

Partisan Rules Make Congress Much Weaker Than It Has To Be

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There are many reasons why congressional power has flowed from Congress to the executive and judicial branches. But without question the main culprit is hyper-partisanship that has resulted in congressional gridlock. When Congress cannot legislate it not only cannot make any new laws, it cannot correct an executive agency or any court whenever they misinterpret a law that is already on the books. As a result, the only lawmaking that goes on takes place in executive agencies or in the courts.

Like every unhappy family, Congress is unhappy in its own way. The House and Senate are unhappy in opposite ways: in the Senate everyone has too much power for the good of the institution; and in the House too much power is concentrated in the hands of too few people.

The effects are also the opposite: Nothing can get through the Senate unless it is as bipartisan as can be, while nothing can get through the House unless it is as partisan as can be. That's a formula for congressional inaction, and that means legislative power oozes to those who should be following the law rather than making it.

If we had to choose which patient needs help the most, we'd have to say the House, if only because we can better afford to have two bodies that behave like the Senate rather than two bodies that behave like the House. Most suggestions on how to fix the House focus on how we can improve the class of persons we send to the House, and I'm all for that. But until we can figure out how to elect a better class of Congressmen, we should focus on reforms that will not require a new set of players, or require changes in the law or Constitution that we may never get (and certainly won't get any time soon).

The rules that House majorities adopt to conduct business are a very good place to start. Rules of procedure do more to shape the political process—for better and for worse—than most people realize. In recent decades, both parties have chosen to adopt increasingly partisan, “winner take all” rules that make it easier for them to get more of what they want. They've done so with the best of intentions—to promote the partisan agendas they believe they were elected to enact. But the result has been to make the House a much more partisan body than it has to be, and that has made it much harder for the House to work with the Senate.

THE WAY WE WERE

Today's very partisan rules harken back to a day when partisanship was as great as it is today, but the parties were different. For most of the last century, the parties were more ideologically

diverse internally, and as a result they were more like each other than they are today. Each party had more in common with the other, and both parties were more like the country as a whole.

In those days, the outliers in both parties tended to agree with the other party whenever they disagreed with their own party. Progressive Republicans tended to agree with Democrats on issues when they disagreed with their Republican colleagues, and conservative Democrats tended to agree with Republicans when they disagreed with their Democratic colleagues.

Not everyone agreed that bipartisan parties were all that good of an idea. In the heyday of bipartisanship a major complaint of political scientists was that the two parties didn't stand for anything—that they tended to obscure choices and frustrate voters who had no big reason to favor one party over the other. This was the “problem” lamented by the APSA in their report, “Toward A More Responsible Two-Party System,” way back in 1951. (If only we had that problem today!)

Some folks realized that more ideologically aligned, parliamentary-style parties were fundamentally ill suited to work within our constitutional system of divided powers and eccentric constituencies. Austin Ranney famously responded to the call for more ideological parties by arguing, in effect, “be careful what you wish for.”

What few seemed to realize was that one of the effects of ideologically diverse party caucuses was to *minimize the impact that excessively partisan rules had on the political process*. To whatever extent the majority party was functionally bipartisan in its behavior, anything that the majority party could pass on its own was something that minority members could vote for as well.

Today, as the result of a whole host of reasons—from gerrymandering increasingly partisan districts, so that only the most partisan candidates can get elected to Congress; the “big sort” of voters into communities of interest that think alike, shop alike, and vote alike (Bishop 2008); a media culture that nourishes and inflames these already polarized voters; and a money machine that operates at the behest of either party to destroy any candidate who strays from the party line—the House now has two caucuses that agree among themselves on almost everything, and agree with the other side on virtually nothing at all.

The relatively recent development of more rigidly ideological, partisan caucuses has only served to show how partisan the old rules can be. After all, even the most partisan system of majority rule would tend to operate in a bipartisan manner,

so long as whichever party was in charge was itself somewhat bipartisan: Tyrannical rules don't seem nearly so tyrannical if the tyrant looks a whole lot like you. But change the tyrant and keep the tyrannical rules and things get real bad real fast. That's where we are today.

