

# CONGRESSIONAL Ambivalence

The Political Burdens of Constitutional Authority

JASMINE FARRIER

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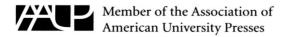
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## Congressional Ambivalence

## To Dan

## Acknowledgments

This book is a sibling to Passing the Buck: Congress, the Budget, and Deficits (2004). In May 2001, as a dissertation fellow at the Miller Center of Public Affairs at the University of Virginia, I presented a paper on the curious institutional and political history of the line-item veto movement. At that moment, however, deficits and budget reform were (temporarily) off the political radar screen. So the conversation turned to whether my research approach was relevant to other, still-simmering policy dilemmas that also drove Congress to sacrifice institutional prerogatives, such as military base closures and fast-track trade implementation rules. I was instantly intrigued. A few months later came September 11, and Congress renewed its institutional identity struggles under novel circumstances. The new book project aimed to make sense of Congress's problematic place in contemporary separation of powers arrangements by examining all of these issue areas for patterns in rhetoric and action.

As Congressional Ambivalence evolved, I was fortunate to have expert guidance. I am deeply grateful to Lawrence C. Dodd, Daniel J. Palazzolo, and James P. Pfiffner for their close reading of the book manuscript and insightful suggestions. I am also thankful for conference paper feedback (often with extensive email follow-up) from Joseph M. Bessette, Louis Fisher, Richard M. Pious, Randall W. Strahan, and Jeffrey K. Tulis. In addition, I drew on the case studies in this book to contribute articles to PS: Political Science and Politics (2007) and Presidential Studies Quarterly (2010), refining my arguments in the process. My chapter in The Constitutional Presidency (2009), edited by Bessette and Tulis, blended my budget arguments from this book and Passing the Buck. For a sabbatical semester and other forms of research and institutional assistance, I thank the Department of Political Science and the College of Arts and Sciences at the University of Louisville. I must also express my heartfelt appreciation for Stephen M. Wrinn, the indefatigable director of the University Press of Kentucky, and his expert staff for their enthusiasm and efficiency.

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Finally, I must acknowledge my wonderful home team. My daughters, Tovah and Talia, went from being a toddler and a baby at the beginning of this project to elementary school students at its completion. At home and school, they have already developed a keen interest in tracing the means and ends of decisionmaking. The constant and generous support of my family (parents, in-laws, and grandmother), department colleagues, and friends is far too vast to detail here, so I owe them all itemized appreciation in person. My tribute to my husband can be summed up easily: thank you, Dan, for everything.

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## Introduction

## Congress and the Cycle of Ambivalence

I voted for it [the Patriot Act in 2001]. I have come to wish I had not.
—Senator Robert Byrd (D-WV), 2005

It was a mistake; I regret my vote [for the Iraq War]. I regret not realizing how incompetent [the Bush administration] would be. The president did not level with us. And if I had known it, I would never have voted to give him that authority in the first place.

-Senator Joe Biden (D-DE), 2007

So, in a sense, we have a political gun at our heads that we can't afford to say that we know better.

—Representative Charles Rangel (D-NY), 2008, on pressure to pass Secretary Paulson's emergency bank bailout/rescue proposal

Congress does not have a clear and consistent place in the separation of powers system. Sometimes members describe their own institution as having a pathological inability to deal with an important national issue and opt to suppress normal legislative processes and/or delegate power to another institution. At other times, members say that they regret their vote to sacrifice congressional power—or otherwise want to revisit the policy—because they do not approve of how the delegated powers were used later. As the epigraphs to this introduction imply, the George W. Bush years were especially difficult for Congress. However, these patterns of legislative give-and-take are also visible in recent decades of peacetime military and international trade policy under a variety of political and policy circumstances. While the George W. Bush era's bookends of September 11, 2001, and the sudden economic crisis of 2008 provide an especially dramatic window through which to view Congress's identity crisis, the legislative rhythms and rhetoric behind delegation and its complex aftereffects have much deeper roots.

#### 2 Congressional Ambivalence

This book shows how and why Congress is particularly ambivalent about delegating authority on issues that address the "national interest" but have profound local policy and electoral consequences. This institutional ambivalence is reflected in a cycle that has different permutations in each area but that generally follows a pattern of delegation of power, followed by expressions of regret in various direct and indirect ways, followed often by more delegation. In the first part of the cycle, members of the House and Senate vote to give up member, committee, and/ or majority party power over policymaking. During this time, members openly discuss Congress's strengths and weaknesses in dealing with the policy dilemma at hand as well as the merits of the traditional legislative process, allowing Congress to delay, change, and deliberate over different alternatives. In the second part of the cycle, months or years later, after the delegation has expired or in a critical reaction to the president or some other entity's use of the delegated power, individual members launch a barrage of attempts to oversee, delay, or undermine the decisions that stem from the delegation. Yet these efforts (sometimes symbolic, sometimes substantive) to recalibrate power usually have limited or temporary success. In the third part of the cycle, when a new iteration of the same policy problem resurfaces, if there is sufficient executive branch pressure, members opt to delegate power again.

