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Responsible Congress and Political Time

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Consider the apocalyptic premise and precautionary measures Bruce Ackerman proposes in “Before the Next Attack”. Terrible events *will* come in a form that makes “all comparison with September 11 pale”, he tells us, and the President will take precautions against a “second strike”. Ackerman knows that in the face of terrorism, the President, Congressional representatives, and a fearful public will unhesitatingly reverse discount. That is, they will sacrifice present civil liberty to reduce the risk of future death and destruction, picturing the next attack in catastrophic terms where the stakes are existential survival. Ackerman adds another element to this picture by predicting the “total implosion” of liberal democratic values and large-scale breakdown of the rule of law. He advocates protection against unchecked executive prerogative:¹ a statute that bolsters Congress’ institutional independence by giving Congress a device to limit unilateral presidential emergency power. The plan is formal and tied to constitutionally assigned responsibility: an initial declaration of emergency power that is time-limited, after which power lapses unless an escalating supermajority of votes in Congress continues the emergency regime.

Ackerman's statute has not been on Congress's agenda for many reasons, not least because both present and future infringements on liberty are not randomly distributed but fall on predictably vulnerable groups. Massive detentions that threaten us all are hard to imagine; we displace the costs onto others.² Ackerman also proposes that every election should select a "vice-representative" to serve in the event of a decapitating strike on Congress. We won't get that either; Thomas Mann and Norman Ornstein devote a chapter of *The Broken Branch* to leadership's abdication of responsibility to sensibly insure institutional continuity.

It is in this spirit that Sotorios Barber takes up the question "what is the best theory of the democratic responsibility of Congress?" He warns that "unlimited economic growth may be suicidal" and uses Congress's inattention to global warming to illustrate political "immaturity". Acting as sober agents for our future selves and for future others is part of what we mean by "grown up", and as Congressman Dick Armey confessed, "the practice of politics too often takes the form of professional juvenile delinquency: short-sighted and self-centered."³

I use these examples to underscore the tendency on the part of officials and commentators to swing back and forth between a myopic focus on the present and apocalyptic visions of future events that will change everything. Historically, the chief sources of eschatology were religion and philosophy, but except for "end of timers" and the rare Hegelian alert to the end of history, Americans don't live in sacred time. Instead, we predict apocalyptic secular events. Apocalyptic thinking is as much an obstacle to responsible government, I argue, as the stubborn "presentism" of news and election cycles it is in reaction against.

My theme is responsible Congress and the problem of *political time*. Consider four categories of political time: ⁴

- News time. It is now instantaneous, incessant, often visually recorded, and every moment is archived so that each instant can be resurrected and replayed.
- Electoral time. In the U.S. elections are held at regular intervals. However, like the war on terror, political campaigns have become permanent, with the result that elected officials make and frame legislation for strategic political purposes and literally spend less time on Congressional business.⁵
- Historical time. This is the stretch of time in which we see and understand ourselves coherently. It comprises the narratives of American history and identity that we project into the national future. It is the time frame of responsible political action.
- Apocalyptic time. Attention is riveted on some future event – certain, catastrophic, and irreversible -- that will change everything.

Perhaps democracies do not think about and plan for the future well. The grip of news time and electoral time seems inexorable. Although “the welfare of our children and grandchildren” is frequently invoked during campaigns, there are good political reasons why intergenerational sensitivity is mainly rhetorical. As Barber says, responsible democratic “guardians of interests” are politically accountable to voters who elect and sanction them, and who suffer from what has been described as blind retrospection and unenlightened self-interest.⁶ We could reasonably conclude that Congress’s

preoccupation with the present and inaction with regard to the future reflects constituents' preferences. Simply, the sanction of retrospective voting operates against imposing present costs on people to whom these burdens have not been persuasively justified. It turns out to be hard for men and women, personally and individually, to be good agents for their future selves (as in saving) much less for extensions of themselves (their children and grandchildren) and least of all for anonymous future generations. The obstacle is not just Publius' "sudden breeze of passion or every transient impulse", selfishness or complacency. It is also the limits of imagination about the future, absent a crisis that makes the need to take precautions and to pay present costs "cognitively available" and popularly desired.

