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Congress Is Weak Because Its Members Want It to Be Weak

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If you follow politics in America today, you probably spend most of your time gawking at the president. It is hard to avoid attributing every dysfunction of the moment to Donald Trump's peculiar mix of reckless talk and often feckless action. But judged on a scale of institutional breakdown, the presidency—even this presidency—is not our biggest problem. No, the failures of the Congress both run deeper and are harder to explain. They begin with a simple inability to get much accomplished. Republicans have controlled both Houses of Congress since 2014 and since 2017 have had a president willing to sign more or less anything they send him, but they have mostly been spinning their wheels in frustration.

They pat themselves on the back for cutting the corporate tax rate, a reform that has had bipartisan support for most of this century yet barely happened. And they praise themselves for confirming judges, an act that requires only a simple Senate majority now. But that's about the sum of it.

They are less inclined now to talk about health-care reform, which was the foremost plank of every Republican platform since 2010 but fell apart last year and seems to have been abandoned. Presidential priorities such as immigration and infrastructure are going nowhere. The same can be said of longstanding Republican priorities such as entitlement reform.

The budget process has never been so hobbled. Not only did we come close to an unprecedented government shutdown during single-party control of Congress and the presidency, but this year has also marked the first time in the four-plus decades since the modern budget process was created that neither chamber has even considered a budget resolution.

And the trouble didn't start in just the past few years. Presidential hyperactivity in recent decades has masked a rising tide of dysfunction—giving us policy action to observe and debate while obscuring the disorder that was overtaking our core constitutional infrastructure. It kept us from facing what should be an unavoidable fact: Congress is broken.

So whether you measure it by legislation, public approval, member satisfaction, even just committee work or each house's ability to live by its own rules and procedures, the institution looks awfully dysfunctional. And the primary reason for that dysfunction may be the worst news of all: Congress is weak because its members want it to be. And that means the structure of our system, the insights of its framers, and the incentives that shape our politics don't offer obvious solutions.

The Constitution gives the Congress powers but not responsibilities. The president is required to execute the laws and tasked with responding to changing world events on the country's behalf. The courts have to consider cases and controversies put before them and apply the laws accordingly. But while the general scope and reach of the Congress's authorities are laid out in Article I, the institution is not really told what it must do within that scope. That's because the assumption was that Congress would naturally seek to control things and run as far and as hard in pursuit of power as the Constitution allowed, so that only boundaries were needed.

James Madison believed the legislative branch of government would exhibit an unquenchable ambition. As he wrote in *Federalist 48*, it would always be “extending the sphere of its activity, and drawing all power into its impetuous vortex.” In *Federalist 51*, Madison offers this as the reason for the bicameral legislature: “In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches.”

The legislative branch would be so dominant because the intense ambition of its members couldn't really be contained. Those members would speak most directly for the public, and their jobs could not be bounded by the laws as the job of a judge and a president can be. They would have the power to *make* the laws, after all, and so would be the moving force in our regime, striving incessantly to act.

Today's Congress simply defies that expectation. It suffers from a malady the framers never quite imagined when they thought about politics: a shortage of ambition. Members are certainly eager to retain their offices, but they seem oddly indifferent to *using* those offices.

For example: About half a year from an election that could plausibly end their unified control of Congress for a while, congressional Republicans appear to have decided to spend this time doing essentially nothing. Even if bipartisan agreement is too hard to achieve, they have the opportunity, using the budget-reconciliation process, to take on serious legislative work with bare majorities. And they have a president eager to sign practically anything. But they are choosing to send him little of consequence.

It is precisely the president's relative passivity that helps us see Congress's ambition shortage. As an institutional matter, and in terms of his uses of his formal powers, Donald Trump is almost certainly the weakest president we have seen since before the New Deal. He is intensely interested in playing the leading role in the drama of our national politics, but he views that role in terms of media and cultural theater. He has barely lifted a finger to advance any legislative agenda of his own. He has used his executive authorities less aggressively than any modern president (and has used them mostly to reverse the aggressive hyperactivity of his predecessor). He has populated his administration with many officials rightly inclined to restrain the presidency. And he has proven largely incompetent to propel the engine of the federal bureaucracy in any particular direction on most issues.

