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Restoring the Deliberative Process

WHenever I talk to an audience about congressional process and the importance of maintaining the regular order in Congress, I can look over the crowd and see attention start to wander: people shift a little in their seats, their eyes get a bit unfocused, they look around more at the people nearby. Yet I continue to include material like this, because these issues matter deeply to our country. Adhering to its well-established procedures and restoring the deliberative process would strengthen Congress considerably as an institution.

Why Congress Needs the Deliberative Process

Not long ago, a group of political scientists asked what bothered me the most about Congress in recent years. The answer, I told them, was disturbingly clear: a lack of deliberation.

A few years ago, for example, the House dealt with three significant domestic priorities: tax cuts; a rewrite of Medicare rules to

provide for greater prescription drug coverage; and a bid to create a new energy strategy. Normally, bills on matters of such enormous importance would pass through an extended deliberative process of committee and floor review before going to a final conference committee of the House and Senate—a small group of senior legislators from both houses who work out the differences between the House and Senate versions of the bill. Yet in each case, Congress shortened the normal deliberative process and gave the conference committees the bulk of the responsibility for crafting the legislation, excluding most members of Congress from meaningful involvement. The White House negotiated the final version of the trillion-dollar tax cuts with just three senators and one member of the House. This is not a good way to make laws.

It is no longer unusual when Congress opts for shortcuts, or decides that the majority's goals justify whatever means are necessary to achieve them. Under Republicans and Democrats alike, both houses have been moving in this direction for some time, particularly on important pieces of legislation. It has reached the point where anyone who cares about the integrity of our most representative institution needs to sit up and take notice.

Americans often look with some disdain at the traditional way Congress considers legislation. Why go to all that effort? Bringing an issue before a committee, hearing what witnesses have to say, arguing over amendments to the bill before it even leaves the committee, sending a bill to the floor, arguing again over amendments, debating a final version, and then sending the House and Senate versions off to a conference committee—it can take months, and frequently years, for a particular measure to clear all those hurdles. The process seems convoluted and unwieldy.

But that is because too few Americans understand how much these details matter. The process of deliberation guarantees that their voices are heard and their freedoms protected. Committees are where members of Congress with different backgrounds, political philosophies, and regional outlooks build consensus—in essence, where they make sure that legislation meets the needs of a broad array of Americans.

Committees are also where members and their staff use the expertise they've developed in particular policy arenas to ask hard questions, consider the merits of proposals, and smooth out problems. This is also true of the process once bills leave a committee and move to the floor of the House or Senate. To a large extent, every stage is designed to allow Congress to explore all aspects of a problem, accommodate different interests, reduce points of friction and difference, and build a consensus in support of a bill. This is how Congress knocks out bad ideas and proposals, and adjusts good ideas to make them better laws.

Democracy is first and foremost about process. The Founders understood that *how* we reach a result matters. As congressional scholar Norman Ornstein observed, "The system of checks and balances and the legislative process as it evolved in the House and the Senate were built around deliberation . . . If there is one word at the core of Congress' essence, it is deliberation."¹ The Founders created a system to ensure that all proposals receive careful scrutiny, and that all voices are considered—not just those of a narrow majority.

I realize that as a former member of Congress I risk looking like a fusty old codger tut-tutting the harmless exuberance of a new generation. Certainly, winning policy battles matters for the 535 duly elected senators and representatives, all of whom feel strongly about issues and all of whom want to represent the best interests of their constituents. Yet winning should not be the only thing in a democracy, and what has been happening with increasing frequency in Congress is not harmless. There are real principles at stake these days on Capitol Hill.

When I was in the Congress, I often winced at a comment I heard with growing frequency: "Let's get on with it. We have the votes and we can do whatever we want." If all you care about is winning, perhaps process doesn't matter. But, to my mind, that is not how democracy works.

The democratic process is how we as a society examine the issues confronting us, attempt to reconcile competing views, and try to move forward even when we don't all agree. For this to work, all involved have to feel that, even if the process didn't produce the

outcome they wanted, it was still fair—their voices were heard, their opinions considered, all competing options weighed. When those in positions of power within Congress start acting as though these things don't matter, the institution loses legitimacy with its own members, and, more importantly, with the American people.

