



A REPUBLIC, If We Can Keep It

Taking Stock of Congress in the Trump Presidency

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MEMO PREPARED FOR CONFERENCE: A REPUBLIC, IF WE CAN KEEP IT

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Taking Stock of Congress in the Trump Presidency¹

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Two of Congress's most important functions in the American political system are: (1) checking executive authority and (2) policy legitimation. This paper argues that Congress has continued to serve as a check on executive authority during the Trump presidency, despite unified party control. However, Congress has a weaker record of policy legitimation. Rather than achieving the large bipartisan majorities that have long characterized congressional policymaking, the Republican majority has largely sought to legislate on narrow partisan lines. In such efforts, however, the party has had only limited success. On a wide range of important issues, Congress under unified GOP control remains as gridlocked as it was under divided control in the party-polarized Obama presidency. Congress's shortcomings under Trump (thus far) center more on the institution's capacity for conflict resolution and policy legitimation than on checking executive centralization of power.

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The durability of democratic institutions cannot be taken for granted.² Comparative politics scholars and others have pointed to the potential for democratic breakdown in the United States.³ This would, undoubtedly, surprise many Americans, who generally regard the U.S. constitutional system as a “machine that would go of itself.”⁴ The Trump administration poses the question whether this confidence is instead hubris.

Has the performance of the 115th Congress (2017-18) sustained or undercut the normal functioning of the U.S. constitutional system? Is the machine still going? I argue that the 115th Congress has been more effective at checking executive power than in setting national policy upon a broad base of public legitimacy.

So far, Congress has performed its traditional role of checking presidents and preventing concentration of power in the executive branch. Congress has refused to advance administration priorities that run contrary to Republican party orthodoxy and has asserted its preferences over executive and judicial branch appointments. It has also engaged in oversight and driven media narratives unfavorable to the president. Even though President Trump has led a government with unified party control in the midst of a party-polarized era, his White House has had to engage in constant negotiation with the legislative branch.

At the same time, however, the 115th Congress has struggled in conflict resolution and policy legitimation. Rather than seeking the large bipartisan majorities that have historically characterized congressional lawmaking, the Republican majority has mostly attempted to legislate on party-line votes, with limited success. Indeed, Congress under unified GOP control remains almost as gridlocked as it was under divided party control in the Obama presidency.

Checking Executive Authority

Based on his survey of Congress members’ actions that garnered coverage in American history texts, Mayhew concludes: “The main site of ‘opposition’ to presidential administrations . . . is unquestionably Congress, and playing that role is unquestionably one of the main things Congress does.”⁵ Mayhew emphasizes that over the course of U.S. history congressional opposition to presidential administrations was just as likely to emerge from within the president’s party as from without.

The 115th Congress has not departed from the historical pattern. Despite unified party control, Congress has served as a site of opposition to presidential authority. Even though Republicans have maintained extraordinarily unified ranks on roll-call votes,⁶ Trump has not been in command of his party in Congress. Instead, the 115th Congress has checked the Trump administration in legislation, appointments, oversight, and via public criticism.

² Larry Diamond, “Facing Up to the Democratic Recession,” *Journal of Democracy* 26 (2015): 141-155.

³ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2016).

⁴ Michael Kammen, *A Machine That Would Go Of Itself: The Constitution in American Culture* (New York: Alfred A. Knopf, 1987).

⁵ David R. Mayhew, *America’s Congress: Actions in the Public Sphere, James Madison Through Newt Gingrich* (New Haven: Yale University Press, 2000), 107.

⁶ Republican cohesion on party-unity votes in 2017 was 92% in the House (2nd highest ever recorded) and 97% in the Senate (highest on record). See “CQ Vote Studies: Party Unity,” *CQ Magazine*, February 12, 2018, <http://library.cqpress.com/cqweekly/weeklyreport115-000005263236>.

Legislation

Conflict between Congress and the Trump administration on legislation has been tacit, but continuous. Republicans quietly treated the administration's budget proposals in both 2017 and 2018 as "dead on arrival."⁷ The two-year spending deal Congress agreed to in February 2018 bore little resemblance to the president's budget and substantially increased rather than cut domestic discretionary spending.

Congressional Republicans have taken no interest in acting on a range of issues central to Trump's presidential campaign, including infrastructure and immigration. The 115th Congress has made no progress on a major infrastructure package, and Senate Majority Whip John Cornyn (R-Tex.) has publicly questioned whether there would be time to do so before the 2018 elections.⁸ The administration's immigration proposals have also gone nowhere in Congress. When Senate Democrats successfully forced a debate on the status of the "Dreamers," the administration's favored immigration bill received fewer votes than any other proposal considered.⁹ For its part, the House of Representatives has yet to advance any immigration proposal, despite the president's endorsement of the House Judiciary Committee chair's bill.¹⁰ Congress has appropriated additional money for border fencing, but it has declined to fund the construction of Trump's proposed southern border wall.¹¹

Generally speaking, the only legislative priorities on which Congress has acted have been those where Trump's preferences dovetailed with longstanding Republican party orthodoxy. Even on these issues, however, Congress was not always able to deliver. The administration's highest profile legislative drive, the repeal and replacement of Obamacare, failed. No issue had been more central to Republican party messaging throughout the Obama presidency, but Republicans were unable to marshal legislative majorities for an alternative healthcare policy despite an effort that dominated the congressional agenda for more than nine months of 2017.