When crises *are* immediate and brought home to us, we see a swing to the opposite extreme. Politicians can be counted on to be "worst-case entrepreneurs" and to announce "one-percent" doctrines; that is Ackerman's point. 9/11 enabled Congress to vote approval for the Patriot Act without reading the bill, and President Bush incessantly referred to the attacks and to the scenario of Saddam Hussein giving nuclear weapons to terrorists to arouse public support for the Iraq war. Cass Sunstein makes this point by contrasting Congressional response to ozone levels with non-response to global warming. True, it was not very costly for industry to move away from aerosols but as important, the public could picture a "hole" in the "protective shield" and death from skin cancer. Photographs of melting polar caps do not make the impact of climate change on us personally and individually sufficiently concrete.⁷ Similarly, the burden of high gas and oil costs is transient and diffuse, and not a dependable source of popular support for reformed energy policy. As a result, until recently the main recourse for stimulating and

sustaining popular attention has been the apocalyptic prediction that global warming will kill us all.

Barber is surely right to argue that part of democratic representatives' responsibility, along with being guardians of the people's interests, is to *create* a people that appreciates the need for disciplined political responsibility. (Or, as David Mayhew acidly remarked, we often seem to want a new people, not a new Congress.) If representatives succeed in the business of public education, then costly actions on behalf of future security and welfare not only care for the nation's true interest but also reflect popular preferences. It is with this in mind that theorists of deliberative democracy experiment with randomly chosen "citizen juries" and other nonbinding deliberative arrangements. The idea is to provide the public and Congress with the results of popular decision-making that is informed, unbiased, nonpartisan, and the product of sustained deliberation. The expectation is that the unofficial decisions made by "citizen juries" will be a much publicized and persuasive part of the mix of voices that seek to official decision-making: advocacy groups and self-styled public interest groups, news-time driven media, political parties, and corporate lobbying and campaign contributions directed at committee chairs and Congressional leaders in what is "widely viewed as a market for public policy".⁸ At present, news time and election time make elected officials vulnerable to constituents for whom danger is less "cognitively available" than costs. Indeed representatives may very well share their constituents' preferences and beliefs, and their tendency to discount the future.

Barber's discussion of the constitutional foundation of responsible government does not acknowledge the problem of political time. Instead, his focus is the traditional

problem of political space. He applauds the founders for designing institutions capable of producing ‘as nearly as possible right results’ on matters of common defense and general welfare. The political space of Congress in particular is constitutionally charged with deliberating, he tells us, and he identifies responsibility with deliberation. For Barber and political theorists generally, deliberation gives “public reasons” scope and rules out certain kinds of arguments and justifications. For Barber, it should make reasons grounded in experience and science, not authority, decisive.

It goes without saying that when it comes to catastrophic future events, experience has limitations as a guide to precautions or discounting the future. The category of scientific reasons has meaning in contrast to religious authority, but otherwise it is an insufficient ground for deliberation by responsible agents for our future selves and for future others. The difficulty of translating science into policy remains. (Are you an enemy of science if you disagree with the Stern Report, adopted by the British Government?⁹) So does the distinctive Congressional responsibility of translating policy into legislation. These are ineradicably political.

I want to take just a moment to acknowledge the difficulty of care for the future even for scientists and economists who take on all the known difficulties of assessing uncertainty and risk but are free of political responsibility. Take the precautionary principle – it is normally interpreted to require reasonably foreseeable adverse impacts, but in a worst-case scenario are officials obligated to take action even before credible evidence is secure? How do we guard against the possibility that attention to one risk will produce aggressive actions (as in Iraq) that create enormous costs themselves? This dilemma plagues policy-making for the future beyond matters of security and global

warming. In responding to the prospect of calamitous financial collapse, Congress “locked in full emergency mode, reacting and defending” has run up an enormous rescue tab; the danger as a New York Times editorial points out “is that in fighting today’s crises, the government is teeing up the next one...but frank acknowledgment of the dangers would put a premium on getting the rescues right today.”¹⁰ What about discounting? Does intergenerational justice require neutrality between lives today and future lives such that “present generations are obliged to take the interests of their threatened descendents as seriously as they take their own”.¹¹ If so, what does that entail? Some argue that without discounting we will reduce economic growth and impose even greater burdens on future generations, making their lives worse off. There’s the countervailing observation that regulation *creates* innovation, decreasing the costs of controlling emissions, say. But there is also the possibility of ecological limits to growth regardless of innovation. Economists are less humble than moral philosophers (even today, December , 2008) but they are just as unlikely to agree on the correct discount rate for future scenarios.

