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President and Congress: A Bicentennial Perspective

By Thomas G. West

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The Heritage Foundation and The Claremont Institute recently published *The Imperial Congress*, a book highly critical of the way Congress does its business today.

The *Washington Times* review of *The Imperial Congress* by Gary Schmitt pointed out that, although our book did a good job exposing current congressional abuses, it did not make the positive case for how Congress ought to work under the constitutional order intended by the Framers. That is what I would like to address today.

I want to begin by saying something about the state of the federal government, which after all is what is at issue. We coauthors of *The Imperial Congress* were saying that the U.S. today is ill-governed, that it could be better governed, and that it will be better governed when we return to the constitutional order as originally conceived.

The U.S. is ill-governed in three ways. First, public policies, domestic and foreign, are defective. Second, corruption in Congress is endemic to the system of public policy that is in place. Third, lawlessness and favoritism are built into the system. We have given numerous examples of these things in our book. But let me summarize why bad policy, lawlessness, favoritism, and corruption are an integral part of the way the federal government does its business today.

Replacing Local Control. Government in this country has changed tremendously since the mid-1960s. During that period, America's politics were revolutionized by a vast centralization of the administration of the local affairs of the nation. Prior to 1965 most Americans had little to do with the federal government in their everyday lives. There was hardly any federal role in education. Business was mostly unregulated except by the states. Relations between the sexes were supervised by the states (through their various marriage laws). Local governments built almost all roads, bridges, bike paths, and sewers. But extensive federal intervention in local affairs has now replaced the mostly local control of local affairs.

The quality of public policy is generally worse. Confusion and partisan wrangling have replaced bipartisan consistency in foreign policy. Crime and drugs, minor problems in 1965, devastate the poor and endanger everyone else. Public education is measurably worse. Family life is collapsing among the poor and is shaky elsewhere. American industry – heavily regulated from top to bottom – is far less competitive in the world than it was in 1965. The one major improvement – enforcement of equal rights for all, regardless of race – is blemished by the change in civil rights from enforcement of equal rights to granting of special favors for government-approved races.

Besides the deficiencies in government policy, there is another price to pay, one that is not as well understood: the impossibility of central administration of the local affairs of the nation by the rule of law. That is the crux of our current problem. There are too many local

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differences, too many reasons for exceptions for particular kinds of industry, for desert or mountain localities, and so on. The attempt to control the details of everyday life from the center seems to require constant exceptions. So rather than make general laws for the nation to live by, the administrative state operates through executive branch agencies. Broad grants of rule-making power are made to these agencies. At the same time, Congress allows and even requires those agencies to make exceptions to the very rules that they make. These rules are of course made outside the legislative process mandated by the Constitution. Thus, actual policy is determined in the absence of general laws, according to the intervention of particular parties interested in the rule-making process or in the exceptions to that process, usually in a way hidden from the public.

Day-to-Day Business. Former House Speaker Jim Wright's dealings with the Federal Home Loan Bank Board are an instructive illustration. According to the report commissioned by the House Ethics Committee, Wright met frequently with Board officials to get them to allow certain insolvent Texas savings and loans to remain open when the Board wanted to reorganize them. No law was broken because the Board made up its own regulations. Outside Counsel Richard J. Phelan thought that Wright had acted unethically when, for almost a year, he personally prevented a bipartisan bank bill from going through Congress in order to pressure the Bank Board to treat his four banking friends favorably. However, the House Ethics Committee members voted that no violation had occurred. On this charge, the Republicans on the Committee split their vote. Probably the Committee members voted as they did because they know that pressuring executive branch agencies to give special treatment to constituents is an important part of the day-to-day business of every important Congressman.

The situation is similar with the vast grant-making apparatus of the government. Billions are handed out every year for purposes essentially local but speciously national, such as "cleaning up the environment" or "aiding low-income areas." Wright used his power as a congressional leader to get federal agencies to give his friends (and indirectly himself) millions of dollars for such purposes as "paving and building new roads [in Ft. Worth], building a new police station, constructing a bridge over Marine Creek, beautifying Marine Creek, building bicycle trails and pedestrian walkways, and renovating and cleaning key structures in the stockyards area" (p. 177 of the Phelan report). Jim Wright brought great pressure to bear on HUD to get this grant. What tipped the scales was the intervention at Wright's request of Republican Senator Paul Laxalt.

Inherently Corrupting. Helping donors and other members of his constituency is of course the sort of thing that every Congressman, Republican and Democrat alike, tries to do. But what the Phelan report on Wright brings out, with its accumulation of such stories, is that this kind of activity is inherently corrupting. (This was not the intention of Phelan, but it shines through the report nonetheless.) The current system is corrupting because when the government hands out such vast sums of money for local projects, when it does not rule by publicly voted-on law but by *ad hoc* grants, regulations, and exceptions to regulations arrived at privately, the temptation is enormous, given the realities of human nature, for Congressmen to think that the public good is served by helping their local friends with government money or regulatory relief.