The major legislative achievement of the 115th Congress, the Tax Cuts and Jobs Act, enacted a longstanding Republican wish list of tax cuts for corporations and individuals. It is

⁷ Sylan Lane, "GOP Senator: Trump Budget 'Dead on Arrival,'" *The Hill*, February 28, 2017, <http://thehill.com/policy/finance/321576-gop-senator-trump-budget-dead-on-arrival>; Andrew Taylor and Martin Crutsinger, "Trump Budget Plan Already Outdated After Budget Deal," *Washington Times*, February 22, 2018, <https://m.washingtontimes.com/news/2018/feb/11/trump-budget-plan-already-outdated-after-budget-de/>.

⁸ Ari Natter and Mark Niquette, "Senate Republicans Cast Doubt on Trump's Infrastructure Plan," Bloomberg Politics, February 27, 2018, <https://www.bloomberg.com/news/articles/2018-02-27/trump-s-public-works-plan-may-not-advance-this-year-cornyn-says>.

⁹ Ed O'Keefe, David Nakamura, and Mike DeBonis, "Immigration Bills Fail in Congress, Leaving 'Dreamers' in Limbo," *Washington Post*, February 15, 2018, https://www.washingtonpost.com/powerpost/as-immigration-showdown-looms-in-senate-trump-administration-is-doing-everything-in-our-power-to-stop-bipartisan-plan-official-says/2018/02/15/e0cff9d0-1260-11e8-8ea1-c1d91fcec3fe_story.html?utm_term=.d82231852f58.

¹⁰ Press release, Congressman Bob Goodlatte, "Trump Administration Supports the Securing America's Future Act," January 10, 2018, <https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=1082>.

¹¹ The 2018 omnibus appropriations legislation (H.R. 1625) provided for additional fencing in the Rio Grande Valley and in San Diego, but no funding to build a wall like the concrete prototypes the Trump administration has developed. Note that when *USA Today* asked every congressional Republican about support for a wall along the southern border, only 69 of 292 Republicans replied in the affirmative. See Paul Singer, "Exclusive: Less than 25% of Republicans in Congress endorse Border Wall Funding in USA Today Survey," *USA Today*, September 20, 2017, <https://www.usatoday.com/story/news/politics/2017/09/20/trump-border-wall-survey-congress-republicans-billions/640196001/>.

hard to credit Trump with the achievement, however, as similar legislation would almost certainly have passed under any Republican president elected in 2016. Congress would probably have reversed a large number of Obama-era agency rules under any other Republican president, as well.¹² Of the 115th Congress's significant legislative enactments, arguably the only one that would not likely have occurred under another Republican president was the Countering America's Adversaries Through Sanctions Act.¹³ This legislation, only signed under the duress of Congress's veto-proof margins, imposed sanctions on the Russian Federation and required the president to get congressional approval before those sanctions could be waived or terminated.

The legislative record of the 115th Congress thus reveals a president with very limited ability to drive policy. The 115th Congress has served as an independent gatekeeper on the president's legislative agenda, advancing only those administration priorities that commanded Republican support before Trump's surprise 2016 presidential nomination.

Appointments

Congressional influence over presidential appointments to the executive and judicial branch has been no less important. This influence has not taken the form of Congress voting down presidential nominees, but Congress has nevertheless restricted the president's autonomy.

Although Congress has not made a show of rejecting Trump's nominations, congressional scrutiny and media investigation has led to 41 Trump executive branch nominees being withdrawn thus far in the 115th Congress,¹⁴ a markedly higher number than the 16 withdrawn nominations throughout the 111th Congress (2009-10), the last episode of unified party control.¹⁵

Trump was able to install more extreme and less conventionally qualified appointees in a number of cases as a consequence of a shift in Senate procedure that now permits simple majority cloture on executive branch nominations.¹⁶ However, this procedural change would have strengthened any president's hand in unified government, and it does not appear that Republican senators have shown special deference to Trump. Indeed, Republicans have not hesitated to take Trump's nominees hostage to extract policy concessions on a variety of issues, slowing down the confirmation process.¹⁷ More than a year into his term, the president has filled only 357 of 640 Senate confirmable positions (56%), a rate more than 30% slower than the average for the past four presidents at the same point in their terms.¹⁸

¹² In 2017 Republicans made use of the Congressional Review Act to overturn fourteen agency rules adopted in the last 60 days of the Obama administration.

¹³ Public Law No: 115-44.

¹⁴ United States Senate, Nominations Withdrawn, accessed March 12, 2018, https://www.senate.gov/legislative/nom_wdr.htm.