Omnibus Bills

By now you're probably familiar with one of the worst of Congress's problems: its habit of waiting until the last minute each fall to appropriate money for government agencies, then relying on a massive "omnibus" bill, which is often thousands of pages long and covers thousands of federal programs. Just as predictably, pundits at newspapers around the country then condemn federal lawmakers for hastily putting together a bill that no one can possibly read before it's voted on. Members of Congress ought to listen more carefully to these critics. The simple fact is that by allowing this practice to continue, they're behaving in an undemocratic manner.

In the past, Congress would take up its thirteen individual appropriations bills for defense, agriculture, energy, and so on according to a set schedule, allowing its members to scrutinize the bills with which they were unfamiliar and giving them opportunity to address unpopular or badly written provisions. That well-established process for carrying out Congress's fundamental "power of the purse" has been followed only once since 2001. Instead, many of the separate appropriations bills are combined into huge omnibus bills and brought to the floor of the House and Senate in a form that allows the proponents of the bill to ask a single question: Do we fund the federal government this year or not?

This sounds efficient and practical, so you might wonder what's wrong with it. Let's start with sheer size. Sometimes the bill lands on lawmakers' desks just a day or so—or even less—before they're due to vote on it. The package might contain funding for thousands of federal programs, both large and small. Clearly, it's impossible for legislators to know what they are expected to approve.

Not surprisingly, this offers plenty of opportunity for mischief. A few years ago, for example, a provision was inserted into an omnibus bill that would have allowed members of Congress and their aides unprecedented access to ordinary Americans' tax returns. It was caught only after the bill had been passed by both houses. No member of the House committee responsible for that section of the bill would own up to putting it in, and in the end a committee staffer took responsibility. Our elected representatives, in turn, were faced with the unpalatable choice of saying that they'd known about the measure but chosen to remain silent, or saying that they'd been entirely unaware of—and just approved—a highly controversial piece of legislation written by a nonelected staff member.

Sometimes a much larger issue is involved. One of the factors contributing to the recent financial collapse was that federal banking regulators were prohibited from keeping an eye on the "credit default swaps" which were purchased by many financial institutions to the tune of several trillion dollars. These "swaps" were a major factor in the subprime meltdown and subsequent recession. So why couldn't federal regulators oversee credit default swaps to make sure that there were sufficient funds to back them up? Such oversight was prohibited by a provision added in 2000 to a must-pass omnibus spending bill by a single senator at the very end of the session. A congressional aide later said about the provision, "Nobody in either chamber had any knowledge of what was going on or what was in it."²

Over the years, omnibus bills have contained numerous provisions that clearly would not have passed had they come up for a separate vote. It's a process that allows a few legislators—often those in the leadership and members of their staff—to bypass the traditional democratic processes that are supposed to govern Capitol Hill, undermining legislators' accountability to their constituents and the transparency representative democracy needs.

I recognize that there may be times when popular or badly needed legislation is bottled up by a recalcitrant committee chairman or held hostage by delaying tactics, and the only way to bring

it to the floor is through some vehicle like an omnibus measure. But it hardly seems worth preserving an omnibus process for such occasions if it is used far more often to evade simple democratic rule.

What is both most frustrating and most encouraging about all this is that nothing terribly dramatic needs to happen to return to a more democratic process. There have been proposals to require that members have at least three days to study legislation before voting on it, and this would be helpful. The real issue, however, is the omnibus practice itself. To fix that, members need to insist that Congress return to the “regular order”—taking up individual appropriations bills on schedule.

There was a time when legislators were keenly aware of the need for such a disciplined habit. On the House floor, when events seemed to be spinning out of control or the leadership appeared to be trying to finagle the process to hide some action it knew could not garner majority support, cries of “Regular order! Regular order!” would ring out. Not long ago, a commentator in the Capitol Hill newspaper *Roll Call* remarked, “Allowing the individual appropriation bills to be considered separately, on their own merits, has become so unusual that it is difficult to even say that it is the ‘regular order.’”³ That is an immensely sad comment on how far ordinary members of Congress have allowed their own prerogatives to be undermined. It should be a call to arms.

