pardons for violations of it; while Congress can accept or reject treaties, the president and his officers negotiate them. But all in all, the balance favors Congress.

Also, as with the judiciary, Congress has the sole power of impeachment and removal for officers of the executive branch, but this cannot be exercised trivially. Instead, it's reserved for treason, bribery, and high crimes and misdemeanors. Of course, Congress could easily interpret willful presidential failure to enforce congressional laws as a high crime and misdemeanor, then move for impeachment. This is what the Radical Republicans did against President Andrew Johnson in 1868, for his failure to abide by the Tenure of Office Act. Johnson was spared by just a single vote in the Senate. Perhaps nothing signifies the primacy of Congress better than this: It can remove a president, but the president cannot remove a member of Congress.

Overall, the Constitution creates a system of government in which the president and the courts have limited ability to involve themselves in legislative business, but Congress has multiple ways to involve itself in the business of the executive and judicial branches. Ours is not a system of coequal branches. It is one of legislative domination. The executive and judicial branches exist to prevent Congress from violating individual rights or undermining the public interests. But there are limits to what either can do. The larger, broader, and more durable a majority in Congress, the more likely it can govern over and above the objections of the other branches.

The Congress of today bears little resemblance to this vision embedded in the Constitution. Our system in practice is hardly one of legislative domination, but rather of *executive* domination. The presidential office bestrides the body politic like a colossus, ostensibly freed from the limits imposed on it by the Constitution. Members of Congress who claim theirs is a “coequal” branch are, at this point, probably being overoptimistic.

Consider the *effective* powers of the president, above and beyond what the Constitution anticipates, just in the past few years. Over the past three presidential administrations—those of Barack Obama, Donald Trump, and Joe Biden—there have been massive changes in American immigration policy. Mass amnesty has been granted to illegal immigrants. The barring of illegal entry by immigrants has massively increased, then massively decreased. And yet Congress has passed no law whatsoever on either subject. All these changes were initiated at the executive level, while Congress did nothing.

The same goes for all manner of economic regulation as well, through which the president of the United States can effectively re-create whole swaths of the nation's regulatory structure by executive fiat. Energy, automobiles, consumer protection, and more—the regulatory framework surrounding all these issues can change, not by virtue of congressional legislation but by a new resident at 1600 Pennsylvania Avenue.

These are not recent developments either. The great authority Congress wields is the power of the purse. The framers saw this as an essential check on government, to make sure that it spent the people's money wisely. Yet two-thirds of government spending is “mandatory,” allocated outside the normal appropriations

process. This spending is determined by formulas set by laws, many of which are generations old.

It is not just spending either. The United States Congress has not formally declared war since 1941, and yet the United States has been involved in frequent conflict since then. Still to this day, the president can justify military action by recourse to the post-9/11 joint declaration of the House and Senate against al Qaeda.

Perhaps the most ridiculous example of executive domination over Congress came during the Obama presidency. In January 2012, the president declared that the United States Senate was adjourned, even though it remained in pro forma session. This move struck at the very heart of congressional independence in its internal affairs, a key component of the constitutional order. Obama did this to place “recess appointments” to the National Labor Relations Board (NLRB). Under the Constitution, the president can temporarily place officials into executive positions when Congress is out of session. Did Congress wield its vast constitutional powers to limit this gross presidential overreach, just as James Madison would have predicted in *Federalist* 51? No. It was left to the Supreme Court, which invalidated the appointments on behalf of a plaintiff who had been regulated by the reformed NLRB.

Far from standing up to the president, Congress can barely handle the powers it retains. The appropriations process—the means by which Congress spends money for “discretionary” categories like national defense and the executive departments—is a total mess. Congress cannot keep to its mandated deadlines, leading to persistent anxieties about a government shutdown, usually followed by last-minute, massive omnibus bills. Members are given virtually no time to read or understand what is in these mega-bills, let alone opportunities for debate and amendment. The process—now more than a half century old—is badly outdated, yet Congress refuses to reform it. Instead, it continues to violate a core constitutional obligation that it spend the people’s money in a considered and deliberate fashion.

