

Pre-chewed Politics

Does Congress deserve to be called the 'broken branch'?

Legislation:

The increase in partisanship, and election of more ideological members, has impacted productivity.

The 113th Congress (2012-14) set new records for partisan voting in its first session. Republicans in the House of Representatives voted with their party on average 92% of the time. Similarly, in the Senate, Democrats voted with their party on average 94% of the time. House Republicans also voted unanimously on 35% of votes that divided the two parties, while Senate Democrats voted unanimously on 52% of divisive votes. Some of President Obama's most significant legislative achievements had almost no Republican support. The Patient Protection and Affordable Care Act (2010) passed without a single Republican vote. After the Democrats lost the House in 2010, and Senate in 2014, this partisanship made it increasingly difficult to pass laws needed to address pressing issues. The 113th Congress narrowly avoided being the most unproductive in history. Legislators passed 296 bills, which is just slightly ahead of the 112th Congress, which passed 283 over its two years. The 112th Congress was nicknamed the "Do-Nothing Congress", a phrase that was coined by President Eisenhower in 1948 to describe the 80th Congress, which actually passed 906 bills. Even though the Republicans controlled both houses, the 114th Congress still only passed 329 bills, several of which provoked presidential vetoes. House Republicans voted 60 times to repeal Obamacare, even though it was inevitable that President Obama would veto any repeal bills that passed, which he did in January 2016. After Donald Trump won the 2016 presidential election, the path for Republicans to pursue their agenda seemed clear. Yet, in March 2017, the Republican leadership had to withdraw the American Health Care Act, largely due to opposition from the Freedom Caucus, which includes the party's most conservative members. Given the ideological divides that exist between and within the two main parties, perhaps not even unified government is enough to overcome gridlock.

However... Congress has still passed some historic laws, and there have been some signs of bi-partisanship.

The 111th Congress passed several historic bills. The Patient Protection and Affordable Care Act (2010) overhauled the US healthcare system, after decades of failed attempts. The American Recovery and Reinvestment Act (2009) launched a \$787 billion stimulus to help the American economy recover from the 2007 financial crisis. The Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), overhauled the regulation of the banking industry. More recently, the 114th Congress passed the Every Student Succeeds Act (2015) with bipartisan support, greatly reforming the how the nation's public schools are evaluated by encouraging states to limit the amount of time students spend taking tests. In 2016, there was even enough bi-partisan support to override President Obama's veto of the Justice Against Sponsors of Terrorism Act, which allows anyone injured, or the families of those killed, by terrorist attacks on US soil, to pursue lawsuits against foreign nations for any role that they may have played in these attacks. The bill had passed unanimously and the override passed 97-1 in the Senate and 348-77 in the House.

The filibuster has become so common in the Senate that practically every vote now needs a supermajority.

A filibuster is where Senators make use of their right to unlimited debate to delay a particular bill or nomination. They continue talking or adding amendments until they successfully pressure their opponents to make changes or drop the bill or nominee entirely. To stop a filibuster, 60 Senators must support a 'cloture motion' to end the debate and trigger a vote. From 1917-70, the cloture procedure was used only 8 times to prevent the disruption of filibusters. In contrast, during the 113th Congress there were 253 cloture motions filed. In the 111th, 112th, and 113th Congress, Republicans used filibusters to delay practically every bill pursued by Democrats, and every nomination made by the President. In the 114th Congress, with Democrats in the minority, it was Republicans frustrated by these delays. Republican Senate Majority Leader Mitch McConnell filed 128 cloture motions from Jan 2015 - Jan 2017. In September 2015, Democrats filibustered a 'resolution of disapproval' that would have prevented President Obama from lifting some of the existing economic sanctions on Iran, jeopardising a sole-executive agreement his administration had negotiated.

However... the filibuster does ensure that the minority party is able to influence legislation.