Every White House, moreover, mirrors the personality of the chief executive. So the Trump White House has been a hothouse of frenetic, undisciplined, and unproductive chaos—self-obsessed, media-obsessed, but ultimately uninterested in the substantive work of the presidency. At least in domestic affairs, we are getting a flavor of what our system of government might look like without a president.

And what we're learning from this strange experience is that the role of presidential overreach in undermining our system has probably been overstated, while the role of congressional underreach has been underappreciated. Congress has not looked upon Trump's weakness as an opportunity and has not stepped in to fill the vacuum. The little that has gotten done (tax reform in particular) has certainly looked more like the agenda of congressional Republicans than of the president. But very little has gotten done. And members of Congress spend much of their time waiting to see what the president will say next.

This turn of events might cast the state and modern history of our constitutional system in a rather different light from the one in which conservatives have been inclined to see it over the last few decades. It suggests that the two trends that have most worried conservatives about the system—the trends toward excessive executive power and excessive judicial activism—are both rooted in congressional dereliction.

This also helps make better sense of the history of the administrative state, which has been distorted some in the popular conservative telling. The villain of this story is Woodrow Wilson, so that the tale has been about presidential excess from the start. But the historical evidence leaves little doubt that Congress created the administrative state, and indeed that it did so with little presidential guidance or involvement more or less until the New Deal. The original “independent” regulators were formed as commissions and given a peculiar middle spot between the branches of our government in part precisely so that they would *not* simply add to the president’s arsenal of authorities—and would remain answerable to Congress to a meaningful degree.

This began to change with the New Deal, but very much with Congress’s complicity. And by the last few decades, a pattern of congressional neglect has clearly emerged that has been misattributed (at least in part) to presidential and judicial excess. That pattern has dominated the work of our constitutional system in this century. Broad delegations of power in statutes have let presidents wield what are properly legislative authorities, and intentionally vague legislation has empowered judges to fill gaps that legislators should never have left open. Members of Congress are happy to complain about the other branches, but they are not inclined to use the enormous power at their disposal to restrain those competing institutions and reassert their own. We have seen this in health care, education, energy and banking regulation, and across the full scope of domestic affairs. And Congress’s abandonment of its role in foreign policy has been, if anything, even more comprehensive.

That presidents and judges would have rushed to capitalize on these opportunities is no surprise. They are ambitious, as the framers knew they would be. Why Congress would willfully create such opportunities for them is the question to be answered.

So how could there be a shortage of legislative ambition? What did James Madison miss?

He didn’t get the psychology of politicians wrong. People who run for Congress are still very ambitious and driven. But their ambition is now channeled away from the institution of Congress and redirected along two related paths.

The first is partisan. As polarization has increased, members of Congress have grown more inclined to understand their political and policy ambitions in partisan terms and therefore to see themselves as belonging to a team that extends beyond Congress. That means when they are in the president’s party, they generally work to advance the president’s priorities—because they usually share those priorities, and because they expect success for the president to redound to their own political benefit.

This obviously slackens the institutional tensions that are supposed to keep our constitutional system in balance. That’s how we could find congressional Democrats earlier in this decade calling on President Obama to assert the authority to rewrite immigration laws on his own, seemingly unconcerned about the usurpation of legislative prerogatives. It’s how we find Republicans asking President Trump to use his regulatory power to do things they could do with legislative power—to protect religious liberty or enable oil drilling along the coasts.

It is worth noticing in this regard, and when it comes to the decline of Congress more generally, that the problems have been thoroughly bipartisan. There is a popular genre of political science and commentary devoted to blaming Congress’s problems on the behavior of Republicans since the Gingrich era of the 1990s. They are derided as somehow simultaneously dogmatic and nihilistic, and blamed for turning the institution into a partisan combat zone. In this telling, it was the end of a blissful half-century of Democratic dominance that started all the trouble.