The legislature’s inability to fix the appropriations process illustrates just how internally dysfunctional it has become. Congress is chronically understaffed, with fewer employees than the Department of Agriculture. Considering the vast amounts of money the legislature spends and its ability to affect hundreds of millions of people, this is shocking. Congress has just a fraction of

the employees that the companies on the Dow Jones Industrial Average have. How can it possibly accomplish its duties with such little help?

It is a matter of not merely quantity but also quality. Legislative staffers with policy expertise are grossly underpaid relative to what they can get in the private sector, so turnover is rampant. Without an expert staff, Congress struggles to understand the implications of policy proposals and relies disproportionately on outside groups, which have acquired the expertise but whose advice inevitably favors their own interests, be they economic or ideological.

Too many members of Congress themselves are likewise useless. Many of them are radicals, partisan flame-throwers, or fame seekers, who lack the intellectual or moral virtues necessary to seek the public interest. Certainly, that is not true of all or even most members. But how can Congress possibly find common ground when such a large fraction of its members have no interest in doing so?

Consequently, not only does the president dominate the body politic, but—absent fundamental changes to the way Congress operates—we the people would be foolish to wish it were any other way. The legislature of 2023 simply is not capable of wielding the powers that the framers intended it to. The most democratic of all our branches is the least reputable, a fact that just about everybody—left and right, Democrat and Republican—acknowledges. Poll after poll over decades has found the job approval at Congress under 20 percent, a result that makes most people wonder what’s wrong with the 20 percent who *actually approve* of the job Congress is doing.

How has this happened? The rest of this series will develop an argument based on a historical review of congressional relations with the executive branch. Here, five causal factors are introduced, followed by a brief sketch of the historical argument.

The first factor is rampant corruption in Congress for much of the 19th century, combined with legislators’ persistent and continued unwillingness to reform the institution so that it reflects the national interest. This continued corruption diminished Congress in the public mind and sapped it of moral authority. Second, a series of entrepreneurial presidents in the

20th century—particularly Teddy Roosevelt, Woodrow Wilson, Franklin Roosevelt, and Lyndon Johnson—employed the Progressive Era idea of a strong executive to expand the power of the executive, liberate presidential nominations from the control of state-based political machines, and establish the president in the public mind as the tribune of the nation.

Third, Congress was unwilling to take direct responsibility for the enhanced role of the national government that had emerged by the middle of the 20th century. The permanent war footing of the United States after World War II induced Congress to transfer discretionary authority to the executive for the sake of national security. And as pressure mounted on Congress to use its vast powers to regulate the economy, the legislature chose to hand a great deal of discretion to the executive branch, rather than take the political risks of designing the regulatory regime itself. Fourth, under the Constitution, the “ratchet” goes in only one direction. Once Congress has ceded power to the president, it requires a veto-proof majority in the legislature to take it back, as the president has every institutional incentive to protect the gains his office has made over Congress. Fifth, and most importantly, is a decisive shift in expectations—a change in the normative view of which branch should dominate. The people came to look to the president, and Congress obliged the public’s low view of its institutional position by accepting presidential domination.

Endemic to the constitutional arrangement is a constant struggle among the branches for supremacy, a tension that was evident in the early days of the republic. The struggle between Federalists and Jeffersonian Republicans was in part an anxiety over the power of the president—particularly the Republicans being caught flat-footed that Alexander Hamilton was serious about what he wrote in *Federalist* 70 about energy in the executive. With the advent of the spoils system and the convention-nomination process by 1840, it seemed as though the president would acquire the upper hand. It had become acceptable for him to fire large swaths of government employees for political purposes, and the conventions had freed his nomination from direct congressional oversight. Andrew Jackson seemed to be the harbinger of a new, powerful executive.

But, except for Abraham Lincoln (an exceptional man who governed during exceptional circumstances), it was not to be. The president simply lacked the capacity

to leverage the vast number of available patronage jobs for his institutional advantage, and control effectively migrated to the Senate—a power enhanced by the Tenure of Office Act, which limited his ability to fire executive officials. Moreover, the president was constrained by the method of nomination, because it concentrated power in state political parties, which were dominated by members of Congress.