¹⁵ Maeve P. Cary and Michael Greene, "Presidential Appointments to Full-Time Positions in Executive Departments During the 11th Congress, 2009-2010" Congressional Research Service, July 15, 2014, Report # R43638.

¹⁶ This procedural change was made in 2013 by a Democratic-controlled Senate.

¹⁷ Anthony Adragna, "GOP Friendly Fire Imperils Trump Nominees," *Politico*, February 8, 2018, <https://www.politico.com/story/2018/02/08/republicans-trump-nominees-397714>.

¹⁸ Political Appointee Tracker, Partnership for Public Service and the *Washington Post*, March 8, 2018, <https://ourpublicservice.org/issues/presidential-transition/political-appointee-tracker.php>.

Even before hearings are scheduled, anticipation of the confirmation process affects the nominees presidents put forward.¹⁹ The effect of this anticipation is obvious in Trump's choices. As Glassman observes, Trump's reluctance to put forward un-confirmable nominees "explains why Steve Bannon and Michael Flynn got White House jobs while Elaine Chao, Steve Mnuchin, and James Mattis got Senate-confirmed positions."²⁰

Among Trump's successful nominations is a relative dearth of appointees with distinctly "Trumpist" profiles. Most Senate-confirmed Trump appointees possess mainstream Republican credentials and espouse few unorthodox policy stances. The administration's difficulties identifying and nominating confirmable appointees who reflect Trump's policy preferences have contributed to its unusually slow staffing of the executive branch.

There is no question that President Trump is having a transformative effect on the federal judiciary.²¹ But that effect largely consists of installing nominees with solid Federalist Society bona fides—in other words, hardline but orthodox judicial conservatives. Even while Senate Majority Leader Mitch McConnell has moved forward on judicial nominations at a breakneck pace, the Senate still failed to act on 23 judicial nominees Trump put forward in 2017.²² Three Trump judicial nominees withdrew under congressional scrutiny. In public hearings, Sen. John Kennedy (R-La.) subjected several to embarrassing questions about their qualifications.²³ For example, of one nominee, subsequently withdrawn, Kennedy said: "He's never tried a lawsuit in his natural life. And he's gonna be on the federal bench? Give me a break."²⁴ When Trump put forward judicial nominees unlikely to have been advanced by another Republican president, Republican senators were more likely to second-guess or oppose his choices than when he put forward credentialed, orthodox conservatives.

Oversight

The Republican Congress has come in for a significant amount of criticism for its handling of executive oversight.²⁵ When stepping down as chair of Government Reform and Oversight, Rep. Jason Chaffetz (R-Utah) frankly admitted that congressional Republicans lacked interest in investigating the Trump administration: "[T]here aren't many people who say, 'Look,

¹⁹ For an insightful discussion of the complex interplay between president and Congress on appointments, see Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* (New Haven: Yale University Press, 2017), 119-151.

²⁰ Matthew Glassman, "Donald Trump is a Dangerously Weak President," Vox.com, December 27, 2017, <https://www.vox.com/the-big-idea/2017/12/4/16733450/donald-trump-weak-president-neustadt>.

²¹ Consent Machine: 'Advice' Dwindles in the GOP's Rush for Judges," *CQ Weekly*, January 16, 2018, <http://library.cqpress.com/cqweekly/document.php?id=weeklyreport115-000005246659&type=hitlist&num=1>.

²² United States Senate, Nom Failed / Returned, accessed March 12, 2018, https://www.senate.gov/legislative/nom_rtn.htm.

²³ Kate Harloe, "This Republican Keeps Humiliating Trump's Judicial Nominees," *Mother Jones*, December 15, 2017, <https://www.motherjones.com/politics/2017/12/this-republican-keeps-humiliating-trumps-judicial-nominees/>.

²⁴ Fred Barbash, "Louisiana Sen. John Neely Kennedy," *Washington Post*, December 19, 2017, https://www.washingtonpost.com/news/morning-mix/wp/2017/12/19/louisiana-sen-john-neely-kennedy-no-jimmy-kimmel-he-wasnt-dragged-out-of-the-swamp/?utm_term=.cb2b3c9541a3.

²⁵ Barely six months into the Trump administration, polling showed voter dissatisfaction with congressional oversight. See Cameron Easley, "Poll: Voters Aren't Happy With GOP Oversight of Trump Administration," *Morning Consult*, June 21, 2017, <https://morningconsult.com/2017/06/21/poll-voters-arent-happy-gop-oversight-trump-administration/>.

we have a duty and an obligation to fulfill the oversight responsibility.”²⁶ Despite Republicans’ disinclination, however, congressional oversight and investigations have nevertheless broken news and generated media coverage unfavorable to the administration.

The party-polarized contemporary Congress generally conducts less executive oversight during unified party control than under divided government.²⁷ Unquestionably, a Congress controlled by Democrats would have been more aggressive in pursuing a wider range of investigations, particularly considering the Trump administration’s target-rich environment. Thus far, for example, Congress has declined to investigate Trump’s and his family’s potential financial conflicts of interest or allegations against Trump regarding sexual assault and harassment. Congress has taken only modest interest in questions about excessive spending and management problems at agencies or the conduct of U.S. military operations abroad, including a Niger ambush that resulted in the deaths of four special forces soldiers.

