



“Negotiations and Delegation”

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POLS 4620E

Lecture #27

University of Georgia

I. Introduction

- a. Course updates

II. Aftermath Section

III. Cox and McCubbins Response

- a. argument
- b. Of course the condition matters
- c. Partisan NEED
- d. Punishing defectors?
- e. Thoughts?

IV. Binder and Lee (2013)

- a. Why is it hard to make deals in Congress?
- b. What is transparency?
- c. Distributive Lawmaking and the spatial model
- d. What are ‘intense demanders’?
- e. Positions, NOT policies
- f. Ankle-Bones and Shoulder Bones



Negotiation and Delegation Outline

V. Deal-Making Instruments

- a. Secrecy
- b. Penalty Defaults
- c. Expertise, both neutral and partisan
- d. Repeated interactions
- e. Messaging and Communications
- f. Presidential Leaders
- g. Critiques?

VI. Delegation

- a. National Emergencies and 2019 Border Security
- b. The Presidency
- c. Green Lantern Theory
- d. Why Delegate?
- e. The NEA

VII. Conclusion

- a. Have a great day

Aftermath Section

AFTERMATH SECTION

For their legislative history project, students are required to complete an "Aftermath Section" that analyzes post-enactment events related to the enactment. This might include the law being amended by a subsequent piece of legislation, being altered by a series of Supreme Court decisions or its enforcement by the President and bureaucracy. The aftermath section is due on **Monday, April 26th at 11 pm.**

You have been assigned a specific question or set of questions to focus on in your aftermath section in your prompt sheets. **PLEASE READ THESE!** So you shouldn't be following the exact aftermath section format from the "Writing a Legislative History" slides. Again, pull up your prompt sheet, find the number assigned to you (under Assignments) and locate that number on the aftermath questions section. Then answer those questions as best you can.

Median word count on this section from past classes was 850 and the average word count was 950. Median word count for an A was 1266 and the average word count for an A was 1638. The median number of citations was 5, the median number of citations for an A was 5. Does this mean you have to hit these numbers? Of course not, we had A's that were much shorter and low grades that were much longer. But students have asked about length on these sections.

Students are strongly encouraged to consult [Bioguide](#), Historical Newspapers, [ovez](#), JSTOR and google scholar for additional information on this section. Please also consult the prompt sheet for suggested sources.



Above: Your Aftermath section will also be "inspired by real events," whatever the hell that means. It should also be good enough to earn "four stars" from Morning Star.

Aftermath Section

AFTERMATH SECTION: OVERVIEW AND STRUCTURE

A good example of an aftermath section can be found in the Anti-Drug Abuse Act case on the Congress Project website:

<https://www.thecongressproject.com/anti-drug-abuse-act-of-1986>

Questions to be answered in an Aftermath section: When did the President sign it into law? Did the papers quote the President's discussion of it?

Was the law amended by a subsequent law? Was it overturned in a later Supreme Court case? Bureaucratic rules?

How do contemporary scholars view the law? Was it effective? Citations from google scholar will help here.

Perhaps more so than any other section, the length of the Aftermath section will vary greatly depending on the enactment. As with the Background section, students should pay attention to any "Key Questions" that were provided with by the instructor. If there's something in the **Key Questions** the instructor suggests be address in the Aftermath section, please address it.



Above: Maryland basketball star Len Bias, whose death helped motivated the passage of the act.

Aftermath Section



Above: Senator Charles Mathias (R-MD) (above) informed Majority Leader Bob Dole (R-KS) he would filibuster the bill with a death penalty provision in it and he was "prepared to spend Christmas [in the Senate]" to do so.

AFTERMATH SECTION: STRUCTURE

In the Anti-Drug Abuse Act case, the Aftermath section largely follows the questions detailed above. The first sentence notes when President Reagan signed the law. It's followed by newspaper coverage of the signing.

The following paragraph briefly detailed the passage of subsequent legislation amending the 1986 bill.

Finally, much of the Aftermath section focused on problems caused by the legislation, as identified by scholars and political observers. The idea here was to identify the positive or negative qualities the law is most known for.

