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A CASE FOR STRONGER CONGRESSIONAL COMMITTEES

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INTRODUCTION

With congressional partisanship at record highs and congressional approval ratings at record lows, the federal government's so-called "first branch" should consider reform. Two recent white papers (one analyzing the House;¹ the other, the Senate²) cast light on the nature of the admittedly complex problem. Together this research suggests that a significant amount of power has shifted to the chambers' leaders. The legislature has shifted from a "transformative legislature," which generates and develops legislation, toward an "arena," which functions to display political clashes or position-taking on externally generated legislation.

1. Jeffrey A. Jenkins and Charles Stewart III, "The Deinstitutionalization (?) of the House of Representatives: Reflections on Nelson Polsby's 'Institutionalization of the House of Representatives' at Fifty," paper prepared for presentation at the Congress and History Conference at the Carl M. Albert Center, University of Oklahoma, June 16-17, 2016. <https://archive.org/details/JenkinsAndStewartTheDeinstitutionalization-OfTheHouseOfRepresentatives>

2. Change footnote 2 to: James E. Wallner, "Unprecedented: Informal Rules and Leader Power in the United States Senate," paper prepared for presentation at the Congress and History Conference at the Carl M. Albert Center, University of Oklahoma, June 16-17, 2016. <https://archive.org/details/JamesWallnerUnprecedentedInformalRulesLeaderPowerInTheUSSenate062016>

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Congressional staff and policy wonks have an obvious interest in these papers, because they most immediately bear the burden of the implications. So, too, do the rest of us. Once we understand how the nature of Congress has shifted, we can understand why it does what it does and see a way forward.

Ironically, the clearest path ahead may be to go backward, away from a hierarchical, leadership-dominated model of operating the chambers to one that disperses more power to committees.

CONGRESSIONAL DYSFUNCTION

The American electorate agrees on very little, except its frustration with congressional dysfunction. According to a June 2016 study by the nonprofit Congressional Institute, only 12 percent of Americans approve of the job done by Congress.³ On average, voters actually have a higher disapproval than approval even of their own representatives. Voters are particularly furious, according to the study, because of lack of accountability and ineffectiveness. According to a CNN/ORC poll, 65 percent of Americans believe the most recent Congress was the worst in their lifetime.⁴

Other metrics also find Congress to be failing in its role. According to a Brookings Institution study, Congress has over the past few decades steadily passed fewer and fewer bills, a fact the media repeats frequently.⁵ Congress faces a greater

3. Congressional Institute, "Congressional Institute Reform Study," June 2016, p. 2. http://conginst.org/wp-content/uploads/2016/06/congressional_institute_reform_study_full_report.pdf

4. Mark Preston, "CNN/ORC poll: Most Think Congress Is Worst in Their Lifetime," CNN.com, Sept. 10, 2014. <http://www.cnn.com/2014/09/09/politics/cnn-poll-congress/>

5. Raffaella Wakeman et al., *Vital Statistics on Congress* (Brookings Institution, 2013), chapter 6. https://www.brookings.edu/wp-content/uploads/2016/06/Vital-Statistics-Chapter-6-Legislative-Productivity-in-Congress-and-Workload_UPDATE.pdf

partisan divide than ever, with – according to *National Journal* rankings – zero congressional Republicans who are more liberal than any congressional Democrat, and zero Democrats who are more conservative than any congressional Republican.⁶ Many factors are at play in this ideological sorting, but the analytical big picture is that Congress has transitioned from a “transformative legislature” to an “arena.”

According to the late political scientist Nelson Polsby, democratic legislative bodies can be divided between “arenas,” like the British Parliament, and “transformative legislatures,” like (at least for most of its history) the U.S. Congress. Arenas mostly serve as forums for debate and discussion—a means for an external government to gauge the variety of public sentiment on a bill—rather than for bill development or to pass legislation.⁷ Transformative legislatures, by contrast, actually create legislation through internal processes; their actions have tangible and practical consequences for how policy is developed, rather than simply revealing public opinion.

