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Britain's Road to Constitutional Gridlock, American Style

by Kathleen Hunker*

British tourists witnessed an odd sight when visiting the American capital earlier this fall. Standing before the war memorials and bird-harassed statutes was a collection of printed signs advising the public that the national attractions were closed as a result of a partial shutdown of the federal government. If the idea of a government shutdown was not odd enough, a quick internet search would have revealed that the shutdown did not come from an external crisis, such as a massive storm or financial collapse, but rather from the intended design of a constitutional actor, the U.S. House of Representatives.

As one might expect, the shutdown instigated a loud reaction worldwide as international spectators pondered how the American government could seemingly[1] bring itself to a standstill. Many commentators, including those in Great Britain, reasoned that the shutdown must be a product of destructive party politics and suggested that it was symptomatic of a greater breakdown in American democracy.[2]

These commentators, however, overlooked two important points. First, the characteristic gridlock of American politics is an intentional feature of the country's constitutional tradition, which views competition between government branches as a necessary check on political authority. Second, other democracies, including the United Kingdom, have adopted constitutional reforms that have opened up their governments to the same conditions that make constitutional gridlock possible. Thus, if the British public finds the obstructionist behavior seen in American politics distasteful, then it

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[1] Not all government services were suspended as a result of the shutdown. *See Government Shutdown: What's Closed, What's Open?*, CNN (Oct. 9, 2013), http://edition.cnn.com/interactive/2013/09/politics/government-shutdown-impact/.

[2] *See, e.g.*, Martin Wolf, *America Flirts with Self-Destruction*, FINANCIAL TIMES (Oct. 1, 2013), http://www.ft.com/cms/s/0/bca4c114-29d8-11e3-bbb8-00144feab7de.html#axzz2ndqNgfnF. *See also What the Rest of the World Thinks of America's Shutdown*, DAILY BEAST (Oct. 2, 2013), http://www.thedailybeast.com/articles/2013/10/02/what-the-rest-of-the-world-thinks-of-america-s-shutdown.html.

needs to reassess its approach to constitutional reform. Otherwise, the British public's zeal for checks on government authority could lead to the very same type of political antics.

A LESSON IN CONSTITUTIONAL GRIDLOCK:

The partial shutdown of the United States federal government represents a classical example of how the country's constitutional culture incites political gridlock. House members were concerned that President Obama's signature healthcare legislation, the Patient Protection and Affordable Care Act (PPACA), represented an unprecedented and unjustifiable seizure of one-fifth of the U.S. economy. They, therefore, used Congress' power of the purse and refused to pass a stopgap appropriations bill in the hopes of leveraging it for concessions that would mitigate the law's affects. After President Obama declined to negotiate, the previous stopgap budget expired, forcing the federal government into a partial shutdown until a new settlement was reached.[3]

Of course, this standoff between the Republican-controlled House and President Obama was not the first time a constitutional actor rebelled against the perceived excesses of the PPACA. Indeed, since its enactment, the law's implementation has been besieged by other government actors, wanting to corral what they believe is an illicit power grab.

Few can forget, for instance, the hullabaloo of the summer of 2012, when the U.S. Supreme Court came within one vote of declaring the entire law unconstitutional.[4] The Obama Administration certainly cannot forget the Court's 7-2 decision that dismantled the law's attempt to compel states to expand Medicaid.[5] Since that fateful decision, half the states have refused to expand Medicaid,[6] and another twenty-seven have refused to set up the health insurance exchanges needed to distribute federal subsidies to individuals interested in buying qualified health plans.[7] Some experts now predict that these acts of rebellion may prove fatal to the law's implementation.[8]

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[3] *See* Holly Yan, *Government Shutdown: Get Up to Speed in 20 Questions*, CNN POLITICS (Oct. 1, 2013), http://www.cnn.com/2013/09/30/politics/government-shutdown-up-to-speed/.

[4] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[5] *See id.* at 2608.

[6] *Where the States Stand on Medicaid Expansion*, ADVISORY BOARD COMPANY, http://www.advisory.com/Daily-Briefing/Resources/Primers/MedicaidMap (last visited Dec. 9, 2013).

