

REVIVING A CONSTITUTIONAL CONGRESS

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Mid-September is the ideal time to observe Constitution Day in Washington. The three constitutional branches—legislature, executive, and judiciary—are regrouping following their summer breaks. Each one is laying plans for a new season of checks and balances. The scheme of separated powers was ordained by our bewigged founders two hundred and twenty-eight years ago. Yet here we see it in real time and modern dress—a living, breathing, perspiring organism. And classically American: government by organized rough-and-tumble.

Our Constitution is often treated as a reliquary, worthy of reverence but no longer of much practical use—filled with outmoded requirements that impede up-to-date government, obstacles that must be worked around, creatively reimagined, or politely ignored. Yet the Constitution reflects, in many deep and subtle ways, the character of the people who established it and have lived and prospered under it for centuries. This is particularly true of its structural features of federalism and separated powers, which vindicate Americans' democratic nature, our distrust of power, and our taste for open competition.

The struggle for power and advantage is a constant of human society. In democracies, that struggle is organized and advertised through political campaigns and elections. It is equally present *within* government, but there it is not always observable. In the parliamentary systems of Europe, open competition ends with the election returns and formation of a government. At this point legislative and executive powers are fused. Struggles over policy and personal advantage continue, but work themselves out in private within the ministry offices and leadership councils. A well-led government can present, at least for a time, a unified, dignified, self-confident public face.

That is seldom possible in the American system. Here, competition in government is exposed for all to see. The two political branches possess separate electoral bases and are assigned powers that are partly shared and partly independent. They are co-dependent and must work out their differences in public. Presidents, executive officials, and members of Congress may bring astute tactics and compelling rhetoric to the task, but in the heat of public contention they are also prone to diatribes, bluffs, missteps, backtracking, and humiliations. Dignified the process is not. Europeans who disdain our cowboy capitalism may think we have a cowboy government to match.

Parliamentary systems have their strengths, but open competition is the American way. Checks and balances are important means of policing the corruption and abuse that arise whenever power is monopolized. They are also means for pursuing two things that Americans care about especially—limited government and humble leaders. The sheer cumbersomeness of our constitutional structure usually requires extended negotiation leading to a substantial consensus before the government can act. And the spectacle of continuous public extemporizing makes it difficult for our leaders to pretend that they are in command of events. Joseph Schumpeter observed that the democratic leader “might be likened to a horseman who is so fully engrossed in trying to keep in the saddle that he cannot plan his ride.” Americans can see that every day.

But our system depends on a reasonable balance of power among the three constitutional branches, and we are losing that. In recent decades power has shifted dramatically away from Congress—primarily to the executive but also to the judiciary.

Part of the shift has resulted from presidents, executive agencies, and courts seizing congressional prerogatives. This part of the story has been much in the news. President Obama has effectively rewritten important provisions of the Affordable Care Act (Obamacare) and immigration law, while circumventing the Constitution’s requirement of Senate approval for senior executive appointments. The Environmental Protection Agency has contorted the Clean Air Act beyond recognition to regulate carbon dioxide and other greenhouse gasses—and has done so after Congress declined, following extended deliberation, to embark on such regulation. The Supreme Court has acquiesced in most (not all) of these executive usurpations, while taking for itself the authority to decide other live political controversies. It did both last June just before leaving town for the summer. First, the Court approved the Obama administration’s

extra-statutory extension of tax credits to persons who purchase health insurance on the federal Obamacare exchange. The next day it declared same-sex marriage a constitutional right, calling a halt to the diverse efforts of state legislatures in wrestling with the issue.

But the most important part of the story has an opposite plot: Congress itself, despite its complaints about executive and judicial poaching, has been giving up its constitutional powers voluntarily and proactively for decades. Beginning in the early 1970s, Congress has delegated broad lawmaking authority to a proliferating array of regulatory agencies, from EPA, OSHA, and NHTSA in the early years to numerous executive councils, boards, and bureaus under Obamacare and Dodd-Frank in 2010. In the new dispensation, members of Congress vote bravely for clean air, affordable health care, and sound finance, while leaving the real policy decisions to executive agencies.