While both Democrats and Republicans criticise filibusters as undemocratic obstruction when in the majority, they regard them as a vital tool when in the minority. The threat of a filibuster forces those drafting bills to compromise. The majority party has to listen to the views of the opposition, and the many interests and voters that they represent, which arguably helps prevent 'tyranny of the majority'. The 2017 American Health Care Act gives an insight into what would happen without the filibuster, as Republicans tried to pass their Obamacare replacement bill through a special procedure called a 'budget reconciliation', in which filibusters cannot be used. The 1974 Congressional Budget Act created an expedited process for amending certain tax and spending laws to bring them in line with the spending

targets set out in the budget resolution Congress is supposed to pass each year. If a budget resolution calls for cuts to spending, then laws establishing 'mandatory programs' like Medicaid, which are automatically funded each year, need to be amended. The budget resolution instructs relevant committees to propose any changes necessary to 'reconcile' the cost of existing mandatory programmes with the spending targets set by the budget resolution. These proposed changes are assembled into what is called a 'budget reconciliation bill', which can only be debated for 20 hours in the Senate, and needs only a majority vote. Reconciliation bills can only make changes that directly impact the federal budget, so Republicans could not use this procedure to, for example, scrap rules requiring insurance companies to provide certain benefits. However, they did attempt to make substantial cuts to Medicaid, sizable tax cuts for higher earners, and end 'Obamacare's' income based subsidies – all without any input from Democrats. Had this procedure not been available, the threat of a filibuster would have forced Republicans to moderate their plans.

Congress delegates considerable legislative authority to federal departments and agencies.

When Congress passes laws and creates new federal programmes, it gives responsibility for the execution of these laws to particular executive departments and agencies. Congress often leaves laws deliberately vague, opting to delegate legislative power to federal bureaucrats, who write more specific regulations. These rules set out how exactly the law will work in practice. Congress leaves this to federal bureaucrats because they recognise that they have greater expertise. Members of Congress are often very well educated, and through their committee work may become very experienced in particular policy areas, but they still feel it best to allow, for example, the Environmental Protection Agency, to write the specific, technical rules necessary for keeping the nation's air and water supplies clean and safe.

However... Congress arguably delegates too much authority, inevitably leading to conflict over regulations.

Another reason why legislators write deliberately vague laws is because it is simply much easier. The Democratic and Republican parties have become increasingly polarised, and few bills attract bi-partisan support. It is easier to pass a bill that requires, for example, a reduction in air pollution, if representatives, who fear being held accountable by their constituents, do not have to put their name to the more controversial finer details. By delegating to the executive branch, representatives can boast that they have taken action on an important issue, whilst also shirking responsibility if regulations prove to be controversial. When the EPA announced its Clean Power Plan in 2015, numerous states and businesses immediately took legal action, arguing that the rules went far beyond the agency's authority. If Congress did not write such vague laws, or defer so much legislative authority, these conflicts might be more avoidable.

Appropriations:

Congress often fails to pass budget resolutions, or appropriations bills, threatening government shutdowns.

The budget process begins in February, when the president publishes their budget proposal for the coming fiscal year, which runs from October to September. This proposal outlines the funding the president wants for federal agencies and departments. The House and Senate Budget Committees then draft their own budget resolution, setting a total level of federal spending, which may be different to what the president wanted. Once they have agreed total spending levels, the 12 appropriations subcommittees begin to draft the actual appropriations bills that will allocate funds to the various federal departments. However, Congress was unable to pass a budget resolution for the 2011, 2012, 2013, 2014, or 2015 fiscal years, and between 1977 and 2016 there were only four fiscal years where Congress passed all appropriation bills ahead of the October deadline. If Congress fails to appropriate funds before the October deadline, the unfunded parts of government have to shutdown. To avoid this, Congress can pass a continuing resolution, which temporarily funds the federal government at the previous year's levels, to allow more time to pass the proper appropriations bills. However, these temporary measures mean the parties avoid answering difficult questions about the national debt and deficit. In 2013, Congress failed to even pass a continuing resolution, leading to the first shutdown in 17 years. By the start of the 2014 fiscal year, Congress had not passed any of the 12 appropriations bills. Instead the House and Senate tried to pass a continuing resolution, to keep the government funded until the two parties could reach an agreement on taxation and public spending. However, the Republican House used the crisis as an opportunity to pressure the Democrats, and passed a continuing resolution that defunded President Obama's healthcare reforms. The Democratic Senate refused to pass this bill, and so the Government began a partial shutdown, with all non-essential services stopped and more than 800,000 workers sent home without pay.

However... Congress has used continuing resolutions and omnibus bills to keep the government funded.

