

Legislative Capacity, Executive Power, and the Dynamics of Separation of Powers Politics

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Book Overview

Congress is widely viewed by the public as the most unpopular, unproductive, and ineffective branch of government. Increasingly, Congress has come under fire for lacking the expertise and resources to deal with complex policies. Recent hearings with Facebook executives led many in the media and public to pillory Congress's lack of knowledge about complex corporations and the Internet. At a hearing on quantum computing, Rep. Kinzinger (R-IL) told witnesses, "I can understand about 50 percent of the things you say."¹ In response, members have argued for increasing congressional access to resources and expertise. Arguing for reinstating the now-defunct Office of Technology Assessment, which provided Congress with expert staff assessments on policy issues, Rep. Takano (D-CA) said, "a great surgeon does not operate without modern tools... Congress should not make policy decisions without relevant and unbiased information."² These are not new complaints. Speaking in favor of the original OTA in 1972, Rep. Charles Mosher complained, "we in the Congress are constantly outmanned and outgunned by the expertise of the executive agencies."³ Congressional (in)capacity has profound consequences not just for legislative policymaking but also the power of presidents. These concerns are further amplified in the U.S. state legislatures, which are often far less professionalized than Congress. We argue that this has important implications for the relative power of legislatures in a separation of power system.

The separation of legislative and executive power has long been a hallmark of American governance. A system of checks and balances was premised on the idea, as articulated by James Madison, that "[a]mbition must be made to counteract ambition" so that one branch does not dominate another. In this book, however, we argue that ambition is not sufficient for legislators seeking to constrain an energetic executive branch. Instead, legislatures must also possess the *opportunities* and the *means* to do so. We argue that Congress and state legislatures have often lacked sufficient capacity, historically and today, to assert themselves against executives. This has created situations where executives, who do possess ample access to expertise and resources, can bypass legislatures to impose their will. In this way, legislative capacity fundamentally determines the balance of power between the executive and legislature. Without it, the constitutional principle of checks and balances is compromised and the goals of a separated system could be undermined. These questions have become more pressing as citizens and scholars alike perceive presidents expanding their powers to new heights.

¹ https://www.washingtonpost.com/news/the-switch/wp/2018/06/06/i-can-understand-about-50-percent-of-the-things-you-say-how-congress-is-struggling-to-get-smart-on-tech/?utm_term=.d0763e43b0c5

² 163 Cong. Rec. H6416 (2017)

³ 118 Cong. Rec. 3202 (1972)

In our book, we develop a theory of separation of powers policymaking that brings capacity to the forefront. We argue that low capacity legislatures face difficulties checking the executive branch, both through *ex ante* constraints such as limiting discretion and *ex post* mechanisms like oversight. When legislative capacity is low, the executive branch can exercise the greatest power. Such situations empower executives to unilaterally bypass ideologically unfriendly legislatures, allowing them to short-circuit the legislative process and produce outcomes closer to their own preferred ones. When legislative capacity is high, however, the legislative branch can act to effectively stifle an ideologically opposed executive. Hemmed in by high capacity legislatures, executives will act with restraint in their use of policy tools and take into account legislative preferences to a greater degree.

Our theory yields testable predictions regarding how legislative capacity influences two features of our political system: 1) legislative attempts to restrain executive power; and 2) the exercise of executive power. We present the results from a variety of empirical tests using expansive new datasets to evaluate this theory in the United States. Since Congress has varied substantially in its own capacity over time, we use new historical datasets -- dating back to the nineteenth century in some cases -- to evaluate how capacity has affected the dynamics of power over time at the federal level. Our measures of capacity include staffing size, congressional spending, and novel indicators of staff and member human capital. We also examine the fifty U.S. states, where there is considerable variation in legislative capacity and other political conditions.

To analyze legislative attempts to control executive power, we develop a new measure of discretion to show how changes in its capacity influence Congress's ability to delegate more or less authority to agencies based on ideology. Low capacity legislatures are unable to limit executive discretion to political opponents. In another chapter, we demonstrate that capacity determines presidential success to a substantial degree in the appropriations process. Finally, we also examine changes in congressional oversight in a separate chapter, finding that the ability of Congress to monitor an ideologically opposed executive branch is contingent on its capacity. These three chapters demonstrate the ways in which diminished capacity impairs legislatures from carrying out fundamental tasks in constraining the executive.

Then, we examine how legislative capacity alters the executive's use of unilateral power. First, we examine presidential use of executive orders from 1905-2016, bringing new historical data to the study of presidential unilateral action. During periods of low congressional capacity, presidents issued significantly more executive orders during divided government. As congressional capacity increased over the course of the twentieth century, presidents were much more constrained and issued fewer executive orders when facing an oppositional Congress. We also test our argument at the U.S. state level, which provides rich variation in capacity. Using the most comprehensive dataset to date of more than 30,000 gubernatorial executive orders, we find patterns consistent with the federal level. Legislative capacity determines the ability of governors to pursue their policy preferences unilaterally in the face of a hostile legislature. We also show important evidence on how different domains of capacity interact.

Overall, our manuscript offers important insights into the dynamics of the separation of powers system in the United States. Legislative capacity plays a critical role in the performance of

Congress and state legislatures. The effects are not just limited to legislative outputs, however. It fundamentally shapes the incentives of executives as well. When legislative capacity is low, presidents and governors have a freer hand in pursuing policy goals that may be opposed by legislatures. When this capacity is high, executives are constrained. Unlike previous work, we argue that capacity is a precondition for inter-branch ideological divergences to influence policy outcomes.

In these ways, legislative capacity is central to separation of powers politics. This work also has important implications for evaluating several current policy debates about capacity, including whether to increase congressional staffing, to revive the OTA, and the perennial argument over term limits. In the conclusion, we also highlight additional contexts to which the lessons our work may apply, including presidential systems in Latin America and elsewhere. More generally, our work demonstrates that legislative capacity is key to understanding whether separated systems operate as intended and when executive power thrives.