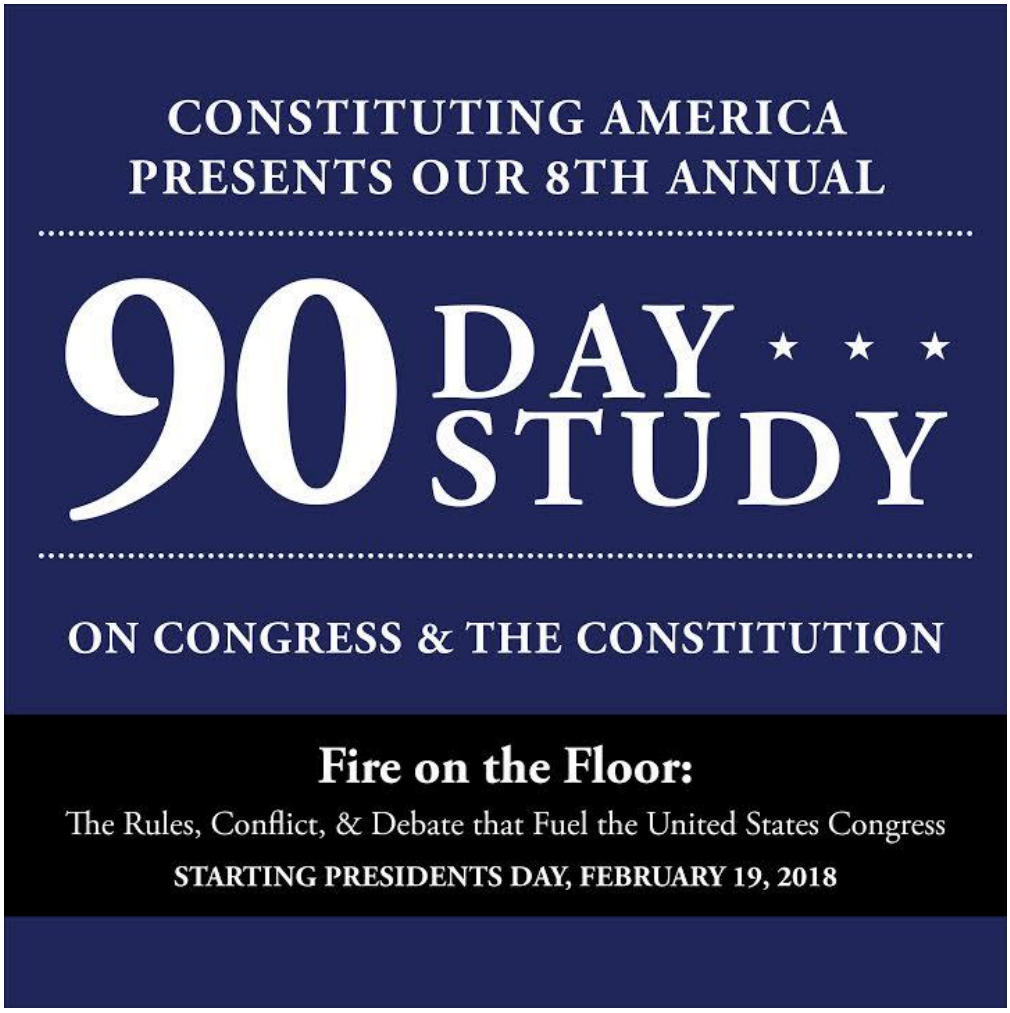


**A 90 Day Study**

**United States Congress and the Constitution**

# Fire on the Floor:
# The Rules, Conflict, and Debate that Fuel the United States Congress

**Starting Presidents Day, February 19, 2018**

**Featuring Essays by Constituting America's Guest Constitutional Scholars**

**Edited and Compiled by Amanda Hughes**

# Fire on the Floor:
# The Rules, Conflict, and Debate that Fuel the United States Congress
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**David Alvis,**
Associate Professor of Government, Wofford College; Author, *The Removal Power Controversy 1789-2010,* and *Statesmanship and Progressive Reform*

**James D. Best,**
Author, *Tempest at Dawn,* a novel about the 1787 Constitutional Convention; and *Principled Action, Lessons from the Origins of the American Republic*

**Marc Clauson,**
Professor of History and Political Economy, and Professor in Honors, Cedarville University

**Daniel A. Cotter,**
Adjunct Professor, The John Marshall Law School; Immediate Past President, The Chicago Bar Association

**Patrick Cox,**
Award-winning and acclaimed historian, author, and conservationist; President, Patrick Cox Consultants, LLC

**Bruce Dierenfield,**
Professor of History, Canisius College

**Scot Faulkner,**
Served as Chief Administrative Officer, U.S. House of Representatives and as a Member of the Reagan White House Staff; Financial Adviser; President, Friends of Harpers Ferry National Historical Park

**Patrick Garry,**
Professor of Law, University of South Dakota; Author, *Limited Government and the Bill of Rights,* and *The False Promise of Big Government: How Washington Helps the Rich and Hurts the Poor*

**Amanda Hughes,**
Outreach Director and 90 Day Study Director, Constituting America; Author, *Who Wants to Be Free? Make Sure You Do;* Anthology Contributor, *Loving Moments,* and *Moments with Billy Graham*(forthcoming)

**Joseph Knippenberg,**
Professor of Politics, Oglethorpe University

**Joerg Knipprath,**
Professor of Law, Southwestern Law School; Constituting America Fellow

**George Landrith,**
President, Frontiers of Freedom

**Andrew Langer,**
President, Institute for Liberty; Host, The LangerCast, RELMNetwork.com; Constituting America Fellow

**James Legee,**
Visiting Lecturer of Political Science, Framingham State University

**LaVaughn G. Lewis,**
Co-editor with W. David Stedman, *Our Ageless Constitution* and *Rediscovering the Ideas of Liberty*; Former Teacher

**Adam J. MacLeod,**
Professor of Law, Faulkner University; Author, *Property and Practical Reason*, and Co-editor, *Foundations of Law*

**Robert M. S. McDonald,**
Professor of History, United States Military Academy, West Point; Author, *Confounding Father: Jefferson's Image in His Own Time*

**Cleta Mitchell,**
Partner, Foley & Lardner, LLP practicing election and political law, Washington, DC office

**William Morrisey,**
William and Patricia LaMothe Chair in the United States Constitution, Hillsdale College; Constituting America Fellow; Author, *Self-Government, The American Theme: Presidents of the Founding Civil War;* and *The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government*

**Forest Nabors,**
Professor of Political Science, University of Alaska at Anchorage

**Brian Pawlowski,**
Member, American Enterprise Institute State Leadership Network; Pursuing a Master's Degree in American History; Served as a Marine Corps Intelligence Officer; Former Lincoln Fellow, Claremont Institute for the Study of Statesmanship and Political Philosophy

**Ben Phibbs,**
Constituting America High School Best Essay Winner; Moot court participant and church youth band leader; Homeschool Senior planning to attend Patrick Henry College

**Gary Porter,**
Executive Director, Constitution Leadership Initiative

**Joseph Postell,**
Associate Professor of Political Science, University of Colorado-Colorado Springs; Author, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government*; Editor, *Rediscovering Political Economy* and *Toward an American Conservatism: Constitutional Conservatism during the Progressive Era*

**Samuel Postell,**
Ph.D. Student, University of Dallas

**The Honorable Frank M. Reilly,**
Professor of Constitutional Law, Election Law, and Political Science, Texas Tech University; Lawyer; Municipal Judge

**W. David Stedman,**
A Founder, National Center for America's Founding Documents and National Foundation for the Study of Religion and Economics; Co-editor with LaVaughn G. Lewis, *Our Ageless Constitution* and *Rediscovering the Ideas of Liberty*

**Flagg Taylor,**
Associate Professor of Political Science, Skidmore College

**Janine Turner,**
Constituting America Founder & Co-President

**Richard E. Wagner,**
Holbert Harris Professor of Economics, George Mason University

**Tony Williams,**
Author of five books including *Washington and Hamilton: The Alliance that Forged America;* Senior Teaching Fellow, Bill of Rights Institute; Constituting America Fellow

# INTRODUCTION

## The United States Congress and Its Place in Constitutional Government

## Guest Essayist: William Morrisey

Against the arbitrary rule of George III, the American Founders opposed the rule of law. On the most fundamental level, in their Declaration of Independence, they appealed to the laws of Nature and of Nature's God against tyrannical violations of the unalienable rights established by those laws. Eleven years later, in designing the human, conventional, constitutional law that reframed the federal government, the Founders established a republican regime intended to prevent the return of arbitrary rule to their country.

Of the three branches of government, they put the legislature first; understanding that the perfect, divine Lawgiver established the rule of His laws in nature, the Founders knew that procedures established for imperfect, human lawmakers needed to keep such persons directed toward the defense of the natural laws. Congress also 'came first' for a historical reason: In our first constitution, the Articles of Confederation, the legislature was the only branch of government. Not only was Congress itself unicameral, but the executive and judicial powers were folded into it.

Such legislative dominance had seemed to make the rule of law unquestionable, but the contrary turned out to be true. Under the Articles, laws passed by Congress couldn't penetrate into the states to govern individual citizens. This left an apparently formidable, unicameral federal legislature dependent upon the states for revenues and for enforcement. The purpose of the rule of law is to place a layer of protection between the persons enforcing the commands of government and persons ruled by those commands. But the rule of law is nonetheless a form of ruling. Under the Articles, the states amounted to a second, political 'layer' of authority; the federal government could enact laws but it could not *rule* by those laws. As Publius writes in *The Federalist*, "Government implies the power of making laws"; it also implies the power of enforcing them.

If the federal government shall truly govern, however, additional safeguards needed to be built into it. A unicameral legislature that made laws but also enforced them and judged cases arising under them, reaching down to individuals within each state, might behave like a many-headed version of George III. Better, then, to follow the longstanding recommendation of John Adams and establish a bicameral legislature. With the legislators in one house proportioned to the population of the states, the popular or democratic character of American republicanism would survive. Although women couldn't vote in most states, the percentage of adults who could vote in the United States was still higher than in any other legislative body in the world at that time– far higher than in the British House of Commons, for example, whose members were elected by no more than fifteen percent of the adult population. By contrast, not only were the House members chosen by a more broadly-based electorate, but members themselves needed to meet no property requirements. Publius observes, "Under… reasonable limitations, the door of the House of Representatives is open to merit of every description, whether native or adoptive, whether

young or old, and without regard to property or wealth, or to any particular profession or religious faith."