While Congress has come close to other government shutdowns since 2013, they have been narrowly avoided, which shows some sign of improvement. In recent years, Congress has often opted to pass a form of appropriations bills called an omnibus bill. Omnibus bills package several of the usual 12 individual appropriations bills into one large bill

that is then considered as a whole. While omnibus bills can save time, and can be easier to pass, critics argue that by condensing what should be 12 separate bills into one huge bill, which is often rushed to prevent a shutdown, omnibus bills do not receive adequate scrutiny. If a member of Congress dislikes a particular appropriations bill, they can vote against it while still supporting the other 11 appropriations bills. But if they disagree with a section of a huge omnibus bill, they are faced with voting against the entire bill, threatening a government shutdown. After lengthy negotiations between party leaders, Congress was able to pass the 2016 Consolidated Appropriations Act (an omnibus bill) in December 2015, which funded the Government until September 2016. The Act achieved a degree of compromise between centrist Republicans and moderate Democrats, but it still faced much criticism. In September 2016, for the 2017 fiscal year, the 114th Congress opted to pass continuing resolutions until the start of the new Congress, giving the new Trump Administration the opportunity to influence the budget. The 115th Congress passed a budget resolution in 2017, but it remains to be seen whether some, or any, of the appropriations bills will be passed on time.

Earmarks have been banned, which arguably makes the appropriations process less wasteful.

An earmark is traditionally understood to be a line in a spending bill that instructs the executive to spend a portion of money on a particular project in a particular part of the country. Opposition to earmarks grew after extensive media coverage of projects that were deemed to be particularly wasteful and unnecessary. The most famous examples were a 2004 earmark supported by Representatives from Alaska for what became known as the 'bridge to nowhere' - a \$230 million bridge connecting a small town in Alaska to an island of only 50 inhabitants, and the 2005 arrest of Republican Representative Randy Cunningham, who received at least \$2.4 million in bribes for earmarking defence projects for a particular contractor. Earmarks have been banned across the House since 2011, and, after President Obama similarly vowed to veto any bill containing earmarks in his 2011 State of the Union Address, the Senate eventually followed suit. Critics argue that not only did earmarks lead to money being wasted on projects that were designed to win votes, but they also undermined scrutiny and oversight. The more time that members of Congress spent lobbying committee members to approve funding, the less time they spent actually scrutinising bills. Critics argue that it is wrong for votes to be 'bought' with earmarks, and that members were encouraged to support bills they had serious reservations about, if they included funding for their district or campaign donors. They argue that it is far better for bureaucrats to award money based on merit and open competition.

However... The ban transferred even more power to the executive, and made gridlock even worse.

Supporters of earmarks argue that elected representatives are in a better position to know where federal money would do the most good than unelected bureaucrats in Washington. They point out that the Constitution gives Congress the power of the purse, and argue that it is wrong to delegate this power to the executive. Some argue that the president and their appointees are just as likely to be influenced by political factors when deciding where to spend federal funds. It has been suggested that the Obama administration directed far more money to competitive swing states, than states with large Republican majorities. Supporters also argue that earmarks only ever added up to only a tiny portion of the overall budget, and achieved a great deal inside and outside of Congress. They argue that earmarks grease the wheels of government, building support for important legislation that would otherwise be impossible, given the partisan divides that exist in Congress. They argue that Congress has only become more dysfunctional since the ban, regularly failing to pass appropriations bills, and making no progress on key issues like immigration reform. A 2016 poll found that 63% of Americans support the earmark ban, but Congress' approval rating that year was often as low as 13%.

Representation:

The 115th Congress is the most diverse in history.

Record numbers of racial or ethnic minority members were elected in the 2016 elections – mostly Democrats. The 115th Congress has 38 Hispanic members (same as the 114th Congress), 49 African-American members (up from 46 in the 114th Congress) and 15 Asian-American members (up from 11 in the 114th Congress). In total, there are 102 racial minority members - 92 seats in the House and 10 in the Senate. A record breaking 109 women are also serving in the 115th Congress, up from the 108 women who served in the 114th.

However...Congress is descriptively unrepresentative of America's diverse population.

Descriptive representation is the idea that Congress should look like the American people. If half the country is female, then half of Congress should be female. Arguably, having representatives from a wide range of social groups, informed by very different life experiences, ensures that a much greater range of issues are raised, with debates informed by many more perspectives. While the 115th Congress is the most diverse in history, it still does not fully reflect the American people. The majority of members are still overwhelmingly white, male, middle-aged, Christian and

rich. Just 19% of Congress is female, and relatively few have leadership positions – only 5, all Democrats, in the Senate and 13 in the House, of which only two are Republicans. There are only two House Committees and two Senate Committees chaired by women. Majority-minority districts have helped voters to elect more African-American and Hispanic candidates but Congress again does not reflect the public. 81% of Members of Congress are white, compared with 62% of the US population.