[7] Drew Desilver, *Most Uninsured Americans Live in States That Won't Run Their Own Obamacare Exchanges*, PEW RESEACH CENTER (Sept. 19, 2013), http://www.pewresearch.org/fact-tank/2013/09/19/most-uninsured-americans-live-in-states-that-wont-run-their-own-obamacare-exchanges/.

[8] *See, e.g.*, John Davidson, *States' Refusal to Establish Exchanges Could Undo Obamacare*, DAILY CALLER (Jan. 17, 2013), http://dailycaller.com/2013/01/17/states-refusal-to-establish-exchanges-could-undo-obamacare/#ixzz2n2q4YPjH.

As of this fall, the House has voted to repeal or otherwise undermine the law forty-two times. In addition, twenty-eight states have filed suit in response to the act,[9] and multiple legal challenges continue to work their way back to the Supreme Court.[10] When it comes to a perceived overreach of power, various constitutional actors within the American government are poised and willing to obstruct the PPACA's implementation—the fact that the law was officially enacted notwithstanding.

GRIDLOCK IS NOT A FLAW; IT'S A FEATURE:

Unsurprisingly, the subsequent political turmoil was the subject of many jeers from the British public, who watched with schadenfreude-like disbelief as the American government seemingly paralyzed itself. Commentators were quick to disparage the shutdown as the latest proof of Washington's "chronic dysfunction" and often suggested that the gridlock was indicative of a larger breakdown in American democracy. [11]

But what the editorials, broadcasts, and sarcastic Tweets often failed to appreciate was that the shutdown was not the result of some modern addition to American politics or even some unusual level of party bickering. Since the modern congressional budgeting process took effect in 1976, the United States government has experienced eighteen government shutdowns.[12] These shutdowns have been initiated by both political parties and, on occasion, have been used by even the President's own party to force concessions.

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[9] Twenty-six states jointly filed suit in Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). Two states filed separately in Virginia v. Sebelius and Oklahoma v. Sebelius.

[10] For example, Sissel v. U.S. Dept. Health & Human Serv., a case challenging the Affordable Care Act under the Origination Clause, is now before the Court of Appeals for the District of Columbia. *See* Sissel v. U.S. Dep't of Health & Human Servs., CIV.A. 10-1263 BAH, 2013 WL 3244826 (D.D.C. June 28, 2013); Valerie Richardson, *Forty House Republicans Side with Obamacare Origination Clause Suit*, WASH. TIMES (Nov. 17, 2013), http://www.washingtontimes.com/news/2013/nov/17/forty-house-republicans-side-with-obamacare-origin/?page=all.
Also, Halbig v. Sebelius is currently pending in federal district court. *See* Michael F. Cannon, *An Update On Halbig, and Other Lawsuits That Could Make the Decrepit HealthCare.Gov Look Like A Hiccup*, FORBES (Oct. 30, 2013), http://www.forbes.com/sites/michaelcannon/2013/10/30/an-update-on-halbig-and-other-lawsuits-that-could-make-the-decrepit-healthcare-gov-look-like-a-hiccup/. Lastly, eighty-seven other suits have been filed against the Department of Health Human Services for its interpretation that employers must provide health insurance covering certain contraception methods and abortion-inducing drugs.

[11] *See* Gary Younge, *And So America's Skewed Democracy Lurches on Toward Its Next Crisis*, GUARDIAN (Oct. 17, 2013), http://www.theguardian.com/commentisfree/2013/oct/17/america-skewed-democracy-debt-ceiling-shutdown; Michael Cohen, *Q: Who's to Blame for Government Shutdown? A: the Republican Party*, GUARDIAN (Sept. 30, 2013), http://www.theguardian.com/commentisfree/2013/sep/30/government-shutdown-blame-republican-party.

[12] *See* Dylan Matthews, *Here is Every Previous Government Shutdown, Why They Happened and How They Ended*, WASH. POST, WONK BLOG, (Sept. 25, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/25/here-is-every-previous-government-shutdown-why-they-happened-and-how-they-ended.

Instead, the shutdown was the predictable, nay, the intended result of a constitutional system that views constant mistrust and competitive struggles between government actors as necessary checks to political power.