The other branch of the legislature, the Senate, exists to protect the states, which exchanged their power effectively to veto federal legislation for a hand in making that legislation. With each state equally represented in the Senate, and with Senators elected by their state legislatures, citizens in every state could feel confident that the federal laws which would now rule them directly would not compromise the rightful powers of the states. In addition, the requirement that any proposed law would need approval of both houses, and that the senators would serve terms three times longer than members of the House, guarded citizens against what Publius calls "sudden or violent impulses" in lawmakers who might otherwise be swept up in the passions of the moment.

Although our contemporaries frequently use the terms 'democratic' and 'republican' as if they were synonymous, the Founders did not. The purpose of republican or representative government, as distinguished from the pure democracies of ancient Greece, where all acted as legislators and often as judges in the assembly, was precisely to empower reason over passion, to obtain "a cool and deliberate sense of the community," as Publius phrased it. "Had every Athenian citizen been a Socrates"–a philosopher, a person ruled by reason–"every Athenian assembly would still have been a mob," so powerful the passions become when human beings begin to orate at one another. Had Athens had a senate, Publius goes on to observe, Socrates would not have been put to death by his countrymen; the existence of a second seat of deliberation would have slowed things down, given Athenians time to think the matter through.

Despite their longer terms in office, and despite the property qualifications required of senators, the United Sates Senate would be no voice for an aristocracy, no House of Lords. The Constitution prohibits laws establishing primogeniture, the social and economic foundation of landed wealth. Senators may be richer than members of the House, but they are every bit as 'common.' All Americans are 'commoners.'

As a final precaution, the framers of the 1787 Constitution carefully *enumerated* the powers of the federal government. Congressional law governs interstate and international commerce, the military (including the militia), and establishes a federal judicial system operating under what Publius calls a "uniform rule of civil justice." Other powers remain in the states, or in the sovereign people.

Given these legal and institutional safeguards, why then do we now see such an extraordinary concentration of power in the federal government? Part of the answer may be seen in the transformation of Congress, a transformation undertaken and completed in the first seven decades of the last century, but especially between 1933 and 1969. That transformation, amounting to a partial regime change, will be the topic of the next essay.

*Will Morrisey is William and Patricia LaMothe Professor Emeritus of Politics at Hillsdale College, and is a Constituting America Fellow; his books include Self-Government, The American Theme: Presidents of the Founding and Civil War and The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government.*

## Introduction, Part 2: The United States Congress Today

## Guest Essayist: William Morrisey

The careful design of the United States federal government, as seen in our Constitution, has been admired and imitated throughout the world. Yet few Americans today think of their government as very much limited to matters of commerce, military defense, and constitutional law. Nor do we think of Congressmen as citizen-legislators, serving a few years in the nation's capital and then returning home to the applause of grateful, armed, and vigilant fellow-citizens.

What has happened, since 1787?

Both our federal and state governments have been transformed in the past century. Although I have never worked in Congress, I have worked on a state legislative staff. At no time did I or anyone else on that staff participate in formulating the bills that became laws. Each of the two major parties had staffs in the state capital charged with that responsibility, augmented by the Office of Legislative Services, a state agency staffed by attorneys who reviewed all bills to ensure that the language was legally correct. 'My' state senator could propose an idea for a law, push to get it out of committee and onto the floor, but neither he nor his staff could have been seriously described as law*makers.*

We were nonetheless quite busy. Doing what? Typically, a constituent would call our office, in some degree of agitation over treatment received at the hands of a state administrative agency. My first task was to determine whether the complaint was likely to be legitimate, which it usually was. It transpired that, on occasion, unelected bureaucrats contract George III syndrome; symptoms included arbitrariness, injustice, and a touch of conceit. I would call the relevant state official (unlike the ordinary citizen, I had a handbook with their names, titles, and telephone numbers) and engage him or her in civil but firm conversation. I would often draft a letter to the relevant department head for the signature of 'my' senator, following up on that conversation, putting a sort of legislative-branch imprimatur upon the point. Given the fact that the legislature retained control of the purse-strings holding the funds which kept bureaucratic lights on, these efforts more often than not had the desired effect.

That this new non-legislative task now forms the core of what's still called the legislative branch of the federal government–that the procedure I followed was very far from restricted to the government of just one state, or even all the states, but extends to Congress itself–was confirmed at that time by political scientist Morris P. Fiorina, who published the current edition of his book on the subject in 1989. Cogently titled *Congress: Linchpin of the Washington Establishment*, this study has deservedly become a standard text in colleges throughout the country.

Fiorina began by contrasting the rate of turnover in the biannual House election of the 19th century with that seen since the 1960s. In the 1880s and throughout that century, 40-50% of House members were replaced in each election. By the 1980s, the replacement rate had dropped to 15%. Being generally more elderly than their House colleagues, Senators die or resign more frequently, but that is no measure of *voter* sentiment, except in those cases when a Congressman

may resign in anticipation of losing. So, for example, since 2008, 43% of Senate seats have 'turned over,' while the House has held steady.

Why the difference between the early Congress and the modern Congress?

Fiorina identified two principal causes. In the 19th-century House, committee assignments had been determined by the Speaker of the House, but Progressive-era reforms included a system of committee advancement based on seniority. Once years in service counted towards a member's eventual chairmanship of committees and subcommittees, voters had a reason to keep 'their guy' in office; the more seniority he has, the more federal dollars he can direct to your district.

More important, however, was the Progressives' expansion of the federal bureaucracy, which spiked upwards in the New Deal of the 1930s and then again with the Great Society programs of the 1960s. With a substantial and complex centralized bureaucracy now in place, combining legislative/regulatory, executive, and judicial/administrative-court powers within its agencies, Washington developed what the English call an "establishment"–a permanent ruling class. Legislators still legislated, but in a different way; they still did favors for constituents, but also in a different way.

The good-humored and slightly cynical Professor Fiorina described it in terms of a certain sort of clever circularity. Congress enacts a law, signed by the President and sometimes initiated by him, through his allies in Congress. Congress couches the law in vague, general terms. This leaves the bureaucracies with the task of filling in the regulatory details; since the proverbial devil happily resides in details, this makes many Washington establishmentarians very happy indeed. Here's where you, the citizen, come in: lost in the bureaucratic maze, confused by paperwork, whipsawed (as you think) by persons you didn't elect, who consequently care little for your plight.

Ah, but now you turn to your rescuer, your friendly, local Congressman. He (or rather his staff) intervene heroically on your behalf, setting things right, winning your approval and, more usefully still your vote and a reputation as one stand-up guy. To top it all off, your devoted representative can do this while inveighing against bureaucratic red tape and burdensome paperwork, imposed upon hardworking taxpayers by faceless and unfeeling bureaucrats. Thus Americans may detest "Congress" while re-electing their own Congressmen time and time again. They just can't stand the *other* 434 members of the House. Or, as legendary House Speaker Thomas "Tip" O'Neill put it in the 1980s, "All politics is local."

This new and symbiotic relationship between Congress and the Washington bureaucracy has resulted in larger Congressional and administrative staffs. For Congress, Fiorina cites statistics that are now familiar. As late as 1960, House members' office staffs averaged nine positions. By 1977, that doubled. Senators had larger staffs to begin with, but these staffs doubled, too. Less lawmaking was going on, on the Hill, but more pork-barreling and a lot more "constituent casework" had been added.

In the past three decades, things have changed again, although not back to the old norm. Staffs have been reduced, now averaging 14 for House members, 34 for Senators. (One might observe

that desktop computers have also made staffers more productive, with less need for typists and file clerks.) The real change isn't in staffing, however, but in public opinion. All politics is still local when it comes to helping constituents with routine problems. But (as Fiorina himself has written in recent articles) our political life has become much more 'national' in terms of the issues addressed in local Congressional campaigns. Here, the turning point was the 1994 House election campaign engineered by House Minority Whip Newt Gingrich. Gingrich persuaded House Republicans to run on such national issues as welfare reform, term limits, tax cuts, and a balanced budget amendment. It worked; his party won enough seats to take the majority for the first time in 40 years.

Since then, a semi-'nationalized' electorate hasn't so much "polarized" (meaning, separated itself into 'Left' and 'Right' factions, with no centrists). In Fiorina's term, political and media *elites* have "sorted" themselves into such factions; there are no more conservative Democrats, and no more liberal Republicans. A few moderates remain, grabbing headlines on close votes, but Democrats like Senator Russell Long and Republicans like Jacob Javits no longer exist. A middle-of-the-road electorate has no comfortable home in either party.

Fiorina's analysis should be supplemented by observing that the increase in national sentiment among voters and also ideological conflict among elites has sharpened in part because more people now question the post-World-War-II consensus, which consisted of broad approval of Progressive-style government policies. The difference between, say, Richard Nixon and Hubert Humphrey in the 1968 presidential election was a matter of degree. The difference between Ronald Reagan and Walter Mondale in 1988 was not, nor was the difference between Donald Trump and Hillary Clinton in 2016. Reagan and Trump ran against the administrative state itself. That has caused the heirs of Progressivism to take their battle positions in defense of *their* status quo–nowhere more so than in the "linchpin of the Washington establishment."

Another way of putting it is: For the first time in a century, Congress is getting interesting, again.

*Will Morrisey is William and Patricia LaMothe Professor Emeritus of Politics at Hillsdale College, and is a Constituting America Fellow; his books include Self-Government, The American Theme: Presidents of the Founding and Civil War and The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government.*

# CONGRESS: THE LEGISLATIVE BRANCH

## Beginnings of the United States Congress, Part 1

## Guest Essayist: Tony Williams

### The Constitutional First Congress

As Representative James Madison reflected on the task of the First Congress, he stated, "We are in a wilderness without a single footstep to guide us." Perhaps Madison was wrong for the

representatives and senators had a few guides at their disposal. They had their experience in the state legislatures and the national Congress under the Articles of Confederation. In addition, they had their wisdom and prudence to pursue the public good in deliberative government. Most fundamentally, they had the new Constitution as the fundamental guide for all their actions.

