THE REPUBLICANS' CONGRESS PROBLEM

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The Republicans' victories in the November congressional elections have gotten them into a serious fix. For they have acquired leadership of a branch of government that is strong in theory and in public reputation but has grown weak in practice as a result of decades of delegation and disuse of its constitutional powers. And the Republican 114th Congress will be facing an executive branch that has accumulated tremendous powers to make policy on its own and is now under the management of a leftist president who will continue to exercise those powers aggressively.

The Republicans may nonetheless win some significant policy victories. On two of their top priorities, Obamacare and the EPA's efforts to regulate greenhouse gases and carbon-based energy, the action has shifted to the courts and the states, whose constitutional powers remain relatively robust. Several legal challenges to the administration's far-fetched applications of the Affordable Care Act and Clean Air Act will be decided in 2015. And both programs depend on the cooperation of at least a substantial number of states, which have become increasingly Republican and leery of federal regimentation. Reversals could oblige President Obama to seek Congress's help in rescuing two of his most cherished legacies, opening the door to conservative reforms.

Yet the Congress problem is serious, both for the Republicans' immediate political ambitions and for the good health of our constitutional order. Shortly before the elections I wrote an essay, published by *The Weekly Standard*, addressed to the looming political problem but inspired by earlier writings on the constitutional problem (here and here). I had documented Congress's wholesale delegation of taxing, spending, borrowing, and lawmaking powers to the executive branch, and viewed with alarm the growing concentration of power in a single branch and a single person. It occurred to me that a period of fully divided government, with one party controlling Congress and the other the White House, might provide an opening for institutional revival. To paraphrase James Madison in *Federalist* 51, the partisan interests of the congressional majority might be connected to the constitutional rights of the place. When the prospect of partisan division appeared on the horizon, I proposed a series of steps to make such a connection during a Republican-led 114th Congress.

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I will review a few of these proposals in light of subsequent developments in a moment, but first I need to acknowledge and emphasize a fundamental difficulty lurking behind the congressional power deficit. The modern age has worn down the representative legislature. The idea that we should be governed by elected representatives of local districts, who gather to make law by hammering out compromises among differing interests and values, began as an embodiment of republican aspirations against the prerogatives of kings and autocrats. But that was a very long time ago, when politics and government were naturally constrained by what economists call high transactions costs. When travel and communications were slow and costly, legislative gatherings were crucial occasions to learn of developments in other regions, to take the measure of far-flung political leaders friend and foe, and to forge alliances and make compromises far from the gaze of hometown electorates. When political organizing was costly, interest groups were few and broad-based, and established civic and political elites, including legislative elites, held sway. When law enforcement and program administration were costly, the executive could perforce do only a few things. In that world, representative lawmaking was not beanbag but it was manageable, and central to realized democracy.

Modern affluence and high technology have disrupted all of those functions. Legislators no longer need to schlep to Washington to find out what is happening around the country, to form positions on political questions, or to plot and dicker with their peers; all of this can be done instantly and at much lower cost through the media and direct communications. We now have thousands of well-heeled, well-organized lobbies devoted to every conceivable cause, whose abilities to monitor, reward, and sanction individual legislators have drastically reduced the space for deliberation and compromise. Relentless pressures for additional government interventions have overwhelmed legislative capacities and the disciplines of the committee system. Falling costs of administration have magnified the inherent advantages of executive action—hierarchy, specialization, and the ability to multiply functions essentially without limit.

The basic congressional adaptation to these developments has been to transfer policymaking to executive agencies. Congress sets broad, generally uncontroversial goals (clean air, safe products, fair finance) and delegates authority for achieving them to agencies — which make the real political choices through rulemaking and other regulatory techniques. Legislators adopt a new business model: In place of the give-and-take of representative lawmaking, they shift to influencing executive decisions as individual, publicly licensed activists on behalf of national as well as state and district constituencies. The committee structure is supplanted by centralized party leadership

devoted to supporting or opposing the actions of the administration. Regular order, especially in budgeting, taxing, and appropriating, collapses under the weight of a thousand worthy and unworthy causes clamoring for assistance. Although these changes are largely the result of apolitical (and on the whole quite wonderful) economic and technological developments, their consequences are not apolitical: They produce a legislature that is institutionally biased toward continuous government growth, and much better equipped for expanding than for restraining the public sector.

