

# The Once and Future Congress

By John Samples

As executive authority expands to fill the void left by Congress's self-imposed decline, the balance of powers that the Constitution was designed to foster has unraveled.

But a congressional renaissance is possible—if lawmakers are willing to reclaim their proper role in the constitutional order.

ILLUSTRATION BY KEITH NEGLEY

In *Federalist* no. 39, James Madison noted that the new Constitution created a government that was “strictly republican” because “it is evident that no other form would be reconcileable with the genius of the people of America; with the fundamental principles of the revolution,” or with the idea of self-government.

At the forefront of this republic is Congress, in which Article I of the Constitution vests all legislative power to tax, to spend, to regulate commerce, to declare war, and to write laws. “In republican government the legislative authority, necessarily, predominates,” Madison later wrote in *Federalist* no. 51.

But over the past century, Congress has gradually surrendered many of these powers to the executive branch, eroding the carefully designed separation of

powers intended to encourage deliberation and restrain the concentration of power. Successive presidents have sidestepped or steamrolled Congress, with little pushback from the legislative body originally envisioned as the heart of American self-government.

Is the United States still a republic in fact as well as aspiration? Let's first recall what republicanism meant to the Framers of the Constitution.

## Original Meaning

Above all for the Framers, a republic was not a monarchy. Legitimate authority came from the people, broadly understood, not from hereditary rulers. Government should be in some way based on the consent of the governed. Delegates of the people created a government by writing a constitution







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that was then ratified by popular vote. Yet the Constitution was not the whole story. The public would also give its consent periodically through elections.

The public would not directly make laws or, for that matter, directly elect their governors. The US Senate was elected by state legislatures for many decades, and to this day, the president is formally chosen by a majority of state electors, not by a majority of voters. The Framers knew that direct action by a majority of voters or by a monarch, even an elected one, had its advantages. However, in the long run, they thought a slower and more indirect

expression of the popular will would better serve the people.

Republicanism also meant restraints on political power. The Constitution itself limited elected officials and thereby those who elected them. The rule of law also constrained elected officials and electoral majorities. Neither officials nor majorities could simply do as they wished contrary to prior laws and, of course, the fundamental law of the Constitution. The Constitution divided and balanced political power among the legislative, executive, and judicial branches. And Congress itself was divided between a Senate and a House of Representatives, the latter more directly expressing the will of the people, the former constraining that will. This division and balance fostered struggle over gaining and exercising political power, which would of necessity be exercised indirectly and slowly. Passing laws would require broad support among the people.

Notice also what the Framers thought about the American people. They would be moderate in expectations about government, preferring stability and consent over immediate action by a sovereign. The citizens of a republic would have a certain virtue, the ability to look beyond the moment to a longer future that would be served by the slow and indirect exercise of power.

Congress came first in the Constitution because it was the quintessential republican institution. But where does the legislative branch rank today? Are we still a republic?

## Presidents Unbound

We live in a world where presidents (not Congress) matter most to the public and increasingly to governing. Almost everyone knows the name of the president; perhaps half of a state or district knows the name of their senator or representative. The president is the center of public attention. And recent presidents have claimed many powers thought to be legislative.

In the opening months of President Trump's second term, he upended international trade with sweeping tariffs on much of the world, even though Article I of the Constitution grants Congress powers to "regulate Commerce with foreign nations" and "lay and collect Taxes, Duties, Imposts and Excises." After Congress refused to appropriate the full sum for a wall on the US-Mexico border in his first term, Trump declared a national emergency, allowing his administration to divert previous congressional appropriations for military construction projects to pay for the wall. Trump thereby bypassed the congressional appropriations process demanded by the Constitution. Trump frequently appointed "acting" officials, circumventing the Senate confirmation process required by the appointments clause (Article II, Section 2). He also rolled back through executive order certain regulations previously enacted by Congress. But Trump's use of presidential power is not unusual.