In recent years, Congress has even handed off its constitutional crown jewels—its exclusive powers, assigned in Article I, Sections 8 and 9, to determine federal taxing, spending, and borrowing. Several executive agencies now set and collect their own taxes or generate revenues in other ways, and spend the proceeds on themselves or on grant programs of their own devising, without congressional involvement. Most members of the current Congress cannot even remember the days when that body passed annual appropriations, agency-by-agency, often with “riders” directing how the agencies may and may not spend the funds. More recently, following its hapless efforts to use the debt ceiling to force policy concessions from the administration, Congress washed its hands of the borrowing power, too, telling the Treasury that it may borrow as needed to pay the government’s bills for a set period of time.

Today the consequences of congressional self-enfeeblement are vividly on display. Congress is under management of conservative Republican majorities in both House and Senate, and is facing a left-progressive President with a big agenda. One would think that Congress would be busily reclaiming its constitutional authorities and exercising them to moderate—not check, but at least balance—the President’s actions. But that is not happening.

A harbinger the current disarray came shortly after last fall’s elections, when President Obama announced unilateral revisions to immigration policy that many Republicans opposed on policy or constitutional grounds or both. Congressional leaders

promptly pledged that the new Congress would forbid those changes with a rider to the appropriations of the Customs and Immigration Services agency. A few days later came an embarrassed retraction: staff had just discovered that the CIS finances itself through its own fees and is independent of congressional appropriations.

Congress could have put the agency back on regular appropriations, but as things have turned out even that wouldn't have helped. Congress has been unable to pass any appropriations bills (there are supposed to be 12 of them, covering various sets of executive agencies) for the new fiscal year that begins in two weeks, on October 1. So it is obliged to resort once again to a Continuing Resolution (CR)—a last minute blunderbuss statute that extends the previous year's entire federal budget with broad percentage adjustments.

The CR surrenders Congress's power of the purse. When Congress is appropriating individual agencies, it can adjust program spending and policy elements on a case-by-case basis. It doesn't always get its way in the face of a possible presidential veto, but at least it is in the game, with a multitude of tactics and potential compromises in play. In contrast, the threat of shutting down the government is disproportionate to discrete policy disagreements. The tactic would be a plausible only in the rare case where congressional opinion amounted to veto-proof majorities in both chambers—and in that event Congress wouldn't be reduced to a CR in the first place. An opposition Congress sometimes thinks it has the President cornered with an unpopular position, as in the wake of the horrible Planned Parenthood revelations which have some members threatening to defund the group. But the game of CR shutdown chicken always comes down to a crisis where the President—always at the center in times of crisis and able to control the terms of public perception and debate—has the upper hand.

President Obama's current strength is complementary evidence of constitutional drift. Since his party lost control of the Senate last November, he has launched a fusillade of aggressive executive initiatives in addition to his immigration revisions, such as subjecting the Internet to comprehensive regulatory controls. I think was within his constitutional rights on the Internet matter; but such a monumental change in national policy, almost certainly opposed by majorities of the relevant House and Senate committees, would have been inconceivable in the recent past.

With sixteen months left in his two, highly contentious terms of office, President Obama is no lame duck. This is not because he is highly popular. He is not—his public approval ratings have been in the mid- to high-40s and lower than his disapproval ratings, and he is widely disliked in Congress by members of both parties. It is rather that the nature of the presidency has changed since the Twenty-Second Amendment, ratified in 1951, limited presidents to two terms. The political scientist Richard Neustadt, who was working in the Truman White House at that time, went on to write a landmark study, *Presidential Power*, during the waning days of the Eisenhower administration. It argued that presidents occupy an inherently weak office, and must devote themselves to continuous persuasion, popularity seeking, and cultivation of Congress in order to advance their agendas. The book became the White House operations manual for JFK and all subsequent presidents—until now. The evolution of executive branch autonomy has transformed the presidency into an inherently powerful office, capable of moving mountains regardless of whether its occupant is well liked. President Obama and his political advisers are the first to have realized that Neustadt is obsolete. He devotes himself to fundraising and firing up the faithful on the progressive left, but is relatively indifferent to his standing with the general public and Congress. He has the wherewithal, working through the regulatory agencies, to make law and policy on his own through noon on January 20, 2017.

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Now Congress could, if it wanted, get back into the action and become a fully functioning participant in our constitutional apparatus. Let me tell you how. I have noticed that there are many popular five-step plans for dieting, job interviews, blind dates, and other extreme challenges. So here is my Five-Step Plan for Congressional Restoration.