The system of centralized control over local affairs throughout the nation thereby leads Congressmen to treat local, private, parochial, personal concerns as if they were national ones. It is this centralization and nationalization of inherently local affairs that is at the heart of today's setup and the corruption endemic to it. Government domination of local

life is now so pervasive and so massive that many local interests involving billions of dollars are constantly affected by every shift and turn of the details of national policy making and regulation.

Arguing for Exemptions. Here is another example, from the Occupational Safety and Health Administration. One scholar, who has read hundreds of pages of congressional testimony, told me he never found a single small businessman who argued that the existence of OSHA is bad for worker safety and ought to be abolished. Almost every small businessman who complains about OSHA says something like, "Just in my case the regulation does not fit my circumstances. Please make an exception for me or change just this one rule."

Given this system, it is no wonder Tony Coelho (former Congressman from California) has been able to "roll the PACS," as Michael Barone put it in a talk at Heritage earlier this year. As Coelho himself admitted when he was chief fund-raiser for House Democrats, he tells them that their campaign contributions are buying "access" to Congressmen. He is saying in effect that, if you donate, you get to ask the Congressman for help with the federal bureaucracy when you have a problem – to get them to act in a way that benefits you. But if you do not donate, do not expect your phone calls to be returned.

Criticism of Congress, however, is controversial even among some conservatives. For instance, Representative Mickey Edwards, the Oklahoma Republican, recently published an article in Heritage's *Policy Review* arguing against those who believe Congress's power has gotten out of hand at the expense of the President. Edwards maintains that it would be against the spirit of the Constitution to strengthen the presidency. His thesis, which contradicts Congress's consistent pattern of centralizing over the past 25 years, is that favoring Congress is favoring decentralization.

Edwards' mistake arises from a misunderstanding of the decentralized internal organization of Congress. As Congress has increased the bureaucratization of American life, it has lost control as a body, while individual members have gained control, over parts of national policy. This organizational change in Congress has facilitated centralization by providing more and more opportunities for individual Congressmen to benefit constituents.

Most Congressmen want to limit the Jim Wright problem to the issue of Jim Wright's venality: violating House rules to make personal profits.

Selling Access. Even House Republicans are reluctant to take on the Speaker, because many of them are themselves hip deep in the same water. And they, too, like the water, even if they more often vote against the policies that keep it flowing. Reelection rates for Republican incumbents are almost as high as for Democrats. The water that I am referring to is the administrative state with its constant opportunities for congressional intervention to help constituents and special interests, often to the tune of billions of dollars. The removal of Jim Wright as Speaker not only will not solve the problem, it may worsen it by bringing into the congressional leadership a smoother, more telegenic Speaker who will grease the skids all the more effectively for the kind of government Jim Wright specialized in.

This system of selling access to the bureaucracy in return for campaign contributions or personal honoraria used to be called, in plain English, bribery. People could go to jail for such things, and they sometimes did. Today it is simply business as usual in Washington. It has become so routine that the public knowledge of Lloyd Bentsen's $10,000 breakfast club for lobbyists was not even considered a negative factor when Dukakis was looking for a

vice-presidential candidate. Except for one minor effort by Dan Quayle, no one used it against him during the campaign.

When the Framers wrote the Constitution, they certainly did not expect Congressmen, let alone congressional leaders, to be spending most of their time getting government to do favors for their friends back home. They did not expect them to be routinely receiving large donations of money from those in a position to benefit or suffer from legislation before Congress. They expected them to come to Washington, pass the necessary laws and appropriations, and go home. Yet doing favors for organized private interests – whether businesses, public interest lobbying groups, or individual constituents in their districts – is the primary job of Congressmen today.

At Odds with Congress. Mickey Edwards' defense of Congress and the Republicans' unwillingness to go after Wright for his really serious abuses confirm that the issue we are talking about does not divide people along the normal partisan, liberal-conservative or Democratic-Republican, lines. It is an institutional difference. With some notable exceptions, congressional Republicans and Democrats tend to be on the same side on this issue. Even Democratic President Jimmy Carter found himself frequently at odds with a Congress that at that time had huge Democratic majorities. There is something, evidently, about the very office of the presidency that brings Presidents of either party into conflict with Congress.

It will do no good to say, as many do, that we cannot go backwards, that a modern complex industrial society cannot be governed without huge centralized bureaucracies. This is such a common objection that it has to be mentioned. The response is simple and decisive. In 1965 the U.S. was a complex modern society, yet at that time there was minimal bureaucratization of our national life. And no one would say that the U.S. was not a modern, complex industrial society in 1965. And as I said, the U.S. was probably better governed then than it is now, with some exceptions, to be sure.