The foremost task of the First Congress was to breathe life into the new government based upon constitutional powers and standards. In early April 1789, Congress finally assembled a quorum and immediately debated the necessary task of finding a means of collecting revenue for the federal government under the powers of Article I, section 8 and focused on tariffs, or a tax on imports. The debate immediately revealed a sectional split over protective tariffs, which were eventually passed over the objections of many southerners, and helped lay the foundation for a partisan divide.

On April 30, President George Washington took his constitutional Oath of Office at Federal Hall and then delivered his First Inaugural Address to the Congress assembled in the Senate chamber. The Congress resolved several issues related to the presidency that summer.

First, a lengthy debate occurred in which Vice-President John Adams offered several suggested ways for addressing the president by titles that smacked of monarchism and earned him the sobriquet of "His Rotundity." Congress wisely settled on the republican simplicity of "President of the United States."

Second, President Washington actually went to the Senate for advice and consent on a proposed treaty with the Creek Indians because the Constitution seemed to mandate this course of action. After enduring frustrating haggling, Washington stormed out of the Senate and did not return, submitting future treaties for Senate ratification after they were made.

Third, Congress created several executive departments constituting a cabinet made up of the war department under Henry Knox, the treasury department under Alexander Hamilton (despite the great fear of corruption in this office), and the state department under a surprised Thomas Jefferson, who did not learn of his appointment until arriving back from France in late November and did not assume his duties until March 1790. The president won the authority over removal of the department officials. Virginian Edmund Randolph became the nation's first Attorney General. To give some idea of the size of the federal government, Washington's Mount Vernon had about the same number of people including workers and slaves.

The Congress had the constitutional authority under Article III to set up the federal court system including the Supreme Court. The resulting Judiciary Act of 1789 passed later that summer, and John Jay became the nation's first chief justice of the Supreme Court.

On June 8, Madison rose on the floor of the House to deliver a speech proposing amendments for a Bill of Rights to fulfill the Federalist promise made during the ratification debate. While many representatives thought it was a "tub to the whale," or a distraction from more important business, Madison persevered and eventually won passage of twelve amendments that were sent to the states for ratification. As a result, North Carolina and Rhode Island joined the Union.

While sectional fissures had opened up during the session that adjourned for the fall, Washington was pleased by the results: "It was indeed next to a miracle that there should have been so much unanimity, in points of such importance….So far as we have gone with the new government, we have had greater reason than the most sanguine could expect to be satisfied with its success."

That fall, Secretary of Treasury Hamilton wrote a Report on Public Credit that he presented to the next session of the First Congress in early January. The controversial plan proposed for the national government to assume the massive war debts of the states to reorganize and pay the debt to place national finances on a firmer footing. The plan struck many in the South as an attempt to consolidate national power and stalled. Eventually, the plan passed that summer as part of a deal (the Compromise of 1790) for a national capital on the shores of the Potomac supposedly made at a famous dinner hosted by Jefferson for Madison and Hamilton.

Southerners were further outraged when a Quaker petition to end the slave trade (and thus slavery) was sent to the Congress. The ensuing debate over slavery took on a strong sectional cast right at the beginning of the nation and would plague national politics for the next seventy years.

The last session of the First Congress opened on December 1790 to no less controversy. At the behest of Congress, Secretary Hamilton submitted another financial plan, this one proposing a National Bank. This proposal again stirred up fears of centralization and stoked sectional tensions. When Madison and Jefferson raised objections, President Washington solicited opinions from his cabinet on the constitutionality of the bank because of his strict adherence to the Constitution. Hamilton's arguments won the day and persuaded Washington to sign the bill passed by both houses of Congress. Whatever the divide and different views of each side, all the congressional and executive debates over the bank were anchored in the meaning and authority of the Constitution.

The First Congress had its share of divisive, mostly sectional politics that would form the basis of the nation's first political parties only a few years after. However, the First Congress produced a series of remarkable legislative achievements that contributed to the political and economic stability of the new nation. Even when the members of Congress disagreed, the standard for their viewpoints and deliberations was the U.S. Constitution.

*Tony Williams is Senior Teaching Fellow at the Bill of Rights Institute; a Constituting America Fellow; author of Washington and Hamilton: The Alliance that Forged America, and Hamilton: An American Biography.*

## Beginnings of the United States Congress, Part 2

## Guest Essayist: Marc Clauson

Legislative assemblies came to be debated first in the seventeenth century, especially in England. They were also discussed in theory by Thomas Hobbes, John Locke, James Harrington, and Montesquieu, among others.[1] I will define representation, equating the term

with political representation, as "making citizens' voices, opinions, and perspectives "present" in public deliberation and policy making process" when "political actors speak, advocate, symbolize, and act on behalf of others in the political arena."[2] When we think of our own American system, we ought to consider the issues the Founders addressed regarding representation, and "built into" the Constitution:

1. Why have a legislative body at all, as opposed to a monarch or elected executive?
2. Who would be represented by Congress, individuals or states, or both?
3. How many "houses" or chambers of a Congress should be created, and why?
4. Who would be able to articulate a political "voice" through Congress?
5. What powers would this legislative body have, given the inevitable inequality of authority?
6. How would the legislative bodies relate to the other branches, Executive and Judicial, the question of separation of powers and checks and balances?
7. What should be the "voting rules" (simple majority, super-majority) of Congress for various types of proposed actions?

The Founders had an answer to each of these questions, and in many cases, ingenious answers that were either wholly innovative or combined elements of ideas already existing. The result was a legislative assembly (-ies) that would become the envy and sometimes the object of hatred of other nations and political thinkers and practitioners.

The origins of the American Congress are found in both theory and practice.[3]The issues above were debated at the Constitutional Convention and also in the *The Federalist Papers*, addressing both the existing "Constitution," the Articles of Confederation, which established a unicameral Congress, and the proposed new bicameral Congress. An examination of the Founding documents will answer our larger question, why did our Founding Fathers propose the kind of legislative assemblies contained in the Constitution? What was their vision?

To begin, the Founders were avid readers and aware of both philosophical and practical examples of representative political (and ecclesiastical) bodies. They had drawn from many quarters wisdom about law-making and had concluded, similarly to John Locke, that legislation—law making—was best accomplished by a group of decision makers. Since the proposed new government was based moreover on the consent of the people (again, much as John Locke), Congress as conceived should be chosen in some way by the people and represent the people.

Representation entails an inequality of authority as between the electorate and the legislature. But placing all power in one person or one group of persons strikes James Madison as problematic: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[4] This statement justifies having a Congress in the theory of separation of powers. Madison also saw this separation as formally dividing law-making from law enforcement. This institutionalization was desirable given the "encroaching spirit of power" in any arrangement.[5] Otherwise, as Montesquieu had said, there

could be no liberty.[6] We cannot forget also that the Founders did not hold an overly optimistic view of human nature.[7]

Madison also wrote in Federalist 10, "The federal constitution forms a happy combination in this respect; the great and aggregate interests, being referred to the national, the local and particular to the state legislatures."[8] Madison is here concerned with federalism, but implicit is the notion that public goods and problems come in "different-sized packages" requiring differing levels of government to address them. The national Congress then can deal with larger issues and, in addition, can represent a large number of people that otherwise could not feasibly be present together in one place at one time through one set of assemblies.[9] This is an advantage of both federalism and republicanism, the latter essentially equivalent to representation by a legislative body.[10]

The Founders however go farther in their analysis. The states and the people as individuals (direct representation) can voice their interests because of the way the Congress is structured. The number of House seats are made to depend on population, while the Senate consists of two delegates per state. The people of larger states can exercise a greater voice in the House, and yet the people have equal representation in the Senate, approximating a "one man, one vote" ideal.[11] Whereas only one method for choosing members and one legislative body would distort political demand, a bicameral legislature provides a balance (as well as a compromise, to be sure).[12] Finally, it adds another check to the internal structure of decision-making, requiring another deliberative body that can slow down or stop undesirable legislation.[13]

A last beneficial aspect of the American Congress has to do with its voting rules. Decisions are of different types, imposing different costs on those to whom a law would apply.[14] Some decisions are "ordinary," whose social costs are not disproportionate in relation to the problem to be addressed. But others, constitutional-level decisions or extraordinary kinds of decisions, may potentially impose inordinate costs on constituents in relation to the costs of the problem itself. Each of these would require a different voting rule, ranging from simple majority to super-majority. The voting rules for Congress reflect this principle and thereby minimize the potential for costly, even catastrophic, decisions.

No institutional arrangement is perfect, as no individual is perfect. The Founders valued design principles highly, but they also advocated for virtuous public officials. However, they knew they could not guarantee virtue at all times. Therefore, they took pains to design, in this case, a Congress that would give voice to the people while limiting the possible abuses of power in that Congress as well as in the other branches.

*Marc A. Clauson is Professor of History, Law and Political Economy and Professor in Honors at Cedarville University. Marc holds a PhD from the University of the Orange Free State, SA, Intellectual History and Polity); JD (West Virginia University College of Law, Jurisprudence); MA, ThM (Liberty University, New Testament Studies and Church History); MA (Marshall University, Political Science); BS (Marshall University, Physics); and PhD work (West Virginia University, Economic Theory).*

[1] Bernard M. Manin, *The Principles of Representative Government*. Cambridge University Press, 1997.
[2] Suzanne Dovi, "Political Representation," *Stanford Encyclopedia of Philosophy*, January 6, 2017, page 1, at https://plato.stanford.edu/entries/political-representation / and Hanna Pitkin, *The Concept of Representation*. University of California, 1967.
[3] A unicameral Congress already existed under the Articles and had been meeting since before 1776. In addition, the English Parliament was an influential model, especially the House of Commons.
[4] Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, edited by George W. Carey and James McClellan. Liberty Fund, 2003, Federalist 47, Gideon edition.
[5] Ibid., Federalist 48.
[6] Ibid., Federalist 47.
[7] See Federalist 10.
[8] Ibid., Federalist 47.
[9] Ibid., Federalist 14, where the representation concept is defended: "Such a fallacy may have been the less perceived, as most of the popular governments of antiquity were of the democratic species; and even in modern Europe, to which we owe the great principle of representation, no example is seen of a government wholly popular, and founded, at the same time, wholly on that principle. If Europe has the merit of discovering this great mechanical power in government, by the simple agency of which, the will of the largest political body may be concentered, and its force directed to any object, which the public good requires; America can claim the merit of making the discovery the basis of unmixed and extensive republics. It is only to be lamented, that any of her citizens should wish to deprive her of the additional merit of displaying its full efficacy in the establishment of the comprehensive system now under her consideration.As the natural limit of a democracy, is that distance from the central point, which will just permit the most remote citizens to assemble as often as their public functions demand, and will include no greater number than can join in those functions: so the natural limit of a republic, is that distance from the centre, which will barely allow the representatives of the people to meet as often as may be necessary for the administration of public affairs. Can it be said, that the limits of the United States exceed this distance? It will not be said by those who recollect, that the Atlantic coast is the longest side of the union; that, during the term of thirteen years, the representatives of the states have been almost continually assembled; and that the members, from the most distant states, are not chargeable with greater intermissions of attendance, than those from the states in the neighbourhood of Congress."
[10] Ibid., Federalist 10.
[11] See Ibid.,
[12] Ibid., Federalist 52-65 contain an extensive discussion of the House and Senate.
[13] Ibid.,
[14] See James Buchanan and Gordon Tullock, *The Calculus of Consent: The Logical Foundations of Constitutional Democracy*. University of Michigan 1962.