Gerrymandering means that many members of Congress do not have an incentive to compromise.

The US Constitution requires congressional districts to be of roughly equal population size. Redistricting is where district boundaries are redrawn to give them more equal populations. As this process is often left to state legislatures, there is substantial room for gerrymandering – redrawing districts to benefit a particular party. Representatives in gerrymandered safe seats, which have almost no chance of being won by a rival party, have little incentive to compromise, or to seek the support of both Republican and Democratic voters. Instead, their main threat comes from a primary challenge. Many Republicans fear being called RINOs (Republicans in name only) and so refuse to make any concessions to Democrats, in case it fuels a primary challenge. House Majority Leader Eric Cantor lost his seat in 2014, not to a Democrat, but in primary challenge from an unknown economics professor, supported by the Tea Party.

However... it is arguable that representatives are simply reflecting the views of their constituents.

While many districts have been gerrymandered, it is arguable that their elected representatives are doing a good job of representing their views. What might be considered gridlock to some people could actually be seen as good representation for those voters who do not want to compromise on issues like 'Obamacare' and public spending. Even if we discount gerrymandering, it is hard to dispute the fact that America is ideologically divided, with urban areas leaning more Democratic, and rural areas leaning more Republican.

Some members arguably prioritise the interests of donors and pressure groups over their constituents.

Pressure groups and financial donors can exert a significant influence over key votes in Congress. Due to their short, two-year terms, Representatives are under constant pressure to fundraise. Former members of Congress estimate that legislators can spend as much as 50% of their time in office fundraising for their re-election. As the majority of time is spent soliciting major financial donations, critics are concerned that members will become overly concerned with meeting the needs of wealthy donors. Pressure groups with large memberships can exert a similar influence. Despite polls showing over 90% of Americans support mandatory background checks on anyone buying a firearm, a bill to introduce the measure was defeated in the Senate by a Republican filibuster in 2013. Groups like the NRA, with active, vocal memberships, lobbied intensively against the bill. President Obama argued that the Senators were "worried that the gun lobby would spend a lot of money and paint them as anti-Second Amendment."

However... opinion polls suggest that many voters are happy with how they are being represented.

Congress' approval rating was 24% in March 2017, which, while considerably higher than the record low of 9% reached in November 2013, is still worryingly low. These low ratings have been largely attributed to the gridlock that has plagued Congress in recent years. However, support for individual Representatives and Senators tends to be much higher. Polls conducted prior to the 2016 elections found that 59 of 100 Senators had approval ratings of 50% or higher among their own constituents. If most voters are happy with how they are being represented, then the gridlock in Congress could simply reflect a divided public. For Tea Party activists, who favour less government intervention, it is actually a positive development that fewer laws are being passed. From their perspective, more legislation simply means more intrusion, more taxation, and more government.

Oversight:

Congressional oversight of the executive branch can be weak when the president's party controls Congress.

For the majority of George W. Bush's presidency, the Republicans held a majority in both the House and Senate. Critics argued that this led to a worrying decline in oversight of the executive. They argued that, in particular, there was far too little scrutiny over the build up to the wars in Iraq and Afghanistan, or into allegations of torture at US controlled prisons like Abu Graib, or oversight of the increasingly powerful intelligence agencies. Between 2003 and 2005, the Senate Armed Services Committee did not hold a single hearing on combat operations in Afghanistan, and only held nine on Iraq - under 10% of their hearings. The House Armed Services Committee did slightly more, with one hearing on Afghanistan and 18 on Iraq, but this was only 14% of hearings. Within two months of the Democrats retaking the House and Senate in the 2006 mid-term elections, there were almost 100 oversight hearings on the Iraq War alone. The Democrats had much less to lose from embarrassing President Bush than the Republican Party did.