In this respect, the United States stands apart from most nations. Whereas a majority of constitutional traditions structure their political system around collaboration and coalition building, the United States Constitution sets its political actors in jealous competition with one another—what Americans call checks and balances.[13] Ideally, this prevents any one political body from accumulating too much power and becoming a threat to liberty.

Unlike the United Kingdom, which values comity between political branches, the American political tradition is built upon the mistrust of power—a fear that does not subside with a successful election or the enactment of a law.[14] Rather, the Constitution grants each actor, whether federal or state, unrelenting opportunities to obstruct legislation, and the distrusting political culture offers actors the motivation to take advantage of them.[15]

In short, the intended aim of the American political tradition is to obstruct bad laws, not push good ones through. Thus, the shutdown and other challenges facing the Affordable Care Act do not indicate a breakdown in American politics, but rather a sign that the constitutional system is working as intended.

BRITAIN MAY SEE TRAFFIC UP AHEAD:

More to the point, British criticism of the shutdown failed to connect the repercussions of divided government and its ensuing gridlock with recent reforms taking place in the United Kingdom. Under the traditional model, Parliament is legally sovereign. There are no legal limitations on its legislative competence, and no constitutional actor may question the legitimacy of its legislation.[16] The country relies on political pressure, the rule of law, and self control to discourage government officials from trespassing on its citizens' liberty.

Over the past few decades, however, the United Kingdom has adopted several reform measures in its constitutional structure that have moved the country away from parliamentary sovereignty and towards an American-style system of divided power and checks and balances. In 2005 for example, Parliament implemented the Constitutional

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[13] *See* THE FEDERALIST NOS. 10, 51 (James Madison).

[14] *See* THE FEDERALIST NOS. 47, 48 (James Madison).

[15] *See* Kathleen Hunker, *Elections Across the Pond: Comparing Campaign Finance Regimes in the United States and the United Kingdom*, 36 HARV. J.L. & PUB. POL'Y 1103 (2013) (observing that the United States' presumption that public officials lack trustworthiness gives constitutional actors an incentive to intervene).

[16] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 203 (6th ed. 1902).

Reform Act, which removed judicial powers from the House of Lords and gave them to a newly-created Supreme Court.[17] Parliament has also adopted the Human Rights Act 1998,[18] which not only gave a set of rights 'first-among-equals' status but also granted the courts the ability to declare an act of Parliament "incompatible." Of course, the law stopped short of granting U.K. courts the power to overturn duly enacted legislation. [19]

At first glance, these reforms do not appear to have generated a great deal of constitutional gridlock. Parliament still retains final legal authority, and constitutional actors have been mindful in avoiding direct conflicts with Parliament.[20] Put differently, the new reforms may have given the courts and other bodies the opportunity to hinder Parliament, but they do not seem eager to engage.[21]

That is not to say that the courts and other actors stand idly by when the government attempts to infringe on fundamental liberties. Even without the direct power to overturn laws, the courts often review the discretion of administrative officials and, absent a compelling interest, censor any actions that violate fundamental rights.[22] The courts have also refused to presume that Parliament intended to legislate contrary to the rule of law, meaning that the legislature must use express language if it wants to violate fundamental rights and squarely confront the public with its intentions.[23] More recently, the courts have issued declarations of incompatibility, advising both Parliament and the public that certain legislation breached the U.K.'s obligations under the European Convention of Human Rights.[24]

These practices, however, keep to the British tradition of using political pressure as a check on government power and flail in the event of an unambiguous command

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[17] *See* Constitutional Reform Act, 2005 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2005/4/pdfs/ukpga_20050004_en.pdf.

[18] Human Rights Act, 1998 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1998/42/contents.

[19] Parliament unambiguously declined to extend the power to set aside primary legislation in part because Parliament feared that the power would "draw the judiciary into serious conflict with Parliament." HOUSE OF COMMONS, RESEARCH PAPER 98/24: THE HUMAN RIGHTS BILL, BILL 119 OF 1997–98 (quoting Home Office, *Rights Brought Home: The Human Rights Bill,* CM 3782 at 9–10 (1997)) *available at* http://www.parliament.uk/documents/commons/lib/research/rp98/rp98-024.pdf.