Given the prominence of Congress in the Constitution as the font of “all legislative powers,” it is property to conclude that it should function as a transformative legislature.⁸ Moreover, because the United States lacks a British-style government that exists external to Congress and drafts most legislation, if Congress fails to generate laws, the governance system falls out of balance; presidents and executive-branch agencies increasingly will legislate on their own.

Polsby defined a legislative body’s degree of institutionalization according to three factors:

1. Increasing boundaries separating the House from the outside world;
2. Greater complexity and specialization; and
3. Universal, automatic rules to govern its behavior.

Congress’ steady institutionalization, leading up to the 1960s, was characterized by specialized, career politicians, a hierarchy of seniority and an established structure, each of which reinforced its role as a transformative legislature. However, according to researchers Jeffrey A. Jenkins of the University of Virginia and Charles Stewart III of the Massachusetts Institute of Technology, these institutionalizing trends have, to a large extent, reversed themselves.⁹

6. Josh Kraushaar, “The Most Divided Congress Ever, At Least Until Next Year,” *National Journal*, Feb. 6, 2014. <https://www.nationaljournal.com/hotline/2014/02/06/most-divided-congress-ever-least-until-next-year>

7. Nelson W. Polsby, “The Institutionalization of the U.S. House of Representatives,” *American Political Science Review*, vol. 62, no. 1, pp. 144-168, March 1968. <https://www.jstor.org/stable/1953331>

8. U.S. Constitution, Article I, Section 1, 1789. http://www.archives.gov/exhibits/characters/constitution_transcript.html

9. Jenkins and Stewart, 2016.

Jenkins and Stewart first analyze Polsby’s claims regarding declining House turnover, which he saw as representative of increased boundaries to entry. They show that while Polsby was correct that House turnover declined leading up to the publication of his seminal paper in the 1960s, it plateaued in succeeding decades and has actually risen since 2010. Similarly, they demonstrate that the increase in the mean length of service, which grew rapidly in the 1940s and 1950s, stagnated after the 1960s and actually fell by 10 percent over the past decade. Thus, they conclude, the boundaries defining the House as a distinct institution have weakened.

They go on to illustrate a commensurate deinstitutionalization with respect to the House speakership in the years since Polsby’s analysis. Jenkins and Stewart’s data demonstrate that, between 1899 and 1971, 83 percent of House speakers had served longer than 20 years in the chamber and none had served less than 15. Since 1971, however, only 33 percent have served longer than 20 years prior to becoming speaker, while 22 percent had served fewer than 15. Furthermore, the trend of speakers living longer *after* they leave the Office of Speaker of the House demonstrates the speakership is no longer the culmination of a long career, as it was when the House was more institutionalized.

WAXING LEADERSHIP, WANING COMMITTEES

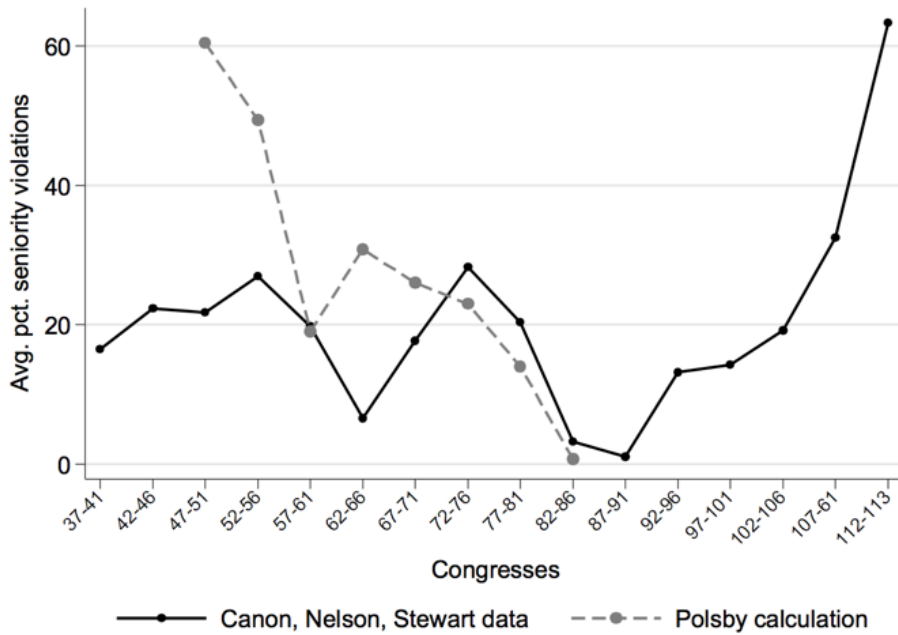
Committee growth in the early and middle of the 20th century was one primary facet of the institutionalization of the House. By the time Polsby wrote, committees had gained power, independent sovereignty and technical, specialized rules. However, under recent policies – especially those championed by former Speaker Newt Gingrich, R-Ga., in the 1990s – committees have seen their independent power erode.