With the Republicans now controlling both Congress and the White House, it has been alleged that oversight has again become less rigorous. When the House Committee on Oversight and Government Reform released its schedule in January 2017, outlining the items it planned to table for scrutiny over the next two years, Democrats were dismayed to find that not a single item focussed directly on President Trump, despite requests that the Committee look into a range of concerns, such as the conflict of interest raised by Trump's many businesses. The House Intelligence Committee is currently investigating possible ties between Russia and Trump's election campaign, as well as Trump's claims that President Obama tapped his phones. However, Democrats are sceptical about these investigations. The Chairman of the House Intelligence Committee, Devin Nunes, also served on President Trump's transition team, and Nunes has already had to apologise for taking information straight to the President, rather than his Committee.

However... divided government can equally lead to extremely partisan, potentially less effective, scrutiny.

In 2014, House Republicans established a new temporary 'Select Committee on Benghazi' to investigate whether executive incompetence led to the deaths of four Americans at the US diplomatic compound in Libya in 2012. This could be seen as Congress fulfilling its oversight function, by investigating a tragic event in order to prevent a repeat in the future. However, Democrats argued that the select committee was not about oversight but point scoring, pointing out that there had already been nine different House and Senate committee investigations, 17 hearings, and six reports on Benghazi, none of which had upheld the claim that the Obama administration had conspired to mislead the public and Congress over the cause and nature of the attack. Democrats argued that Republican simply hoped to discredit President Obama, and former Secretary of State, Hillary Clinton. Similarly, in December 2014, the Senate Select Committee on Intelligence released its long awaited report on the CIA's use of 'enhanced interrogation' to gain information from suspected terrorists after the 9/11 terrorist attacks. The Democratic majority's report claimed that: CIA agents had tortured numerous suspects; enhanced interrogation had not obtained useful intelligence; and the CIA had deliberately misled the White House. However, the Republican minority on the Committee chose to release their own report, which argued that the CIA had saved lives and played a vital role in fighting terrorism. After four years of investigation, on an issue as serious as the use of torture, the two parties could barely agree on any details, making it less likely that future administrations will follow the report's conclusions.

The Senate has repeatedly refused to give its "advice and consent" to executive appointments.

President Obama had more nominations filibustered than any other President. From 1949-2013, 168 presidential nominees were filibustered. Of these filibusters, 82 were used to block appointments made by President Obama. This had a significant impact on the federal agencies, courts, and bodies that were left with vacancies for extended periods. When America was dealing with its first Ebola case on America soil in October 2014, the country still did not have a Surgeon General, as Republican filibusters had held up the nomination for months. Likewise, when tensions between America and Russia were building over the crisis in Ukraine in July 2014, America did not actually have a Russian Ambassador. The position had been left unfilled since February, which did not help the executive branch to work with Russian leaders. After Justice Scalia died in February 2016, Senate Republicans swiftly announced that they would not even consider President Obama's nominee (Merrick Garland, Chief Judge of the US Court of Appeals for the DC Circuit), even though he had been widely praised by Senate Republicans in the past. The Senate insisted that the next president should make the nomination. Critics argued that it was wrong for the Senate to leave the seat empty for almost a year, just to gain the chance that a Republican president could make the nomination.

However... Democrats used the 'nuclear option' in 2013, which sped up the confirmation process.

In November 2013, Senate Democrats took the so-called 'nuclear option' of changing the Senate rules to ban filibusters for all executive branch nominees and judicial nominees with the exception of the Supreme Court. As Democrats lacked the 2/3 majority they needed to change Senate rules, the party used a very tactical parliamentary manoeuvre, which was heavily criticised by Republicans. The then-Senate Majority Leader Harry Reid raised a point of order (a parliamentary procedure used to ask a question about parliamentary procedure, or claim that the rules are not being followed) to suggest that the next cloture vote should need only a simple majority. The presiding officer of the Senate ruled the motion out of order. Reid then appealed this ruling, and it was overturned by a vote of 52-48. This change to the rules made it easier for Democrats to process the large number of nominees awaiting confirmation in 2013. As the Republicans now hold a majority in the Senate, this rule change now benefits President Trump. So far, all of Trump's Cabinet nominees have been confirmed, however, his nominee for Labour Secretary, Andrew Puzder did withdraw from consideration ahead of the Senate vote, after it became apparent he lacked sufficient support. The nomination of Betsy DeVos's as Secretary of Education was also controversial because the Senate vote split 50/50, meaning that, for the first time in history, the Vice President, and president of the Senate, Mike Pence, had to cast the tie-breaking vote for a cabinet nominee.