There are multiple driving forces behind each part of the cycle of ambivalence. Delegation has multiple causes and explanations, as we see in the above epigraphs and in the following quotations:

Why do we have the base realignment and closure process at all? The reason is that for years and years, this Congress ... put parochial pork-barrel interests ahead of national defense interests and prevented the Defense Department from doing what needed to be done and close obsolete military bases.

Members can covet [legislative trade] power and not use it, or we can sensibly delegate it, with the clear ability to bring it back if necessary, and enter into bilateral, multilateral, and world trade arrangements which clearly benefit all Americans.<sup>1</sup>

In 1994 Representative Thomas Andrews (D-ME) denigrated members' narrow representative and electoral compulsions to protect military

bases in their district, and in 2002 Representative Bill Thomas (R-CA) articulated a more strategic hope for delegation, by which power can be given to the president to perform certain tasks on international trade but then yanked back to Congress on demand. But regret and anguish surfaced as well, as Senators Byrd and Biden indirectly refuted Representative Thomas's argument that the delegation of power is all that controllable and lamented their previous decisions to delegate to President George W. Bush. Yet, despite low presidential approval and a Democratic-controlled Congress at the end of the Bush years, Representative Rangel's quotation implies that "crisis" situations, such as the Wall Street meltdown of 2008, still pave a road that leads directly to the White House, even if the same administration is accused of mismanagement of previous delegations.

Each case study in the book will explore these and other institutional and political causes of delegation as well as the significant consequences of these actions. In the cycle of ambivalence, Congress forfeits its role in shaping major policies to the president or some other entity that is not necessarily better prepared to see the national interest, void of its own parochial interests or political motives. Members of Congress may hope that oversight and legislative sunsets give the institution a reserve of power to address problems that stem from delegation, but it turns out that after-the-fact examination is much more complex than it appears, especially if the executive branch is uncooperative or if vigorous and critical oversight does not make the leap into new law. Therefore, Congress gives up its best chance to shape policy at the outset of the process, where it has the most leverage. These possible outcomes of delegation are often predicted in the original decision as memberseven ones voting in favor—express their trepidation and even anguish about the power loss in committee hearings and on the floors and, in acknowledgment of the pressures of the moment, hope for opportunities to revisit the policy down the road.

The central premise of this book is that we cannot fully understand the role of the U.S. Congress in the American political system without recognizing how the cycle of ambivalence reflects and affects the power balance between the Congress and the president. Institutional ambition is relatively steady in the executive branch under a variety of policy and political contexts, but this is not so in the House and Senate. The book explores the causes and consequences of ambivalence from Congress's perspective by analyzing prominent areas that combine foreign and domestic policy and reflect trade-offs between national and local interests and political perspectives. In members' arguments for and against the delegation of power in each part of the cycle, we see explicit dissection of the constitutional roles and multiple representative demands of the contemporary national legislature and the relation of the members to the whole. Regardless of the personal sincerity of these statements or the subsequent expressions of shock, regret, and outrage after the delegations yield new policy, such rhetorical patterns echo through decades of policy deliberation on the same issue under different partisan regimes. At the same time, there is a remarkable consistency in the ways executive branch officials discuss their institution's unique electoral and institutional perch. Despite the uneven ideological, regional, and electoral support of the president and any given policy he prefers, his branch is often seen by members of Congress to speak for the national interest. The executive branch's institutional and electoral differences with Congress are obvious, but the question of which branch has an organic institutional lock on "good" public policy is an open one.

In addition to pointing out the existence and nature of the cycle across these areas, this book has two other purposes. First, I argue that we can understand the ambivalent nature of Congress in the separation of powers system by examining public statements found in committee and floor debates that make up the legislative history of a bill. By drawing largely from the primary sources that store the public record of viewpoints held by members of Congress and tracing the legislative processes and bill alternatives that provide the occasions for that rhetoric, we can see a revealing set of institutional self-diagnoses that are varied in particulars but have broad, give-and-take rhythms over time. Second, congressional scholars from a variety of approaches and methodologies have not paid enough attention to the roller-coaster quality of Congress's presence in major national policy. Over years or decades, multiple iterations of the same policy area can yield dramatically different outcomes and dominant rhetoric.