Nevertheless, the 115th Congress has still held investigatory hearings that have caused damaging political fallout for the Trump administration. Less than three months into the Trump presidency, the House and Senate Intelligence Committees had already launched formal inquiries into Russian involvement in the 2016 U.S. elections and possible collusion with the Trump presidential campaign.²⁸ After the president fired FBI Director James Comey on May 9, 2017, the Senate Judiciary Committee opened a third formal inquiry.

These congressional probes—encompassing public hearings, closed-door testimony, media interviews with congressional investigators, and numerous leaks—have been potent drivers of news coverage. All the broadcast networks interrupted their regular daytime programming to carry Comey’s testimony before the Senate Intelligence Committee. Kriner and Schickler observe that the probe into Russian involvement in the 2016 campaign has been “unusual in the extent to which it has captured sustained public attention for such a long time period.”²⁹

Congress’s Russia-related investigations expanded in various ways as additional news came to light, such as the revelation of National Security Advisor Michael Flynn’s meeting with the Russian ambassador to discuss the lifting of Russian sanctions, the existence of the 2016

²⁶ Quoted in Charles. S. Clark, “Chaffetz Exits Oversight Panel Accusing Trump of Secrecy As Bad As Obama,” *Government Executive*, June 19, 2017, <http://www.govexec.com/management/2017/06/chaffetz-exits-oversight-panel-accusing-trump-secrecy-bad-obama-administration/138790/>.

²⁷ Mayhew initially found that presidents serving in divided government were not subjected to more high publicity investigations during the 1946-1990 period, but his updated data series encompassing the more party-polarized 1991-2002 period showed that presidents faced far more high-profile investigatory activity under conditions of divided government than under unified government. See, David R. Mayhew, *Divided We Govern: Party Control, Lawmaking and Investigations, 1946-2002*, 2nd ed. (New Haven: Yale University Press, 2005, 223-26). See also, Douglas Kriner and Liam Schwartz, “Divided Government and Congressional Investigations,” *Legislative Studies Quarterly* 33 (2008): 295-321; Douglas Kriner and Eric Schickler, *Investigating the President: Congressional Checks on Presidential Power* (Princeton, NJ: Princeton University Press, 2016); Frances E. Lee, “Presidents and Party Teams: The Politics of Debt Limits and Executive Oversight, 2001-2013,” *Presidential Studies Quarterly* 43 (2013): 775-791; and David Parker and Matthew Dull, “Divided We Quarrel: The Politics of Congressional Investigations, 1947-2004,” *Legislative Studies Quarterly* 34 (2009): 319-345.

²⁸ The Senate Intelligence Committee launched its investigation January 13, 2017 and the House Intelligence Committee followed suit on March 3, 2017.

²⁹ Douglas Kriner and Eric Schickler, “The Resilience of Separation of Powers? Congress and the Russia Investigation,” *Presidential Studies Quarterly*, forthcoming.

Trump Tower meeting between Donald Trump, Jr. and Russian agents, the foreign agent registration status of Trump campaign officials, the extent of the Russian-backed social media campaign, and other matters.

Even though the investigations being run by the House Intelligence Committee and the Senate Judiciary Committees bogged down in partisan infighting, all three of these congressional investigations helped keep the issues in the public eye and on the front pages of the newspapers. Partisan conflict undermines the credibility of an investigation, but even news coverage about partisan wrangling on a committee still increases its visibility. Ranking Member Adam Schiff (D-Calif.) became a regular on the Sunday political talk shows and on cable news, in spite of his party's minority status and pervasive partisan conflict on the House Intelligence Committee.³⁰ The broader point is that once these investigations were launched, it was not possible for even loyal Trump committee chairs to fully control the news that emerged from them.

In assessing the 115th Congress's role in executive oversight, the most troubling development has been the efforts of Republicans on the House Intelligence Committee and the Senate Judiciary Committee to discredit nonpartisan investigations into Russian meddling in the 2016 elections. House Intelligence Committee chair Devin Nunes (R-Calif.) released a memo accusing Robert Mueller's special counsel investigation of relying upon politically-motivated sources and withholding that information from a federal judge.³¹ Nunes' committee also sought to discredit the leading Democrat on the Senate Intelligence Committee by leaking his private text messages.³² For their part, Republicans on the Senate Judiciary Committee made an extraordinary criminal referral to the Justice Department accusing a key source in the Mueller investigation of making false statements to federal law enforcement.³³ In March 2018, the House Intelligence Committee closed its investigation with a report clearing the Trump campaign of charges of Russian collusion.³⁴ Taken together, these actions raise the prospect that congressional Republicans will side with Trump should he choose to close down the Mueller investigation altogether.