## House History: Purpose of the United States House of Representatives as the Immediate Will of the People

## Guest Essayist: Scot Faulkner

The reason the U.S. House of Representatives is so different from the U.S. Senate is deeply rooted in the history of representative democracy.

Since the first time hunter gatherers sat around a campfire, leaders depended upon the advice of trusted counselors. These advisors evolved into a lord's or noble's Privy Council, and eventually into the "upper chambers" of many democracies, such as Britain's House of Lords. These members were chosen "from above" – directly by the noble, not "from below" – by the people. In America, the U.S. Senate was based on being chosen "from above" by State Legislatures until April 8, 1913, when the 17th Amendment to the U.S. Constitution mandated that Senators be directly elected.

The path that led to the U.S. House of Representatives took much longer. Leaders needed centuries, and revolutions, to accept sharing power with those they ruled.

The path to the people choosing their representatives began because Humans are naturally entrepreneurial. It did not take long after the Vikings and other raiders settled down that towns and trade arose throughout Northern Europe. The moment merchants could exchange goods in safety, economic activity burst from out of castle walls and pulled away from the control of the nobility. Anywhere there was a harbor, or roads crossed, commerce occurred and towns grew.

By the 12th Century, towns, like Lübeck in Germany, were growing large enough to have their own governance. They still paid homage and taxes to nobles, but day-to-day commercial activity was now locally controlled by town councils (members known as burghers or burgesses) and by skilled associations and guilds of artisans.

Local governance, except during the religious wars of the 16th and 17th Centuries, was focused on the basics of human existence. This includes water, sewer, garbage, roads, and safety. By focusing on the engineering aspects of daily life, people learned how to work together, sorted out differences, and developed the vital attributes of civilization – tolerance of differences balanced with rules of engagement.

Economic freedom was the other driver for representative democracy. Once people were able to make a living with little or no meddling from the noble, they realized that the noble needed them more than they needed the noble. The noble wanted to maintain his castle and his knights both for protection and power. For this he needed to charge fees or taxes. Once independent towns grew outside of castle walls, or far away from manor lands, people had the freedom and mobility to "vote with their feet". If a noble is cruel, corrupt, or charges extortionary taxes people would move to the next village.

Economic vitality and localism in England drove a centuries' long migration from King over the people to people over the King. On June 15, 1215, local English nobles forced King John to sign the Magna Carta declaring he could not levy taxes without their consent.

The Magna Carta initiated a tug-of-war between King and subjects.

By 1341, the Commons began to meet separately from the nobility and clergy (now the House of Lords) in Parliament. Parliament, now with two chambers, expanded its role from validating royal edicts to initiating its own edicts, and ultimately to reviewing and even rejecting the King's actions.

By 1485, the King was no longer a Member of Parliament. By this time a member of either chamber could present a "bill" to Parliament. Bills supported by the monarch were introduced by Members of the Privy Council, who sat in Parliament. In order for a bill to become law it had to be approved by a majority of both Houses of Parliament before it went to the King for their approval or veto. The basic outlines of western Democracy were forming.

In the 17th Century, Charles I tried to reverse these arrangements, fought and lost a civil war, and then lost his head. The British Parliament sanctioned dictatorship, then returned to the old ways, before finally establishing the power to remove or anoint kings during the "Glorious Revolution" in November, 1688. In 1701, the "Act of Settlement" codified the preeminence of parliament and began the English constitutional monarchy.

America's path to the U.S. House of Representatives took a similar course. The Royal Charter that established Jamestown in Virginia evolved from governance by the Charter holders into governance by the King's Representative (Royal Governor) and his Advisory Council. When the settlers demanded their own voice, the Virginia House of Burgesses, in 1619, became the first democratically elected legislative body in America.

The House of Burgesses became a proving ground for what would become the U.S. House of Representatives. Drawing upon British tradition, revenue and spending bills originated in the House instead of the "upper chamber". Drawing from British tradition, the members of the House held their positions for short periods of time in order to be held closely accountable by those they represented.

James Madison and Alexander Hamilton, writing under the pseudonym "PUBLIUS", outlined the reasons for the unique binding of the House of Representatives to those they served.

As part of their series of essays advocating for the ratification of the U.S. Constitution "PUBLIUS" wrote in Federalist No. 52:

"First. As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be

effectually secured…. It is a received and well-founded maxim, that where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration."

Their case for shorter terms of service and frequent elections was detailed on February 19, 1788 in FEDERALIST No. 57:

> The House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.

When the U.S. House of Representatives meets, it draws upon this rich and deep history and set of precedents. It remains true to its origins: larger, rowdier, fractious, governed by rules and votes, and highly sensitive and responsive to the popular will and issues of the moment. This is in contrast to the slower pace, decorum, and informal agreements that characterize the Senate.

*Scot Faulkner advises corporations and governments on how to save billions of dollars by achieving dramatic and sustainable cost reductions while improving operational and service excellence. He served as the Chief Administrative Officer of the U.S. House of Representatives. He also served on the White House Staff, and as an Executive Branch Appointee.*

## Senate History: Purpose of the U.S. Senate, the "Cooling Factor" and "Sober Second Thought"

## Guest Essayist: James Legee

The Senate was intended to be the upper house of America's Congress, a long-serving chamber of sober debate. Here, the passions of human nature, which history watched manifest into noble appeals to virtue and liberty as often as into the deplorable institution of slavery or the savagery of the French Revolution, were to be calmed and sober reason allowed to prevail.

The House of Representatives, apportioned by population and elected directly by the citizens of the United States, served to animate the preamble, giving voice to "We the People," a key element of James Madison's Virginia Plan. While Americans generally recall the Federalist victory of ratification of the 1787 Constitution and largely credit Madison, the debate in Philadelphia was far more complex. What came out of Philadelphia, and was ratified in the State Conventions, was a document and system of government far less democratic than Americans live under today.

With two representatives from each state who were selected by state legislatures, the Senate was intentionally designed to incorporate elements of the New Jersey plan. While this is reminiscent

of the English Parliamentary system and certainly was a compromise, this was not merely Sherman's attempt to appease smaller states. Rather, many of the founders had an abiding distrust of human nature. They feared the inflamed passions of citizens, whether the victims of circumstance, moved by a demagogue, or in error on a question of significance to the whole.

When we turn to the debate in Philadelphia itself, on May 31, 1787, the Convention was engaged over the appointment of members of what would become the House of Representatives. Roger Sherman of Connecticut and Elbridge Gerry of Massachusetts were two of the first to speak. In Madison's Notes of Debate, he records Sherman's distrust, "Mr. Sherman opposed election by the people… The people, he said, should have as little to do as may be about the Government. They want information and are constantly liable to be misled." Later on June 7, 1787 Sherman rose in support of John Dickinson's proposal that state legislatures elect the Senate. Sherman contended that a "due harmony between the two Governments" arose from such a mode.

While Sherman highlights a distrust of the people and concern for the dual sovereignty of national and state governments, few spoke as vociferously against popular election than Elbridge Gerry. On the May 31 (again, discussing what became the House), Madison relates Gerry's view that "The evils we experience [under the Confederation] flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots… [Gerry] said he had been too republican heretofore: he was still however republican, but had been taught by experience the danger of the levelling spirit." Gerry later outlined a system in which the citizens would nominate people for the state legislature's consideration.

Gerry rose again in strenuous opposition to direct election on June 7. Selection of senators could not be entrusted to the citizens, as "[t]he people have two great interests, the landed interest, and the commercial including the stockholders. To draw both branches [of Congress] from the people will leave no security to the latter interest; the people being chiefly composed of the landed interest, and erroneously supposing, that the other interests are adverse to it … Oppression will take place, and no free Government can last long where that is the case." The Convention of 1787, of course, chose popular election for the House and state legislatures as the electors of the Senate.

Madison, too, was amenable to the concerns highlighted by Sherman, Gerry, and others. In Federalist 63 he wrote "As the cool and deliberate sense of the community ought in all governments … ultimately prevail over the views of its rulers; so there are particular moments in public affairs, when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice and truth, can regain their authority over the public mind?" As Madison outlined in Federalist 51, government must first be obliged to control the governed. Thus, the founders built a redoubt against the harsher aspects of human nature in the form of the United States Senate. Of note, is that James Wilson of Pennsylvania was the only delegate to press for the direct election of not only the House, but the Senate and even the Presidency at the Philadelphia convention.

As time passed, however, public perception of the mode of Senate election came to be viewed as archaic, undemocratic, and highly corrupt. Figures as diverse as Andrew Johnson and William Jennings Bryan called for reform, to let the people select their senators.