Congressman Edwards misunderstands *The Imperial Congress* if he thinks it proposes strengthening the President at the expense of the Congress. What it does propose is a return to constitutional government through rule of law as an alternative to the current corrupt and increasingly lawless government by bureaucrats and Congressmen and judges, who, in operating behind the scenes, remain unaccountable to the public for what they do. We are not asking the President to seize more power, but to return power to the people by compelling Congress to return to its primary constitutional job of lawmaking. Votes on laws are public, and if lawmaking were once again Congress's main job, the people would once again judge their Congressmen on that basis.

1787: Problem of Implementation, Not Principles

How was the Constitution originally supposed to work? The text of the Constitution tells us something about that, but before looking at the text, it is good to understand the context. How did the problem of government present itself to the Framers of 1787?

The Declaration of Independence announced the principle on which the U.S. made its break with Britain and the past: "All men are created equal." That equality has two meanings for government:

First, all being equal, no one is born the natural ruler of another. By nature there are no masters, no slaves. No one may rightfully take away another's life or liberty. In other words, all are endowed with the inalienable rights to "life, liberty, and the pursuit of happiness."

Government's first duty is "to secure these rights," or, as the Declaration sums it up, to secure the "safety and happiness" of the people.

Second, all being free by nature, the only way one person can legitimately become the ruler of another is by that other's consent. So governments must derive "their just powers from the consent of the governed." This requirement of consent applies not only to the founding but also to the operation of governments after they are founded. Otherwise men are slaves of the government. That means democracy – rule by the people or their elected representatives.

In 1787, the situation was this. Democracy had been established throughout the union. Every state governed itself through elected representatives. A national government, a Congress, was elected indirectly by the people through their state legislatures. So the second requirement of the equality principle was everywhere achieved, and democracy had won.

Protecting Life and Property. But these governments were not doing their job well. The rights of individuals were not secure. This was for two reasons. First, in the area of foreign policy, the Confederation government was ineffectual. When Spain closed the Mississippi to American shipping and refused to acknowledge the boundaries of the United States, little could be done about it. American shipping on the seas was likewise vulnerable to foreign depredations. The protection of life and property – the first duty of government – was impossible without a stronger national government.

The second area of government failure was in domestic policy. The rights of property – sometimes even the rights to life and liberty – were constantly being violated by state governments. State monopolies, for example, frequently prevented market access to those who wished to compete against existing wealth. State tariffs and other commercial barriers to interstate trade were common. State legislatures routinely overturned state court decisions whenever someone was able to plead that fairness in his particular case demanded special treatment, such as nonenforcement of a contract.

National Power Needed. A long recession after the Revolutionary War led to increasingly radical measures, including the intentional debasing of the currency by several states in order to relieve debtors. In the worst instance, the state of Rhode Island passed laws requiring merchants to accept almost worthless currency for their goods. Business came to a standstill as stores were closed, and mobs attacked businesses and farmers who refused to sell their goods at a loss. Other abuses followed in Rhode Island and, to a lesser degree, in other states. Thoughtful observers concluded that a national power to regulate commerce was needed to secure equal opportunity to acquire property as well as for the protection of existing property.

In short, we had government by consent, but no adequate protection of equal rights. If the principles of the Declaration were to be fulfilled, a substantial reform of government was needed.

At least, that was the thinking of supporters of a stronger national government. There were of course many Americans who disagreed, but their dispute was largely over implementation. Government by consent and protection of the rights to life, liberty, and property were agreed upon by all. How to achieve this twofold goal was the issue.

Problems with Our First Democracies

There were three leading defects in the state governments of the 1780s. First, it was too easy for factions of debtors or of the poor to take over the legislatures. Some device was needed to make it harder for such factions to gain control of government.

Second, although the state constitutions required separation of the legislative power from that of the executive and the judiciary, in practice the legislatures dominated everywhere. They routinely usurped executive powers, such as appointments and control over administration of the laws. They overrode judicial decisions that were unwelcome to the majority. As Jefferson put it, commenting on the case of Virginia, "All the powers of government, legislative, executive, and judiciary, result to the legislative body." But Jefferson went on to say what all the Founders believed: "The concentrating [of] these in the same hands is precisely the definition of despotic government."[1]

Third, the nation suffered from the absence of a real national government. Congress under the Articles of Confederation had no power. It could not collect taxes; it had to ask the states for money. It could not enforce its laws, having no system of courts to interpret them and no executive to punish individuals who refused to obey them. This was the "radical defect" of the articles, according to *The Federalist*. The government was too decentralized. Not only local but national affairs were being decided at the local level. National weakness and humiliation were the result.

To the honor of the Founders, they looked for and found a solution that would be consistent with the "fundamental principles of the revolution" (*Federalist* 39). Democracy – government by ongoing consent – was the basis. Protection of individual rights was the aim. The solution was to redesign the structures that had been implemented in the first years after the Declaration of Independence.

Structuring Lawmaking Power. The principles of the Revolution require government by officials who act under laws intending the public good and passed by popularly elected legislatures, and these legislatures are to be responsible to the people by periodic reelection. But everything depends on how the lawmaking power is structured.