Congressional Debates Need Facts, Not Spin

Congress likes to think of itself as “the world’s greatest deliberative body,” and considering the issues it has to take on, it certainly merits the label. Our senators and representatives face grueling debates on fighting terrorism as a free society, enhancing economic chances for working families, shoring up the financial system, improving the long-term outlook for Social Security, reforming the tax code, and other knotty issues. Congress, after all, is where this diverse nation is supposed to come together to discuss and thoroughly air the challenges we face.

Yet in terms of not just the process, but the *content* of its deliberation, it still has a long way to go. This was brought home most strongly in a 2006 study by two respected political scientists, which stated that thoughtful congressional debate, rooted in facts, is actually hard to come by. Legislators often resort to “half-truths, exaggeration, selective use of facts, and, in a few instances, outright falsehoods,” wrote professors Gary Mucciaroni and Paul J. Quirk.⁴ This is not reassuring at this especially troubled moment in our history.

We all know that Congress doesn't always live up to the lofty standards we wish it to. Debate on the House and Senate floors can get long-winded, repetitious, and perfunctory. But this study probed deeper than that, exploring how truthful and accurate were claims made during forty-three separate debates between 1995 and 2000 on three key issues of that time: welfare reform, estate-tax reduction, and telecommunications deregulation.

Their conclusion was that in debates, only about a quarter of the claims made by members of Congress were supported by the facts; the other three-fourths were either unsupported or only partially supported by relevant evidence. In addition, “when others exposed speakers' claims as weak, the speakers in almost every case ignored the criticism only to reassert the dubious claims.” This brings to mind the infamous comment by Representative Earl Landgrebe of Indiana during the Watergate debate: “My mind is made up,” he said. “Don't confuse me with the facts.”

Even worse, the authors concluded that “congressional debate is typically no better than moderately informed . . . In a typical debate, the best that Congress achieves is a roughly even balance of fact and fiction.”⁵

I suppose this “facts don't matter” approach might sometimes be expected on the campaign trail. There, unfortunately, we have become accustomed to half-truths, distortions, and falsehoods, and voters have had to learn to take campaign statements with a grain of salt. But when Congress is in the process of making decisions on key issues confronting the nation, is it really okay with the American people that its members deal with each other in a straightforward

and truthful manner only half the time? I doubt it. Members of Congress simply must do better.

Some internal changes in the way Congress operates would improve the situation, as Mucciaroni and Quirk and others have suggested—extending the time for debate, reducing the number of omnibus bills, and restoring the central role once played by standing committees. Committees usually serve to refine and focus debates on the core issues, making it easier both for the American public and for other members of Congress to follow and take part in them.

In the end, though, I think there's no substitute for members and staff becoming more serious and more careful about how they prepare for and conduct debates. They are, after all, making the nation's laws, not trying to score debating points. The American people have an important role to play in this. They must hold their representatives in Congress to a high standard. They must insist that the decisions of Congress be rooted in solid analysis and factual information. Part of the intense dislike Americans have developed for Congress in recent years stems from disappointment in the quality of its political discourse and the prevalence of spin, distortion, and partisan mockery. As the Congress takes up a long list of formidable public policy challenges, it could go a long way toward restoring public confidence by debating them carefully, fully, and accurately, with respect not only for the truth, but for its own role in making the laws of the nation.

Why Congress Isn't Efficient, and Shouldn't Be

While Congress's shortcomings as a deliberative body may be responsible in part for its low public standing, there is another reason that probably trumps them: the widespread conviction that Congress is simply unable to act to get anything done—on Iraq, on health care, on any of the myriad issues that perplex and trouble the average American.

Wander into any conversation on the topic and you'll get an earful about why this is so: too much partisanship; too much arguing for argument's sake; too many special interests; too much political division in the country. One thing you're unlikely to hear, though, is the mundane but inarguable truth that Congress simply isn't set up to be efficient. It moves by inches for a very good reason: it was designed for deliberation, not speed.

Don't get me wrong. There really *is* too much destructive partisanship on Capitol Hill. There *are* too many people in Congress who confuse their party's talking points with productive debate. Capitol Hill *can* find itself so hemmed in by lobbyists and the expectations of campaign donors that progress becomes impossible. And when the country is up for grabs with divided government and a near-even split in the Congress, making progress is tough. Yet it is also true that by its very nature, Congress is inefficient. And though we might be disappointed sometimes that it can't act faster, in general we're better off as a result.