Senator George Frisbie Hoar rose to answer the reformers. Hoar, the grandson of Roger Sherman, found himself one hundred years later in the same chamber Sherman helped to create and occupied. In an 1897 article in The Forum, "Has the Senate Degenerated?," Hoar mounted a defense of the traditional Senate customs and mode of election, but began by acknowledging that the Senate was not a perfect institution. Hoar wrote "It is likewise true that the desire -of the people and the will of the Senate itself have been frequently baffled by using the power of lawful and constitutional debate [filibuster], not for the purpose of discussing practical questions which are expected to be brought to an issue, but for consuming time so as to prevent action." Hoar further recognized that while the method of electing may seem antiquated, America had grown in territory, population, wealth, and prestige under the Constitution, that "although the subtleties of the question of currency and finance present themselves for solution as never before; although we have been brought so much nearer to foreign countries by steam and electricity, and our domestic commerce has multiplied many thousandfold. I believe the people, as a whole, are better, happier, more prosperous, than they ever were before; and I believe the two Houses of Congress represent what is best in the character of the people now as much as they ever did."

Central to the success of the American system, for Hoar, was the preservation of the checks and balances embedded in the Constitution. The President and House represented the will of the American people, but the Senate was to preserve their better angels of our nature, for Hoar the Senate stood for the American people's "…deliberate, permanent, settled desire,—its sober, second thought."

*James Legee, Visiting Lecturer, Framingham State University Department of Political Science*

## Since the First U.S. Congress in 1789: Why, When and How the People's Branch Convenes

## Guest Essayist: Tony Williams

### The People's Branch

In the spring of 1789, several dozen representatives and senators from eleven states (North Carolina and Rhode Island had not yet ratified the Constitution) traveled to New York for the first session of the First Congress. Most fundamentally, they were assembling because the United States had a constitutional republican form of government based upon the consent of the governed.

Other important political principles informed the Framers of the Constitution in creating the Congress. In *Federalist* #51, Madison noted that, "In republican government, the legislative authority necessarily predominates." Therefore, the Framers were guided by additional political

principles to shape the Congress and prevent unlimited government, however much it expressed popular will.

The Congress was split into two houses by a principal called bicameralism, with each house given some important unique powers such as the power to originate money bills given to the House of Representatives. This is also an expression of the separation of powers within a single branch of the government. Federalism was another significant principle that was especially important in the creation of the Senate, which was originally chosen by and represented the states. Finally, the Framers added checks and balances between the two houses of Congress and with the other branches of government. There was real genius to the interplay and balance of these constitutional principles that the Framers put into creating the republican legislative system.

All of these constitutional principles were remarkable and a measure of genius, but the real question is how well it would work practically in the real world. The Congress, after all, was a deliberative body that would be a reflection of human nature and have all the passions, divisions, and factions of a deliberative body. How well would it work initially and into the future when faced with changes and crises was anyone's guess. Its success as the most representative branch of republican government would greatly contribute to the success of the experiment in republican governance and liberty.

The first session of the First Congress worked rather well, primarily because most of the members of Congress had experience in their state legislatures and the national Congress under the Articles of Confederation. It passed taxes necessary for revenue, regulated international trade, set up the departments of the executive branch and the national judiciary, and passed amendments that would become the Bill of Rights.

The sessions of the First Congress were hardly an idyllic republican dream of national unity and working in harmony for the public good, however. It was immediately rent by severe disagreements over national domestic and foreign policies. Sectional differences arose quickly and resulted in the rapid growth of political parties. Members of Congress questioned each other's personal motives and principles even as they disagreed over legislation. Still, their arguments were deeply rooted in an honest disagreement over the exact words and meanings of the Constitution as their guide in all their work.

The character of the First Congress laid the foundation for two hundred years of making laws and governing the republic. The Congress has seen many changes from a golden age of rhetorical statesmanship to powerful Speakers and party leaders to powerful committees to compromise or gridlock. The Congress has also made its own rules—some of them controversial such as the filibuster—as distinct from its constitutional powers. There have been great moments of unity and division.

More broadly, Americans have seen significant changes to their society and the world. They have fought a Civil War and two World Wars, suffered through many recessions and one Great Depression, seen social upheavals that led to greater equality and democracy for all. But, through

all the changes in Congress and the larger society, the Congress has remained a deliberative lawmaking body representing the people by their consent.

Even with the vast constitutional changes wrought by the Seventeenth Amendment that altered the founders' vision of a Senate shaped by the federal principle representing the states to one of representing the people, the Congress has continued its main business of lawmaking in a constitutional republic.

The founders were not perfect: the Congress has often been at the center of national controversy and sometimes even the cause of it. Today, approval ratings and trust seem lower than ever. At other times, it seems as if both houses are "millionaires' clubs" that don't really represent ordinary Americans or are beholden to special interests. Yet, the Congress is still about the people's business and our most representative branch of government as the founders intended.

*Tony Williams is a Constituting America Fellow and a Senior Teaching Fellow at the Bill of Rights Institute. He is the author of six books on the American founding including Washington and Hamilton: The Alliance that Forged America and Hamilton: An American Biography.*

## Legislative: Most Important Branch, of the People, Whose Primary Role Is Lawmaking

## Guest Essayist: James Legee

The contemporary refrain on Congress is that it is the branch of the Federal Government most reviled, and least functional. Pundits and professional scholars alike speak of gridlock and partisanship; political scientists Norman Ornstein and Thomas E. Mann have decried the branch of the people in a series of books with titles like "The Broken Branch" and "It's Worse than it Looks."

If public opinion polling is any indication, Ornstein and Mann are more than justified in their conclusions. A visit to Real Clear Politics (as of authorship) reveals a Congressional approval rating of 15.9%, and a staggering 73.7% disapprove of the job Congress is doing. A quick search of Gallup's historical trends on Congress and the public reveals that approval hasn't risen above 50% since June of 2003.

To many of the framers of the Constitution, this public sentiment would seem quite alarming, especially with an incumbency reelection rate cited as high as 80%. The legislature was intended to be the branch of the people, the expression of their will, and the legitimizing feature of the new 1787 Constitution.

One of the voices most concerned with the new government being as close to the people as possible was James Wilson of Pennsylvania. Wilson emerged early as a vocal Federalist, who sought a robust national government to overcome the deficiencies of the Articles of Confederation and envisioned America as a nation that would come to dominate the North American continent. In Madison's Notes of Debate, we find Wilson's arguments on May 31,

"Mr. Wilson contended strenuously for drawing the most numerous branch of the legislature immediately from the people. He was for raising the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible. No government could long subsist without the confidence of the people."

Madison followed Wilson, he "considered the popular election of one branch of the National Legislature as essential to every plan of free Government." The sentiment was broadly, but not wholly shared, as Elbridge Gerry and Roger Sherman would dissent, to say nothing of the delegation from New York, excepting Alexander Hamilton (and even Hamilton feared mob rule). Regardless, the Federalists understood the need for an energetic centralized government to right the economy, negotiate with the European powers that dominated the seas and a good portion of the North American Continent, and foremost, remedy the flaws of the Articles of Confederation.

While the Congress was to be the branch closest to the people, it was not to serve as a mirror. As Madison famously notes in Federalist 10, faction presented perhaps the greatest source of danger to a Republic. This led to the question as to whether a large or small republic was the way to prevent faction. Madison noted a benefit of republican government was "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen, that the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves, convened for the purpose." A large republic with an assembly of broadly selected representatives served not only as a bulwark against a demagogue, but for Madison, further served to take the laws citizens may create recklessly in a more democratic system, and refine them to preserve liberty and reach their intended goal.

The brilliance of design in the Constitution that came out of the 1787 convention was to at once rest on the support of the people, passing the laws necessary for the public good, and conversely, ameliorate the effects of faction (which Madison believed latent in human nature), preventing the rise of laws destructive to liberty and justice. In being the branch closest to the people, Congress also has an obligation to defend the laws of the people and the people themselves from the usurpations of other branches of government.

In 1834, Senate Whigs censured President Jackson. The Whigs desired documents on Jackson's destruction of the Second Federal Bank, but the Jackson administration refused to comply. Jackson wrote a lengthy and blistering response to the censure, where he accused the Senate of violating not only the separation of powers, but the Constitutional procedure for impeachment.

On May 7, 1834, renowned orator and Whig Senator, Daniel Webster presented not only a tremendous response to Jackson, but made a clear articulation as to why the Congress is the branch of the citizens, "Sir [President Jackson] if the people have a right to discuss the official conduct of the executive so have their representatives. We have been taught to regard a representative of the people as a sentinel on the watch tower of liberty. Is he to be blind though

visible danger approaches? Is he to be deaf though sounds of peril fill the air? Is he to be dumb while a thousand duties impel him to raise the cry of alarm? Is he not rather to catch the lowest whisper which breathes intention or purpose of encroachment on the public liberties and to give his voice breath and utterance at the first appearance of danger? Is not his eye to traverse the whole horizon with the keen and eager vision of an unhooded hawk detecting through all disguises every enemy advancing in any form toward the citadel which he guards?" The goal of the legislature is not merely as a body to create positive law, like the congressionally chartered Second Bank of the United States, but to sit as trustees guarding the liberty of the citizens.

Webster continues, "Sir this watchfulness for public liberty, this duty of foreseeing danger and proclaiming it, this promptitude and boldness in resisting attacks on the constitution from any quarter, this defence of established landmarks, this fearless resistance of whatever would transcend or remove them, all belong to the representative character, are interwoven with its very nature and of which it cannot be deprived, without converting an active intelligent faithful agent of the people into an unresisting and passive instrument of power. A representative body which gives up these rights and duties gives itself up. It is a representative body no longer. It has broken the tie between itself and its constituents, and henceforth is fit only to be regarded as an inert, self-sacrificed mass, from which all appropriate principle of vitality has departed forever." These are not minor implications. Congress has the most direct tie to the fount of power in America, the people. All laws, resolutions, chartered agencies, stem from the desires of the people. When congress fails to take the views into consideration, fails to refine them to compatibility with the constitution, with liberty, and with principles of justice, it has, as Webster notes, ceased to be a representative body.

Often unpopular, dislike for the House and Senate has hit all-time lows. What then, does it mean for Americans today, when public approval of Congress hovers around 20%, when it is meant to be the closest reflection of who they are? What does it say about the character of the citizenry? And perhaps most ominously, will the laws of the nation begin to follow the departed vitality Webster laments above?

*James Legee, Visiting Lecturer, Framingham State University Department of Political Science*

## Why the Legislative Branch Is Listed First in Article I of the United States Constitution

## Guest Essayist: James D. Best

The Constitution is comprised of seven articles. Article I defines the powers of the Legislature, Article II defines the power of the executive, and Article III defines the powers of the judiciary. The remaining short articles handle everything that didn't fit within branch powers.