The seriousness of the Congress problem was on display in the preliminary skirmishing between President Obama and congressional Republicans immediately after the elections and during the December rump session of the 113th Congress. My article's first suggestion for institutional resuscitation was that the new Congress immediately retrieve the authorities for taxing, appropriating, and borrowing that its predecessors delegated to executive agencies in recent years. Critically, this would be done strictly as a matter of constitutional housekeeping—without any changes in immigration policy, the powers of the Consumer Financial Protection Bureau (CFPB), or other matters that divide the Republicans and the administration. That way, when the president was presented with the bill for his signature, he would face a clear, unmuddled choice whether to prevent Congress from reclaiming delegated powers and exercising them as the Constitution provides.

This formulation may have seemed a bit prissy when first proposed, but its practicality became dramatically apparent when President Obama unilaterally revised statutory immigration policies on grounds that Congress had failed to enact those revisions by legislation. Republican opponents promptly responded that they would halt the changes with a rider to the appropriations of the U.S. Customs and Immigration Service. Then, a day or two later, came an embarrassed follow-up: Oops, we just discovered that USCIS is one of those agencies that lives off its own fees and is independent of our appropriations. Hadn't realized that! Sorry!

In the end, the 113th Congress extended all agency appropriations through the 2015 fiscal year with the pointed exception of the Department of Homeland Security—where USCIS resides—which must be reappropriated in February by the new Congress. But that in itself accomplishes nothing, for the fact remains that USCIS doesn't need congressional appropriations until the statute granting it financial independence is rescinded. And if that is done as part of a bill that also prevents USCIS from implementing the president's

unilateral policies, he will surely veto it: The political controversy will concern the merits of the immigration policies, and the constitutional lacuna will remain.

It is worth noting that USCIS gained its financial independence as part of the Homeland Security Act of 2002, passed at President Bush's insistence in the wake of the 9/11 terrorist attacks. An important part of the delegation story is that the executive branch is granted extraordinary powers in the face of emergencies requiring fast action — and the powers remain there after the emergencies have subsided, to be employed for other purposes in normal times. There is a critical lesson here: Crisis and urgency favor the executive, while the legislature thrives on normalcy, routine, and patience. That is the essential reason why Congress should reclaim its constitutional powers in a manner shorn of crisis-provoking battles with the administration over immigration policy, or the budget and authorities of the CFPB (another agency free of congressional appropriations), or raising the debt ceiling. Following the last crisis, the Republican debacle in the 2013 debt-ceiling standoff, Congress simply handed over its borrowing power to the Treasury Department. That, too, should be reclaimed as a first order of business, as part of an unadorned act where Congress declares its readiness to resume routine exercise of its constitutional responsibilities. The subsequent exercise of those powers will involve many hard questions of political tactic. Congress will not win all of these battles, but at least it will have a fighting chance, which it does not have today.

The next step is for Congress to resume exercising its spending power. Congress's inability even to pass and fund a government budget is the source of widespread contempt and ridicule, on Capitol Hill itself as elsewhere. Virtually all members say that doing so would be a splendid idea. Speaker Boehner and Senator McConnell have vowed to set things right, and they don't need the president's assent—just a resumption of Congress's own procedures for annual budgeting and appropriations established by the Congressional Budget Act of 1974 and largely ignored in recent decades.

But adopting and sticking to a budget, and passing twelve appropriations bills by the end of each summer, will require much more than punctilious procedures. It will require a sea change in Congress's culture and structure, and these as I said have evolved in response to powerful dynamics in modern politics and society. The downgrading of the committee chairmen, especially of the chairs of the taxing, appropriating, and budgeting committees, has cleared away internal obstacles to spending growth and interest-group favors that individual members are under constant pressure to accede to. The expedient of the continuing resolution, in which all appropriations are rolled into a single gargantuan

government-wide bill, has fortified the power of the majority-party leadership — vividly on display, during the rump session, in Senate Majority Leader Harry Reid's humiliation of Finance Chairman Ron Wyden. But high-stakes, all-or-nothing CR dramas weaken congressional prerogatives, which depend on routine, segregated, agency-focused appropriations.

And that, as illustrated by the recent confusion over immigration funding, is a matter not just of spending levels and priorities but also of policy prerogative. When I was working in the Reagan administration, Congress not infrequently countermanded our policy initiatives with targeted riders on the appropriations for the Office of Management and Budget, the Department of Justice, and other agencies. One rider prevented my office in OMB from meddling in the Agriculture Department's obnoxious marketing-order program for fruits and nuts—it had been inserted by farm-state Republicans and valiantly opposed on the floor of the House by Democrat Barney Frank. Another, championed by Democrats over Republican opposition, forbade the Justice Department from making a specific legal argument in a big antitrust case before the Supreme Court. We finagled our way around such riders when we could, but we always took them seriously and usually had to capitulate, abandoning our brilliant initiatives and turning to other mischief. The riders were routine, workaday, backstage aspects of inter-branch policy competition, where Congress held the cards whenever it could muster the votes to lay them down.