In the case of the Anti-Drug Abuse Act, the most notable aspect of the law was the provision calling for "mandatory minimum sentences for possession of even smaller amounts of crack cocaine with the crack-to-powder ratio at 100 to one."

Finally, the Aftermath section concludes with contemporary events, highlighting its relevance. Specifically, it notes that: "Attempting to correct their severely flawed and racially biased legislation, Congress passed, and President Barack Obama signed into law the Fair Sentencing Act of 2010 (S. 1789; 111 PL 220). The New York Times reported that "Congress addressed the issue by passing the Fair Sentencing Act of 2010, which reduced the sentencing disparity to 18 to one."

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National Emergencies and the Border



- February 15 – President Trump announces he is declaring a state of “national emergency” in order to repurpose existing federal funds for border security.
- Congress had already appropriated \$1.4 billion for border security in the Consolidated Appropriations Act of 2019.
- Under the National Emergencies Act, the House passed HJR 46 to terminate the emergency declaration, 245-182. The Senate followed suit, 59-41.
- President vetoes the resolution and House veto override failed 248-181.

Overview



This talk:

- Why do American presidents need to declare emergencies?
- Why does Congress delegate?
- What is the National Emergencies Act?
- How does it apply to the border?

Accusations of Presidential Abuse of Power

“Making matters worse is that President Obama is again abusing his power by imposing his policies via executive fiat instead of allowing them to be debated in Congress. President Obama’s frustration with our republic and the way it works doesn’t give him license to ignore the Constitution.”
Senator Marco Rubio (R-FL), 2013



“I taught constitutional law for ten years. I take the Constitution very seriously. The biggest problems that were facing right now have to do with George Bush trying to bring more and more power into the executive branch and not go through Congress at all, and that’s what I intend to reverse when I’m President of the United States of America.” –
Then Senator Barack Obama (D-IL), 2008

The American Presidency is Weak

People often treat the American presidency as if it is all-powerful.

- The American President is frequently referred to as the “leader of the free world.”
- Presidential elections dominate the news cycle. Each election is the “most important” in our lifetime.



Presidents are often accused by opposing partisans of abusing their power and compared to dictators and emperors.

In reality: Two presidencies. And while presidential influence on foreign affairs is substantial, domestic policy is much more muted.

The “all-powerful Emperor” or “unilateral executive” narrative is simple to conceptualize but leads to a misguided view of American politics (see Green Lantern Theory).

Green Lantern Theory

Presidents consistently overpromise and underdeliver.

The criticism is always the same: why can't the president be more like the Green Lantern? Once he/she takes office, they should become powerful and effective.

Reagan version: "if you only communicate well enough the public will rally to your side."

LBJ version: "if the president only tried harder to win over congress they would vote through his legislative agenda."

Both versions are false.



Green Lantern Theory



Nyhan: "Mr. Trump is the purest Green Lantern candidate we've seen in recent years. He cleverly exploits the appeal of presidential omnipotence by contrasting his supposedly decisive style of business leadership as a real estate magnate with the compromises, inertia and policy failures that are inevitable in politics...."

"Mr. Trump is playing a character we created — a Frankenstein's monster of myths of the presidency come to life."

Politicians can't easily knock down his claims about what he will accomplish given their own proclivity for making exaggerated promises. Commentators are in same boat.

The American Presidency is Weak

The results have been predictable. Despite unified party control of government, the Trump administration has not come close to meeting its promises.

This is consistent with past legislative efforts.

Image on the left tracked legislative pledges the President promised to introduce and pass in his “first 100 days.”

Only one of those bills was introduced in that frame.

Why is the presidency so weak? And how do presidents deal with this?



Constitutional Power is Vested in Congress

The Constitution established a truly national government by giving Congress broad powers over crucial economic matters.

Article I, Section 8, of the Constitution sets out the enumerated powers of Congress (examples: impose taxes, regulate interstate and foreign commerce).

At the end of this list a clause authorizes Congress “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers...” We refer to this as the necessary and proper (or elastic) clause.