By the end of the 19th century, Congress had achieved an extensive hegemony over the executive branch. Its control went beyond the general expectations at the time of the founding regarding the proper nature of executive-legislative relations. The president truly lacked independence and power, a result that would have chagrined both the Jeffersonians and the Federalists. Meanwhile, the legislature of this period was thoroughly corrupt and increasingly a source of widespread public scorn and disgust. Though Congress was powerful, it had lost the capacity to govern for the national interest, instead becoming mired in parochialism and double-dealing.

From this frustration grew a desire to expand the president’s power and particularly to liberate the administrative offices from congressional oversight. This sentiment, which grew powerfully during the Progressive Era, saw Congress as not only parochial but *hopelessly* so. While progressives sought to reform Congress (through, for instance, the 17th Amendment), they also were committed to drain it of its power—situating both taxing and regulatory authority in the executive branch.

In the early 20th century, a trio of entrepreneurial presidents—Teddy Roosevelt, Wilson, and Franklin Roosevelt—succeeded in bringing much of this vision about. Through the force of their personalities and their political acumen, they helped establish the president as a kind of national tribune—a spokesperson for the national interest—in a way that no president since Jackson had done.

Likewise, they extricated the institution from the grubbiness of machine politics by undermining the power of state-party machines (typically dominated by members of Congress) to select presidential nominees. This enabled them to leverage the president’s institutional prestige on Congress to not only enact their legislative agendas but redistribute the governing power itself. The international scene after World War II also enhanced the president’s institutional power. The

nation was to remain in a state of permanent wartime readiness, which promoted Congress to grant the president vast discretionary authority, even in the case of making war, a central legislative authority in the founding vision. Moreover, Lyndon Johnson's Great Society created a regulatory and social welfare framework that, over time, concentrated power in the executive branch at the expense of Congress.

Politically speaking, the president today is a much more partisan and divisive figure than in the heady days of the mid-20th century. Except for Ronald Reagan, every president since John F. Kennedy has been exceedingly controversial, if not downright unpopular, for vast stretches of his tenure. If the president asked Congress for greater discretion today, the chances are high that the legislature would reject him out of hand. However, power, once granted, is hard to reclaim in our constitutional system. The president would surely veto any law by which Congress would reclaim its old authority, and mustering a veto-proof majority would be impossible.

And more to the point, Congress does not even really want its power back. The people have come to view the president as the locus of energy in government and expect Congress to behave accordingly. And so it has, submitting itself to presidential diktat lest it run the risk of antagonizing its own voters. Decades of diminishment have taken its toll on the legislature, making it a mere shadow of its former self.

Diligent and hardworking members of Congress leave the institution because they see it as a waste of time. Vain and self-indulgent members stay because it helps them get hits on Fox News or views on Instagram. Congress cannot even attend to its basic functions,

such as appropriating money in a timely and responsible manner. A strange-bedfellows coalition of special interests and ideological extremists exercise outsized control over both parties. Only a handful of members in the institution are even aware of the desperate need for reform. And the broader public, for how much it tends to dislike the president, is aware of legislative irresponsibility and hates Congress even more.

This problem is literally a century in the making and will not be addressed overnight. What is necessary in the first instance is making Congress something more than an object of ridicule. That requires reforming its procedures. The committee system and the appropriations process both need to be reimagined. Raising Congress's public esteem also requires strengthening its institutional capacity—hiring more staff with policy expertise and paying them competitive wages. But the broader political process also needs to be reformed, so that good people are elected to serve in Congress, while bad people are rejected.

A program of reform requires a thorough accounting of legislative-executive relations. The appropriate place to start, therefore, is during the early republic. This is a period when the executive wielded a level of influence that surprised many, including Madison. The next report in this series will consider the presidency during the Federalist era, when a combination of Hamilton's leadership and the crisis of the French Revolution challenged constitutional notions of a dominant legislative branch. While the legislature would strike back in the 19th century, these early conflicts illustrate what was at the time the surprising potential for executive authority.

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