First, Congress should retrieve the taxing, spending, and borrowing powers it has delegated to executive agencies, and place all agencies on annual appropriations regardless of their sources of revenues. This will require statutes signed by the President, so the statutes should be strictly matters of constitutional housekeeping, unencumbered by confrontations over divisive policies. For example, the Dodd-Frank Act's Consumer Financial Protection Bureau is funded by a share of the profits of the Federal Reserve System and is entirely free of congressional appropriations. Many

congressional Republicans loathe this agency and would like to clip its wings—but, for constitutional purposes, Congress should simply put it on regular appropriations, initially at the level the Bureau has already set for itself. Similarly, Congress should retake responsibility for the federal debt, now coursing north of \$18 trillion, rather than pretending that capping the debt without limiting spending is a good tactic for extracting policy concessions from President Obama. In these cases and others, the immediate need is not to parade the conservative bona fides of individual members, but rather to be sure that Congress as an institution is playing with a full deck in policy contests to come.

Second, Congress should exercise its appropriations power. It doesn't need a statute for this—it needs only to follow the procedures laid down in the Budget Act of 1974, passing individual appropriations bills for the President's signature on a regular basis. It would then be in a position to assert Republican priorities on spending levels and to counter selected Obama initiatives with appropriations riders. It could do so with moderately aggressive bills the President might sign, or with highly aggressive ones he would certainly veto—in order to dramatize the differences between Republican and Democratic policy positions, but without shooting itself in the foot with a threatened government shutdown. On some matters, Republicans would compromise with Democrats on spending levels or riders in order to obtain the President's acquiescence in partial policy improvements.

Third, Congress should relearn the arts of legislating, and thereby recover some of the lawmaking powers it has handed off to the regulatory agencies. Congressional Republicans say they want to replace Obamacare with a program that achieves its goals more completely, at less cost, and with less coercion. And they profess to be unhappy with the ways that Dodd-Frank, the Clean Air Act, and many other statutes are being interpreted and enforced, and with the inanity of the tax code and other statutes enacted by earlier Congresses. But they cannot be good to their word on without stepping up to their responsibility for collective choice. Constructing two legislative majorities for such major reforms is tedious, unglamorous, often frustrating business—and is the source of Congress's constitutional might. Doing so in just one or two high-profile cases, in the face of a certain Obama veto, would be the most convincing means of contrasting Republican principles with the President's. At the same time, there are many cases where the Republicans could garner significant Democratic support for

legislation to displace specific unpopular policies of the EPA, FDA, and financial regulatory agencies without rewriting their entire statutes.

Steps 1, 2, and 3 describe a constitutionally engaged Congress and offer a few ideas for how to get there. But Congress's recent confusion over immigration appropriations suggests that we have a long way to go. The journey will require some reforms to Congress's internal structure, and these are the subjects of Steps 4 and 5:

Fourth, Congress should reconstruct an internal policymaking hierarchy. In the late 1960s and early 1970s, Congress dismantled its seniority system and structure of powerful committee chairmen. Both institutions were in disrepute because the seniors and chairmen were mostly Dixiecrats who had used their powers to forestall civil rights legislation. Following the enactment of that legislation, northern backbenchers pounced with reforms that made Congress much more democratic and egalitarian. But the executive branch is specialized and hierarchal along policy lines, and a Congress that can counterbalance it needs to be specialized and hierarchal also. Today's partisan hierarchies are no substitute—they suppress checks and balances when Congress is of the President's party, and replace them with flailing ineffectiveness when Congress is in opposition. Congress needs to complement partisanship with a strong meritocracy that emphasizes mastery of policy fields, devotion to broad political principles (different of course for the two parties), and skill at articulation, debate, and the arts of legislative negotiation. The committee chair in this conception would be powerful and capable of decisive action, but untenured and ultimately accountable for achieving results. This is not a fantasy—witness the decision of the estimable Paul Ryan, 2012 Republican vice-presidential nominee and a natural to join in the 2016 presidential sweepstakes, to instead stick to his legislative knitting as chairman of the House Ways and Means Committee.

