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## WHY ARE THERE NO COALITION GOVERNMENTS IN THE UNITED STATES?: A SPECULATIVE ESSAY

MARK TUSHNET\*

As the government approached a shutdown in 2013, one thing appeared clear: a majority of members of the House of Representatives were opposed to what seemed inevitable.<sup>1</sup> All the congressional Democrats and about twenty congressional Republicans seemed ready to adopt a budget that would have kept the government open.<sup>2</sup> Even more, House Speaker John Boehner appeared to be among those willing to adopt a budget.<sup>3</sup> But Speaker Boehner was unwilling to permit a vote on the relevant measures because a majority of his party caucus opposed one.<sup>4</sup> Were he to allow the vote, one might think – and he might have thought – the budget might be adopted but his caucus would immediately revolt and replace him as Speaker.

But, I wondered, was that really true? That is, was there some way for Boehner to retain his post of Speaker of the House even after a vote by the House Republican caucus to replace him? The answer seemed obvious, and obviously “yes.” He could have proposed a deal to the Democratic minority: “I will resign as Speaker of the House, thereby triggering a vote for a replacement. But I will have one of my twenty or so Republican supporters put my name up for the position. You, though, will not put up Representative Pelosi; instead, you agree to vote for me as the ‘new’ Speaker. What I get out of this is obvious. What you get out of it is a vote on adopting a budget and avoiding a shutdown (and, though Boehner would not say this out loud, ‘whatever concessions you can wring from me on such matters as chairing committees’).”<sup>5</sup>

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\* William Nelson Cromwell Professor of Law, Harvard Law School. I call this a “speculative essay” because I am a constitutional lawyer who believes that there are surely political scientists who would have clearer and perhaps obvious answers to the questions I raise here. The Essay can be regarded as well as an extended, anecdotal, and quirky footnote to Professor Yasmin Dawood’s contribution to this Symposium.

<sup>1</sup> *Can GOP End the Shutdown Now? Maybe Not*, NBC NEWS (Oct. 4, 2013), <http://www.nbcnews.com/politics/politics-news/can-gop-end-shutdown-now-maybe-not-v20821505>, archived at <http://perma.cc/95VS-XMUH>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> In late 2012, there were 232 Republicans and 201 Democrats in the House of Representatives, with two vacancies. MICHAEL BARONE & CHUCK MCCUTCHEON, *THE ALMANAC OF AMERICAN POLITICS 2012*, at 1810-14 (2011). If Boehner could bring nineteen

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This is a proposal for a coalition government (in the House), composed of a majority of Democrats and a minority of Republicans, with the latter in a strong enough bargaining position to extract concessions from the Democrats. But, of course, no one seriously thought that this was a real possibility (and I did not then, nor do I now). Why not?

In this Essay, I speculate about the reasons we do not see coalition governments in the United States, with the proximate aim of identifying interactions between some structural features of our political system – most notably, that Representatives are elected from individual districts – and the modern form political parties take. The ultimate aim of this sketch is to suggest that those who attribute the government’s dysfunction to the Constitution may be overstating the Constitution’s contribution to those interactions.<sup>6</sup> Statutes and norms – both of which are alterable given enough<sup>7</sup> political will – may be at the root of dysfunction. Of course, those statutes and norms are sufficiently embedded that, even if not constitutionally entrenched, they make coalition governments extremely unlikely. Speaker Boehner’s “decision” to forgo attempting to create one – really, the fact that the possibility probably never crossed his mind – was as close to a certainty as one can get.<sup>8</sup>

I begin with a relatively mundane account of political calculation. Perhaps Boehner might have thought that the coalition would last only through the next election, after which he would definitely lose the speakership. How might that happen? One way would be that Republicans would lose their majority in the House. That, though, is an ever-present possibility, and it would count against the coalition idea only if the very creation of the coalition would increase the Democrats’ chances in the next election (relative to their chances without a coalition and with a shutdown).

If Republicans retained their majority and enough of his allies won reelection, Boehner would be in a position to recreate the coalition government and continue as Speaker. So, another route to Boehner’s defeat would be that enough of his allies would lose their seats to challengers from the right, even as Republicans retained their overall majority in the House. With the right

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other Republicans along, he would be elected Speaker of the House with a total of 220 votes, prevailing over the Republican candidate, who would win only 213 votes.

<sup>6</sup> I take this approach as a way of getting beyond the obvious analysis of the sources of contemporary dysfunction: divided government and ideologically homogeneous and polarized parties. To some extent, my argument takes off from the observation that today’s congressional parties are not quite homogeneous enough to describe them as functionally identical to homogeneous parties in other nations.