Committee chairmanships during midcentury were almost exclusively determined by seniority, demonstrating the rule-based workings of an institutionalized chamber. The number of committee chairmanships that did not go to the most senior member of a committee declined, reaching 3.2 percent in the 1950s and 1.1 percent in the 1960s. Since then, however, this number has increased rapidly.

In the 1970s, partially due to Democrats’ replacement of conservative southern committee chairs, chairmanships not awarded by seniority jumped to more than 15 percent.¹⁰ Violations of committee chair seniority have proceeded to reach 32.4 percent of chairmanships in the decade of the 2000s and an astonishing 63.3 percent in the current decade.

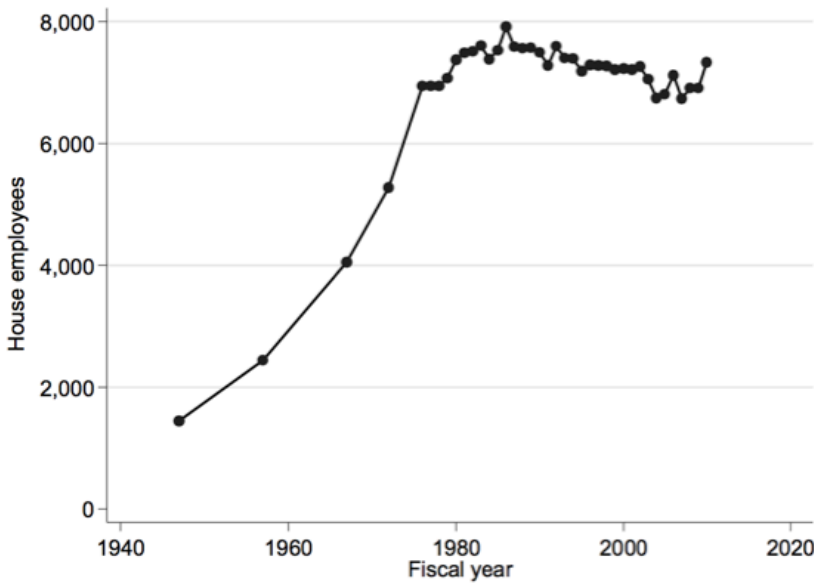
10. Larry M. Schwab, *The Illusion of a Conservative Reagan Revolution* (Transaction Publishers, 1991).