Joe Biden used executive orders and regulatory authority to mandate COVID-19 vaccinations or testing for large private employers, federal contractors, and health

care workers. His administration announced a plan to cancel much federal student loan debt, citing authority under the Higher Education Relief Opportunities for Students Act of 2003, which allows changing loan programs during national emergencies (in this case, the COVID-19 emergency). The sum at stake was \$400 billion, and the Supreme Court stopped the president, for now. Biden also formulated policies regarding climate change and immigration, both purviews of Congress.

Before taking office, Barack Obama worried that the presidency had become too powerful. Once in office, he repeatedly sidestepped Congress to enact his policy agenda. Obama unilaterally granted lawful status and eligibility for federal benefits to half the illegal immigrants in the country. He forced schools across the United States to adopt national curriculum requirements. His administration tried to promulgate new rules vastly increasing the number of workers eligible for overtime pay. It imposed billions of dollars in costs to reduce greenhouse gas emissions, even though Congress did not vote to treat carbon dioxide as a pollutant. Obama also unilaterally amended the Affordable Care Act (ACA) by ignoring statutory deadlines and mandates passed by Congress. President Obama even usurped the "power of the purse," ordering the disbursement of some \$7 billion in "cost-sharing" subsidies under ACA that Congress never appropriated.

President George W. Bush made sweeping claims of inherent executive power in foreign affairs. Yet by the end of



his second term, Bush had also radically expanded presidential power on the home front, into areas where no plausible national security claim could be made. For example, in December 2008, Bush unilaterally ordered a multibillion-dollar auto bailout just days after Congress voted the program down.

The desire to expand presidential power is clearly bipartisan. A president offers quick and direct action to implement partisan programs. The executive branch in that sense is more democratic than a republican institution like Congress. Both parties and their voters appreciate such democratic virtues at least when their party has power. Less partisan observers might wonder, however, why the president came to dominate a government designed to be republican.

### **The Republic's Retreat**

In the 1930s, the political responses to an economic crisis and subsequent war transformed the United States and its government, the latter toward what would be called an imperial presidency.

Consider the effects of World War II first. The United States emerged with a victory and enormous self-imposed obligations. War in Europe had taken 60 million lives. The United States was the only nation powerful enough to prevent another war. And that obligation soon became protecting much of Europe from the Soviet Union, a commitment that itself might mean war.

The Constitution gave Congress the

power to declare war; unlike a king, the president lacked the power to initiate a war. But Congress moves slowly, and keeping the European peace (and in time, pursuing putative national interests elsewhere) might require quick action, not least after nuclear weapons became the chief deterrent to war. A nation with global power and responsibilities, it was said, needed a commander in chief with nearly unlimited discretion, not a squabbling body of politicians with often parochial views and interests. That presumed discretion also led the nation to fight an undeclared war in Korea that cost 36,000 American lives.

The economic crisis of the 1930s also gave us the New Deal, an American version of “Big Government” and the domestic counterpart to globalism. The New Deal at home promised prosperity through an active government regulating the economy and spending for public purposes. (George Selgin’s recent book, *False Dawn: The New Deal and the Promise of Recovery, 1933–1947*, shows that the New Deal was more promise than prosperity: Many New Deal policies were counterproductive, leaving over 17 percent of American workers either unemployed or on work relief six years later.) Failures notwithstanding, American government had changed. The president was expected to lead Congress to tax, spend, and regulate to assure prosperity. Elections changed too. Presidents often either won or lost based on the state of the economy and thus sought to stimulate prosperity through the federal budget. It

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should have mattered more that presidents often had little to do with the state of the economy and that efforts to induce prosperity often led to inflation and stagnation.

Congress also often gave away its power to legislate. Executive agencies gave concrete meaning to the vague laws passed by Congress. Legal scholar Gary Lawson has likened the legal regime that emerged from unrestrained delegation to one governed by “a statute creating the Goodness and Niceness Commission and

giving it power ‘to promulgate rules for the promotion of goodness and niceness in all areas within the power of Congress under the Constitution.’”