<sup>7</sup> To make the argument interesting, “enough” here must mean “substantial political will, but less than that needed to amend the Constitution.”

<sup>8</sup> A preliminary observation is that the United States clearly has had coalition governments in some sense – in the context of divided government, one political party controls the presidency and the other party controls one or both chambers of Congress. I am interested here in the possibility of coalitions within one or both chambers.

numbers, this would have the effect of denying Boehner the possibility of recreating the coalition after the election.<sup>9</sup>

Exploring this route in a bit more detail opens up more general questions about the U.S. party system. Elections for the House of Representatives are district based.<sup>10</sup> That is, there is no “national” party that has the authority to select candidates for individual districts;<sup>11</sup> rather, the “national” Republican Party represented in the House is an aggregation of district-based parties. Consider now the electoral calculations of the twenty members of what we could call the “Boehner faction” or, more traditionally, “moderate Republicans.” In the posited scenario – and, as things turned out, in something close to reality<sup>12</sup> – those members must have believed that their electoral prospects *in their districts* would be better were they to vote for a budget rather than for a shutdown. It is not clear to me why those calculations would change were the vote for a budget the result of forming a coalition – and, more precisely, why the members would think that they were at greater risk of losing the district-based nomination as members of the coalition than as “lockstep” Republicans. Their challengers might call them traitors to the Republican Party, but they could respond that they were the true moderate or traditional Republicans.

One line of response would be to treat these moderates as risk averse. They might fear a flood of funds from outside the district to support a challenger in the party primary. These moderates could acknowledge that they *might* prevail against such a challenger, but might think they were *sure* to prevail if they

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<sup>9</sup> If Democrats retained their 201 seats and three of House Speaker John Boehner’s allies lost their seats (leaving him with only sixteen in his faction), Boehner would lose the speakership in 2015 by a vote of 218 to 217 (assuming that one Republican and one Democrat filled the vacancies that existed in 2012).

<sup>10</sup> Act of June 25, 1842, ch. 58, 5 Stat. 491; *see also* Reapportionment Act of 1929, Pub. L. No. 71-13, § 22(a), 46 Stat. 21, 26 (codified as amended at 2 U.S.C. § 2a (2012)).

<sup>11</sup> Today the national party apparatus does search for and support “high quality” candidates in individual districts, and may be in a position to direct enough resources to such candidates to scare away potential candidates who would come purely from within the district. My sense is that this occurs more rarely than national political operatives would like, and that the dominant process is one in which the national operatives identify someone already likely to win nomination within the district and throw their support to him or her (and then claim that their support was important to the candidate’s success in garnering the nomination).

<sup>12</sup> In the end, eighty-seven Republicans did vote for a budget, albeit after a shutdown. *House Vote 550 – Passes Senate Budget Compromise*, N.Y. TIMES, <http://politics.nytimes.com/congress/votes/113/house/1/550> (last visited Feb. 7, 2014), *archived at* <http://perma.cc/6LBT-D36N>. At the time they cast their votes, they must have thought that voting for a budget would be better for their electoral prospects than continuing to oppose adopting a budget. This is not quite the calculation I describe in this Essay (because this Essay takes into account the electoral effects, perhaps positive, of having shown some “spine” in allowing the government to shut down), but it seems to me reasonably close.

voted with the majority in the Republican caucus. Perhaps so, but challengers from within the party are not the only challengers the moderates must worry about. Districts represented by moderate Republicans are probably more likely to be districts in which Democrats can mount serious campaigns that threaten a loss of the incumbent's seat.<sup>13</sup> So, a risk-averse moderate Republican has to worry not only about losing in a primary but also about losing in the general election as a result of the positions he or she had to take to win the primary.

Moving to a much higher level of generality, perhaps coalition governments do not occur in the United States because such coalitions are characteristic of parliamentary systems, not separation of powers systems. For a government to function at all in a parliamentary system, there must be a majority in parliament to choose and then support a chief executive.<sup>14</sup> In a separation of powers system, the executive government is headed by a president elected separately from the legislature, and the president can run the government even when the parliament is unable to act.<sup>15</sup>

But not quite. The inaccuracies occur in both directions: That is, parliamentary systems can get along without a majority or a majority coalition, and a separation of powers system will ordinarily require a functioning legislative branch. Parliamentary systems can function with a governing coalition through the expedient of caretaker governments that administer the laws in place. For a period of more than 500 days in 2010 to 2011, Belgium had "no government," not in the sense that the national police failed to function, but in the sense that there was no majority coalition.<sup>16</sup> Having "no government" in Belgium did not mean that the national government shut down. Instead, Belgium had a caretaker government.<sup>17</sup>

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<sup>13</sup> Here, there are sure to be data with which I am not familiar, and if moderate Republicans represent districts that are as "safe" for Republicans as other Republican districts, a fair amount of my argument would lose support.