FIGURE I: VIOLATIONS OF COMMITTEE CHAIR SENIORITY, 1861-2013



SOURCE: Jeffrey A. Jenkins and Charles Stewart III

FIGURE 2: HOUSE PERSONNEL EMPLOYED, 1946-2010

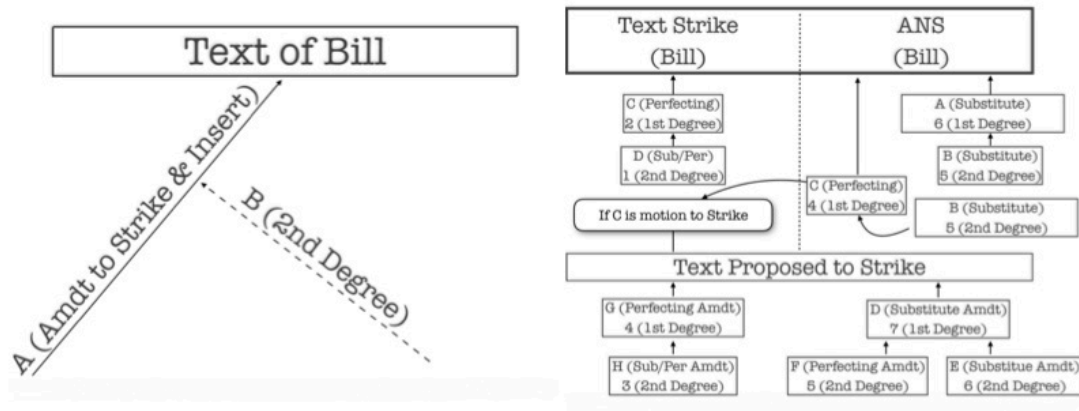


SOURCE: Jeffrey A. Jenkins and Charles Stewart III

Seniority rule in committees, which suggested institutionalization, was especially undermined during the Gingrich-era consolidation of power in political parties. As Gingrich strengthened political parties within the House, committees lost their independence and reliance on rules. Party discretion increasingly dominated who became committee chairmen, thus shifting loyalty away from one’s committee toward one’s party leader.

Even as committees declined in prestige, the number of party committees and whips rapidly increased. Although overall House expenditures and staff began stagnating in the 1980s and then declining since the 1990s, party leadership has been largely spared these cuts; committees have borne the brunt of them. Since 1993, House personal staff declined 0.9 percent, and committee staff declined 38.7 percent, but party leadership staff increased 53.0 percent, demonstrating a shift in the

FIGURE 3: EARLY VERSUS MORE RECENT SENATE AMENDMENT TREES



SOURCE: James A. Wallner

House centers of power to external political parties and away from House institutions.

How has this change altered the functioning of the House? The former power of committees created incentives to concentrate on one's committee work and hope for advancement to senior committee roles through established, institutional roles. With seniority now merely one of many qualifications, and chairmanship left to the party leadership's discretion, representatives must remain loyal to party leadership if they are to advance or accomplish their goals. Thus, parties, and their inherent focus on politics, have replaced the House's former focus on policymaking.

THE SENATE AND AMENDMENTS

Like House leadership, Senate leadership has recently gained increased power, as detailed in a paper by James Wallner, who until recently served as executive director of the Senate Steering Committee.¹¹ The Senate majority leader has used Senate precedent on amendments to dominate the deliberation process. Although these precedential rules arose largely to increase deliberation and orderly functioning of the Senate, Senate leadership currently uses them to prevent certain controversial amendments from being brought to the floor. Precedent, rather than constitutional mandate or self-imposed rules, governs much of Senate procedure. Like judicial decisions, precedents fill gaps in official Senate rules and can be used to alter rules unofficially when circumstances reveal flaws or defects. According to Wallner, precedents created by the chair's rulings on points of order, full Senate votes to appeal points of order or "responses by the Presiding Officer to Parliamentary inquiries" have established such features of Senate deliberation as the majority leader's "right

of first recognition," which gives him or her the first opportunity to propose amendments.

Rooted in House of Commons tradition, the Senate's first standing rules, according to Wallner's analysis, rarely sacrificed the benefits of greater deliberation to those of order. The Senate's rule prohibiting third-degree amendments (an amendment to an amendment to an amendment) and the precedent establishing that only two amendments could be pending at once were among few exceptions. These rules created what became known as an "amendment filing tree," a term that describes the diagram of possible amendments, insertions, deletions, substitutions, amendments to amendments and so forth.

