

Justice Barrett and congressional power

Congress was once the most important branch of government. This was no fluke. Our founders intended this, which is why they discussed Congress

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in article one of the constitution before they discussed the other two branches of government. Over time, Congress has become less influential. First, since World War I our nation has been in an almost constant state of war, cold war, or near war (our enemies have varied and included Germans, Japanese, Russians, and terrorist to name a few). Throughout these tense times, the Presidency has grown in power, mostly because the president is the commander in chief of the military. When our country faced foreign adversaries, the people looked to the president for leadership, and presidents have manipulated this situation to increase their power. Second, since at least the 1970s, Congress has delegated much of the responsibility for creating policy to bureaucrats. Congress

has passed some vague laws and allowed federal agencies like the EPA to create the important governing details. Third, in the last decade, laws passed by Congress have found a substitute. The presidents have been passing increasing numbers of executive orders. These orders do not require any action from Congress to go into effect. Fourth, Congress has given up some policy making power to the Supreme Court. Over many decades, the court has often attempted to do what it has thought was right or what it thought was good policy rather than merely trying to follow the law, especially in cases when they thought that the law led to bad outcomes.

Congress's decline is unfortunate. It is the branch of government that is closest to the people. When this branch works out a compromise, their agreement is probably one that people can live with and are willing to accept. If a bureaucracy, president, or court tries to work out a compromise, it is less likely to gain wide spread acceptance since these actors do not represent the people as closely as Congress does. Congress is the branch of government that is most able to reach compromises

that can settle the divisive issues of our time (or of any time). Our country needs an effective legislative branch.

Fortunately, Congress's decline will probably not be permanent. I see the reemergence of Congressional power as starting in the most unlikely place. I see it beginning when Amy Coney Barrett takes a seat at the Supreme Court. If she ushers in an era when the Supreme Court stops creating policy and only follows the law, Congress can no longer delegate policy making to the Supreme Court. Congress may start passing laws to resolve issues that the court will no longer decide.

If Congress can take some policy making responsibility back from the Supreme Court it may begin on a path that will lead it back to its once lofty status. To regain its preeminent position among the branches of government, it will have to take power back from the president and from the bureaucracy. I do not know if this will ever happen, but the confirmation of Amy Coney Barrett would give me hope that Congress might be starting this journey.