In the closing days of the Federal Convention, now called the Constitutional Convention, the Committee of Detail delivered twenty-three disjointed sections to the Committee of Style. Gouverneur Morris volunteered to edit the language of the resolutions. He also consolidated the sections, organized the presentation, and prepared a preamble. He wrote with such consummate

skill that his words have reverberated through time and distance. Morris took the clumsy and perfunctory preamble from the Committee of Detail and crafted a beloved fifty-two words opening that may be the most important sentence in political history.

Morris cannot take credit for "We the people," but he can take credit for "We the People of the United States." The Committee of Detail preamble used "We the people of the States of …" and then listed all thirteen states.

During the convention, Morris argued for a strong executive. Only Alexander Hamilton may have been a stronger nationalist. As the "Penman of the Constitution," he could have started with executive powers to emphasize the powers of the president. He did not. Why? Four considerations may have led him and the Committee of Style to list legislative powers first.

1. The Congress under the Articles of Confederation sanctioned the Federal Convention.
2. The Federal Convention needed Congress to forward the Constitution on to the state ratification conventions.
3. People would be more comfortable with a strong executive after they saw legislative checks on executive powers.
4. Congress would be the first branch of the new government. It would validate the election of the president, who would then nominate justices to the Supreme Court.

Congress sanctioned the Federal Convention to recommend amendments to the Articles of Confederation. Instead, the convention invented an entirely new system of government. The convention's sole claim to legitimacy came from Congress, and they had to get by this same body to ratify the Constitution. Despite popular misperception, the Constitutional Convention did not "ordain and establish" the Constitution. It took independent conventions in each state to accomplish that herculean task. These first two considerations required the Framers to show deference to the old Congress.

Vast presidential powers terrified early Americans. They had first-hand experience with an autocratic executive, and knew from bloody experience that it was difficult to break free from oppressive. The Articles of Confederation were sickly, but a strong president would be hard medicine to swallow. In the design, the Framers insisted on balanced power between the branches, with each branch possessing potent checks on the other branches. Safety through what we call checks and balances. Delegates to the state ratification conventions had not participated in the four months of debate and compromise. This would be all new to them … and the rest of the nation. Legislative checks on the executive might overcome some of the apprehension surrounding a powerful executive.

The Committee of Style completed another vital task. They wrote an audacious letter to Congress that told them how to implement the new government. Not a trivial matter, and in many respects, much like the chicken and egg question. Under these instructions, the sequence of the branches taking oaths of office is the same as listed in the Constitution. The letter states, "the United States in Congress assembled should fix a Day … the Time and Place for commencing Proceedings under this Constitution." Thus, Congress first. "Senators should appoint a President

of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President" And President next, who would then nominate justices for the Supreme Court.

If the three branches are co-equal, then theoretically, it shouldn't make any difference which branch is described first. Perhaps not for governance, but it made a difference in improving the atmosphere for ratification. The Framers understood that they did not possess the authority to make the Constitution the "supreme Law of the Land." The Framers believed that power resided solely with the people, and now the people would judge their work. Would they approve? Determined and noisy opposition stood ready on the sidelines, eager to knock down anything that smelled of monarchy. The Framers were politicians. Gifted politicians. They knew the weaknesses of the Articles, the symmetry of the Constitution, and the mood of their countrymen. They took many measures to promote ratification. The sequence of the document may have been one more.

Why is the legislative branch listed first in the United States Constitution? To remove obstacles to ratification, to make acceptance easier, and to facilitate implementation.

Theodore White in his book, *In Search of History* wrote, "Threading an idea into the slipstream of politics, then into government, then into history… is a craft which I have since come to consider the most important in the world." This was the Framers gift … and it is a rare gift indeed.

*James D. Best, author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, Principled Action, Lessons From the Origins of the American Republic, and the Steve Dancy Tales.*

## What a Republican Form of Government Means and Why This Structure Mattered to America's Constitution Framers

## Guest Essayist: Joerg Knipprath

Under Article IV, Section 4, of the Constitution, the United States shall guarantee to each state a republican form of government. That raises the question of what was understood not only by a "republican form" of government, but by the substance of republicanism.

It would be a fair summary that, for Americans of the Founding, a republic required a body (constitution) composed of certain structures (separation of powers, blending and overlapping of functions, carefully circumscribed powers), that operated by popular participation (potentially moderated by the principle of representation) in a community of manageable size, and was animated by the spirit of republican virtue and modesty. Government was to be limited (civilian control over the military, no standing army, no holding of simultaneous offices, rotation in office, short term limits of office). Increasingly subject to debate, however, was the extent to which reliance on the virtue of either the governors or the governed was a realistic constraint on abuses by government.

Americans looked to their idealized and sentimentalized version of the Roman Republic with its Stoic virtues–and saw themselves: Simplicity of life, self-reliance, civic duty, and morality inculcated through education, religion, and, if necessary, law. What was true for the governed applied equally to the governors, who were selected by the former and would make law not for their self-interest or for their class or faction, but for the general good.

Plato informs us that *politeia* (often translated as "republic") is an unlimited government controlled by a carefully bred and educated elite (a natural aristocracy). It is distinguished from an oligarchy that governs for its own benefit, and from a hereditary aristocracy, as we understand it, in that there is no birthright to govern. The guardian class reflects virtue (arête) made concrete by application of reason to administer public affairs for the benefit of the whole.

Americans, too, found such a government by a meritocratic elite conducive to the Founding's principles. Thus, Thomas Jefferson would write to John Adams in 1813, "The natural aristocracy I consider as the most precious gift of nature, for the instruction, the trusts, and government of society….May we not also say, that that form of government is the best, which provides the most effectually for a pure selection of these natural *aristoi* into the offices of government?" He (and Adams) also feared the power of an "artificial aristocracy," one rooted in wealth and birth, rather than virtue and talent. To separate them, and to elevate the "natural" and control the "artificial" was the task. Jefferson saw the proper mechanism as free election of assemblies by the citizens, while Adams saw it in a government of separate political bodies, where one would be the formal domain of the wealthy, checked by the other structures. As a complementary matter, while Plato's eugenics was not conceivable, both saw the inculcation of virtue through education as critical for representative government. Jefferson again: "If a nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be." He proposed a process by which even some from families too poor to pay might be selected to receive an education. As he described it pungently, "By this means twenty of the best geniuses will be raked from the rubbish annually, and be instructed, at the public expence."

"Community" was another critical element of a republic. Whether in the Greek *poleis*, early Rome, medieval Italian city-states, or the post-Revolutionary War "united states," it was generally assumed that popular control of public affairs could succeed only in relatively small, physically compact, and socially homogeneous units. As an entity becomes more populous and more socially diverse, and as the locus of government becomes more geographically remote, the spirit of civic involvement and individual sacrifice for the common good weakens. Social science research has corroborated that discomforting, yet common-sense, observation.

With population growth and geographic distance to the place of government, we no longer see each other as individuals bound in community, but as members of classes and factions. As well, the bonds between the governors and the governed fray. The Federalist, especially through the writings of James Madison, time and again returned to that theme in an effort to blunt the opponents' attacks that the remoteness of the general government from the people and the geographically large and socially diverse nature of the "Confederacy" (as they referred to the United States) made republican government at that level impossible and tyranny inevitable. Madison sought to turn the table on the opponents in *Federalist No. 10*. He boldly asserted that the majority would still exercise control of the general government through the vote, albeit

filtered through the principle of representation, but that dissenters would not be permanently excluded, precisely because of the greater size of the domain:

> Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

He amplified his theory in *Federalist No. 51*, discussing fluid combinations of interest groups:

> Whilst all authority in [the United States] will be derived from, and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.

The ideal population size of the community is unclear. Aristotle posited that it had to be large enough to provide the social and economic structure to promote human flourishing, but small enough that everyone would know each other's personal qualities. With 100 residents, you do not have a *polis*; with 100,000, you no longer have one. Plato, with his passion for numbers, declared the ideal community to consist of 5,040 adult male citizens. Based on his number, the entire community likely would be around 30,000 residents. The formula for initial Congressional apportionment was one representative for every 30,000 residents (including slaves calculated under the 3/5 rule). The Bill of Rights sent by Congress to the states in 1789 provided in its first article that Representatives would be apportioned at a maximum of one for every 50,000 residents, similar to the views of the classical writers. Although that proposal failed of adoption, these efforts show the Framers' awareness of the importance of proper community size to the republican nature of government.

Contrary to Plato's *Politeia*, other classical writers, such as Aristotle and Polybius, viewed as "republics" the ideal "mixed" structures that were also the best practical approach to the task of administering public affairs. Aristotle saw this in the political balance in the Athens of his day between oligarchy and democracy, both of which in their pure versions were corrupt forms made to benefit the wealthy and the poor, respectively. Polybius favored the mixture of monarchy (consuls), aristocracy (senate), and democratic (assemblies) elements that he found in the constitutional mechanisms of Rome before the Empire. His description also fits what for many 18th century Englishmen described the essentially republican nature of their limited monarchy, a class-based structure that represented liberty and popular will (House of Commons), stability and wisdom (House of Lords), and energy and unity (king). It comes as no surprise that the *Federalist* uses similar terms in describing the House of Representatives, the Senate, and the President, respectively.

While Plato proposed to invest sole and unrestricted governing power in the guardian class within his ideal republic, advocates of an undivided *imperium* traditionally were defenders of monarchy. Republics more typically featured distributed powers in their formal constitutional arrangements. For the Framers the question was not whether to distribute powers among various branches, but how. There were two, at first blush contradictory, approaches. One was a formal

division of powers and political independence that would prevent each department of the government from consolidating power by intruding on the domains of the others. Classical writers, such as Polybius, had observed this as a feature of Roman republicanism, though not in the context of a formal theory of limited government. Later writers, such as the often-cited and lauded Montesquieu, characterized the English constitutional monarchy in similar manner. More concretely, that approach was earnestly–and somewhat comically–set down in Article XXX of the Massachusetts Constitution of 1780:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them.

There were, then, clear models and definite philosophic grounds for formal divisions of power. While not as detailed as that of Massachusetts, the U.S. Constitution is founded on similar sentiment in its broad division of powers among the three branches and in the specific immunities it grants to a branch against encroachments by another. One example of the former is the distinct vesting of functional powers in the three governmental branches; an example of the latter is the protection of the Speech and Debate Clause for members of Congress.