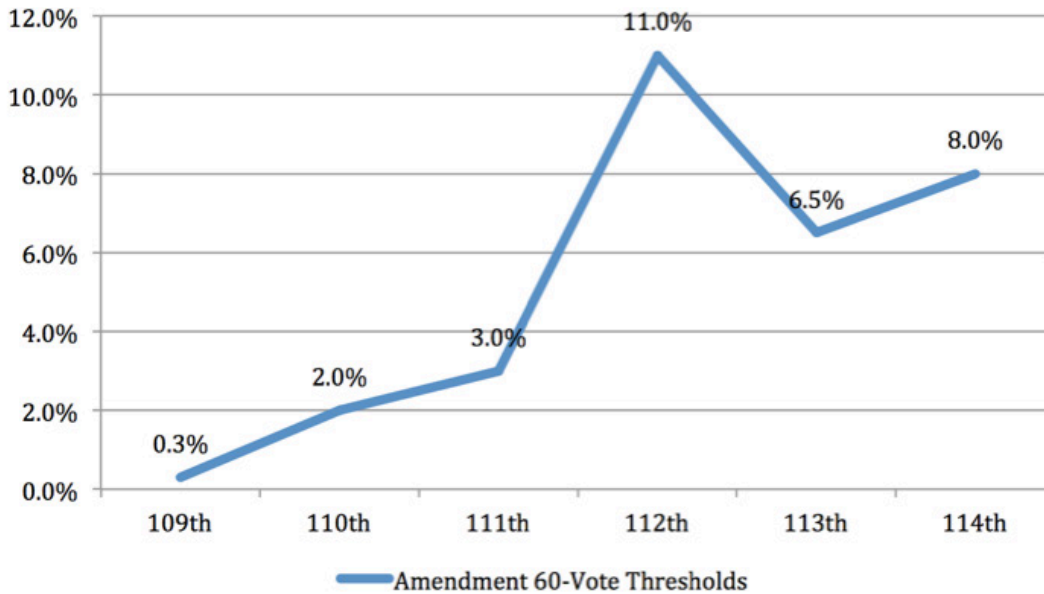
At crucial points, primarily driven by changing precedent, the degree and complexity of possible amendments in the "amendment filing tree" have expanded. This expansion is visually demonstrated by the two diagrams in Figure 3 above. Each new addition to the amendment tree arose from a desire to give rank-and-file senators a greater opportunity to amend proposed legislation.

Curiously, despite this expansion in potential for amendments, the amendment process itself has actually constricted. The number of amendments offered as a percentage of amendments filed for deliberation and vote has dramatically declined since 1993, from around 70 percent to around 20 percent.

The majority leader now uses these precedents, contrary to their original purpose, as a means to gauge Senate opinion more efficiently. The majority leader can "fill the amendment tree" by simply adding meaningless, "blocker" amendment that prevent further amendments to the bill. According to Wallner's data, in the three Congresses from 1989 to 1995, the

11. Wallner, 2016.

FIGURE 4: UC AGREEMENTS TO RAISE AMENDMENT THRESHOLD, 2005-2015



SOURCE: James A. Wallner

majority leader used this tactic only three times. However, in the last three Congresses, the majority leader used it 74 times. By filling the amendment tree, the majority leader can prevent unwanted amendments from receiving votes and can exert greater control on overall deliberation.

The majority leader also can merely threaten to fill the amendment tree, precluding a vote on the amendment, unless senators accept a 60-vote threshold for their amendment's passage. This ensures it would fail in a divided Senate. As the below chart from Wallner's paper demonstrates, the majority leader has utilized this threat much more frequently during recent Congresses. Why? According to a study by Anthony J. Madonna and Kevin R. Kosar, the majority leader restricts show-boating and divisive amendments to get bills passed.¹²

According to Wallner, by routinely offering third-degree amendments (as Sen. Ted Cruz, R-Texas, did in July 2015) and appealing to the chair, senators can generate a change in Senate precedent. Rank-and-file senators thus could permanently alter the balance of power between majority and minority and between rank-and-file senators and leadership. But by and large, they don't do this. Amendment-wielding senators tolerate the higher threshold because losing the vote is still regarded a win. By taking a position, they improve (or so they believe) their re-election odds.