NOBODY likes Congress. Not even members of Congress, who are responsible for delegating most of the president’s limited domestic authority.



Delegation to the President

“Emergency Powers” are not explicitly delegated to the President in the Constitution.

Presidents have long interpreted their existence, however, and used their first-mover advantage to force Congress to react.

For example, Lincoln suspended the writ of habeas corpus that prevented the Union Army from detaining civilians suspected of spying. He does not consult Congress.

More frequently, presidential powers come from express congressional delegation.



Delegation to the President



“The Senate has surrendered so much power; it’s hard to see where his authority stops.”

Article II of the Constitution: “the executive power shall be vested in a president of the united states of America.” Does not describe this power.

Lack of administrative power for the president suggested it would be difficult for presidents to gain control over public policy.

Congressional oversight of executive agencies also hampered the president.

However, as government grew, delegation became common. By delegating to the president and the appointed executive branch the discretion to decide how best to implement and adjust policy to achieve its objectives, Congress shares its lawmaking powers with the president. Why?

Delegation to the President



Why delegate?

- (1) Programmatic necessity. They disagree over the specifics, so they intentional keep the language vague to avoid alienating potential bill supporters.
- (2) Sincere policy need. They lack the expertise to make an informed, specific policy choice.
- (3) Political advantage. They know a policy will cause problems so they pass the buck to the executive.
- (4) Speed. Decisions need to be made quickly and the President is in the best position to do so.



Delegation to the President

The Supreme Court ruled 5-4 that for-profit corporations were exempt from a law its owners religiously objected to. The case, *Burwell v. Hobby Lobby* (2014) struck down “the contraceptive mandate, a regulation adopted by the US Department of Health and Human Services (HHS) under the Affordable Care Act (ACA) requiring employers to cover certain contraceptives for their female employees.”

When Congress passed the law in 2010, they allowed the administration to determine whether employers would be required to provide contraception to female employees under the law.

The court held that the law violated the Religious Freedom Restoration Act of 1993.



Over 50 briefs have been filed in support of Hobby Lobby



Delegation to the President

As attractive as delegation may be, it always has costs associated with it.

Agents may shift policy in an undesirable direction.

When that agent is the president, it is difficult to “fire” the agent. Difficult when the president chooses to administer a program in a direction different from the one Congress intended.

One must monitor agents’ performance to ensure that they are vigorously pursuing the tasks delegated.

Monitoring is difficult and costly: “Fire Alarms, not Police Patrols.”



The National Emergencies Act



Early 1970s—Concern from lawmakers about unchecked presidential power.

In 1973, the Senate created the Special Committee on the Termination of the National Emergency.

Committee determined four national emergencies still remained in effect:

- March 4, 1933, to deal with the economic effects of the Depression. (FDR)
- Dec. 16, 1950, in the wake of North Korea's invasion of South Korea. (Truman)
- March 23, 1970, as a result of a national postal strike. (Nixon)
- Aug. 15, 1971, because of an international monetary crisis. (Nixon)



Also identified nearly 500 statutes that granted the president powers once an emergency was declared

The National Emergencies Act

The House explicitly rejected several amendments offered that would have ended national emergencies after 30 and 90 days.

The NEA passed both chambers overwhelmingly. What it did was establish an expedited process by which Congress could terminate a presidential declaration. Never used before this past year.



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Gutted in *INS v. Chadha*, which barred the use of the legislative veto.

The National Emergencies Act and the Border



The NEA's primary limitation on the executive was the inclusion of language requiring the President to formally declare a national emergency and to specify the statutory authority activated by that declaration.

The act does NOT provide emergency authority on its own.

What does this mean for Trump and the border?

(1) Can he declare a national emergency? Sure.

(2) Will it get him what he wants? Debatable. A number of statutes for him to rely on, none explicitly grant him the authority to repurpose funds this way. There will be a challenge in the Courts where the administration's track record is abysmal.

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Questions, Concerns, Angry Rants?



Don't hesitate to e-mail me.