The second approach sought not separation, but a blending and overlapping of powers. Many Americans reflexively considered the king's patronage power an affront to republican principles in its corruption of government and threat to liberty. "He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harass our People and eat out their Substance," Jefferson would fume in the Declaration of Independence. Vestiges of that disgust remain in passages of the Constitution that prohibit holding an office under the United States while a member of Congress. However, the Scottish philosopher David Hume, not a reflexive supporter of King George, saw the king's patronage power as essential to balanced government and the protection of liberty from what would otherwise be an all-powerful House of Commons:

> [The] House of Commons stretches not its power, because such a usurpation would be contrary to the interest of the majority of its members. The crown has so many offices at its disposal that…it will always command the resolutions of the whole [House], so far, at least, as to preserve the ancient constitution from danger. We…may call it by the invidious appellations of *corruption* and *dependence*; but some degree and some kind of it are inseparable from the very nature of the constitution and necessary to the preservation of our mixed government.

Hume's writings influenced the Framers, especially Madison. The result is that there are many instances of "blending and overlapping" functions. One example is the President's qualified veto over legislation; another is the need to obtain the Senate's approval to confirm the President's appointment of federal officers.

In addition to the spirit and structure of republican government, there remain the crucial operative principles of the vote and representation. The Framers left the former to the control of the states, except to require that voters for the House of Representatives had to have the same

qualifications of the state set for voters for the more numerous of its own legislative chambers. It was generally agreed, consistent with classic republican ideals, that only those with a significant stake in the community (through wealth, age, citizenship, military service) and deemed most suited to participating in public affairs should vote. However, there were significant differences among the states as to the specific qualifications.

Representation was a crucial device not just to give voice to popular sentiment, but to modulate that voice. This was a crucial distinction between the turbulence of democracies and the calm deliberation needed for sober laws that would foster social peace and stability, yet not destroy liberty. As Madison declared in *Federalist No. 10*, "[Such] democracies…have ever been found incompatible with personal security, or the rights of property; and have, in general, been as short in their lives, as they have been violent in their deaths." Further, in *Federalist No. 55*, "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."

Its decisions on the proper composition of legislatures might suggest otherwise, but the Supreme Court has declared that it is beyond its proper role to define what is a "republican form of government." The subject goes to the heart of self-government. To what extent we have departed politically, socially, and culturally from the classical vision of republicanism and what that foretells about the future of the American experiment should be a matter of serious reflection and concern for every free citizen.

*An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: http://www.tokenconservative.com/.*

## The Declaration of Independence and the United States Congress

## Guest Essayist: Gary R. Porter

Most Americans realize that the Declaration of Independence established our separation from Great Britain and that sometime later the U.S. Constitution established the U.S. Congress, the Legislative Branch of government, along with its sister branches: the Executive and the Judiciary. But most Americans would be surprised to learn that the Congress, through the Constitution, has a connection to the Declaration of Independence as well. Many view the two documents as separate and distinct; they were, after all, drafted eleven years apart by two different groups of men for different purposes.[1] But the U.S. Supreme Court has affirmed their connection; in Gulf, C. & S. F. R. CO. v. Ellis , 165 U.S. 150 (1897), the Court declared that while the Constitution was indeed the "body and letter" of our government, the Declaration was the "thought and spirit."

"Thought and spirit?" Whatever could that mean? Webster's 1828 Dictionary contains several usages of "thought," but one particularly fits here: "*purpose*." Couple that with "spirit," which Webster defines as: "*life or strength of resemblance; essential qualities,"* and we can deduce that the Court sees the Declaration of Independence as elucidating the essential qualities and purpose of our government. What are these "essential qualities and purpose?"

For starters, the oft-ignored middle section of the Declaration, Jefferson's "complaints," contains a list of "*repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States*." If these 27-28 "facts"(depending on how they are counted) can be considered examples of "bad" government, then their reverse can become examples of "good" government. For example, Jefferson lodges a complaint against the King by proclaiming that he *"dissolved [the colonists legislatures] repeatedly, for opposinga with manly firmness his invasions on the rights of the people."* If this is taken as an example of poor government operation or design, then to guard against that when designing a new government (ala 1787) we should withhold from the Executive the power to act as did King George. Do we find this in the Constitution? Yes! The President does not have the power to dissolve the Congress, or even send them into recess except under the narrowest of circumstances (only when the two chambers of Congress cannot agree on the "Time of Adjournment").

Following this example we can discern more than twenty examples of good government in the Declaration, and we find many of them show up in the Constitution.

Concerning the Executive, we find:

- The Executive must not become tyrannical
- The Executive must not dissolve Representative bodies unilaterally

Concerning the Legislature, we find:

- The Legislature's laws must be implemented, they cannot be ignored
- Legislative bodies must have the latitude to set their own agenda and rules, free from constraint or influence from the Executive
- The power to legislate is permanent and devolves to the people when suspended
- Rules for immigration and naturalization fall under the purview of the Legislature, not the Executive (unless expressly delegated)

Concerning the Judiciary and the Law, we find:

- Government should have a Judiciary power (the Articles of Confederation did not)
- Judges should be independent and act free from influence by the Executive
- Military law should be subservient to civil law
- Infractions by the military must be punishable in civil court

Concerning the people's rights, we learn:

- The people have the right to be secure in their life, liberty and their pursuit of happiness (or, as was the standard of the time: property)
- The people have the right of representation in government
- The people have the right of habeas corpus and local trial
- The people have the right of petition for redress of grievances
- The people have the right to be taxed only by consent
- The people have the right to first consent to quartering troops

Concerning general principles of government, we learn:

- The purpose of Government is to secure man's unalienable, God-given rights
- Government derives its "just" power from the governed
- Government should not incite its citizens to insurrection
- Government is not permanent, it can be abolished and replaced by new forms
- But, the form of government is unalterable without the consent of the governed

These principles should guide the design and operation of the Congress as they do the rest of the national government. Do they?

We know from Article 1 Section 7 that unless the President vetoes a bill it automatically becomes law (unless presented to him in the last 10 days of a session); thus, "the Legislature's laws must be implemented, they cannot be ignored." Check.

Article 1, Section 5 gives each House the power to "determine the Rules of its Proceedings." Check.

Article 1, Section 8 gives Congress the power to set rules for naturalization ( and by implication, immigration). Check.

"The power to legislate is permanent and devolves to the people when suspended?" This principle of government is not explicit in the Constitution, but if the government under the Constitution should ever be dissolved and replaced with another, I think it is generally understood that the people are the only legitimate sovereignty to do so.

But how about the general principles of government we outlined above; shouldn't the Congress be held to comply with them? Great point; let's see how they've done:

Congress should be working diligently to secure our unalienable, God-given rights. This, according to Jefferson, is the primary reason "*governments are instituted among men*." In this regard, I think there remains some work to do, particularly in the area of the Right of Conscience.

Madison wanted to include an explicit right of conscience in what became the Bill of Rights; he was outvoted. His original draft of what eventually became our 1st Amendment read: *"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience by in any manner, or on*

*any pretext infringed*."(Emphasis added) Madison went even further to suggest that "No state *shall violate the equal rights of conscience, ...."* (Emphasis added) Both of these references to the right of conscience were omitted by the Congress as the draft passed back and forth between the two chambers. Why? We can't really tell from the Congressional debate, but I for one wish both ideas had been retained. An explicit right of conscience would prevent it having to be "teased out" of the Ninth Amendment or, as the case today, trampled underfoot.[2]

Congress could "fix this" with a properly worded Constitutional amendment that secures the Right of Contract based on the Right of Conscience. But they show no inclination to do so, leaving it to be fixed through the second amendment method found in Article V, a "convention for proposing amendments" demanded by the states.

"*Government derives their 'just' powers from the governed?*" Too often, I think, Congress sets its own agenda instead of listening to We the People. The Affordable Care Act would never have passed in 2009 if it had been put to a vote of the people; polls consistently showed 60% or so of Americans in opposition. Yet, the Democrat-controlled Congress passed the legislation in a blatant exercise of partisan power. Part of this is our fault; the American people are largely disengaged from their government other than at election time. "Keeping the republic" as Dr. Franklin urged, requires far more than mere voting (and many Americans will not even do that.

"The form of government is unalterable without the consent of the governed." Hmmm, I don't recall being asked whether the Department of Education was a good idea, or the FDA, or EPA, or any of the other "alphabet agencies" in the federal government today. Congress just went ahead and created these entities. "But they are our representatives, we should let them do what they think is best," comes the reply. With a 97% reelection rate in the House of Representatives,[3] Congress is either doing exceptionally well or the American people simply aren't paying attention (I'm leaning towards the later).

Each incoming Congress normally conducts a ceremonial reading of the Constitution in the first few days of the session. Some complain this is merely for show, that Congressmen and women then proceed to completely ignore their oaths to "support and defend the Constitution." Perhaps there is some truth to this charge. But might we humbly suggest that before reading the Constitution, that Congress also read, out loud, the Declaration of Independence, and then take a moment (or several moments) to reflect on the "thought and spirit" of our government before proceeding with their appointed tasks?

*Gary Porter is Executive Director of the Constitution Leadership Initiative (CLI), a project to promote a better understanding of the U.S. Constitution by the American people. CLI provides seminars on the Constitution, including one for young people utilizing "Our Constitution Rocks" as the text. Gary presents talks on various Constitutional topics, writes a weekly essay: Constitutional Corner which is published on multiple websites, and hosts a weekly radio show: "We the People, the Constitution Matters" on WFYL AM1140. Gary has also begun performing reenactments of James Madison and speaking with public and private school students about Madison's role in the creation of the Bill of Rights and Constitution. Gary can be reached at gary@constitutionleadership.org, on Facebook or Twitter (@constitutionled).*

[1] There were actually eight men who signed both documents; but the first document was the product of a Congress while the second a product of a convention.
[2] See *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, and *Burwell v. Hobby Lobby*, among others.
[3] See: http://www.opensecrets.org/overview/reelect.php

## The Articles of Confederation: The First Written Constitution of the United States

## Guest Essayist: George Landrith

After the decisive Battle of Yorktown in October of 1781 where General George Washington's army defeated and captured the British army commanded by General Charles Cornwallis, the British sued for peace. America had finally won the independence that Jefferson had written about in his famous Declaration formalized by the Continental Congress on July 4, 1776. It took more than five years of war to win that freedom. Now came the difficult task of establishing a nation dedicated to the principles of freedom and self-government.