## Case Selection, Institutional Rhetoric, and Building on Current Congressional Theory

This book focuses on three important areas of public policy and institutional development: five rounds of base-closing commissions, three

decades of fast-track trade implementation processes, and post-9/11 legislation at home (intelligence policy) and abroad (the Iraq War). The cases were not selected to represent variation; the goal is to illustrate a common phenomenon. These issues share common characteristics as they are all domestic/foreign hybrids with national/local consequences, and, perhaps most important, all issues where both the president and Congress can claim explicit constitutional authority. Yet the specifics of each phase vary enough to provide some leverage regarding the generality of the cycle. In each issue area listed above, between major moments of sacrifice, Congress rediscovers its own political rights, institutional resources, and constitutional responsibility to speak for the interests of affected districts and even the elusive national interest in an attempt to compete with presidential rhetoric, agenda setting, and policy power. However, there are important differences in the political and policy nature of the cycle of ambivalence in each case as well as the current moment in the cycle during the transition from the end of the George W. Bush presidency to the first years of Barack Obama's administration.

Each case/chapter focuses primarily on the policy iterations relevant to the delegation of power. Thus, the base realignment and closure (BRAC) commission chapter examines not all facets of domestic military policy but rather the specific BRAC process over the past two decades, the ways in which members created the five rounds, and reactions to the commissions' work. Similarly, the trade chapter does not explore the full regional and partisan history of free trade versus protectionism in the United States, instead concentrating more narrowly on the creation and use of fast track over three decades as a legislative procedure designed to support the implementation of future free trade agreements. In the post-9/11 chapter, I focus more on the debates over legislative processes and executive management before and after the intelligence and war policies passed than on how this complex moment fits into broader questions and history surrounding interbranch control of foreign policy. At the same time, I hope that it is evident that these more narrow procedural issues illuminate much larger partisan and institutional differences. Congressional rhetoric drives the narrative in each case, not because I infer (or intuit) a heartfelt sincerity on the part of the speaker, but because these words represent the dominant strain of argument from that side of the debate. It is also worth noting at the outset that, in the BRAC and fast-track cases, rhetoric can be a more

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insightful guide to the position of a member than votes because BRAC and fast track were often added as one title to omnibus measures rather than being presented as stand-alone bills.

The case studies suggest that, while the cycle exists for each policv issue, it takes different forms. The base-closing case and changes in trade policy reflect the rhythms of congressional sacrifice and resurgence, with the latter coming more strongly over time to a point where increasing criticism of base-closing commissions and free trade in general, combined with the current Democratic majorities, has frozen both issues. The degree of delegation and ambivalence varies as well. Sometimes Congress is more certain of its legitimacy and capacity to serve the national interest than it is at others, and sometimes the argument against delegation is based on partisan differences on the president's actions or policy views, not solely on Congress's institutional ability or inability to serve the national interest. Congress's ambivalence has its deepest origins in the fragmented constitutional design of the institution, but, in these ways, the debate found in public documents is colored by near-term circumstances (party, policy, and alleged presidential misuse of authority). Thus, the Constitution is only one of several factors that define the role of Congress in relation to the president and the cycle of ambivalence at any given point in history. One might argue that we have a living Constitution, lacking in all necessary details on policy and the legislative process, and adaptable to changing conditions. Thus, the cycle of ambivalence reflects a long-standing, recurring, and revealing debate over the proper role of Congress by the members who are explaining their votes to keep or lose power. At the same time, the contours of the debate reflect the mixed motives, changing political, policy, and partisan conditions, and, more deeply, contrasting views on the role of Congress that also stem from the original design of the institution.

The core research assumption here is the importance of legislators' and leaders' public expressions of their policy options and votes, because such political speech explains policy alternatives, the main winning and losing arguments surrounding those alternatives, and the nature of substantive legislative changes. Congressional rhetoric and voting are forms of position taking as well as lawmaking; each helps us understand the other. In his seminal 1974 book on the ways congressional elections shape member and partisan behavior, David R. Mayhew saw the value of looking at congressional speech: "The Congressman as position taker

is a speaker rather than a doer. The electoral requirement is not that he make pleasing things happen but that he make pleasing judgmental statements. The position itself is the political commodity. Especially on matters where governmental responsibility is widely diffused it is not surprising that political actors should fall back on positions as tests of incumbent virtue." But, in the second edition of the book, issued thirty years later, Mayhew laments in the preface the lack of attention to such political actions in congressional studies: "In general, my guess is that position taking has not been examined thoroughly since 1974 because its importance exceeds its modelability. And if it implicates causal relations it is especially tough to address."