If the Republicans are able to reconstruct a strong committee hierarchy, whose chairmen are powers unto themselves rather than handmaidens to the party leadership, they will have moved a long way toward rebalancing congressional–executive prerogatives. If they are able to substitute legislating—collective choice by the Committee of the Whole—for single-member activism, they will have rediscovered the true source of congressional power. Their Democratic colleagues, with an eye on the future, will be attentive students, and in the meantime will cooperate to a degree that will surprise everyone.

The most challenging step of all will be to undelegate lawmaking power from the executive agencies. Here the problem is not only congressional culture and structure but also sheer capacity, for our hundreds of regulatory agencies can make law in much greater profusion and detail than legislative procedures can accommodate. The most audacious proposal is the REINS Act, which would require major agency rules to be approved by statute before taking effect, under expedited procedures that brought them promptly to the floors of both chambers for up-or-down votes. REINS passed the House twice in recent years when it had no chance in the Senate and President Obama had said

he would veto it. When and if it becomes possible to enact such a procedure, legislators will want to consider the implications carefully: Under REINS, the legislative calendar could be commandeered a dozen or more times each session with complex, controversial, procedurally privileged bills that arrived at moments of the president's choosing.

The 114th Congress will no doubt pass some statutes that countermand Obama-administration regulatory actions, where a veto would be fodder for the 2016 presidential campaign. Well and good, but for purposes of constitutional reconstruction I favor annulments of regulatory overreach that stand a good chance of Democratic support and the president's signature. My article offered two suggestions that already enjoy bipartisan support: Enact strong capital standards for large banks and other financial institutions, in place of the weak and inadequate standards favored by the Federal Reserve Board and other regulators, and liberate innovations in personal health information, such as smartphone monitoring apps and 23andMe personal genetic profiles, from the Food and Drug Administration's pre-marketing controls. Passing popular, beneficial laws such as these would build congressional confidence for exercising democratic choice against regulatory excesses and pretensions of agency expertise.

And also against the Obama administration's late-term ambitions, which have greater potential than is generally supposed. The media portrait of President Obama as an unpopular lame duck, with little remaining influence in domestic policy beyond defensive vetoes, and likely to focus on legacy foreign-policy projects, is a serious underestimate. He is a highly astute politician motivated by a highly developed political ideology, and he came to office with a homeland (as well as international) to-do list that he is determined to complete. If he and his advisers often seem aloof from the customary White House preoccupations with public-approval polls and congressional reputation, this may be because they have figured out that the Richard Neustadt conception of the presidency is obsolete. Writing at the end of the Eisenhower administration, Neustadt taught that the president occupies an intrinsically weak office and must devote himself to continuous persuasion and popularity-seeking to advance his agenda. But the subsequent evolution of executive-branch policy autonomy has rendered the president intrinsically powerful and capable of moving mountains on his own, whether or not he is well liked. President Obama seems to understand this; he is learning by doing, and those who are opposed to his agenda need to catch up.

Consider the matter of "net neutrality," which would require Internet- and mobile-broadband service providers to charge identical fees to content providers regardless of

differing transmission costs or market demand (say, high-definition Netflix movies versus routine websites and personal messaging). Although the proposal is technically dense and has little popular salience, President Obama has repeatedly gone out of his way to promote it, beginning in his 2008 campaign and most recently in his remarkable White House statement released the week after the election. His statement proposed that the Internet be converted into an outright public utility subject to controls over prices, entry, and terms of service to customers and among firms in the production chain — just like railroads and airlines in days of yore and Ma Bell when she was a comprehensive monopoly.

This is an astoundingly retrograde notion. Transplanting public-utility controls from Industrial Age amber into a singularly dynamic economic sector—one that has thrived by virtue of open entry, pricing freedom, and unregulated commercial rivalry—would guarantee that the Internet and mobile broadband became a nest of government rent-seeking and political favoritism. Although the president says he "believes" the Federal Communications Commission should be "forbearing" in exercising its new powers over the Internet, there is no precedent in all of regulatory history for such a hope. In any event, the FCC's core, non-forbearing controls on net neutrality would simply freeze in place the Internet's current, circa-2015 configuration—which already involves a host of non-neutral economic arrangements for different kinds of transmission (which would be "grandfathered") that until now have been constantly changing in response to technological invention and commercial discovery of how consumers value and use new services. The most liberal and liberating innovation of modern times would be vouchsafed to the leaden hand of bureaucratic rule.