The solution: keep democracy, but improve the separation of powers and improve federalism. This was summed up in *Federalist* 51 as two devices to divide power and thereby provide checks within government against the abuse of power. First, divide power in the central government between three independent branches; second, divide power between state and national governments. The parts of the central government will control and restrain each other; and the governments of the states and of the union will control and check each other. This system, operating over a large society, will make it more difficult for a majority of the citizens' representatives to become a faction hostile to the rights of the minority or to the common good of the society (*Federalist* 10).

But there was another reason, less urgent perhaps, but deeper, for these devices. That was the need for a division of the responsibilities of government in such a way that government would do its work better. From this standpoint, federalism, or the division of power between state and central governments, was based on the idea that local and particular affairs are better handled by local governments, while great and national affairs are better handled by a national government (*Federalist* 10). Separation of powers was based on the

1 *Notes on the State of Virginia*, Query 13.

idea that the different jobs of government are done better by different kinds of representatives. For example, execution of the laws, which requires vigor, is better done by administrative officials responsible to one man, a President. The choice of what laws to live by is better made by a large group of people from different parts of the country, who will have to achieve a broad consensus through deliberation before they can act (*Federalist* 70).

Separation of powers was made to work for the first time by bringing the legislature under control, on paper by means of extensive constitutional limitations, but in practice by a greatly strengthened chief executive and a much larger extent of territory and population in which the system was to operate. Federalism was made to work for the first time by centralizing government in those areas of policy that are truly national, while leaving local affairs in the hands of the states and individuals. The founders were not in favor of indiscriminate decentralization, as conservatives often maintain today. They were in favor of continued decentralization of affairs that are properly local, but a high degree of centralization of affairs that are properly national. The sphere of national affairs in practice comprised primarily matters of foreign policy and commerce: foreign policy to keep the nation free and commerce to keep markets free.

Before turning to these solutions, it is worth describing the basic mode by which government was supposed to operate, namely, the rule of law.

The Rule of Law

The concept of the rule of law is much older than that of separation of powers. It appears prominently in Plato and Aristotle as a solution, in their thinking, to the key political problem, how to approximate the rule of reason when almost all human beings are driven by their passions.

"The rule of law" is a platitude that has lost its force by pious repetition. In fact the idea of the rule of law is not easy to grasp, especially today. Today we tend to think the law is violated whenever a ruling by some authorized government authority is disobeyed. In fact "law" is a term of distinction. Not everything that government does is by law.

When state legislatures in the 1780s acted outside their own laws or even contrary to them, the rule of law was replaced by the rule of men. But they found more subtle ways of violating the rule of law. When the laws were constantly changing, too long to read easily, or written obscurely – this was common in the states – they were not laws in the full sense.

Classifying Citizens. What is a law? Laws are "rules for the regulation of society" (*Federalist* 75). A rule is a standard that is publicly stated and stable enough to be known by the society. Being rules, laws apply to classes of people, not to individuals. "[W]hat are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?" (*Federalist* 10). A tax law classifies citizens (for example, by income) and lays down what classes pay what amount of taxes. Further, "A law. . . is a rule which those to whom it is prescribed are bound to observe" (*Federalist* 33). It has coercive restraint by prescribing punishments for those who disobey.

"Law is called a rule, in order to distinguish it from a sudden, a transient, or a particular order: uniformity, permanency, stability, characterize a law."[2] In this way James Wilson, who along with Hamilton and Madison was the most thoughtful of the Constitution's

2 *The Works of James Wilson*, ed. James D. Andrews (Chicago: Callaghan, 1896), vol. 1, p. 55.

Framers, distinguished a law from an *ad hoc* decision made regarding a particular case. A lawless despot or a lawless assembly may decide whom to send to prison by judging each case according to criteria applied in that case only, in the absence of established rules. In the 1780s, some state legislatures acted lawlessly by condemning or rewarding particular individuals outside of or against the written laws. According to a speaker at the Virginia ratifying convention, a man was arbitrarily deprived of his life without trial by the Virginia legislature during the 1780s.[3] This kind of lawless conduct can perhaps be warranted in a particular case where the strict application of the rule might lead to injustice or injury to the public good. This is known as equity. But more typically, without rules publicly agreed upon that apply equally to all persons similarly situated, nothing prevents the whims, passions, or private interests of the rulers from prevailing in government. Without laws that have a fair degree of stability, no one would know in advance what was forbidden or permitted. "Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?" (*Federalist* 62).

Hallmark of Government. The reason for rule of law is explained well by John Locke. When men live without government, in the state of nature, they possess their individual rights as well as duties under the law of nature to respect the rights of others. But since there is no political society, the law of nature must be enforced by each individual according to his private judgment. All have what Locke calls the "executive power" of the law of nature. But this power is likely to be abused, as Locke well knows. Most people are biased in their own interest. The state of nature, therefore, quickly degenerates into a state hardly distinguishable from a state of war. Government is established to escape this state, and the hallmark of government is law. The generality of law is meant to correct the bias arising from private passion and interest.