At this juncture, however, the Senate Intelligence Committee investigation continues to proceed on a bipartisan basis and the Mueller investigation has not yet been impeded. Indeed, the Nunes memo and the closing of the House Intelligence Committee's investigation may have backfired³⁵ and undercut congressional Republicans' credibility more than that of the

³⁰ The Republican National Committee even published a report on its website detailing how frequently Schiff had appeared on cable news. See "The Schiff Show," GOP.com, February 27, 2017, <https://gop.com/the-schiff-show-by-the-numbers-rsr>.

³¹ Nicholas Fandos, Adam Goldman, and Charlie Savage, "House Republicans Release Secret Memo Accusing Russia Investigators of Bias," *New York Times*, February 2, 2018, <https://www.nytimes.com/2018/02/02/us/politics/trump-fbi-memo.html>.

³² Nicholas Fandos, "Senate Intelligence Leaders Say House G.O.P. Leaked a Senator's Texts," *New York Times*, March 1, 2018, <https://www.nytimes.com/2018/03/01/us/politics/senate-intelligence-nunes-leaks.html>.

³³ Nicholas Fandos and Rosenberg, "Republican Senators Raise Possible Charges Against Author of Trump Dossier," *New York Times*, January 5, 2018, <https://www.nytimes.com/2018/01/05/us/politics/christopher-steele-dossier-judiciary-committee.html>.

³⁴ Nicholas Fandos, "Despite Mueller's Push, House Republicans Declare No Evidence of Collusion," *New York Times*, March 12, 2018, <https://www.nytimes.com/2018/03/12/us/politics/house-intelligence-trump-russia.html>.

³⁵ David French, "The Big Flaw in the Memo," *National Review*, February 2, 2018, <https://www.nationalreview.com/2018/02/nunes-memo-big-flaw-confirms-new-york-times-story/>.

investigation. At this point, it is too early to gauge the ultimate outcome of these developments as bearing on the 115th Congress's record of executive oversight.

The bottom line is that unified government has afforded the Trump administration protection against congressional oversight, but it has not fully insulated the president from damaging congressional investigations that have harmed his political standing. So far, the oversight performance of the 115th Congress has mostly conformed to expectations based on the norm of recent congresses with unified government.

Public Criticism

Even though most Republican members of Congress have steered clear of publicly criticizing President Trump, the exceptions to the rule have garnered tremendous amounts of media attention. This pattern fits the norm for unified government. Indeed, Groeling demonstrates that outsized coverage of the president's co-partisan critics is especially prevalent under conditions of unified party control.³⁶ With the president serving as authoritative party spokesperson in unified government, the news media tend to take less interest in hearing from fellow partisans who agree with the president. Instead, the focus turns to those co-partisans who offer a critical perspective.

Intra-party congressional criticism of Trump has been highly visible throughout his presidency to date. No moderately attentive follower of public affairs could have missed the news that Sen. Bob Corker (R-Tenn.) had claimed that the White House had become an "adult day care center."³⁷ In multiple Senate floor speeches, Sen. Jeff Flake (R-Ariz.) criticized Trump's treatment of the news media as "despotic," complete with comparisons to Stalin. Flake's broadsides against Trump received far more media coverage than his fellow Republicans' criticisms of Flake himself.³⁸ Sen. John McCain (R-Ariz.) lambasted the administration's "half-baked, spurious nationalism."³⁹

On numerous occasions when Trump has made controversial remarks or disseminated provocative tweets, journalists have taken it upon themselves to track down comments from every member of Congress willing to give a statement. When Trump criticized "both sides" for violence following neo-Nazi protests in Charlottesville, for example, numerous media outlets did round-ups of reactions from Capitol Hill.⁴⁰ When President Trump was reported as referring to

³⁶ Tim Groeling, *When Politicians Attack! Party Cohesion in the Media* (New York: Cambridge University Press, 2010).

³⁷ Philip Rucker and Karoun Demijian, "Corker Calls White House 'an Adult Day Care Center' in Response to Trump's Latest Twitter Tirade," *Washington Post*, October 8, 2017, https://www.washingtonpost.com/news/post-politics/wp/2017/10/08/trump-attacks-gop-sen-corker-didnt-have-the-guts-to-run-for-reelection/?utm_term=.9f52f47c53e4.

³⁸ Burgess Everett, "Flake Rankles Fellow Republicans with Trump Takedowns," *Politico*, January 17, 2018, <https://www.politico.com/story/2018/01/17/republicans-jeff-flake-trump-344500>.

³⁹ Amber Phillips, "'Half-baked Spurious Nationalism': McCain's Most Biting Recent Criticisms of Trump," *Washington Post*, October 17, 2017, https://www.washingtonpost.com/news/the-fix/wp/2017/10/17/half-baked-spurious-nationalism-mccains-most-biting-recent-criticisms-of-trump/?utm_term=.ee669c10fa2e.

⁴⁰ Miranda Green, "GOP Members of Congress Criticize Trump's Comments," CNN, August 16, 2017, <https://www.cnn.com/2017/08/15/politics/congress-reaction-trump-comments-paul-ryan/index.html>.