A more plausible diagnosis, offered by political scientist Frances Lee of the University of Maryland, is the simple fact that control of Congress is now in question in just about every election. This has turned up the partisan heat. The minority party at any given moment imagines it could take over next time and get everything it wants, and so it feels little pressure to cooperate with the majority just to get half a loaf or less. And the majority knows that its hold on

power is endangered and so avoids bipartisan initiatives in favor of forcing the minority to take hard votes on wedge issues.

Both parties behave this way, in and out of power. And they also emulate each other's behavior toward the president when control of the White House switches—as we have seen with the Democrats' budget antics in the Trump era, which have been nearly identical to Republican shutdown politics in the Obama years. And both Republican and Democratic members have deferred and delegated to the president when their party has held the White House.

To some extent, this is because members are happy to pass off to the president and to judges the responsibility to make hard choices. But they do this not only when it comes to unpopular measures they don't want tied to them. As a White House staffer in the Bush Administration, I frequently encountered member requests for executive actions in properly legislative domains that had broad popular support, or at least broad Republican support. Members were perfectly happy to claim credit for getting the president to act rather than acting themselves.

Members from the party out of power in the White House will sometimes suddenly discover a deep concern for congressional prerogatives, of course. But these discoveries rarely reach beyond the bounds of partisan convenience and have tended not to involve enacting durable institutional restraints on presidential power. Presidential overreach is convenient for Congress, because members don't view the institution as the most important channel for their own ambition.

But members do not simply subsume their own ambition beneath that of their party. Ambitious people have pride and want prominence. That, too, remains as true today as in Madison's time. But it points to the second, and even more pernicious, kind of redirection of ambition that is the distinct disorder of the Congress in this century, and that results in a more complicated kind of dereliction of congressional responsibility.

Simply put, many members of Congress have come to see themselves as players in a larger political ecosystem the point of which is not legislating or governing but rather engaging in a kind of performative outrage for a partisan audience. Their incentives are rooted in that understanding of our politics and so are not about legislating. They remain intensely ambitious, but their ambition is for a prominent role in the theater of our national politics. And they view the institution of Congress as a particularly effective platform for themselves—a way to raise their profile, to become celebrities in the world of cable news or talk radio, whether locally or nationally, to build a bigger social-media following, and in essence to become stars.

They can best use this platform not by engaging in the mundane work of legislating but by taking part in dramatic spectacles and by fueling the outrage that is now the engine of our politics. Even for its own members, Congress seems to be most valuable as an object for commentary and a prop in a vivid morality tale about corruption.

Matt Gaetz, a freshman Republican congressman from Florida, has made a name for himself as an aggressive and quotable partisan combatant on cable television. When a reporter from *Buzzfeed* asked him in February whether he was concerned that he was gaining notoriety rather than prominence by doing this, his answer was: "What's the difference? People have to know who you are and what you're doing if your opinions are going to matter."

It is easy to imagine President Trump himself offering the same answer. And indeed, the rise of performative politics in Congress mirrors the performative approach to the presidency embodied by Trump—though it was also very much in evidence in his predecessor's behavior. In both the elected branches, we find people inside a key institution yearning for the role of the outsider, and therefore essentially acting *on* the institution rather than *in* it. Something of the same pattern is evident in the courts today. And we can see it outside of government, too, in the professions, in the

universities, in the media, and throughout the culture. Many of our key institutions are coming to be treated by their occupants as platforms for a kind of moralistic performance art.

Congress, like any serious institution, can only function by socializing its members to work together. But when those members see the institution as a stage for their individual performances, they do not become socialized and are left in a kind of anti-social form, each trying to shine. They often cannot wait to rush off the floor of the House or Senate, find a camera, and tell a waiting viewing public just how badly broken Washington is. This makes accommodation very hard to come by, and it makes legislating difficult and rare. It has everything to do with why so little gets done in Congress now and why every budget process ends with the threat of a shutdown.

This is exacerbated further by the related loss of protected spaces for deliberation in Congress. Every institution needs an inner life—a sanctum where its work is really done. Congress has progressively lost that inner life, as its deliberative spaces have become performative spaces, everything has become televised, and there is less and less room and time for talking in private. By now, the Speaker's Office around midnight as a government shutdown approaches is almost the only private space left, and that is therefore where much important legislation gets made—so that various reforms intended to democratize the Congress and make it more accountable have resulted in a *less* democratic and accountable institution.

