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Negotiating Big Legislative Deals

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With furious negotiations under way about a third coronavirus response bill, this seemed a good time to discuss how titanic legislation of this kind is produced. Much of the commentary about these negotiations (and others that have gone before) is so oversimplified as to be highly misleading.

I will focus primarily on three aspects of this process: how hierarchy shapes the eventual content, how special interest groups' views influence the outcome, and how having a president who feels unbound by conventional norms affects the outcome.

First, to understand how this legislation is coming together, one must watch several different levels simultaneously. The three leaders with the ability to block legislation – Senate Majority Leader McConnell, Senate Minority Leader Schumer, and House Speaker Pelosi – all happen to be exceptionally bright, hard-working and detail-oriented legislators (unlike some of their predecessors). Yet even they cannot possibly master the plethora of subjects at issue in this legislation, much less the many issues and subissues that must be resolved. Although their agreement ultimately will be required for any package to move forward, most crucial decisions are made in negotiations at a more junior level.

Where the two parties' leaders on a committee have a good working relationship – more frequent in the Senate than in the House and more common on committees whose names begin with the letter "A" – many issues are being negotiated by those chairs and ranking members and by their staffs. (These relationships also tend to produce unicameral agreements rather than the bipartisan, bicameral deals that ultimately will be necessary to enact legislation.) When committee-level relations are strained, the committees' staffs serve primarily as repositories of expertise to assist leadership staffmembers, who then negotiate about those issues with their counterparts.

Where the committee structure is functioning, negotiations may be occurring on as many as five levels: between the committee staffs' subject-matter experts, between the committees' majority and minority chiefs of staff or counsels, between the committee's chair and ranking member, between the two parties' leadership staffs, and between the leaders themselves. At each level, negotiators can elevate a finite number of issues to the next-higher level. Although huge ideological divides mean that staff are unlikely to settle on many policies both genuinely like, they must either split differences or horse-trade to narrow the issues down. Failing to do so increases their bosses' burdens, which typically draws complaints.

If a negotiator is pessimistic about how an issue will be handled at the next level up, she or he may either settle for very little or try to get more by trading a concession on another issue where her or his opponent's political position is weak. Thus, when commentators look at a deal and say "Democrats could have done better on issue X", they may well be correct – but doing so would have cost them a success on another issue where Republicans made

concessions that the politics of the issue did not require. That being said, if a negotiator somewhere in the hierarchy is regarded as soft, stupid, or lazy, her or his subordinates will grant sweeping concessions to avoid having issues elevated. (I am continually amazed at how such staffers and legislators can maintain public images as strong champions for their espoused causes when everyone close to the process knows that they roll over at the slightest excuse.) Similarly, even if one regards one's boss as being competent, if they will be outclassed by their opponent, sweeping preemptory concessions may be in order. (Pity the Republican staffer a few years from now who must prepare her or his boss to negotiate with Rep. Alexandria Ocasio-Cortez!)

At each level, including that of the principals, negotiators are making calculations about how many issues, and which ones, they can afford to elevate. At some point, the Democratic and Republican leaders may declare an impasse and take their cases to the public on a few issues on which they believe they have the upper hand. Everyone knows that negotiations will resume – indeed, on the staff and committee levels, they likely will never stop – but the leaders want to see if the electorate (or the respective parties' rank-and-file Members) are willing to arbitrate the issue in question. Senator McConnell did not expect to win Sunday evening's cloture vote; he just wanted to see if it would increase Democrats' discomfort enough to yield more concessions. And by forcing Democrats to tell the public which objections were driving their negative votes, he narrowed the issues on which he could be asked for more concessions.

Second, the process of reaching a deal on legislation bears little resemblance to the offer-and-acceptance process my long-suffering Contracts students must learn. Rather than trading offers and counter-offers, one side commonly will become more-or-less permanent offeror. House Democrats played that role on the second coronavirus bill; Senate Republicans seem to be doing so in the current negotiations. The offeror provides a draft bill to the other side, discusses their counterpart's objections, and returns with another offer.

The advantages of always being the offeror are primary control over legislative drafting and the ability to set the pace of negotiations with less exposure to charges of foot-dragging. For majority parties, it also allows them to threaten to put their bill on the floor without agreement. This forces the minority to cast votes that can be portrayed as obstructionist, which was Sen. McConnell's goal Sunday night. The disadvantage of being perpetual offeror, especially under conditions of mistrust, is that your concessions are clearly set out in writing while your opposite number for the most part makes concessions by verbally agreeing not to complain further about this or that disputed provision.