Yet net neutrality has two powerful champions: a coterie of academic enthusiasts for a "communications commons," and some content-providing firms such as Google with distinctly non-communitarian interests in entrenching current Internet arrangements against future innovation. Whether President Obama became enamored with net neutrality in the faculty lounge or on the fundraising circuit (its corporate promoters are among his strongest financial supporters), the item is obviously high on his to-do list.

Now the president says that net neutrality is beyond his powers—in the hands of the FCC—and that he is simply encouraging the commission to be bold. More likely, as with his similar denials regarding immigration policy, he is insinuating the possibility of unilateral action if the commission and courts disappoint him.

For the president could, if he had to, orchestrate his own net-neutrality regime from the Oval Office by cueing up the abundant instruments at his disposal. The federal government already controls the electromagnetic spectrum, which is the essential resource for mobile broadband and in desperately short supply; although the FCC is formally in charge of allocating most of the spectrum, a large share of it is in the hands of executive departments such as Defense and Commerce, much of it unused or underused. The government operates some facilities, such as the Global Positioning System, that are critical inputs to innumerable mobile apps. And it is a major purchaser of Internet services, and could condition its purchasing contracts on net-neutrality agreements, following precedents in many other policy areas. The Internet has become a major security and diplomacy battleground, which has laid the groundwork for direct White House involvement in its management. And the administration has demonstrated on numerous occasions its willingness to use tax, law-enforcement, and regulatory authorities to cajole corporations into extra-statutory political projects. Prominent examples are the scandal-plagued BP Deepwater Horizon compensation fund, arranged over the telephone; the politically managed bankruptcies of Chrysler and General Motors, which rewarded the administration's allies; and the abrupt, highly costly cancellations of the AbbVie and other "tax inversion" mergers (which would have been perfectly lawful), following private conversations between administration officials and directors of the involved corporations.

The administration's wherewithal to corral service and content providers into an FCC net-neutrality regime, or to gin up a "private–public partnership" on its own, is unspoken but obvious to all concerned. In the weeks since President Obama's statement, several service providers have fallen in line, even to the point of recanting previous, obviously true statements that net neutrality would oblige them to reduce investments in next-generation data-transmission networks. These reconsiderations have reached Congress, where some Republicans are said to be fashioning "compromise" legislation that would impose net-neutrality requirements without going all the way to President Obama's comprehensive public-utility controls. The FCC is moving in this direction also, but legislation would be much better: It could provide custom-tailored financial inducements to cooperating firms at each stage of Internet/wireless-broadband production and eliminate the cloud of judicial review that has scuttled the commission's two previous net-neutrality schemes.

It is difficult to imagine a more inauspicious beginning for the new Congress than legislation that simultaneously (a) accommodates a syndicalist presidential initiative, (b) launches a program of highly discretionary executive-branch controls over a key economic sector, and (c) exhibits the perennial Republican confusion between (i) free markets and competition and (ii) the commercial interests of incumbent corporations. If Congress devoted itself not to passing "compromise" legislation but instead to getting its constitutional act together, it would have a reasonable chance of averting even a determined White House–FCC alliance on behalf of net neutrality. First, in its initial constitutional housekeeping bill that I continue to harp about, Congress would recall the FCC's independent authority to tax and subsidize telecommunications and wireless mobile providers (now to the tune of $9 billion a year). Next, with the commission fully restored to regular congressional appropriations, Congress would forbid the use of those appropriations to write or enforce net-neutrality controls or to encourage "voluntary" adoption. Then, through other appropriations riders, direct legislation, and oversight hearings, Congress would counter discretionary actions by other agencies (as through purchase contracts and selective favors and restrictions) to form extra-statutory net-neutrality "partnerships." And it would take every opportunity to protect and promote a genuinely free and open Internet — following the excellent precedent, during the December rump session, of preventing the administration from ceding Internet governance to foreign governments. Finally, the most effective means of promoting a robust and dynamic Internet over time would be to encourage liberalization of the allocation and use of the electromagnetic spectrum (one proposal for doing so is set forth here).

Net neutrality vividly illustrates the radical imbalance in the current prerogatives of the two political branches — but also the latent potential for congressional revival, even in the face of a concerted executive campaign. It is also a reminder that the Constitution is about more than checks and balances within the federal establishment: These are simply means, imperfect in the best of times, for keeping the exercise of federal power within prudential bounds. Republicans are, of course, hardly immune to the temptations for exceeding those bounds. And that is why their position in opposition to a boundlessly interventionist administration presents them with a double opportunity: not only to restore Congress's constitutional position, but also to use that position to limit rather than augment federal power. The net-neutrality challenge is only the first of many such opportunities that are about to come roaring at them.