



## Falling down on the Legislative Job

By Richard W. Rahn

CONGRESS IS LARGELY RESPONSIBLE FOR ITS OWN DYSFUNCTION

The administrative state began in earnest 130 years ago with the creation of the Interstate Commerce Commission in 1883, which was a major power giveaway by Congress to an independent agency. From that time, Congress has continued to delegate law and rulemaking to executive agencies, such as the Internal Revenue Service and the Environmental Protection Agency, and to so-called independent agencies, such as the Securities and Exchange Commission, the National Labor Relations Board and the International Trade Commission. Despite increasingly delegating and shirking its constitutional responsibilities, Congress has become more and more dysfunctional in recent decades.

Over the last few weeks, many members of Congress, both Republicans and Democrats, have demonstrated that they do not understand their jobs or don't care. One gets the impression that many in Congress are not well schooled in American history, have trouble with rudimentary arithmetic, and do not understand basic game theory.

The Senate Democrats are in the minority, a fact that a number of them seem to fail to comprehend. Given the number of seats they will have to defend versus the number the Republicans will have to defend in the 2018 election cycle, the high probability is that

they will remain in the minority. By changing their proper role of "advise and consent" when it comes to confirmation of judges to a purely ideological test, they have destroyed any incentive for the Republicans to come up with consensus candidates for all federal courts — not just the Supreme Court.

The good news is that more judges are likely to be selected who believe in strict adherence to the Constitution and other laws as written. Senate Minority Leader Charles Schumer exhibited the same mentality as the World War I generals at the Battle of the Somme, when they kept ordering their infantry to run straight at German machine gun nests, no matter how many were killed.

The House Republican Freedom Caucus also exhibited a lack of understanding of arithmetic in that they only have the numbers to block the adoption of a greatly flawed health care bill but one considerably better than the status quo. They do not have the numbers to obtain a much better bill. Their unwillingness to engage in a sufficient compromise means that taxes will be a trillion dollars higher over the next decade, and the job-killing employer mandates will remain. Some victory.

Most of the policy proposals of the Freedom Caucus are laudable but, unfortunately, unattainable at this time. Moving slowly in the right direction and living to fight another day is better than pure suicide. Most members of the Freedom Caucus have a better grasp of fiscal policy than many House members, but have a poor understanding of game theory. President Reagan both understood good economics (his degree was in economics) and game theory. He partially earned his living in the 1930s as a poker player — and he knew when to compromise and when not to — which was one reason he was such a great leader.

The Republican leadership in Congress also seems to have a problem with arithmetic — as in "how many votes do I have for this bill?" They also come up short in communicating with their own members — let alone the outside world — and playing hard ball when required. You don't let the kids (or members of Congress) go on vacation over Easter if they haven't done their homework (or passed

major legislation like health care) on schedule. Most members of Congress hate staying in Washington (even with the advent of air conditioning), so an effective way of disciplining them is to make them stay in session until their work is done. This is also not pleasant for the leadership — but that is what leadership is all about.

Small children sometimes give away their toys, but then scream and yell about other children having them. For more than a century, Congress has behaved in much of the same way. It gave away much of its law- and rule-making power to newly created executive and "independent" administrative agencies. According to distinguished professor of law and expert on the administrative state Philip Hamburger and other legal scholars, Congress had no constitutional authority for such delegation. These administrative agencies write and promulgate rules, then serve as judge and jury as to whether their rules are legal, understandable and reasonable, and also establish their own penalties, most often in the form of fines. Individuals and businesses have little recourse against abuses by these agencies in that they are often precluded from going to the constitutional courts to seek redress. It is nearly impossible for the administrative state and liberty to coexist.

Members of Congress rant and rave against the abuses and overreach of government agencies, while failing to recognize they are creatures of Congress. Legislative bodies were largely created to stop arbitrary administrative laws and rules by the king. But Congress finds it easier to delegate its powers to others than to take on the difficult job of making the laws and rules themselves. The liberty-sapping and wealth-destroying administrative state enables big government, which would not exist if all laws and rules were actually passed by Congress as the Constitution requires.

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