Case In Point: The Revival of the “Super Speaker” as a Weapon of Partisan Warfare

Unlike every other party officer in the House, the Speaker has to be elected by a majority of the entire House. The framers wanted it that way: They wanted someone who could not only

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speak to the House, but speak for the House. And the only way to guarantee that is to make sure the Speaker serves at the pleasure of a majority of the House.

This means that the Speaker needs more than a majority of the majority party to get the job: He needs the support of a super-majority, enough to constitute a majority of the entire House. And he needs that level of support all the time, because it can be withdrawn at any time. And that means that a minority in the majority party has the power to fire their own Speaker, if they want to.

Dissidents who will vote to fire a leader who doesn't agree with them are nothing new. What is new is the extremism of today's dissidents—what they're willing to fire their Speaker over, and how willing they are to do so. And the new willingness has a lot to do with the fact that the office has become so much more powerful than it used to be.

Among a vast array of other powers, big and small, today's Speakers have essentially been given the power to dictate what the House will be allowed to vote on. They can force the whole House to vote on whatever their caucus wants to vote on, even if it's going nowhere and is only going to score partisan points against vulnerable members of the minority party. And that happens a lot. Likewise, today's Speaker can *prevent* the House from voting on anything at all—even if an overwhelming majority of the whole House wants it—if a big enough minority of his caucus would fire him for allowing the vote to take place. And that happens a lot, too, though it's less noticeable.

This is a power that was never intended by the framers, and it's not found in the Constitution; it's given by rules of the House, adopted by partisan majorities for partisan purposes.

The power of the modern Speaker has become so great a prize that anyone who can control it, bend it to their will, or neutralize it doesn't have to negotiate or compromise or bargain with anyone else. That gives a determined minority in the majority party a *motive* to hold their Speaker hostage. And the requirement that the Speaker serves at the pleasure of the whole House and not just the majority of the majority—a requirement that was designed with a much weaker office in mind—gives them the *opportunity* to hold their Speaker hostage.

The result is a mismatch between a Speaker who has too much power to say “no” to what must be done, and not enough job security to say “yes.”

It wasn't always that way. In fact, the office of the modern Speaker was only invented a little over a hundred years ago, but it quickly turned into a Frankenstein monster that was killed by the very generation that created it.

What happened was that a Republican majority, who couldn't get anything done in the face of the delaying tactics of the Democratic minority, decided to change the rules of the House so as to strengthen their *party* by weakening *themselves*:

They essentially agreed to give their proxy—on virtually everything—to their Speaker.

As expected, Speaker “Czar” Reed promptly began to use this power to push the minority party around. What was *not* expected was that his successor, “Uncle Joe” Cannon, would use that power to push around dissident members of his *own* party.

This led, in 1910, to the most famous *coup* in the history of the House, when a bipartisan coalition in the House—consisting of Republican Congressman George Norris and a small band of his Republican colleagues, together with all of the minority Democrats—voted to change the rules of the House in order to clip the wings of the Republican Speaker.

What followed was a long period when the strength of Speakers depended less on raw power and more on qualities of individual leadership. An era when bipartisan coalitions could legislate whenever purely partisan majorities couldn't—or wouldn't. When Speakers like Sam Rayburn and Carl Albert and Tip O'Neil roamed the Earth.

In the last few decades the Congress has changed, and so has the office of the Speaker. Political polarization has purged most of the more moderate, bipartisan members of both parties. And both parties have adopted increasingly Cannon-like rules every time they come to power, all for the greater good of advancing their own partisan agenda.

So once again we have Cannon-era rules, which first broke down when an abusive Speaker began to push around a moderate minority in his own party. Only now the system is breaking down because an extremist minority has learned how to push around a more moderate Speaker in their own party. What to do?

IF NOT A “SUPER SPEAKER,” THEN WHAT?

First, we need to acknowledge that weaker Speakers had their problems, but governing didn't seem to be one of them. Because Sam Rayburn and Tip O'Neil couldn't dictate to the House, there was no reason for an extreme faction in their own party to move to fire them for not doing so.