Algernon Sidney, an English political writer much admired by the Founders, gave us this statement, which John Adams liked to quote, on the rule of law at its best:

> [The law] is void of desire and fear, lust and anger. 'Tis *mens sine affectu* [mind without passion], written reason, retaining some measure of the divine perfection. It does not enjoin that which pleases a weak, frail man, but without any regard to persons commands that which is good, and punishes evil in all, whether rich or poor, high or low. 'Tis deaf, inexorable, inflexible.[4]

Reason Over Passion. The rule of law enables democratic government to do something that it might seem unable to do. In *The Federalist* Hamilton asks: "Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason without constraint." Madison also says: "But it is the reason alone of the public that ought to control and regulate the government. The passions ought to be controlled and regulated by the government." But how can it control their passions when the people themselves elect the government? The answer is that, if the government is properly constructed, the people's reason will prevail over and constrain the people's passions. That which is best in the people will be embodied in their representatives or rather in the laws made and enforced by their representatives. An assembly may sense that debts ought to be forgiven in unusual circumstances, but formulating a general rule requires thought about

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3 *The Debates in the Several State Conventions*, ed. Jonathan Elliot (Philadelphia: Lippincott, 1836), III, 66.

4 Algernon Sidney, *Discourses concerning Government*, III.15. "Mind without passion" is from Aristotle.

the reason why such an exception ought to be made. The generality of law prevents action based on the pity or love that a government official might have for a friend.

Further, rule by laws insures responsibility, for publicly announced rules can be known and judged by the people better than thousands of particular actions, most of which would be unknown to the public.

The rule of law, in sum, is a political device designed to make as likely as possible the coincidence of the two requirements of just government: that it be by consent of the people and that it secure the safety and happiness of society. The law aims to embody the public's reason by requiring the men who govern to act in conformity, at least in principle, to reasoned discussion and a rule of universal application.[5] No favors for constituents.

Blatant Favoritism. Contrast the rule of law with the practice of Congress today. Congress generally refuses to rule by laws. It occasionally does, to be sure, when it passes truly general rules that apply to everyone and make clear what it is that they have to do. But more typically today, Congress does two things together: 1) create executive agencies with very broad grants of discretionary power, telling them to figure out what the rules are going to be and giving them a general goal, like "stop pollution" or "protect consumer safety." And 2) Along with these very broad grants of authority, Congress likes to list many of the specific things they want these agencies to do, often outside the law in conference reports, letters to agency heads, or phone calls. The 1986 Tax Act, for example, contains page after page of exceptions, saying quite blatantly that the law does not apply to this business or that university. Yet these exceptions are identified in such a way that the reader cannot tell what is going on. To choose one example at random, one section of the tax law says a given provision does not apply to

> A mixed-use project containing a 300 unit, 12-story hotel, garage, two multi-rise office buildings, and also including a park, renovated riverboat, and barge with festival marketplace, the capital outlays for which approximate $68,000,000.[6]

The reader cannot even tell which state the named facility is in, so that the Congressman responsible and the named business, which may have given him campaign funds, cannot be held accountable by the public for this blatant act of favoritism.

Vague Mandates. That is what a law is these days: a combination of broad grants of rule-making authority to executive branch agencies with long lists of administrative details about what particular expenditures to make (or what exceptions to make). That is what goes on in the public laws voted on in Congress. The rest of the process goes on in the agencies. They have to figure out what rules to make. Here the process moves for the most part behind closed doors. Those involved are: the interests affected by the rules, individual Congressmen (typically the committee or subcommittee chairmen who have oversight over the agency in question), and the executive branch officials.

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5 Harry V. Jaffa has argued convincingly that the Founders' conception of the rule of law was the same as Aristotle's aphorism that the law strives to be "reason without passion": "Equality, Liberty, Wisdom, Morality, and Consent in the Idea of Political Freedom," *Interpretation*, January 1987.

6 Tax Reform Act of 1986, Public Law 99-514, 11 Stat. 2160. This is one of hundreds of similar special-interest exceptions.

Vague mandates satisfy the public that Congress is working to solve problems like discrimination and pollution. They do this without having to take a stand on the actual, necessarily controversial rules to address these problems.

Hundreds of pages of details bore everyone, so few know or care what is in these laws. Not one Senator or Congressman has read the typical law or appropriation that passes today. Instead, staffers work on different parts of the laws, and Congressmen agree to defer to each other on the whole.

Between the overly vague and overly detailed, there is no middle ground for general laws. But that is what law is supposed to be about: general rules to live by, expressed in short enough form that citizens can read them and know what they have to do. Today only experts know what is in the law, and sometimes it takes months for it all to come out. Often enough, no one is more surprised than members of Congress.