This has happened in the name of transparency. And transparency is a good thing. Without it, institutions that serve a public purpose can easily become debased and unaccountable. But every good thing is a matter of degree, and we have treated transparency as a good thing with no costs, when in fact it can have some enormous costs, and these must be accounted for. In this case, the cost is a Congress that increasingly has the appearance of a show, and that does less and less real bargaining, accommodating, and legislating.

Combine that with related reforms also intended to curtail corruption—most notably the elimination of earmarks in legislation—and it becomes easier to see why the intense ambition of legislators finds itself directed to things other than legislating, and so in turn why Congress seems so dysfunctional.

None of this points to any easy answers. In fact, although pretty much everyone who watches Congress (including its members) would now agree that institutional reforms are needed, there is not much agreement about just what such reforms should aim to achieve.

Congress isn't working, but what is it failing to do? Is its purpose—like that of a European parliament—to enable the majority party to enact its agenda while it holds power? Or is its purpose—as envisioned by the framers of our Constitution—to compel accommodation among competing factions in a diverse and often divided country?

Reformers with the former goal in mind tend to see the partisan dereliction of congressional responsibility as a potentially promising development. They aim to make Congress more pliable, to remove obstacles to pure majoritarianism, and to empower party leaders and more efficient procedures. Those who seek the latter propose reforms that would instead empower Congress over the executive, empower members and especially committees over leaders, and encourage substantive policy conflict in Congress as a way to ultimately force compromise. They seek not ways to make the most of dereliction, but ways to reinvest the ambition of members in the work of their institution.

The experience of this century should teach us to prefer the second course. A weak Congress invites aggression from the other branches, and a Congress whose members direct their ambitions outside the institutional framework of our system sends that system dangerously out of balance—exacerbating partisan polarization and public frustration. Only an assertive and functional Congress—a Madisonian Congress—can help our politics find the practical

accommodations essential to both addressing public problems and lowering the temperature of our overheated public life.

The insight that the problem with Congress is that members' ambitions are now misdirected can help reformers think creatively and practically about what Congress needs. The budget process, which is at the center of Congress's troubles, clearly needs to be reformed with this insight in mind—perhaps by eliminating the distinction between authorizing and appropriating legislation and breaking up the big spending bills into many smaller pieces that would have Congress always legislating but in focused and discrete ways that offer members concrete reasons to be engaged.

A transformation of oversight is also plainly in order. It is particularly important now to give Congress more of a role in federal regulation, maybe requiring its assent for major rules (as the so-called REINS Act would do), requiring it to legislate a formal regulatory budget for the executive branch just as it now imposes a budget on spending, and (as Kevin Kosar and Philip Wallach have proposed) providing it with a specialized agency to oversee regulation on the model of the Congressional Budget Office.

There is no easy answer to the incentive for performative over legislative politics, of course. But congressional reformers should consider whether transparency has gone too far, and whether limits might be placed on the televising of all floor and committee action. A much more robust role for committee work in setting the schedule for congressional activity and in drafting and revising legislation would also give members a more legitimate forum for prominence and therefore more of a chance to invest themselves in legislative work.

None of this would solve the overarching problem. But institutional reforms can be a matter of degree, and Congress could stand to improve its functioning incrementally. Such improvements should always keep in mind Madison's exhortation in *Federalist* 51 that "the interest of the man must be connected with the constitutional rights of the place."

The real trouble, however, is that any reforms along these lines would first require members to want them. If the problem with Congress is a shortage of properly constitutional will, this is all the more of a problem when it comes to institutional reforms of the Congress.

Congress is weak and dysfunctional because that suits its members. It could renew itself only if its members wanted such renewal. The health of our constitutional system rests on the premise that the officials who populate it will be ambitious on behalf of the institutions they occupy. A shortage of constitutional ambition is the real trouble with Congress—and not only with Congress.