Next, a lesson from the Cannon-Norris contest: Norris wanted to regulate the business of the House by taking away

the Speaker's power to dictate to the House—through a Rules Committee that was controlled by the Speaker—and put the Rules Committee under the control of the House, by electing its members through regional caucuses of House members. That reform was never adopted because the Democrats expected to get the majority—and the Speakership—in the next election, and they only wanted to clip Cannon's wings, not their own. But the idea was still a good one. If the Speaker doesn't have enough job security to do what needs to be done, then put that power someplace else.

During most of the last century that power was broken up and dispersed through the committee system. Speakers had the

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power to start members off on their careers by placing them on committees, but the absolute power that Cannon had over the whole House was distributed to committee chairmen, who had absolute power over the jurisdiction of their committees. Some committees were more important than others, but every committee was important to everyone at some point. And within the committees the seniority system was used to decide who wielded the committee's absolute power over its jurisdiction.

That system had its obvious flaws, in that it gave too few people too much power over some things, and at times some of those things were pretty important. But it was very effective in preventing the problem we have today, which is too few people having too much power over *everything* all of the time.

It's hard to imagine giving committee chairmen as much power as they had in the heyday of the committee/seniority system. But it's not hard to imagine changing the rules so that each side has some control over what comes to the floor. Committee seats and committee resources are allocated on the basis that each party gets something to work with, and each party gets to decide what to do with its share. The same principle can apply to the Rules Committee process. Each side could get to choose some amendments, with the majority party getting the majority of the amendments. But the majority doesn't get to choose for the minority, and the minority gets to propose something that the whole House has to vote on. Likewise, rules could be adopted that would make germane amendments in order whenever they had a certain minimum amount of bipartisan support.

It's conceivable that allowing the minority to play "gotcha" style politics with purely partisan amendments could lead, through some sort of "balance of terror," to a decrease in the use of amendments for purely partisan purposes. But that's not the important thing: Allowing the minority some limited right to insist on voting on an alternative to what the majority wants to vote on would definitely make it possible for the House to vote on bipartisan legislation even when a partisan majority doesn't want to. Each side should have the option to bring up a bipartisan measure whenever a purely partisan measure cannot pass the House, or has been rejected by the Senate.

The discharge petition process can also be reformed to allow for more bipartisan votes on more bipartisan legislation. Originally conceived, and used, as a way for the majority party to get around one of its own recalcitrant committee chairmen, it's now used mostly by the minority party for partisan purposes, in a (usually) vain attempt to embarrass vulnerable majority party members for not signing on to what looks like good legislation. As long as the petition requires a majority of the whole House, the rule puts pressure on the small number of majority party members who need to sign in order to reflect the views of their constituents, while exposing them to retaliation from their colleagues for doing so. But the

rules could provide for a much lower threshold for bringing legislation to the floor, provided there was a certain minimum level of bipartisan support. And anti-retaliation rules can protect members of either party from being pressured not to sign.

Another lesson from the Cannon-Norris contest: Changing the rules requires a majority of the whole House. And when that won't come from the majority party, it can only come from a bipartisan coalition of members of both parties.

There is the basis for a grand bargain here, if only those who have the power also had the nerve: The few remaining moderate Republicans should follow Norris's example and work with Democrats to change the rules of the House. Not to make it easier for partisan extremists to dominate their Speaker, or to make it easier for a partisan Speaker to prevent a bipartisan majority from doing what they want, but to make it easier for a bipartisan majority to act on legislation whenever a purely partisan majority cannot—or will not.

WE'D ALL BE STRONGER WITH A WEAKER SPEAKER

It's time we realized that both parties have helped to make the House even more partisan than it has to be, by adopting increasingly partisan rules as the means of getting their way on everything—especially in reviving a too-powerful Speaker as a weapon of partisan warfare. Both parties have played the role of Dr. Frankenstein in bringing this monster back to life, only now Igor has control of the monster.

We'd all be stronger—the moderates on both sides of the aisle, the House of Representatives, and the Congress—if we were to change the rules to make it easier for a bipartisan majority to vote for what they want. Only the extreme partisans would lose, and that's as it should be. ■

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