Scientists, ethicists, and economists can advise Congressional staffs, committees, and regulators on the choice of discount rate and its distributive effects or on an efficient “carbon price”. They can design policy and advocate for it. They publicize their positions in news and political time along with think tanks, organized interest groups, and lobbyists. Scientists, ethicists, and economists have to sell their expertise to a lay Congress, and members of Congressional committees must decide to put legislation to which these analyses and judgments apply on the agenda. Again, responsibility is not only a policy matter but also a legislative matter.

It is no overstatement to say that every challenge to a responsible Congress surveyed in these conference papers, every discouraging element of institutional dynamic, is compounded by the problem of political time. Legal scholars and political scientists have produced a long list of recent political obstacles to deliberation -- ranging from partisan polarization that results in subordination to the President and weak oversight to decision rules that violate “regular order”, preclude majority/minority debate on committees and in conferences, and produce results that are neither amendable nor transparent and that fail to articulate costs. Against this background, obstacles to addressing problems with long-term and uncertain horizons of harm on the one hand and assignable costs today on the other are even more formidable.

What are the distinctive obstacles political time poses to a responsible Congress? And what might encourage Congress, in the grip of news and electoral time, to attend to historical time and to think about the future concretely, in terms of reasonable precautions and discounting, and to put legislation for security and welfare on the agenda? Several inhibitions constrain Congress in assuming its charge of care for the future. I focus on the conditions of institutional responsibility, and only indirectly on representatives’ personal moral disposition to deliberate for the future.

First, as Barber’s constitutional foundationalism reminds us, Congress’s responsibility is for *national* security and welfare. Global warming wreaks damage no matter where it is produced, and has many different environmental effects in different places. One political difficulty is that the national costs and benefits of programs to reduce the impact of carbon emissions, say, are not complementary. Large costs are projected to be borne by the U.S.. These costs, including financial assistance to poorer

countries, may well be morally justified since we are a principal source of the stock of greenhouse gases and are comparatively rich, but the benefits of reducing global warming redound first of all to poor people in poor places. Thus, Thomas Schelling wrote that “greenhouse gas abatement is a foreign aid program...”,¹² and the Senate passed a unanimous, bipartisan resolution urging President Clinton not to sign the Kyoto Convention if it would injure the economic interests of the U.S. or if it failed to mandate scheduled commitments on the part of developing countries.

There are countervailing forces to a national perspective, of course. Moral philosophers underscore environmentalism as a universal obligation and religious leaders speak in terms of stewardship of the earth, urging us to see that our true self-interest is inseparable from altruism. Environmental advocates, too, operate in a moral key. The combination of apocalyptic terms in survival is at stake and moral terms of obligation to future generations and care of the earth are powerful, the sentiments widespread. Advocacy, lobbying, and the personal commitment of individual representatives could conceivably alter Congress’s sense of moral as well as practical urgency, and increase representatives’ appetite for enforceable international treaties. An empowered popular movement could expand presidential authority, as social movements typically do, and the executive could shift Congressional priorities by declaring, say, a Green New Deal.

That said, legislative politics will not be guided by moral obligation alone, even if moral advocates are politically organized. For the constitutional structure of election cycles and constituency forcefully support “presentism”. The two year House term, the comparatively small size and homogeneity of House districts, and representation understood in terms of responsiveness to constituents’ demands, attention to special

interests in the district, and provision of constituent services are all constraints. They are reflected in membership on specialized committees. Some differentials of Congressional conduct and policy can be explained by the Senate's longer term, heterogeneous constituency, and internal rules designed to facilitate more talk (a truly latitudinarian view of deliberation!). I do not know of a study that addresses the question whether this differential in election time, constituency, and internal rules matters when it comes to agenda-setting and deliberation for the future.

