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Reviving a Constitutional Congress

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The following is adapted from a speech delivered on September 15, 2015, at Hillsdale College's Sixth Annual Constitution Day Celebration in Washington, D.C.

Our Constitution is often treated as a reliquary, worthy of reverence but no longer of much practical use. 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 continue, but they work themselves out in private within 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, where 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 contention they are also prone to diatribes, bluffs, missteps, backtracking, and humiliations. Dignified the process is not.

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 command events.

Yet 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 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 to embark on such regulation. The Supreme Court has acquiesced in most of these executive usurpations, while taking for itself the authority to decide live political controversies. It played both roles last June, first approving the Obama administration's unilateral extension of tax credits to persons who purchase health insurance on the federal Obamacare exchange, then declaring same-sex marriage a constitutional right.

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. Since the early 1970s, Congress has delegated broad lawmaking authority to a proliferating array of regulatory agencies, from EPA and OSHA 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

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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 and spending. 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 of the current disarray came shortly after last year's elections, when President Obama announced unilateral revisions to immigration policy. Congressional Republicans promptly announced that the new Congress would forbid those changes with a rider to the appropriations of the Citizenship and Immigration Services agency. A few days later came an embarrassed retraction: staff had discovered that the CIS finances itself through 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, because Congress is unable to pass any appropriations bills (there are supposed to be 12 of them, covering various sets of executive agencies). Instead, 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 Congress 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 plausible only in the rare case where congressional opinion amounted to veto-proof majorities in both chambers. Even when Congress thinks it has the President cornered with an unpopular position, as in the wake of the horrible Planned Parenthood revelations, the game of CR chicken always comes down to a national crisis where the President—always at the center in times of crisis and able to control the terms of public 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, such as subjecting the Internet to comprehensive regulatory controls. I think he 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.

The fact that President Obama is not a lame duck is not due to his popularity. 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 limited presidents to two terms. In *Presidential Power*, a landmark study written during the Eisenhower administration, political scientist Richard Neustadt 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. This book became the operations manual for President Kennedy and all subsequent presidents—until now. The evolution of executive branch autonomy has transformed the presidency into an inherently powerful office, regardless of whether its occupant is well liked. President Obama and his advisers are the first to have realized that Neustadt is obsolete—that whatever his polls, the President has the wherewithal, using executive agencies, to make law and policy on his own through noon on January 20, 2017.

* * *

Now Congress could, if it wanted, get back into the action and become a fully functioning participant in our constitutional apparatus, by adopting the following 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 Federal Reserve profits, entirely free of congressional appropriations. Many congressional Republicans loathe this Bureau and would like to clip its wings, but for constitutional purposes Congress should simply put the Bureau 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 conservative *bona fides*, but rather to be sure that Congress 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 policy differences, but without shooting itself in the foot with a threatened government shutdown.

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 without stepping up to their responsibility for collective choice. Constructing two legislative majorities for such major reforms is tedious, unglamorous, often frustrating business—but it is the source

of Congress's constitutional might. Doing so in one or two high-profile cases, in the face of a certain Obama veto, would be the most politically compelling means of contrasting their principles with the President's. At the same time, there are many cases where the Republicans could attract significant Democratic support for legislation to displace specific unpopular regulations 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 of Congress's internal structure and procedures, and these are the subjects of Steps 4 and 5.

Fourth, Congress should reconstruct an internal policymaking hierarchy. In the late 1960s and early '70s, Congress dismantled its seniority system and structure of strong 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 success of that legislation, northern backbenchers passed reforms that made Congress much more democratic. 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 and the President are from the same party, and replace them with flailing ineffectiveness when the branches are 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 accountable for achieving results.

Fifth, the Senate should cut back to near abolition the filibuster (which effectively requires 60 rather than 51 votes to pass a bill) and the hold (whereby individual members can prevent scheduled motions 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 discouraged by Senate culture. Today they are frequent, costless, and routinely employed. Conservatives tend to favor the current practices, seeing 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 (e.g., Obamacare, Dodd-Frank) that propel new executive exertions which Congress is then helpless to moderate. The filibuster and the hold have become mechanisms of legislative passivity in the face of executive activism, and of the regression of Congress into a collection of solo practitioners.

Congressional lawmaking cannot hope to keep pace with executive lawmaking unless the Senate becomes a majority-vote legislature. Congress as a whole would remain a super-majority institution, due to 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."

* * *

Congress has yet to sign up for my Five-Step Plan. Media coverage of Congress suggests a reason: extreme partisanship and Republican disarray. 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. 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, but also that the government was in some degree representative—that it embodied, defended, and furthered 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 in the form of election by citizens voting in geographic territories. Legislators represented local political jurisdictions such as states in the U.S. Senate and districts 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, was conceived and developed when government was naturally constrained by what economists call high transaction 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 colleagues, 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 perforce do only a few things.

Modern affluence and high technology have disrupted all of those functions. Legislators no longer need to go 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.

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 publicly. 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 and redefine others.

The legislature's principles—representation and compromise—are relatively unimpressive. Representing geographic localities is not what it used to be, because of globalization and increased personal mobility; locality is not without political importance, but many people today care

more about representation of their personal values, group identities, and vocational and avocational interests. And individual legislators have little capacity for decisive personal action—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.

* * *

Restoring Congress to a central position in government will clearly be a heavy lift; 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 principles and traditions. Concentrated power leads to abuse and corruption, of which there is much on display today at the IRS, VA hospitals, and elsewhere. It is easy to imagine a major upheaval paving the way for a congressional resurgence.

Such a resurgence should be of particular importance to those of conservative and libertarian persuasions. This is 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 agencies 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, 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 portrays the populace—not with perfect resolution, but well enough to show each of us 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 *classically* liberal 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.

In 1959, political theorist James Burnham wrote a fine book, *Congress and the American Tradition*, which identified in an earlier era many of the patterns of congressional decline that we see 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, 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 . . . 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. ■