<sup>14</sup> See, e.g., Mark Eisen, Note, *Who's Running This Place? A Comparative Look at the Political Appointment System in the United States and Britain, and What the United States Could Learn*, 30 B.U. INT'L L.J. 295, 297 (2012).

<sup>15</sup> The rise of what then-Professor Elena Kagan called "presidential administration" illustrates this phenomenon, in the context of a legislative system that is effectively paralyzed across a wide range of issues. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>16</sup> Valerie Strauss, *589 Days with No Elected Government: What Happened in Belgium*, WASH. POST (Oct. 1, 2013, 1:55 PM), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/10/01/589-days-with-no-elected-government-what-happened-in-belgium>, archived at <http://perma.cc/HU5G-UCRD>.

<sup>17</sup> *Id.* For caretaker governments to work, though, the political culture must have developed some norms of cooperation, and nations without histories of caretaker governments may find it difficult to develop such norms on the spot. Without a history of coalition governments, the norms that allow them to form and persist do not exist in the United States, and are difficult to develop.

Caretaker governments not only operate the basic apparatus of government; they also collect taxes and spend them in some predetermined way.<sup>18</sup> And, typical separation of powers systems do not allow the president to levy taxes and spend money without legislative authorization.<sup>19</sup> So, there might be circumstances in which some sort of coalition government might be required even in a separation of powers system.<sup>20</sup>

So, perhaps the U.S. system of separation of powers could accommodate coalition governments. And, indeed, it has had them. For present purposes we can say that coalition governments have taken two forms: the *single-party* coalition and the *cross-party* coalition. Speaker Boehner's situation in 2013 illustrates both forms.

First, the district- (and state-) based nature of political parties means that each congressional party is in fact a coalition: Tea Party Republicans and moderate Republicans, for example. The factions within the coalition agree on some matters, and disagree on others. But, when the "party" holds together, it must be because they all believe that associating as a single party with a recognizable brand name is better than formally separating into discrete, easily identifiable factions. That will be true if the brand name conveys something

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<sup>18</sup> Cf. Richard Allen Greene, *Belgium Ends Record-Breaking Government-Free Run*, CNN (Dec. 6, 2011, 11:41 AM), <http://www.cnn.com/2011/12/06/world/europe/belgium-government>, archived at <http://perma.cc/576S-CJXG>; see also 1958 CONST. art. 47 (Fr.) ("Should the Finance Bill setting out revenue and expenditure for a financial year not be tabled in time for promulgation before the beginning of that year, the Government shall as a matter of urgency ask Parliament for authorization to collect taxes and shall make available by decree the funds needed to meet commitments already voted for.").

<sup>19</sup> According to Professor Dawood, in Canada the prime minister can obtain "a special warrant from the Governor General . . . to secure the funds necessary to run the government." Yasmin Dawood, *Democratic Dysfunction and Constitutional Design*, 94 B.U. L. REV. 913, 934 (2014). This allows the prime minister to run the government. And, the equivalent of presidential administration – the aggressive use of already existing delegated authority – might allow a prime minister to govern more generally by "legislating" new rules.

I note here the controversy over whether, facing an impending failure of Congress to authorize expenditures to pay for already-contracted debts, the President has the power to pay those debts even in the absence of an appropriation because failure to pay them would amount to an unconstitutional "question[ing]" of the public debt under Section 4 of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 4. Notice, though, that the controversy involved existing debts, not funds for ongoing operations, even at a level frozen at the moment funds ran out.

<sup>20</sup> Perhaps Congress could enact a statute providing a "general" continuing resolution, effectively appropriating the same amount of money in the absence of a budget as was appropriated in the budget most recently adopted. No ongoing coalition would be needed to ensure the continuing operation of the government. I am sure that this hypothetical statute would have to have many technical details to deal with the formalities of the appropriations process, but I assume that careful drafting could deal with that difficulty.

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about their areas of agreement, and those areas are more important than the areas of disagreement.

But, one might wonder why the single-party coalition holds together when its factions disagree over something important, such as the desirability of avoiding a government shutdown. That is, under these circumstances, why do defections not occur?<sup>21</sup> A standard answer is that the coalition's leaders have resources they can use to reward the faithful members and punish the unfaithful. For example, they may have amassed funds in "leadership PACs" that they can direct to a faithful member's campaign.<sup>22</sup> Or, as leaders within a chamber they can influence committee assignments, giving good assignments to their allies and bad ones to defectors.