Fifth, the Senate should cut back to near abolition the filibuster (which effectively requires 60 rather than 51 votes to pass a bill) and "hold" (whereby an individual member can prevent a scheduled motion from reaching the floor). In times past these procedures were rare and limited to cases of exceptional minority and home-state opposition, because employing them was onerous and strongly discouraged by Senate culture. Today they are frequent, costless, and employed routinely to delay or prevent legislative action for reasons of simple opposition, non-germane tactic, and personal

advantage. Republicans and conservatives tend to favor the current practices, and Democrats and progressives to oppose them, because both sides see them as slowing the pace of lawmaking and therefore of government growth. But this construct is out of date. The great engine of government growth is now executive lawmaking, punctuated by spasms of legislation (Obamacare, Dodd-Frank) that propel new executive exertions which Congress is then helpless to moderate. The filibuster and hold have become mechanisms of legislative passivity in the face of executive activism, and of the regression of Congress to a congeries of solo practitioners.

Congressional lawmaking cannot hope to keep pace with executive lawmaking unless the Senate drops its House of Lords pretensions and becomes a majority-vote legislature. Congress as a whole would remain a super-majority institution, because of bicameralism and the different electoral bases of the two chambers; and Senate super-majorities could be reserved for some exceptional cases, such as confirmation of life-tenured judges, in addition to those such as treaty ratification specified in the Constitution. But for regular legislation it would cease to be the kind of minority-veto assembly described by Alexander Hamilton in *Federalist 22*: "Its situation must always savor of weakness, sometimes border on anarchy."

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Congress has yet to sign up for my Five-Step Plan. Media coverage of Congress suggestions a reason: extreme partisanship and Republican disarray. The GOP cannot act in unity because its feisty Tea Party insurgents want to confront President Obama and the Washington status quo head on, heedless of the counsel of party elders. There is something to this explanation, but it is superficial. More deeply, congressional decline is the result of profound changes in modern society and culture.

The representative legislature is the product of social thought and political contention going back to the ancient Greeks and Romans, running through the Magna Carta of 1215, and culminating in the 17th and 18th centuries in Europe and the United States, most prominently in the works of Locke, Montesquieu, and the American founders. It became the institutional vehicle of republican aspirations against the prerogatives of kings and despots.

The problem was to devise a source of government authority that was secular, peaceable, and generally accepted as legitimate. The legitimacy criterion meant not only

that citizens acquiesced in the government's power and obeyed its commands, but also that the government was in some degree representative—that it embodied, defended, and advanced the characteristic values and interests of citizens and society. Representativeness was achieved, at various times and places, through assemblies of all citizens, of some citizens chosen by lot, or of self-appointed elites such as the barons and church officials who forced the Magna Carta on King John. But in the modern era it was increasingly achieved through democratic choice in the form of election by citizens voting in geographic territories. Legislators represented local political jurisdictions such as states in the U.S. Senate, or special election districts as in the U.S. House of Representatives.

The contemporary era has not been kind to this great inheritance. The idea that we should be governed by elected representatives of diverse local districts, who gather to make law by hammering out compromises and counting noses, was conceived and developed when government was naturally constrained by what economists call high transactions costs. When travel and communications were slow and costly, legislative gatherings were crucial occasions for representatives 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 deals. When political organizing was costly, interest groups were few and broad-based, and established civic and political elites, including legislative elites, held sway. When surveillance, law enforcement, and program administration were costly, the executive could perform only a few things.

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, Internet, and direct communications. Well-organized interest groups are able to monitor, reward, and sanction individual legislators with great precision, drastically reducing the legislative space for deliberation and compromise. Multiplying pressures for government interventions have overwhelmed legislative capacities—while falling costs of administration have magnified the executive's advantages of hierarchy, specialization, and capacity to add new functions essentially without limit.

The representative legislature has also been a victim of modern habits of mind, which tend to value identity over locality, rationalism over representation, and decision over deliberation. Each of the three branches of American government has its own distinctive principles of operation and legitimacy. The judiciary's principles are reason and resolution—courts determine the facts of a dispute, resolve the dispute by deduction and inference from texts and precedents, and explain their reasoning publically. The executive's are personality and action—presidents incarnate important features of national character and aspiration, dominate political attention and debate, and take personal actions that settle some matters in a stroke and redefine others by changing the “facts on the ground.”