12. Anthony J. Madonna and Kevin R. Kosar, "Could the Modern Senate Manage an Open-Amendment Process?" R Street Institute Policy Study No. 42, October 2015. <http://www.rstreet.org/wp-content/uploads/2015/10/RSTREET42.pdf>

INEFFECTIVENESS AND PUBLIC DISCONTENT

Congress as a whole is morphing from a "transformative legislature" into an "arena." As these white papers indicate, the House is deinstitutionalizing and the Senate is thwarting more amendments.

These findings fit with the picture of a Congress that operates more chaotically (particularly the House) and devotes more of its precious time to symbolic actions designed to garner media and public attention (evident in both chambers). The atomization of legislators has elicited an effort to impose control from the top down. Agenda-setting and policymaking power has therefore flowed upward. As a consequence, rank-and-file congressmen and minority party members increasingly feel and behave as outsiders who want to "fight the power." This makes getting things done even more challenging.

Rising voter discontent is fueled by Congress' shift toward an "arena." Voters overwhelmingly believe that congressional ineffectiveness is due to members' inability to work together, rather than national ideological differences.¹³

The public also laments the lack of congressional accountability for its failure to get things done, and is frustrated by its inscrutability. The arcane rules by which the Senate majority manipulates the amendment process are the norm for the legislative process, not the exception.

13. Congressional Institute, "Congressional Institute Reform Study," June 2016, p. 6. http://conginst.org/wp-content/uploads/2016/06/congressional_institute_reform_study_full_report.pdf

Furthermore, American voters are neither used to, nor desirous of, an arena-type legislature in the model of the United Kingdom. Voters wish to see their representatives actually work to develop, debate and pass legislation, rather than merely display their thoughts on legislation, likely developed by outside interest groups.¹⁴

CONCLUSION

How can Congress revert to a transformative legislature? The answer is to reinvigorate committees and subcommittees as power centers. There are various ways to do this. Here are three reforms that could advance this objective.

First, committee chairmen should be picked through seniority, instead of on the basis of their fundraising prowess or loyalty to party leadership. A mandated seniority rule for committee chairmanships would enable chairmen to serve longer terms and encourage them to take greater responsibility for developing working relationships with their fellow committee members and the policies they produce.

Second, the number of committees and subcommittees should be expanded, creating more policy-influential positions for individual legislators. Giving more legislators more policy sway would reduce their alienation and give them skin in the game of legislating. Their individual successes as legislators would be tied to their policymaking efforts.

Third, bills reported by committees should be called up for a vote as a matter of course. This would put an end to the habit of committees producing “messaging” bills, which aim to grab media attention but are never intended to be enacted into law. It also would reduce the resentment among committee members, who do not like seeing their hard-bargained compromises blithely cast aside.

In sum, a Congress of 535 individual operators clearly does not work well. Nor does a legislature that is directed by a few top leaders. The incentives of individual legislatures can be channeled toward the first branch’s collective good through the medium of committees and their subcommittees. As Woodrow Wilson long ago observed, “it is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in its committee rooms is Congress at work.”¹⁵

ABOUT THE AUTHORS

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Before joining R Street, Kosar was a research manager and analyst at the Congressional Research Service, an agency within the Library of Congress. There, he advised members of Congress and committees on a range of legislative issues. He has testified before Congress, and published reports and essays on variety of public policy and public administration subjects. His work has appeared in scholarly and professional journals, such as *Presidential Studies Quarterly*, *Public Administration Review* and *National Affairs*; and in popular media, including *National Review*, *Politico*, *Washington Post*, *Washington Monthly* and *The Weekly Standard*. Kevin earned a Bachelor of Arts from Ohio State University, and master’s and doctoral degrees in politics from New York University.

Adam Chan was a summer 2016 research assistant at the R Street Institute, and is completing his bachelor’s degree at the University of Chicago.

14. Tim LaPira and Herschel Thomas, “So What if Congressional Staff Levels are Declining?” LegBranch.com, June 27, 2016. <http://www.legbranch.com/the-blog/2016/6/27/so-what-if-congressional-staff-levels-are-declining>

15. Woodrow Wilson, *Congressional Government: A Study In American Politics* (Houghton Mifflin, 1885), p. 79.