Something like the obverse of the issue of leadership rewards and punishments operates on the side of potential defectors. Assume that defection matters only if enough members leave (or threaten to leave) the single-party coalition. Imagine, then, that a group of members meets as a cabal to plot a coordinated defection. Their action will succeed only if they all defect at once. But, how can each one be confident that the others will adhere to the plan? They may have their own leadership PACs with funds, but the coalition's leaders are almost certain to have more financial resources. And, whoever leads the cabal will have few other resources to keep the defectors true to the plan – no control over committee assignments, for example, unless the defection succeeds.<sup>23</sup> The risk of failure may be so high that the potential defectors never actually coalesce into a coherent faction that can act together.<sup>24</sup>

Note, though, that this problem would not arise were Boehner to pursue the strategy sketched earlier. He would remain Speaker, and could reward his allies with committee assignments, even to the point of giving them good assignments by taking the assignments away from the more conservative Republicans. More generally, when a faction's leader can credibly threaten that a defection will substantially shift the balance of power in the chamber, the leader will have the resources to reduce potential defectors' anxieties about the consequences of failure.

One might respond that Boehner's defection would destroy the Republican Party in the House. What, though, would "destruction" mean? Not, at least in the first instance, that individual Republican House members would lose their

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<sup>21</sup> Historically, that is indeed what happened with the collapse of the Whig Party. Issues that divided the Whig coalition came to eclipse in importance the issues on which the coalition was united.

<sup>22</sup> Or to a challenger's campaign, in the case of a defector.

<sup>23</sup> For an interesting recent study of a successful defection from a single-party coalition, see Ruth Bloch Rubin, *Organizing for Insurgency: Intraparty Organization and the Development of the House Insurgency, 1908-1910*, 27 *STUD. AM. POL. DEV.* 86 (2013).

<sup>24</sup> The evanescent lives of various "Gangs of Six or Eight" in the Senate suggests the difficulty of holding minority factions together in the face of leadership opposition. See, e.g., Gail Russell Chaddock, *Senate's 'Gang of Six' Key to Healthcare Reform*, *CHRISTIAN SCI. MONITOR*, Aug. 8-9, 2009, at 9.

seats. Rather, Boehner's defection would "destroy" the Republican brand name in the House. As long as some other brand name becomes available to each member, it is not clear why any member would care. Boehner's allies could brand themselves "Moderate Republicans" or "New Republicans" or "Classic Republicans." The more conservative members could be "Tea Party Republicans" or "Real Republicans" or "Classic Republicans" (the last possibility indicating that the struggle over brand names might be an interesting one). It is not clear to me why Boehner's allies – the potential defectors from the single-party coalition – would worry about the rebranding.<sup>25</sup>

Next, consider cross-party coalitions in U.S. political history. In the mid-twentieth century Congress was controlled by a cross-party coalition of Southern Democrats and conservative Republicans.<sup>26</sup> In the terms I have been using, the Southern Democrats defected from the majority "party" in both congressional chambers. The Democratic Party's congressional leadership was unable to prevent the defections by using the leadership's resources.<sup>27</sup> Southern Democrats were elected from what was then the one-party South, and again the district- and state-based character of congressional parties mattered. As repeated failures of attempted "purges" led from Washington show, the "national" party's leadership found it difficult to identify and successfully support challengers within the defectors' districts and states.<sup>28</sup> Nor were rewards and punishments using resources within Congress available. Committee assignments and much else turned on sheer seniority, and the party's leadership had little discretion in allocating these "within Congress" resources.<sup>29</sup>

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<sup>25</sup> This is particularly true because of the district-based nature of congressional parties. Under the circumstances imagined here, it would not be surprising to find that the general label "Republican" would (to use language from copyright and false advertising law) tarnish the reputation of the moderate Republicans in Speaker Boehner's faction *within their districts*, whereas the explicit label "Moderate Republican" would enhance their reputation there.

<sup>26</sup> See William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 204-06 (2001). This terminology, however, is somewhat inaccurate. Southern Democrats supported many welfare-state programs up to the point where such support would have enhanced the political power of blacks in the South, and were relatively more internationalist in foreign affairs than their Republican allies. *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> SUSAN DUNN, *ROOSEVELT'S PURGE: HOW FDR FOUGHT TO CHANGE THE DEMOCRATIC PARTY* 6 (2012).