“shithole countries,” every member of Congress was invited to go on record with a response.⁴¹ Critical remarks from Republicans typically lead in such news stories. Often striking in such controversies is the relative paucity of Republicans willing to publicly defend the president.

High profile intra-party congressional criticism of Trump has been nearly continuous throughout his presidency thus far. Even if such critical voices do not represent the mainstream of the Republican party, they shape media narratives and drive unfavorable coverage. Although it is not unusual for the news media to amplify dissent within a majority party that controls unified government, the pattern has been a highly prominent feature of the Trump presidency.

Conflict Resolution and Policy Legitimation

Congress’s capacity to check executive power seems undiminished relative to contemporary norms for unified government. But the 115th Congress has shown limited capacity for conflict resolution and policy legitimation.

One of Congress’s remarkable strengths as a political institution is its longstanding tendency to legislate on the basis of broad coalitions encompassing majorities of both parties. Mayhew documented the pervasiveness of this pattern in his landmark book *Divided We Govern*.⁴² Despite the rise of party polarization in Congress, this pattern has not faded at all. Important legislation still usually passes with significant support from the congressional minority party; in fact, enacting coalitions are no more partisan than in the past.⁴³ The Affordable Care Act, enacted with no minority party buy-in, has not become the norm.

The 115th Congress, however, has largely attempted to proceed with major legislation on the basis of Republican-only majorities. Less than two weeks after the 115th Congress convened, Congress passed a concurrent budget resolution intended to circumvent the Senate filibuster and permit the repeal and replacement of Obamacare on simple majority vote in both chambers.⁴⁴ Congress’s subsequent failure to enact sweeping health care legislation in 2017 was due to Republicans’ inability to marshal sufficient intra-party support.

The January budget resolution paving the way for Obamacare repeal and replacement largely set the tone for 2017. With the exception of the Russian sanctions act, which passed with nearly unanimous support,⁴⁵ the major legislation of 2017 was enacted on party-line votes. By far, the most important 2017 enactment was the Tax Cuts and Jobs Act (TCJA).⁴⁶ It sharply and permanently lowered tax rates for corporations, dramatically reduced taxation of the foreign profits of U.S. companies, limited and eliminated many tax deductions for individuals while raising the standard deduction, and temporarily reduced individual income, estate, and alternative

⁴¹ “Congress Reacts to Trump’s ‘Sh*thole Countries’ Comment,” *CBS News*, January 12, 2018, <https://www.cbsnews.com/news/congress-reacts-to-trumps-shthole-countries-comment/>.

⁴² David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-2002*, 2nd ed. (New Haven: Yale University Press, 2005), 128-135.

⁴³ James M. Curry and Frances E. Lee, “Non-Party Government: Bipartisan Lawmaking and Theories of Party Power in Congress,” paper presented at the 2017 Congress and History Conference, Library of Congress, Washington, DC, June 15-16, 2017, https://www.loc.gov/loc/kluge/news/pdf/CongressHistory-NonPartyGovernment_CurryLee.pdf.

⁴⁴ S.Con. Res. 3, January 13, 2017.

⁴⁵ H.R. 3364 passed the Senate 98-2 and the House by 419-3.

⁴⁶ Public Law 115-97.

minimum taxes. The legislation also opened the Arctic National Wildlife Refuge to oil and natural gas drilling and abolished the Affordable Care Act's individual mandate. These major policies were adopted without any votes from Democrats in either chamber.⁴⁷

The only other notable legislative accomplishments in 2017 were the rejections of fourteen agency rules that had been adopted in the last 60 days of the Obama administration, also all on party line-votes. Remarkably, all of the majority party's agenda successes in 2017 occurred via procedures that receive protection from filibusters.⁴⁸

Little legislation has progressed in 2018. The most significant enactments thus far in the 2nd session of the 115th Congress were the Bipartisan Budget Act (BBA) of 2018 and the omnibus appropriations legislation for the balance of FY 2018.⁴⁹ This legislation increased spending for defense and nondefense spending, above the caps specified in the Budget Control Act of 2011. It also included some additional sweeteners, such as disaster relief funding, a reauthorization of the Children's Health Insurance Program, and repeal of the Independent Payment Advisory Board. The final votes on the BBA and the Consolidated Appropriations Act hewed closer to the usual congressional norm of bipartisanship. Although the BBA did not win the support of a majority of Democrats in the House, a third of House Democrats voted in favor along with a majority of Senate Democrats.⁵⁰ The Consolidated Appropriations Act passed with majorities of both parties in both chambers voting in favor, but with weaker support among Senate Republicans than among Senate Democrats.⁵¹ The 2018 spending bill is likely the last major legislation that will pass before the midterm elections.