In presidency studies, by contrast, political speech is seen to be at a premium by scholars. In his foundational 1987 *The Rhetorical Presidency*, Jeffrey K. Tulis argues at the outset: "Political rhetoric is, simultaneously, a practical result of basic doctrines of governance, and an avenue to the meaning of alternative constitutional understandings. The political meaning and consequences of those understandings is the central subject." While a cottage industry studying presidential rhetoric sprang up over the past twenty years in reaction to this book, there has been much less comparable attention to the constitutional and political contours of legislative speech, with some key exceptions on different facets of deliberation.<sup>5</sup>

Through the use of various public archives, I have found that, despite different policy circumstances and partisan power balances, the cycle of delegation-regret-delegation reflects astonishingly consistent diagnoses of deep structural tensions within Congress as a collection of national legislators answering to local constituencies. In contrast to much conventional wisdom about Congress and the separation of powers in recent years, renewed partisanship does not fully explain these developments. Members and leaders of both parties have given up power under counterintuitive circumstances over time. While short-term political factors are always in play, larger tensions between Congress's many roles are the heart of the story. In addition, members have a daunting array of choices before them regarding how they approach the multiple local and national responsibilities of their jobs. So it is not surprising that there are legitimate differences between members in terms of institutional protectiveness outside policy and partisan considerations.

This book differs considerably from the dominant questions,

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assumptions, and research approaches of mainstream congressional scholarship on the delegation of power, which has largely used a rational choice perspective to chart the benefits of strategic power loss for members, parties, and the institution as a whole. The delegation of power certainly can be a means of political and policy efficiency as well as electoral gain, but it is much messier over time than these approaches acknowledge as members and even majorities lurch between institutional sacrifice and protectiveness over multiple years or even decades on the same issue. The most logical explanation of anything members do seems straightforward enough: shed opportunities for blame, yet still claim representative credit for trying to protect local interests7 even as members try to connect with constituents by cynically denigrating the institution they serve.8 While strategic in the short term, the point of delegation is often to bite the hand that feeds the district, as in the baseclosing commissions or the fast-track trade rules, which explains in part why delegation decisions are so controversial in committee and floor debates. Another view is that delegation is a purposeful means for partisan policy control, which is best delivered through a principal agent strategy.9

Yet much of the delegation of power emphasized in this book was designed explicitly to limit member prerogatives to represent districts as well as majority power to control legislative outcomes. At an institutional level, the delegation of power can help Congress transcend burdensome transaction costs under certain policy and political conditions. However, the theoretical efficiency and effectiveness of this calculation lose meaning when the decisions are dragged out for years, when they affect high-profile distributive policies even under divided government, and when power is recalibrated again and again.

By contrast, I argue that each part of the cycle of ambivalence certainly applies to all these strategic views to some degree but is much more complex than these theories describe. Strategic views that focus on single instances of delegation do not notice the cycle of delegation-regret-delegation and the related internal struggles surrounding the meaning of representation and institutional power in Congress. In these ways, the policy patterns and scholarly approach of this book bring new relevance to a variety of older institutional approaches to congressional power loss in the twentieth century that examined congressional challenges as a by-product of constitutional handicaps to unified thinking as well as changing relations between members, committees, and the institution

as a whole in the modern administrative state. <sup>11</sup> In addition to constitutional burdens that affect Congress more than the other branches, these theories also argued, Congress suffered in the twentieth century from weakening central leadership to rival executive centralization and the media marvel of the presidency. Interestingly, while scholars have noted a roaring return of partisan politics and power for party leaders since the 1990s, <sup>12</sup> some point out that these trends have not translated into consistent institutional care. <sup>13</sup> Of course, Congress has long developed at cross-purposes. Institutional changes over many decades that are designed to please multiple and competitive masters can affect congressional power positively and negatively. <sup>14</sup> In-depth studies that include multiple iterations of the same problem through oversight, investigation, and repeated tinkering serve to show more complex interbranch power dynamics than any one voting snapshot. <sup>15</sup>

## Minicase of the Cycle of Ambivalence: TARP, 2008-2009

A stubborn old saw of American political culture says that Congress is, and perhaps should be, more institutionally protective of its powers over distributive domestic policy than of its powers over war and military matters. 16 However, congressional inconsistencies on key domestic issues surrounding fiscal and appropriations policy control show that institutional ambivalence can pervade these issues as well. For example, while the budget and deficit policies in the 1980s and 1990s were centered on the delegation of power (i.e., Gramm-Rudman-Hollings I and II, the Budget Enforcement Act, the balanced-budget constitutional amendment movement, and the Line-Item Veto Act), Congress was active in year-to-year budget battles against the same presidents it supported with these new powers. 17 For example, in 1996 Senator Trent Lott (R-MS) offered a philosophical perspective in favor of delegation to a strong national executive (even to an opposition party president with whom he often disagreed on fiscal policy): "I am in the Congress. I guess I should be jealous of ceding authority to the President, but I really do feel the President should have this [line-item veto]. We can only have one Commander in Chief at a time. He is the ultimate authority. He should have the ability to go inside a bill and knock out things that are not justified, that have not been sufficiently considered, that cost too much-whatever reason-without having to veto the whole