Lawmaking by Courts. The other major part of today's system is the judiciary. This is perhaps the most scandalous part of the current system. Major policies affecting the whole nation – real laws – are made by the courts. Take the abortion decision. This has the character of a law: such and such may be done in the first trimester, such and such in the second, and so on. All women, without exception, must obey these general rules laid down by the Court. It states exactly what everyone similarly situated has to do. Yet Congress, which alone has the lawmaking authority, had nothing to do with this law, which is one of the few clear and distinct general rules put into effect in recent years.

Conservatives have complained with some justice about the imperial judiciary. But the Court would not exercise lawmaking power without the implicit connivance of Congress. The Court is now an integral part of their scheme of governance. Congress allows courts to make policy, which it then proclaims itself impotent in the face of. The Court has given Congress a great deal of freedom in the running of executive branch agencies (although courts are increasingly involved here too) and has seized in exchange a big chunk of the legislative power.

Once it becomes clear what the rule of law is, it is also clear how far we have departed from it, and how it is that the current system is incapable of governing itself by the rule of law.

The Virtues and Vices of Assemblies

How was the rule of law to be accomplished according to the Founders? The leading means was to give the lawmaking power to assemblies elected by the people in their local communities.

From the beginning, therefore, the most powerful branch of government in American democracies was the legislature, and the U. S. Constitution continued that predominance. The first article is about Congress, because the lawmaking power is the most comprehensive and most fundamental power of government. Power of the purse resides there, as does power to impeach members of the executive and judiciary.

In the early years after 1776 great confidence was placed in representative assemblies. It was thought that a large group of elected officials from every part of the state or nation would be able to form a consensus on laws that were truly favorable to, or at least not contrary to, the public good. Such a body would be close to the local communities and would hardly be likely to betray their interests. Since laws are public documents, the assembly's actions would be in the open and therefore easily accountable to the people.

Composed of a large group of men, an assembly would be able to act only after forming a broad consensus on the merits. In sum, locally elected assemblies were considered as "best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests" (*Federalist* 70).

The particular virtue sought from a numerous legislature is deliberation. The way a large group acts promotes this quality and is described by Hamilton in *Federalist* 70:

> In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarring of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority. When a resolution is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable.

Public Accountability. Several constitutional provisions show the way Congress was expected to act as a deliberative body. One is the requirement to keep publicly available journals of their proceedings. Another is the requirement for a public record of their votes. These two provisions mean lawmakers will be accountable to the public for what they do. As such, republican government means public government. Finally, the veto provision requires the President to give reasons to Congress for his disapproval. Reasons imply that Congress's decision on whether to override will turn in part on the deliberation that follows the veto – a consideration of the President's reasons.

The nature of legislative deliberation will be determined not only by the size and local roots of the members but also by the quality of the membership. The Constitution's Framers worried greatly about this, for they had experienced state governments whose representatives were not just amateurish but often simply ignorant of public affairs. One of the chief reasons for extending the terms of office for the House and Senate (two- and four-year terms were long for those days – most states had one-year terms) was to enable the members to gain the experience that must underlie intelligent lawmaking (*Federalist* 62). One reason for the failure of state governments had been not just faction but sheer incompetence. It was also expected that federal representatives would often be lawyers and other well-informed members of the learned professions. These men, not attached to any particular branch of industry, would "be likely to prove an impartial arbiter between them, ready to promote either, so far as it shall appear to him conducive to the general interests of the society" (*Federalist* 35).

On the other hand, the Framers did not necessarily expect or wish the representatives to be professional politicians. They expected them to be, at their best, men like themselves: men whose income came from another profession, be it farming or lawyering, but who informed themselves conscientiously about local and national politics.

Unelected Experts. It was inconceivable to the Framers that representatives would need a staff. Their job was lawmaking, and it was precisely to avoid reliance on unelected experts that assemblies were given the lawmaking power. Today in many European countries, even those ruled democratically, laws are deliberated upon privately among experts, intellectuals, and interested groups, and the real decisions are made before they are brought before the parliament. This is of course increasingly the case today also in the U.S., where staffers write much of the legislation, their bosses being consulted only on the broad outlines. Large congressional staffs are in fact a quite recent phenomenon. Congressmen

had only a couple of staffers right up to the 1950s. To get a sense of what Congress was intended to be like, one might look at the legislatures in some of today's smaller states such as Nevada or New Hampshire. These legislators have little or no staff. They are real citizens with professions of their own, attuned to the real interests of their local communities, rather than the interests of powerful groups and donors. Policies really are made for the most part by reaching a consensus among themselves.