[20] *See* Hunker, *supra* note 15, at 1132–34.

[21] This analysis omits the European Court of Human Rights because it is a political body outside of the British constitutional tradition of comity. However, the ECtHR already has expressed a willingness to challenge parliamentary legislation, opening the British government to a new form of constitutional and political gridlock.

[22] *See* R v. Sec'y of State for the Home Dep't, *Ex parte* Brind, [1991] 1 A.C. 696 (H.L.) at 748–49 (Eng.) (applied to the fundamental right of free speech).

[23] *See* R v. Sec'y of State for the Home Dep't, *Ex parte* Simms, [2000] 2 A.C. 115 (H.L.) at 130, 131 (Eng.); R v. Sec'y of Dep't, *Ex parte* Pierson, [1998] A.C. 539 (H.L.) at 587 (Eng.).

[24] *See, e.g.*, Nasseri v. Sec'y of State for the Home Dep't, [2007] EWHC 1548 (Admin) (declaring provisions of the Asylum and Immigration Act 2004 as incompatible with a rights arising under the European Convention of Human Rights).

from Parliament. More important, by comparison to the American judiciary, British courts are more circumspect in their use of their supervisory authority to frustrate Parliamentary policies, preferring instead to trust the legislature's commitment to the public interest.

This is in large part due to the importance comity plays in Britain's political culture. As abovementioned, the United Kingdom operates under a system of political checks and self restraint. Constitutional actors trust one another to act in the public interest and in accordance with the rule of law.[25] As a consequence, each political body shares a tacit agreement not to encroach too much on the others' spheres of expertise. Comity, therefore, tempers the willingness of the courts and other constitutional actors to obstruct legislation.

However, that peace may not hold. As Britain's new constitutional actors mature and become more confident, they will have a growing temptation to test the limits of their authority. And that experimentation will come at a price. Divided government has the tendency to erode shared feelings of cooperation. It gives political bodies separate interests that are distinct from one anothers'. It also gives them a stake in preserving their own authority, making them jealous of any perceived encroachments—in other words, making them mistrustful.

Thus, every time a constitutional actor checks the perceived excess of another, they risk reducing trust in and among government officials, undermining the expectation that each political body will respect the confines of its office.[26] This forms a dynamic where checks among the government's various branches undercut the self-control that is so essential to the British model. Divided government itself creates opportunities and the incentives for political actors to engage in constitutional gridlock.

CONCLUSION:

What does this all mean? The changes to Britain's constitution could have the eventual consequence of creating the political conditions that incite gridlock. The U.K.'s constitutional reforms have introduced structural devices, like declarations of incompatibility, which give constitutional actors the ability to hinder parliamentary legislation. Although the willingness of constitutional actors to engage in this type of behavior is tempered by the principle of comity, that principle could flounder if the forces of divided government erode the amount of trust shared throughout the British system. Put simply, the reforms give the branches of government both the opportunity and the

[25] Lord Lester of Herne Hill, QC & Lydia Clapinska, *Human Rights and the British Constitution*, *in* THE CHANGING CONSTITUTION 62, 64 (Jeffrey Jowell & Dawn Oliver eds., 5th ed. 2004).

[26] DAWN OLIVER, CONSTITUTIONAL REFORM IN THE UNITED KINGDOM 25–27 (2003).

possible motivation to obstruct Parliament's perceived overreaches—conditions that lead to gridlock.

That is not to say that the British public should expect to see "Sorry, We're Closed" signs lining the halls of Westminster any time soon. There are very important structural differences between the British and American political systems that make that particular type of obstructionist behavior less likely in the U.K. In addition, it would take time for relations between constitutional actors to sour.

However, the British public needs to take a moment and reassess the direction of its constitutional changes. Regardless of their purpose, these reforms stand poised to shift the direction of the British constitution away from political checks and towards divided government, with all the complications and hiccups that it entails. If citizens of the U.K. truly find the American system of constitutional gridlock distasteful, they should exercise prudence before mimicking American institutions. Otherwise, their zeal for constitutional change could lead to the very type of political tomfoolery that has become the butt of their late night jokes.