<sup>29</sup> The Southern-conservative coalition of the 1950s was informal rather than formal and so, it might be thought, was more flexible than a formal coalition would be. I doubt that formality matters much analytically. A formal agreement can identify subject matters where the coalition partners agree to hold together – in the Boehner example, adopting a budget – and areas where the partners agree to allow each to pursue its own course. There could even be a "zipper" clause in the agreement stating that each partner can pursue its own course with respect to any subject matter not covered by the agreement, to deal with novel or

Notably, the leadership's inability to discipline defectors in the 1950s resulted from the seniority system. Reforms in internal congressional rules in the latter part of the twentieth century enhanced the leadership's power, thereby making defections more difficult.<sup>30</sup> Observe as well that much of my argument is predicated on the district-based nature of the congressional party system. Importantly from my perspective as a person interested in constitutional law, neither of these features is in the Constitution itself. The seniority system and its demise illustrate the power conferred in the Constitution on each chamber to set its own rules,<sup>31</sup> and there are no plausible arguments that the chambers are somehow constrained in the choice between a seniority system and some other system for allocating authority within the chamber. District-based elections, and so the district-based party system, result not from the Constitution but from an 1842 statute requiring that states elect members of the House from single-member districts.<sup>32</sup> That statute is understood today as an exercise of Congress's power under the Constitution to determine the "Times, Places, and Manner" of congressional elections (or more precisely, its power to displace state regulations doing so).<sup>33</sup>

I make these points to support the proposition that, contrary to some common assertions, the origins of whatever dysfunction there is in our contemporary national political process may not lie in the Constitution itself, but rather in subconstitutional arrangements that in principle could be displaced by ordinary legislation. District-based elections are self-reinforcing, in that current members of the House of Representatives, having been elected from districts, are quite unlikely to vote to shift to some other system, such as statewide elections with seats allocated by proportional representation.<sup>34</sup> Still, we have historical examples of political movements that induced sitting legislators to adopt reforms. Sitting legislators who had been nominated as their parties' candidates in conventions or by party bosses voted to shift the

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unanticipated issues that might arise during the coalition's life. As with zipper clauses in commercial and labor agreements, questions of interpretation would inevitably arise over whether currently some "new" issue actually fell within the scope of a provision on which the partners agreed to act together. I suspect that ordinary political calculations would lead to quite similar outcomes whether a coalition agreement is formal or informal.

<sup>30</sup> Sara Brandes Crook & John R. Hibbing, *Congressional Reform and Party Discipline: The Effects of Changes in the Seniority System on Party Loyalty in the US House of Representatives*, 15 BRIT. J. POL. SCI. 207, 209-10 (1985).

<sup>31</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>32</sup> Act of June 25, 1842, ch. 58, 5 Stat. 491.

<sup>33</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>34</sup> Such a change would convert district-based parties into state-based ones, with unpredictable results for the party coalitions in Congress. In particular, there would be substantially fewer state-based parties than district-based ones, which would reduce the costs of attempting to create a truly national party by influencing decisions made by the state-based parties.



selection mechanism to primary elections.<sup>35</sup> Senators who had been chosen by state legislators voted to submit a constitutional amendment to the states replacing that selection mechanism with direct popular elections.<sup>36</sup>

To conclude this speculative and farfetched exercise: Thinking about why we do not have coalition governments in Congress suggests that the Constitution may play a smaller role than statutes, ordinary policy decisions, and norms in creating whatever dysfunction we are now experiencing. If that is right, ordinary rather than constitutional politics could overcome that dysfunction – most obviously by a decision by voters to give control over the presidency and both chambers of Congress to a single party. Yet “voters” as an aggregate cannot make that decision. Coordinating decisions by individual voters is in the end the task of the political parties, and the district- and state-based nature of our political parties may be a serious obstacle. Put another way, the party mobilization needed to overcome that obstacle might have to be so substantial that it would be the equivalent of the mobilization needed to obtain constitutional amendments.<sup>37</sup>

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<sup>35</sup> Richard A. Clucas, *The Oregon Constitution and the Quest for Party Reform*, 87 OR. L. REV. 1061, 1072 (2008) (emphasizing the importance of states such as Oregon adopting the direct primary system, as opposed to the prior system where political parties selected the candidates).

<sup>36</sup> Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 TEMP. L. REV. 629, 636 (1991). I note that the latter change did involve proposing a constitutional amendment, but the shift away from the seniority system resulted from purely policy-level political calculations. See Crook & Hibbing, *supra* note 30, at 208.

<sup>37</sup> Here I allude to one aspect of Professor Bruce Ackerman’s account of (some) constitutional changes. According to Ackerman, substantial political mobilizations can have constitution-like effects even if they do not produce formal constitutional amendments. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 6 (1999). Ackerman puts less emphasis than I would on the importance of party organization in sustaining these mobilizations.