Powerful Staff. Because of the poor quality of the state legislators of their day, the Framers did not worry about today's problem, the lack of congressional turnover. Their problem was the opposite, the frequency of turnover. Legislatures were so responsive to quick shifts of public opinion that some state legislatures, with their annual elections, lost half their members in every election. Continuity and experience were needed, so the Constitution contained no limitation on the number of terms. Indeed, in today's setting, a limitation on congressional terms of office would be unlikely to have the effect wished for by its supporters. Given the tremendous power already held by staff, a more rapid change of members would probably turn the staff into something more like a permanent civil service, since new Congressmen would be compelled to rely on these "experts" to make their way in the Washington power arena. The PBS TV series *Yes, Minister* shows how staff can establish and maintain this dependence.

But for all their virtues, representative assemblies also have defects, and it was the defects that preoccupied the attention of the Constitution's Framers. The assemblies often usurped the powers of the other parts of the government, which they were ill-suited to perform well or justly. When assemblies were too big, they were easily manipulated by their leadership. "In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." And: "In all legislative assemblies the greater the number composing them may be, the fewer will be the men who will in fact direct the proceedings....The countenance of the government may become more democratic, but the soul that animates it will be more oligarchic" (*Federalist* 59). This is because a large group is like a mob, where few will know well what is going on, and passion easily communicates itself to the members.

Source of Abuse. I mentioned earlier a key defect, the tendency of elected assemblies to shift with every breeze of public opinion, however transient. The constitutional limits of the legislature are hard to define because the scope and nature of law are hard to define. Here is a fertile source of abuse. When does a law become an encroachment? If Congress passed a law requiring stationing of congressional staff, called congressional liaison, in every embassy abroad, everyone would know that this was a usurpation of a core executive branch power. Or would they? It would be in the form of a law, and does Congress not need to be informed? There is a natural temptation to substitute congressional will for a public law. "It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government" (*Federalist* 71).

Being elected by the people in local districts, legislators easily form the conviction that they alone speak for the people – even if a President is also elected by the people, indeed, is the only government official elected by the whole people. Hamilton warned against this tendency explicitly:

> The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity (*Federalist* 71).

Even in the area of deliberation, where an elected assembly would seem to be best suited to act well, there are reasons for worry. Faction, passion, demagogy, ignorance – any or all of these can sour the process.

The Constitution's Framers took all these defects into account when they set up the federal government. They tried to remedy them by an improved separation of powers, which required a complex system of legislative checks and balances, and by an improved federalism.

The Meaning of "Legislative Balances and Checks"

The assumption governing the Founders' approach to the legislature was that, although it should be kept in its proper bounds, it was still to be the most powerful branch. "In republican government, the legislative authority necessarily predominates" (*Federalist* 51). But within these limits, much could be done to compel the legislature to act responsibly.

One of the five key "improvement[s]" in "the science of politics" which appears in *Federalist* 9 is the principle of "legislative balances and checks." Readers often overlook this item, because they have heard the phrase "checks and balances" used so often in connection with the separation of powers idea that they do not notice that the expression refers here only to the legislative part of government. "Legislative balances and checks" obviously refers to the division of the legislature into two parts, the House and the Senate. It probably also refers to the participation of the President in lawmaking through his veto power, whether exercised or merely threatened (*Federalist* 73). And Hamilton may well have meant to extend the idea of "legislative balances and checks" to the separation of ordinary lawmaking from the extraordinary lawmaking of constitution making.

A due separation of statute lawmaking from constitutional lawmaking would properly reduce the legislature to a part of government under the Constitution. It would no longer be the legal repository of supreme political power. But constitutionalism in this sense was not enough. Other "legislative balances and checks" had to be devised in order to prevent the legislature from becoming the *de facto* or illegal sovereign.

These additional checks would have to be discoveries of prudence, working within institutions the Americans had become accustomed to. The principles of free government were of little help. The Declaration has nothing to say about whether the legislature should be divided into two houses, or whether the executive should have a veto, or what role the judiciary could play in keeping the legislature in its proper place. In all these instances, the colonial and British past furnished examples that provided material for these "inventions of prudence" (*Federalist* 51). The Framers, of course, had to adapt them with the necessary changes to serve the "checking" purpose.

Besides the division between ordinary and constitutional lawmaking already mentioned, ordinary lawmaking is further subdivided:

♦♦ Congress is to consist of a House of Representatives and a Senate, and while both houses are to be representatives of the people, the character of the two bodies is kept as

dissimilar as possible. There are different modes of election (popular for House, by state legislatures for Senate), different terms of office (two and six years), different composition (Senate has fewer members from populous states than the House), different sizes (Senate is small, House is large), and different activities (Senate shares in some executive powers, such as making treaties and appointing officials).

◆◆ A third part of the statute lawmaking power is held by the President through the veto power.

◆◆ Finally, statute lawmaking for local purposes is to be taken care of by state and local governments.

The Presidency

The legislature is the heart of democratic government as well as the source of greatest danger to it – "it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions" (*Federalist* 48). The primary institutional means was the presidency.

The Constitution vastly elevated the executive branch compared with the existing state constitutions. Under the Constitution, the President is a coequal branch, not coequal as a lawmaker, but as a coordinate branch under the Constitution in the area of executive authority.