Because even the subject-matter specialists on committee staffs have large gaps in their knowledge, periodically the discussions will briefly cease for the offeror to produce a new draft. After the offeror shares this draft with the other party, both sides will pass it to constituencies in and out of Congress that are important to them. Interest groups will respond by trying to get as many individual Members and congressional organizations (*e.g.*, the Freedom Caucus, the Congressional Black Caucus) to raise concerns with the leadership as they can. This process of discussion draft production will happen several times. The interest groups with the most political capital – mostly bought with campaign contributions but sometimes with credible policy information – will demonstrate their power by being able to get large numbers of Members to raise their concerns during the short windows before meetings resume after each draft comes out. Less-connected groups may be able to get a few Members to sound the alarm over the first or second comment draft, but as

negotiations drag on these groups will find their calls and emails not getting returned in time. Similarly, once the negotiations enter a critical stage, comment drafts will be less-widely circulated. The groups with the most political capital will still have Members or staff willing to leak them language and tell them which issues are genuinely still open. And, of course, the better-resourced interest groups will have top technical experts on hand to analyze that language's implications and propose changes that can benefit them without requiring negotiators to try to get out of agreements they already have been made.

Finally, the President's volatility can be both an asset and a liability for him in these situations.

On the one hand, his unwillingness to deputize anyone to speak definitively for the Administration, his frequent reversals of positions, and his aggressive tweets in the midst of delicate negotiations all have certainly forced concessions that Democrats otherwise would not have granted. His ability to go over their heads to the Republican base keeps congressional Republicans from committing to any major concessions without clear indications of his support – and even when they do make agreements he can sometimes force them to renege if he changes his mind. This volatility allowed him to narrow the paid leave provisions of the second coronavirus bill even after he had tweeted his support for it, after the vast majority of House Republicans had voted for it, and after Democrats had made numerous concessions in exchange for his support.

On the other hand, congressional Democrats now refuse to negotiate with him personally because of his misconduct in prior negotiations. With the other principals all very much repeat players, he could hardly have expected that they would not impose costs on him later for his reneging. Moreover, by conspicuously refusing to meet with Speaker Pelosi and Senator Schumer at points when prior presidents would have invited the bipartisan congressional leadership to the White House, he lost the capacity to blame Democrats effectively for excluding him.

People holding other senior positions whose predecessors have represented previous presidents in analogous negotiations, such as the White House Chief of Staff or the Director of OMB, have similarly acted in ways that have destroyed trust with congressional Democrats or demonstrated that they cannot make meaningful concessions. When Speaker Pelosi and Senator Schumer refuse to deal with these officials, they are not acting out of personal distaste rejecting the officials politically extreme views; instead, these officials have persuaded congressional Democrats that no deal is possible with them. During intense negotiations of this kind, participants place a huge premium on process values, often eclipsing substantive values. People with diametrically opposite substantive views will sometimes unite against another participant in the negotiations who has breached procedural norms, even at the expense of their substantive agendas.

By “fouling out” as a negotiator, the President has less opportunity to steer the final agreement to his own priorities. The Administration is represented on the principals' level by Treasury Secretary Steve Mnuchin. Although his department is only one of several with stakes in the subject-matter of the discussions and he is not close politically to the President, he sufficiently adhered to his commitments in prior negotiations that congressional Democrats were willing to talk with him.

Secretary Mnuchin did, however, lose credibility when the President reneged on both of their agreements to the second coronavirus response legislation. By all reports,

congressional Democrats are now negotiating only with congressional Republicans. Those Republicans no doubt are keeping the Administration informed, and lower-level Administration officials may be participating in some discussions in a technical capacity, but the price of the late concessions on paid leave seems to have been a seat at the table. If the President rejects a deal that congressional Republicans have negotiated, they likely will not defy him. But by making their draft agreements relatively public, they have to know they are making it much easier for Democrats to skewer the President for any obstructionism.

Other presidential styles carry other weaknesses. President Obama's determined rationality prevented him from calling congressional Republicans' bluffs, allowing them to secure huge concessions. President George W. Bush's disengagement denied his subordinates confidence that he could win on issues they did not resolve. And President Clinton's fondness for debating the minutia of policy – although remarkably well-matched with Speaker Gingrich and Senate Majority Leader Dole – often made him too eager to have issues elevated to the principals' level and distracted him from the big picture in negotiations.

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