As the head of the executive branch and thus the bureaucracy, the president may issue formal directives—executive orders—to manage the federal establishment. These orders often deal with current controversies, making the president a kind of hybrid legislator and executive. In the first century of the republic, when Congress still served as the country’s principal lawmaker, presidents issued fewer than 800 executive orders in total. Yet as the chief executive’s responsibilities expanded, so did his power to govern by decree. From Truman through Nixon, presidents issued more than 2,200 executive orders, which became increasingly indistinguishable from legislative acts. In the 21st century, as we saw earlier, presidents rely more than ever on executive orders to bring policy changes.

Congress has also not helped its own case in other ways. For some time, Congress has been the least-favored branch in public opinion, perhaps because its members seem overly political and partisan. Congress also seems to do little to control and oversee the powers it delegated to the administrative state. And Congress has become less independent of the president even in exercising its constitutional authority. Congress has long refused to take responsibility for using force abroad and for dealing with crises such as the 2008



financial meltdown. Congress's budgeting powers—spending and taxing—do not inspire confidence, to put it mildly. More often, the majority in the legislature seems like a servant to their party leader, the president who drives public debate.

That said, some of Congress's problems may be traced to the American people. Congress was not designed to quickly translate electoral outcomes into public policy. To act at all requires a broad consensus in the public about an issue or problem, and such agreement is rarely found today. Deliberation and compromise might see policies through the legislative process, disagreements notwithstanding. But public tolerance for slow actions seems as rare as agreement over policy. The Framers thought that a government doing nothing was better than acting without broad support. Now, doing something—almost anything related to a current issue—seems better in the eyes of the public. In contrast, the presidency seems capable of acting and overcoming gridlock, though often in the name of small electoral majorities. The “spirit of the American people” seems less republican these days and more democratic. That change would have troubled James Madison and the other Framers.

### **A Congressional Revival?**

If Congress wants to reclaim its proper place in the constitutional order, it could begin by asserting its undoubted power of appropriation. Nothing prevents Congress

from returning to individual spending bills rather than continuing resolutions, from constraining emergency and off-budget outlays, and from requiring approval for changes in approved spending by the executive. Congress also has the power to approve initiating (though not making) war and could require its support for significant military actions. And Congress has ample power to control the administrative state. Nothing also prevents the legislature from limiting the power of agencies: Laws could be more concrete and clear when passed, and major regulations could require congressional support. Congress also has ample power to oversee the implementation of laws by the executive branch. Finally, Congress certainly could limit the president by requiring approval of the exercise of emergency powers. Indeed, Congress might from the start set an end date for such emergency powers absent its approval. Congress has the power to right the ship of state. But it must want to use those powers.

Some have suggested more radical changes to Congress, such as limiting the terms of members. The power of incumbency is thought to preclude members from being responsible to their constituents. Reformers hope limiting congressional terms would make Congress more responsible to voters and to society at large. And the people agree: Term limits have been very popular for at least three decades. However, the Supreme Court

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invalidated this reform for Congress in 1995; a constitutional amendment would be required to limit congressional terms. Term limits would certainly make elections more competitive and perhaps members more responsive to their voters. Would such limits revive Congress in the constitutional order? Perhaps. But they are unlikely to be enacted for Congress (as opposed to state legislatures) unless enough Americans want to amend the Constitution to limit congressional terms.

These reforms could be the start of a congressional renaissance. In the decades since the New Deal, the Constitution has been reinterpreted, and our political institutions have changed considerably. The president seems all but supreme. But institutions do not live forever. We may be living through a transition to different and perhaps better institutions. A revived Congress could be part of that national renewal.

But significant changes will require most Americans to realize the established

order has failed. Many people might come to believe that a president acting on majoritarian passions is more likely than a more deliberative Congress to pursue endless wars or disastrous economic policies. And supermajorities might also come to see that presidential supremacy demands a concentration of power in the federal executive, power that can be used at one time or another to harm almost everyone. Only when the costs of direct action by one official become evident will the virtues of deliberation and compromise, the republican virtues, once again appeal to current Americans as much as they did to Madison’s generation. ✦

#### **ABOUT THE AUTHOR**

John Samples is a vice president at the Cato Institute, as well as the founder and director of Cato’s Center for Representative Government. He is currently working on a book-length manuscript about social media and speech regulation.