Reviewing the record of the 115th Congress to date, what is perhaps most striking is how little legislation has been passed. The bulk of the Republican party's successes in 2017 occurred in a single piece of legislation, the TCJA. Of the program outlined in House Speaker Paul Ryan's ambitious Better Way agenda, few initiatives have seen any form of legislative action and only tax reform has been enacted, despite unified Republican control of national government.⁵²

Congress failed to clear any of the annual appropriations bills in 2017, meaning that more than a year into the Trump presidency discretionary spending policy was still governed under the terms set by divided government under Obama. Although the Senate in February 2018 briefly took up immigration reform under pressure to resolve the status of the "Dreamers," no legislation could garner sufficient support to move forward. No major infrastructure legislation has

⁴⁷ The final bill passed the House 227-203 and the Senate 51-48. Twelve House Republicans and 0 Senate Republicans voted no, along with all Democrats in both chambers.

⁴⁸ The TCJA was passed via budget reconciliation. The rejections of agency rules occurred via the Congressional Review Act.

⁴⁹ Public law No. 115-123.

⁵⁰ H.R. 1892 passed the House 240-186 (D 73-119; R 167-67) and the Senate 71-28 (D 36-11; R 34-16).

⁵¹ H.R. 1625 passed the House 256-167 (D 111-77; R 145-90) and the Senate 65-32 (D 39-8; R 25-23).

⁵² Unveiled in the summer of 2016, the "Better Way" plan encompassed a sweeping platform, including: (1) "revenue neutral" tax reform to lower taxes on corporations, simplify taxes by reducing the number of income tax brackets and deductions, and abolish the alternative minimum tax and the estate tax; (2) repeal and replacement of the Affordable Care Act ("Obamacare"); (3) increased funding for border security and other national security purposes; (4) repeal of the financial regulations adopted in 2010 and a series of agency rules adopted under President Obama, along with federal litigation reform; (5) reassertion of the powers of Congress over regulation and government spending, including passing all annual appropriations bills on time; and (6) reform to poverty programs enhancing work requirements for recipients, among other proposals.

advanced. Now that tax reform has passed, Republicans have not achieved any intra-party consensus on what agenda item to pursue next.⁵³

With one major piece of priority legislation, an assortment of agency rule roll-backs, and a tardy budget agreement that has yet to be implemented, the 115th Congress appears comparatively gridlocked. Across a wide array of issues, Congress under unified Republican control appears little better positioned to move forward on legislation than it had been under divided party control under President Obama.

Taken together, the 115th Congress reveals an institution that is struggling with conflict resolution. Congress has demonstrated limited ability to resolve policy disputes either within the majority party or via bipartisan coalition. Other than on must-pass matters such as appropriations and debt limit increases, Congress has not been able to come together across party lines to resolve policy problems, even on those issues that would seem to offer good potential for bipartisanship, such as infrastructure and immigration.

At the same time, the majority party has also shown only limited capacity to go it alone. The Republican party's internal consensus seems not to extend much beyond tax cuts and deregulation. Republicans could not reach internal agreement on health insurance policy, despite tremendous effort. It is not clear that the party currently has any appetite to pursue the traditional Republican agenda of cutting spending or entitlements.

Thus far, the 115th Congress has achieved a weak record as a policy legitimating institution. Enacting major legislation without any cross-party support jeopardizes a law's capacity to attain broad public acceptance and long-term viability.⁵⁴ "Divisive enactment raises eyebrows," write Patashnik and Zelizer. "Ordinary citizens who do not pay close attention to public affairs could easily conclude that there *must* be something wrong with a new law if a near-majority opposes it."⁵⁵ Moreover, the losing party in a close fight has incentive to continue agitating against a law. Republican resistance to the Affordable Care Act, for example, has persisted for the better part of a decade.

Enacting laws on party-line votes also endangers successful implementation. Significant problems with the ACA could never be addressed via technical corrections, despite the manifest need for follow-on legislation.⁵⁶ Republican-controlled state governments refused to cooperate with the Affordable Care Act, declining to accept federal funds for Medicaid expansion or to set up insurance marketplaces on which Obamacare plans were sold. Republican state attorneys general and allied outside groups brought an array of lawsuits, some of which succeeded in limiting the reach of the law. It is unlikely that the Tax Cuts and Jobs Act—primarily a tax cut bill—will spark scorched earth opposition in the implementation phase. However, it is clear that

⁵³ John Wagner, Ed O'Keefe, and Paul Kane, "After Tax Bill's Passage, Tensions Over What Republicans Should Do Next," *Washington Post*, December 21, 2017, https://www.washingtonpost.com/politics/after-tax-bills-passage-tensions-over-what-republicans-should-do-next/2017/12/21/0cf7d892-e66b-11e7-833f-155031558ff4_story.html?utm_term=.2e8fef61efc0.

⁵⁴ Michelle Whyman, "The Roots of Legislative Durability: How Compromise Creates Laws that Last," PhD Dissertation, University of Texas at Austin, 2016.

⁵⁵ Eric M. Patashnik and Julian E. Zelizer, "The Struggle to Remake Politics: Liberal Reform and the Limits of Policy Feedback in the Contemporary American State," *Perspectives on Politics*, 11 (4, 2013): 1071-1087, 1077.

⁵⁶ Jonathan Weisman and Robert Pear, "Partisan Gridlock Thwarts Effort to Alter Health Law," *New York Times*, May 26, 2013.