The memory of the hated monarchy had distorted the vision of the authors of the early state constitutions. They had thought of the executive as a replacement for the royally appointed governor – an undemocratic institution that had to be kept under tight control. But the executive under a democratic constitution is elected directly or indirectly by the people, and he is no less representative of the people than the legislature. It took Americans several years for the truth of this to sink in, and the misbehavior of state assemblies helped.

In particular, they had to learn how to "republicanize the executive" in order to restrain legislative power in practice. Experience in the states prepared the way. Members of the convention had no problem seeing the President as a representative of the whole people and therefore worthy of being granted great powers under the Constitution. This was especially true after the hard problem of how to elect him was solved. The electoral college meant that the people would have a prominent role in the election process and that the President would probably be elected independently of Congress.

Controlling Legislation. Specifically, the President was given a large share of the lawmaking power by the veto (and to a lesser degree by his constitutional duty to recommend measures to Congress). With the veto, the President can control legislation with the support of only one-third of one house.

Second, the Constitution, by the plenary grant of executive power to the President and him alone, gives him supreme authority over the executive branch, although 20th century Supreme Court decisions, to say nothing of Congress's laws, have not recognized this. The Constitution says, "The executive power shall be vested in a President of the United States" – not "a President, subject to such limitations as Congress shall decree." Once officials are appointed, the President has authority over them to "take care that the laws are faithfully executed." And of course the Constitution is the supreme law of the land.

Third, the "executive power," as the Framers understood it, gives the President extensive but not exclusive powers in the conduct of the nation's foreign policy. To understand the reason for this, it is helpful to reflect on the difference between domestic and foreign affairs. Domestic affairs are ruled by law, that is, primarily by the executive and the courts acting under Congress's laws. The essence of foreign affairs, however, is lawlessness. All foreign relations are lawless in the sense that there is no common judge, to use Locke's language, to appeal to when one nation suffers at the hands of another. A lawless situation is the same as the state of nature: actions of others cannot be predicted with reliability, and there is a need for quick actions and reactions to events, especially in time of war.

Locke calls this foreign policy power "federative," and he says it naturally belongs to the executive. This is because one man, as opposed to a body of men, can act swiftly, secretly, and flexibly – all necessary in the fast-changing world of international lawlessness. Speed is needed because other nations may attack. Secrecy is needed because, where there is no common authority, all devices, including deception, may be needed to prevail in a contest of force. Secrecy conceals weakness and makes possible exploitation of the weakness of others.

Commander-in-Chief Power. But although the everyday conduct of foreign affairs was recognized as an executive function by the Framers, they reserved the declaration of war to Congress. This is the most momentous step a nation can take, and they thought it too important to allow a President alone to do it. But as to conduct of war, the "war-making power," this is an aspect of the Commander-in-Chief power. And the President is not required to get congressional approval to "repel sudden attacks," as was said in the Convention, or to conduct quick and necessary uses of the nation's force, as presidents have done almost two hundred times from John Adams to Ronald Reagan.[7] Even with treaties, the President negotiates, and the Senate only ratifies. ("Advise and consent," in the Constitution, is a technical term that does not imply a co-negotiating role for the Senate.)

The real basis of presidential power in foreign affairs arises from the difference between the state of nature and civil society. The very qualities that suit Congress to make laws – large size, local roots, slow acting, consensus forming – make it utterly unsuitable for conducting foreign policy, except for massive decisions that are appropriate for deliberation, such as declaring war or continuing a presidentially initiated action by appropriating further funds. Otherwise energy is the quality needed, with its concomitant speed, vigor, and secrecy.

Besides the actual text naming his powers, the Constitution acknowledges the presidential difference in several ways. There is no publicity requirement corresponding to those for Congress (publishing journals and votes). This acknowledges the executive need for secrecy (preserved in the term "executive session," which congressional committees like to invoke). Another textual difference is the wording of their respective oaths of office: The President alone swears to "preserve, protect, and defend the Constitution." Congressmen (and other government officials) swear "to support this Constitution." The President, it appears, is the supreme defender of the instrument, in the text as in our history. The example of Lincoln comes foremost to mind.

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7 L. Gordon Crovitz listed them in *Wall Street Journal*, January 15, 1987.

Conclusion

Today's practice is a substantial departure from the original conception of President and Congress in our constitutional order. It has been assumed for some time that our way of conducting national politics is inevitable and even good. In light of the problems with government today, a reassessment of the original scheme makes sense. Far from being a utopian ideal that can never be recaptured, the Founders' constitutional order in fact functioned recognizably within the lines they laid out until quite recently, in fact until about 1965. We will find ourselves better governed when Congress returns to its main job of lawmaking, and the President once again takes charge of the executive branch.

As long as this country continues to have free elections, these changes can be initiated at any time the people begin to think it important for them to happen.