Think about how Congress was designed by our founders. They wanted to ensure that the body was representative of the American people, and that it provided a forum for reasoned exploration of the issues besetting the nation—in other words, they wanted reflection and deliberation before action. So they created the Senate and the House, which not only provide two different means of representing the country, but require that everything happen twice. Add to that the maze of subcommittees and committees that bills go through and the multiple hurdles they must pass, and it's no surprise that only a small fraction of the bills introduced ever become law. This is an arduous trek for a bill, and it makes for an endless variety of ways in which legislation can be amended or stopped outright. It also, however, provides an opportunity to consider thoroughly the implications and potential effects of each measure.

Beyond its structure, Congress is an immensely complex institution. Power resides not just in the leadership, but also in the committee chairs and ranking minority members, members acknowledged

to be experts in a particular field, successful fundraisers, particularly media-savvy members, and others. Then the Senate adds a layer of complexity. There, the ability to filibuster a measure means that effectively it takes sixty votes, not a simple majority, to pass legislation on controversial topics. This is an extremely high bar.

Moreover, Congress's very representativeness is at once its greatest strength and its greatest weakness. This is now such a diverse nation that the assumptions about public policy prevailing in a congressional district in Utah or Mississippi will be very different from, if not diametrically opposed to, those you might find in Los Angeles or much of New England. Congress is where all the varied points of view must grapple with one another, and where all the many private interests at play in the country, those with money and those with nothing but moral suasion, get their say. It's hardly surprising that it can take a while to sort all this out, especially in the House, whose members must stand for election every two years and who therefore are always keenly attuned to the political calendar.

To get a sense of what can happen when Congress does act speedily, look no further than the huge tax cuts approved in 2001 at President Bush's request; he said that taxes could be cut while also reducing the national debt and saving for future initiatives. Instead, annual deficits have soared. Likewise, recall the shock of members when they were later told by the administration that the Medicare prescription bill would cost hundreds of billions of dollars more in its first decade than they'd been led to believe.⁶ These bills were rushed through Congress at such a pace that they never got the detailed consideration they needed.

The truth is that Congress deals with the toughest issues in the country. Its job is to understand them thoroughly, weigh the beliefs and interests of an astounding variety of Americans, and consider carefully how to move forward. On the whole, we want to use the brakes on the process provided by the Constitution and by congressional structure; passion and speed are not conducive to good legislation.

Congress Should Not Be Just about Winning

When the House convened in January 2007 and power shifted to the Democrats, those who were watching got treated to a small but revealing moment. As John Boehner, the new minority leader of the House, was handing the House gavel over to the incoming Speaker, Nancy Pelosi, he looked out at the assembled members and told them, "Be nice." It might have sounded like a jocular and insignificant point, but if Congress follows any single admonition, I hope it's that one.

In truth, it shouldn't even need saying. For an individual legislator, cultivating good relationships with other legislators and treating them fairly ought to be a matter of habit. In order to get anything done, you have to work constantly to line up support from fellow members, hear what they have to say, and try to convince them that what you want to accomplish matters. Even if they don't agree with your goals, they'll still respect your efforts.

But treating those in the other party fairly is at the moment as much a group imperative as it is wise personal custom. Congress still hasn't gotten over an extended period in which fair and decent treatment of others was too often downplayed, and it created a toxic environment on Capitol Hill. Those in power have the opportunity to freshen the atmosphere, and every American has a stake in whether or not they make good use of it.

For if there's any single lesson to be gleaned from the Republican takeover after the 1994 elections or the recent shift back to Democratic control, it is that the manner in which a majority wields power has enormous consequences. If members of the minority party lose on issues of policy but believe that the process was a fair one, they might be frustrated but they'll abide by the results. If, on the other hand, they feel constantly slighted, ignored, shut out of the legislative process, and treated overall as if they have nothing to contribute to

the national dialogue, they will seethe with resentment. They will do everything in their power to frustrate the majority. And, the vicissitudes of politics being what they are, they will eventually be put back in a position of power.

Which is why I was somewhat disconcerted to see that the Democratic majority in the House, which certainly understands the sting of unfair treatment, has on occasion yielded to the temptation of its newfound power to shut down Republican participation—cutting off minority amendments, using procedural shortcuts, restricting debate. They often seem to forget how damaging mistreatment of the minority can be.