Democrats have little inclination to cooperate in technical corrections needed to the TCJA.⁵⁷ State governments controlled by Democrats have already begun exploring workarounds to spare their residents tax hikes resulting from the TCJA's reduction in state and local deductions.⁵⁸ Laws that cannot command broad acceptance at the time of their enactment may never win it.

On the other hand, the 115th Congress's difficulty enacting legislation serves at least some important legitimating function in itself. When broad agreement cannot be reached, inaction can be a case of "doing no harm." As Mayhew observes: "Often, when confronted by a polarized, dissonant, or irresolute public the unsurprising behavior of a representative assembly is to do nothing at all. Often, when Congress is doing nothing at all . . . it is actually responding to an unresolved electorate with a perfect ear."⁵⁹ A Congress that does not act when there is no substantial support for any particular course of action may better sustain the national government's legitimacy than enacting divisive legislation.

Although inaction may work better for policy legitimation than contentious action, the failure to find paths forward on pressing national policy problems, such as debt and deficits, climate change, and immigration, does not enhance Congress's own institutional legitimacy or public esteem.

Concluding Thoughts

The contemporary Congress retains its historic institutional strength in checking executive power and thwarting any would-be autocrat. In describing the dominant ways democracies erode, Bermeo defines executive aggrandizement as "when elected executives weaken checks on executive power one by one, undertaking a series of institutional changes that hamper the power of opposition forces to challenge executive preferences."⁶⁰ Recent cases of democratic backsliding down this path include Turkey under Recep Tayyip Erdoğan, Ecuador under Rafael Correa, Russia under Vladimir Putin, and Hungary under Victor Orbán. Nothing along these lines has occurred in the Trump presidency.

Congress's capacity to check executive power—in legislation, appointments, oversight, and public criticism—remains robust. If anything, Trump appears weaker in leading and managing Congress than other recent presidents possessing unified government, due at least in part to his unusually low public approval. Trump's position relative to Congress will probably deteriorate further after the midterm elections.

However, the 115th Congress has not exhibited Congress's usual penchant for enacting laws with broad public support. In most cases, the upshot has simply been a relative paucity of legislation and the persistence of gridlock despite unified party control. But on some high profile matters, most importantly on tax policy, the majority party has opted to advance legislation to

⁵⁷ Bob Bryan, "Republicans Are Already Acknowledging They Need to Fix their Gigantic Tax Law—But that Could Be Impossible," *Business Insider*, January 3, 2018, <http://www.businessinsider.com/trump-gop-tax-reform-bill-needs-fixes-technical-corrections-2018-1>.

⁵⁸ Patricia Clark, "State Governments Are Already Gaming the Republican Tax Overhaul," *Bloomberg*, January 4, 2018, <https://www.bloomberg.com/news/articles/2018-01-04/state-governments-are-already-gaming-the-republican-tax-overhaul>.

⁵⁹ David R. Mayhew, *The Imprint of Congress* (New Haven: Yale University Press, 2017), 107.

⁶⁰ Nancy Bermeo, "On Democratic Backsliding" *Journal of Democracy* 27 (January 2016): 5-18, 11.

govern the nation without any bipartisan buy-in. These patterns raise concern about Congress' performance as a policy-legitimizing institution.

It is not easy to suggest institutional reforms that would enable Congress to better serve its functions in the American political system. The problems identified here are more political than institutional. It is not surprising that the congressional check on an executive branch will be less of an obstacle under unified government than under divided government, particularly given the curtailment of the filibuster in confirming nominations. Likewise, it would not be reasonable to expect a representative assembly governing a large, diverse nation to easily and frequently reach broad agreements.

One modest reform Congress might consider to bolster its capabilities to check executive power would be to revisit the Federal Vacancies Reform Act of 1998 governing the temporary filling of executive branch offices requiring Senate confirmation. The Trump administration's difficulties identifying Senate-confirmable appointees has led to an extreme reliance upon acting officers throughout the federal bureaucracy. Faced with these acting officials running up against the time limits specified in the FVRA, the administration has in some cases opted to downgrade the officer's title and then delegate the job duties to them, thereby circumventing Senate confirmation.⁶¹ Such actions test statutory limits on allocating power to officials who have not been Senate confirmed. The Senate may perceive these actions as a threat to its power and may want to pursue reforms.

There is no institutional remedy to Congress's struggles with policy legitimation. But in the wake of the 2016 elections—troubled by foreign power interference and rife with claims about election fraud and illegal voting—Congress should consider what more it can do to help strengthen public confidence in American elections. Trust in the electoral process is the bedrock of democratic legitimacy. Congress would do well to explore reforms to shore up this foundation.

⁶¹ Josh Eidelson, "Trump's Stand-In Bureaucrats May Have Overstayed Limits," *Bloomberg*, December 12, 2017, <https://www.bloomberg.com/news/articles/2017-12-12/acting-trump-brass-who-ve-stuck-around-too-long-may-draw-rebuke>.