In short, the constraints of election time suggest that responsible governing would require altering public perception of the costs of reducing risk. The argument that developing a cheap way to control emissions is an opportunity for economic renewal, is one example; another is the promise of jobs from clean energy policy. We are now seeing this transition from the swing between presentism and apocalypse to historical time. Take Al Gore's recent New York Times piece, "The Climate for Change". The opening paragraphs point as expected to the "existential threat to the future of the human species". But Gore goes on to bring the "good news" that immediate investment in a 5-point plan to solve the climate crisis will put people to work creating 21st century technologies.¹³

The shift of focus from survival to jobs and investment is striking, and potentially politically enabling. Why? We could speculate that this shift is potentially effective because it directs attention from a catastrophe that is beyond voters' ken, global warming, to another that is "cognitively available", a once in a lifetime economic crisis. Or we could speculate that a focus on innovation is an emotionally welcome sea-change from fear to the more familiar mood of American optimism and self-congratulation on our potential for innovation and global leadership.

The main point, however, is that putting global warming in the context of investment in technology and job-creation makes correcting green gas emissions distributive. It focuses representatives on the potential for parceling out costs and benefits among geographic constituencies. It invites Congress to link a legislative agenda to their voters and their districts in a politically salient way. It does not remove the inhibition of electoral time, but could help to make election time more congruent with historical time. It puts precautions and discounting in the context of a coherent narrative about national identity and values.

That said, election time is not the optimum time frame if we want committed decision makers capable of being sensible consumers of expert calculations of precautions and discounts, which brings me to the third constraint. More than other aspects of Congressional business, responsibility for the future argues against term limits and suggests that incumbency and safe seats are not necessarily bad. Of course, entrenchment can serve interests adverse to responsible care for the future, but it also creates conditions for commitment to long-term legislative goals. There are advantages to experience and continuity in the composition of Congress, and re-election is not just self-serving or partisan. On this view, the competitiveness of elections is not the sole value it sometimes seems to be for scholars of election law and democratic theory. Again, entrenched office-holders can be on the wrong side of history, but Congressional leadership that can match expertise with committee roles is a sine qua non of responsible care of the future.¹⁴

Finally, consider voting theory and election time. The leading retrospective account sees elections as sanctioning of representatives' action (or inaction) during an

election cycle. Another account of voting speaks to the problem of political time in more promising terms. Its expression in political science is the notion that elections are not only about sanctioning but also about selection of “good types” defined in terms of consistency, intrinsic ability and competence. These representatives act on constituents’ behalf independent of reelection incentives. James Fearon presents the advantages of a selection approach by showing that elections as sanctioning devices have limited ability to induce politicians to do what the (median constituent) voter wants done, in part because of information deficits that make monitoring difficult. He argues that selection is at least as good a mechanism for producing responsiveness.¹⁵ We see that elections understood as opportunities to select “good types” is even more important when it is a matter of doing what voters would or should want done by responsible representatives. Choosing “good types” speaks to Barber’s insistence that responsible government is not just a matter of institutional design but also of personal commitment to deliberating on security and welfare.

If democracies are particularly bad at care for the future, we might ask what sort of government can we imagine doing a better job when it comes to precautions and discounting? Hereditary monarchy? Think of Henry V’s soliloquy ‘heavy lies the head that wears the crown’ about the king’s personal responsibility for England as *his* estate in Shakespeare’s play. But contemporary experience with proprietary rulers shows them to be predatory not precautionary. Political theorists laud civic republicanism; they invoke the Romans who valued future citizens as much as they did themselves. This account is not only idealized, in addition most versions of civic republicanism are parochial and inward-looking, not attentive to international politics and global problems.