Those in the majority can always come up with reasons for taking shortcuts that allow it to act. That's not the point. The point is that in our democracy, the process is every bit as important as the legislation it produces. Fairness and trust should be the coin of the realm. Congress represents everyone, not just those who voted for members who happen to form the majority. Allowing the regular order of hearings, amendments, and debate to flourish—with fair restrictions to keep it wieldy, if necessary—would go a very long way to healing the scars of the last few years and make it less likely that Capitol Hill will return soon to the ugly bitterness that cost it so much public good will and led to legislative stalemate.

As I said at the beginning of this chapter, internal procedures can seem unbearably arcane and of little import to most Americans. Nothing could be further from the truth. The goal in the House—the most representative institution our nation possesses—is to create a process that is fair and that allows the nation's business to be done, while also letting the minority present an alternative policy, have it debated fully, and then see it voted up or down. The way the majority uses the rules is a basic test of that fairness: if it quashes the minority's ability ever to have its alternatives heard, it flunks.

Now, the House minority bears a share of responsibility, too. If its members are constantly playing little games to score political points, rather than developing serious policy alternatives, then it, too, shares the blame for undercutting the civility and fairness necessary for the House to work. As congressional scholar Norman

Ornstein put it not long ago, "If the minority uses the opportunity to offer amendments to exploit cynically the opening for political purposes . . . it soon will lose its moral high ground for objecting to majority restrictions on debate and amendments."⁷

So far, neither Democrats nor Republicans have covered themselves with glory on this front. The House ought to be a beacon of open, deliberative, and thoroughgoing debate, an institution that truly represents the diversity and fair-minded decency of ordinary Americans. Let us encourage our representatives to make Congress a model of open and fair treatment.

To Govern Well, Return to the Basics

At this moment, with an administration in the White House and newly invigorated majorities in Congress that were all brought into office on promises of "change," there is a fundamental question Washington must answer: If we are to fix our government so that it works competently, effectively, and democratically, how should we go about it? What, in other words, would it take to revive not only our system, but our people's faith in it?

The answer I've been suggesting may seem odd, given how badly askew most Americans believe things had gotten and how desperately they hope for a new order. Rather than "fix" our representative government, I believe that we need to let it function as it was designed to function. We have to return to the basics of our constitutional system, understanding and appreciating its intent and contemplating how this might apply to our vastly changed circumstances today. It's worth remembering that the basic operating manual for our government was written 220 years ago, when we were a much smaller, less complicated, less diverse nation, when communications and events moved much more slowly, and when the sheer breadth and scope of challenges facing the government—while hardly minor—were more manageable. If anything, it's remarkable that our system continues to work even reasonably well.

Returning to the basics means tolerating and encouraging lively debate and thorough deliberation. It means following the well-

established regular order which slows things down, gives all sides a chance to be heard, and allows a careful airing of the facts. And it means respecting the voice of those in the minority and making sure that every proposal faces hard questions and tough scrutiny.

We need to accept that there will inevitably be conflict—our system presupposes it—but that winning political battles is not the highest good; rather, resolving conflict within the constraints of the Constitution and according to democratic principles trumps the victory-at-all-costs mentality that has been so prevalent in recent years. Compromise and accommodation, especially in a nation with so many varied interests at play, are the key to policy success and political legitimacy. All of these steps strengthen the Congress as an institution, and help to restore the balance of power with the president that is so essential to the proper functioning of our representative democracy.

Yet even if all these things happen, restoring Americans' faith in the system will require one other thing: patience. While our government needs to respond to the demands of its citizens, under our system the response is typically slow because it's meant to be slow. Our government was not designed to respond to every passing fancy of the people, but rather to give judicious consideration to the nation's needs. Nor can it solve all of our problems. Our representatives may strive to sort out the hopes, desires, and dreams of the American people, and to come up with the best solutions they can, but the plain fact is that some problems are so difficult and our perspectives so varied that no solution might be forthcoming, even when the system is working well.

Our expectations, in other words, need to be high but realistic. We should look for a government that encourages cohesion and political stability, and safeguards individual freedom, prosperity, and peace. If it can do that, then the fact that it can't easily resolve every problem we confront will come to seem a tolerable imperfection, rather than the dismaying infirmity that so many Americans believe it to be today.