The legislature's principles—representation and compromise—are relatively unimpressive. Representing geographic localities is not what it used to be, because of the globalization of commerce and culture and increased personal mobility; locality is not without political importance, but many people today care much more about representation of their personal values, group identities, and vocational and avocational interests. And individual legislators have little capacity for decisive personal action. On their own they can campaign, give speeches and interviews, write letters, question hearing witnesses, and cast votes, none of which hardly ever resolves anything. Their primary assignment is to negotiate with other representatives, leading to collective decisions that no one is entirely happy with or, quite frequently, to no decision at all.

The legislative process seems murky and desultory when viewed from a distance, tactical and opportunistic when viewed up close: “Laws, like sausages, cease to inspire respect in proportion as we know how they are made.” But that quip, made in 1869, assumes that laws on their own inspire respect, which is a bit outdated at a time when many educated, influential people believe that public policies should be principled and systematic—Michael Oakeshott's “rationalism in politics.” Legislative enactments, precisely because they reflect tactical compromises among conflicting values and competing objectives, typically cannot be rationalized from any standpoint of a priori principle.

Restoring Congress to a central position in contemporary government will clearly be a heavy life. But not, I think, impossible. Americans like competition in government—we routinely elect Congresses and presidents of opposing parties, and an all-powerful

executive state goes against our instincts and traditions. Concentrated power leads to abuse and corruption, and there is much on display today at the IRS and Veterans hospitals and elsewhere. It is easy to imagine a major upheaval paving the way for a congressional resurgence, and for Congress's taking itself more seriously than it does today.

Congressional restoration should be of particular importance to those of conservative and libertarian persuasions. This is much more than a matter of today's conservative Congress standing up to today's liberal President. A government where more decisions are made by Congress and fewer by executive action is going to be a smaller government, simply because of the incorrigible cumbersomeness of legislative decision-making. To say that the purpose of congressional reform is to restore constitutional balance is something of a slight: Its purpose is also to restore limited government to some degree, because Congress's sprawling, diverse, conflicted membership is itself a bastion of limited government.

Furthermore, Congress is not only a branch of power but also a "selfie" of the nation in full. It not only represents but also portrays the populace—not with perfect resolution to be sure, but well enough to show each of us how we look and where we stand in the throng of fellow citizens who are our legal and political equals. A citizenry that permitted this portrait of its collective self to play a more central role in its government would need to be more liberal in the classical sense than ours has become. It would need to be more patient with disagreement, including intractable disagreement; more alert to the improving potential of dialogue, even when no decision ensues; less insistent on comprehensive plans and final solutions and capacious application of state coercion; and more attuned to the relative advantages of imperfect private markets and voluntary ordering.

I wish that today's Tea Party activists were more attentive to these considerations. In their rage against our bloated and frequently corrupt federal establishment, they seek Promethean drama. They wish to stand for conservative principles even when, or perhaps especially when, they are sure to be mowed down—so long as their stand is public and heroic. In so doing they are encouraging rather than moderating the modern thirst for media-driven, demonstrative politics that is weakening the institutional Congress. High drama and crisis play to the executive's advantage. The legislature

thrives on routine, incrementalism, and careful husbanding of its immense formal powers.

I will give the last word to James Burnham, the political theorist and editorialist who was a leading figure at *National Review* from its founding in 1955 through the late 1970s. Burnham is enjoying a well-deserved revival these days, especially for his works *The Managerial Revolution* (1941) and *The Machiavellians* (1943). He also wrote a fine book on Congress, *Congress and the American Tradition* (1959), which appeared at about the same time as Neustadt's playbook for presidential power. It identified in an earlier era many of the patterns of legislative decline that I have discussed today. Burnham had many criticisms to level at Congress—don't we all! But here is his conclusion:

To ask whether Congress can survive is ... equivalent to the question: Can constitutional government survive, can liberty survive, in the United States? This equation between Congress and liberty may at first seem paradoxical. Undoubtedly Congress has sometimes acted ... in ways that have served to undermine both law and liberty, and it has done so both in consort with and in opposition to the other branches of the government. The tie in this century and this nation between the survival of Congress and liberty is ... historical and specific. Within the United States today Congress is in existing fact the prime intermediary institution, the chief political organ of the people as distinguished from the masses, the one body to which the citizenry can now appeal for redress not merely from individual despotic acts ... but from large-scale despotic innovations, trends, and principles.

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