Let's hope Congress can overcome the obstacles to responsibility for the future because if not democratic Congress, who? A nonpartisan "Commission for the Future" with responsibilities that reach far beyond the narrow ones of a districting commission? Courts? In an essay in this volume, Jack Beerman analyzes the Supreme Court's instruction to the EPA that in implementing the Clean Air Act the agency should include the effects of global warming gasses. But the case turned on statutory construction, and it is not clear that Congress had that intent the Court attributed to the legislation. Some state and local governments have taken action on global warming on their own, which may put pressure on industry to alter technology and lower costs, and which could influence elected officials at the national level, but it still falls to Congress to legislate. The President? Barber's theory of responsible government is only nominally about Congress; he asks whether "friends of responsible government would do better by conceding the case for presidential government". Similarly, Mann and Ornstein too locate their hopes for Congressional renewal outside Congress -- in new presidential leadership that will alter the divisive institutional dynamics of Congress.¹⁶

With this, we come full circle : if inaction or delegation by Congress, or deference to the executive, or passing decisions off to courts is a derogation of constitutional responsibility for the future, what can make representatives take care? I've pointed to some of the key obstacles and to some enabling conditions: moral urgency, institutional design and political incentives in the form of distributional possibilities, and recasting elections from sanctioning devices alone to the selection of "good types". Together they might loosen the grip of news and electoral time, lift the politically unhelpful cloud of apocalyptic time, and give historical time its moment.

¹ Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in the Age of Terror* (Yale: 2006).

² There are other problems: the reasonable assumption that the escalator is easily reversible by Congress, for one, and confidence that future incursions on rights are reversible for another. For a catalogue of the psychological factors that lead to cognitive distortion and displacement and lead to the choice of programs that are less effective in forestalling future attacks see Jonathan H. Marks, "What Counts in Counterterrorism", *Columbia Human Rights Law Review*, 2006: 102-135.

³ Richard Arney, "Compassionate Conservatism was a Mistake" *The Wall St Journal*, November 7, 2008: <http://online.wsj.com/article/SB122602742263407769.html>

⁴ David Runciman proposed these categories in "Does it Make Sense to Discount Liberty?" unpublished paper delivered to the Harvard Government Department Political Theory Colloquium, October, 2008, on file with the author

⁵ Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress is Failing America and How to Get it Back on Track* (Oxford University Press, 2006), p. 170.

⁶ Christopher H. Achen and Larry M. Bartels, "Blind Retrospection: Electoral Responses to Drought, Flu, and Shark Attacks", paper presented at the annual meeting of the American Political Science Association, Boston Marriott Copley Place, Sheraton Boston & Hynes Convention Center, Boston, Massachusetts, Aug 28, 2002.

⁷ A significant proportion of the public agrees in the abstract about reducing greenhouse gases but appears unwilling to pay costs out of pocket, Cass R. Sunstein, *Worst-Case Scenarios* (Cambridge, Ma., Harvard University Press:2007), pp. 42-3.

⁸ Stephen Ansolabehere, John de Figueiredo, and James Snyder, Jr., "Why is There so Little Money in U.S. Politics", *The Journal of Economic Perspectives*, Vol. 17 no. 1 (Winter, 2003): 105-130 at 114. They argue that the "investment" view of campaign finance cannot account for the discrepancy between the value of policy and the amounts contributed, or for the fact that most firms do not make political contributions. Legislators' votes, they conclude, depend almost entirely on their own beliefs and the preferences of their voters and their party.

⁹ Freeman Dyson, "The Question of Global Warming", *New York Review of Books* 55, no. 10 (June 12, 2008)

¹⁰ "Bailing Away", *The New York Times*, Sunday Opinion, November 30, 2008, 7.

¹¹ Sunstein, p. 12,

¹² Quoted in Sunstein, p. 47.

¹³ http://www.nytimes.com/2008/11/09/opinion/09gore.html?_r=2

¹⁴ As I write Rep. Henry Waxman replaced John Dingell as chair of the Committee on Energy and Commerce and upset the seniority system. Waxman is seen as more liberal on climate change and energy legislation.

¹⁵ James Fearon, "Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance", in *Democracy, Accountability, and Representation*, Adam Przeworski, Susan Stokes, and Bernard Manin, editors (Cambridge University Press: 1999), p. 56. .

¹⁶ We have to speculate as to why: the president's capacity as decider or presidential advantages in both mobilizing popular opinion and educating and proposing transformative political agendas The day after the 2008 presidential election Joe Trippi noted that Obama's socially networked campaign machine could be mobilized in support of his agenda and against members of Congress "standing in our way on health care". McClatchy, Washington Bureau, Washington Post, 11/05/08: mcclatchydc.com/homepage