But the Continental Congress did not leave the task of creating a government until after the war was won. Shortly after declaring their independence in July 1776, the Continental Congress began to debate what sort of government they should create. More than a year later, on November 15, 1777, they sent the Articles of Confederation to the states for ratification.

The Articles of Confederation established a war-time confederation of the 13 original states. Even though the Articles were unratified by the thirteen states until March 1, 1781 — about eight months before the victory at Yorktown — it was used by the Continental Congress to govern during the Revolutionary War and to prosecute the war.

The experience of early American political leaders with big, powerful government had been decidedly negative. The British government, as it became frustrated with American's desire for freedom, had barred free speech, censored and outlawed a free press, forbidden the freedom of association, mandated religious beliefs and practices, outlawed gun ownership, and denied the people's right to govern itself by abolishing their colonial legislatures. The grievance of "taxation without representation" was only a small part of the frustrations of colonial Americans with British rule.

In an attempt to preclude such abuses in America's future, the Articles of Confederation created a weak central or national government. It created an unicameral national legislature known as a congress, but no presidency, and no judiciary, and no power to tax. The central government could make war, negotiate peace, negotiate commercial agreements with foreign nations, and adjudicate disputes between the states. But they had no power to enforce those decisions or agreements. So even those limited powers proved in practice to be mostly theoretical.

The Continental Congress could only request states to fund the war effort, but often those requests were ignored — which made funding the Continental Army extraordinarily challenging

and risked the success of the War for Independence from the very beginning. Reading General Washington's letters to Congress pleading for food, clothing, shoes, guns and ammunition for his soldiers reveals one of the frustrating weaknesses of the Articles.

During the Revolutionary War and thereafter, it became apparent that the government they had created was too weak and ineffective. After independence was won, the various states pursued their own interests and there were increasing economic disputes about trade and travel between the states. There was a growing sense that the Articles of Confederation were failing and that reform was needed. At the same time, the fear of big, powerful centralized government that could abuse the rights of its citizens remained a serious concern.

In 1786 and early 1787, Shay's Rebellion, the armed uprising of 4,000 rebels near Springfield Massachusetts, highlighted and focused what was already in the general consciousness of the nation — that the Articles of Confederation needed to be reformed. Additionally, the Rebellion may have increased support for restructuring the Articles so that the federal government was stronger — and yet, still strictly limited with powers checked and divided. Thus, many believe that Shays Rebellion created a climate in which the U.S. Constitution could be more easily proposed and ratified in the following years.

Even though not ultimately successful and eventually replaced by the United States Constitution, the Articles of Confederation played a vital and important part in the development of America and its experience with liberty, individual rights, and self-government.

First, our nation's name "The United States of America" was established in the Articles of Confederation. This name is more than just a name — it recognizes that the thirteen original states preexisted the national government and that they voluntarily united themselves by their mutual agreement and to promote their common interest in freedom.

Second, the Articles of Confederation established the important precedent of having a written constitution — not merely an amorphous collection of precedents and traditions as was common at the time. This was a revolutionary idea. To this day, Great Britain does not have a written constitution. Thanks to the Articles of Confederation, America's tradition is to have an actual text that we can debate and refer to with specificity.

Third, the Articles established the important concept known as "federalism." The Articles created a federal government that had limited powers, but left everything that was not specifically given to the central government to the individual states. Many nations simply have a central government with no state governments. Providences are often simply geographical subdivisions of the larger landmass. But in the United States, states have their own written constitutions and have their own powers and authorities — independent of the federal government. The Articles of Confederation formalized the importance of this division of power in the minds of Americans.

Fourth, under the Articles of Confederation, the Northwest Ordinance of 1785 was passed which helped shape the expansion of the United States and began the process of outlawing slavery. It provided that several large and powerful states with territorial claims on western lands relinquish

their claim to those lands and prohibited slavery there. This paved the way for five new states to later join the United States under the U.S. Constitution as free states — Ohio, Indiana, Michigan, Wisconsin and eastern Minnesota.

Because the framers of the Articles of Confederation were so focused on not creating a central government that could ever repeat the abuses they witnessed as colonists of the British crown, they created a national government that was too weak. These weaknesses revealed themselves throughout the Revolutionary War and afterward. But the Articles of Confederation created a solid foundation upon which the current U.S. Constitution was built.

In September 1786, the Annapolis Convention called for a Constitutional Convention to address needed reforms to the Articles of Confederation. Beginning in May 1787, that Constitutional Convention was convened in Philadelphia where the Declaration of Independence had been debated and adopted about 10 years earlier. George Washington was unanimously elected the president of the convention. Because of his national reputation and trust, the proceedings enjoyed a certain level of credibility in the minds of the American people which ultimately helped the new Constitution obtain ratification.

After a long and fierce debate, the Constitutional Convention discarded the Articles of Confederation and adopted the United States Constitution. This new Constitution gave the federal government enough power to cure the defects observed in the Articles of Confederation, but still focused on ways to limit, divide, separate and check the power of the central government and ensure individual rights. Despite the abandonment of the Articles of Confederation, many of its foundational elements are clearly present in our government today, and it was an important political document that helped pave the way for America's amazing experience with more than 240 years of independence limited government, and individual liberty.

*George Landrith is the President of Frontiers of Freedom. Frontiers of Freedom, founded in 1995 by U.S. Senator Malcolm Wallop, is an educational foundation whose mission is to promote the principles of individual freedom, peace through strength, limited government, free enterprise, free markets, and traditional American values as found in the Constitution and the Declaration of Independence.*

## Articles of Confederation – Congress Wielded All Three Powers: Legislative, Judicial, Executive, Later Separated

## Guest Essayist: Daniel A. Cotter

On November 15, 1777, the Continental Congress approved what was this newly declared independent nation's first constitution, the Articles of Confederation. The Articles included a single governing body, the Continental Congress. Requiring unanimous ratification by all thirteen of the British colonies, it took until March 1, 1781, when Maryland ratified the Articles, for them to become effective. The Articles governed until 1789, when the United States Constitution replaced the Articles.

The Articles were a war-time pact intended to bring the thirteen colonies, disparate in their needs and interests, together to fight Great Britain. Structured very differently than the United States Constitution, the Articles featured a weak central government that had no real power over the thirteen sovereign colonies. By design, the colonies retained their independence and sovereignty, which pleased the colonies but made it difficult for there to be a unity of purpose or ability to honor the nation's obligations and commitments. For example, to fight the Revolutionary War, the colonies had borrowed substantial sums. Post-war, when Congress attempted to collect the debts from the colonies, it had no power to enforce allocations.

The Articles consisted of 13 articles, likely not a coincidence, with the 13th making it clear that the Articles might only be amended by unanimous ratification by the states' legislatures. (The attendees of the Philadelphia convention in 1787 would ignore this requirement, with Rhode Island not attending the convention.)

Article Two provided:

> Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated.

Article Three confirmed that the intent was not to have a centralized government trump the states, specifying:

> The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare….

The Articles did not contemplate separate branches of government, as we experience today at all levels of government, but rather specified a single governing body. Article Nine sets forth the powers of the national government, including:

- the sole and exclusive right and power to determine peace and war; to exchange ambassadors; to enter into treaties and alliances; to establish rules for deciding all cases of captures or prizes on land or water; to grant letters of marque and reprisal(documents authorizing privateers) in times of peace; to appoint courts for the trial of pirates and crimes committed on the high seas; to establish courts for appeals in all cases of captures, but no member of Congress may be appointed a judge; to set weights and measures (including coins), and for Congress to serve as a final court for disputes between states.
- regulating the post offices; appointing officers in the military; and regulating the armed forces.

The Articles also provided for a President, but that position was mostly an honorific one without any real executive powers with no executive branch and a unicameral legislative house, the Continental Congress. There was no judiciary, there was simply the Continental Congress. Judicial function was limited to trial of pirates, crimes committed on high seas, and courts of appeals.

**What did the Framers think of the Articles of Confederation and why they did not last?**

The Articles were the initial effort of the colonies, who declared independence in July 1776, to form a stronger national government. First introduced in 1776, they were approved by the Continental Congress and from their effective date in 1781 until 1787, when the Constitutional Convention met, they served to get the nascent nation through a war. When the war was over, and the Continental Congress sought to address war debts, interstate commerce and treaties, it became apparent that the existing Articles needed to be amended. The Framers considered some of the weaknesses of the Articles, including: 1) each state had only one vote in Congress, regardless of delegation size or size of state, 2) Congress had no power to tax, which became a challenge in repaying the nation's war debts; and, 3) Congress had no effective power to regulate foreign and interstate commerce.

Some trade disputes ensued, and James Madison called for a convention to be held in Annapolis, Maryland in 1786. Only five states were represented and so the attendees called for a convention the following May to be held in Philadelphia, Pennsylvania. On February 21, 1787, the Continental Congress approved a plan to amend the Articles in Philadelphia in May in what became known as the Constitutional Convention, to amend the Articles, as the resolution stated:

> to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union.

George Washington referred to the Articles as effectuating "*a half-starv'd, limping Government."* In 1780, Alexander Hamilton wrote, "The fundamental defect is a want [lack] of power in Congress." James Madison stated:

> I conceive it to be of great importance that the defects of the federal system should be amended, not only because such amendments will make it better answer the purpose for which it was instituted, but because I apprehend danger to its very existence from a continuance of defects which expose a part if not the whole of the empire [nation] to severe distress. The suffering part [people], even when the minor [minority] part, cannot long respect a Government which is too feeble to protect their interest.

**Conclusion**

When delegates met in Philadelphia to review the Articles of Confederation, they called for an oath of secrecy and immediately set aside the Articles, our first constitution, to embark on a new guiding instrument, the United States Constitution. Many may lament that is has significant weaknesses, but many of the flaws of the Articles were corrected by the Framers, and the rest, as they say, is history.

*Dan Cotter is a partner at Latimer LeVay Fyock LLC and an adjunct professor at The John Marshall Law School, where he teaches SCOTUS Judicial Biographies. He is in the process of writing a book on the seventeen Chief Justices. He is also a past president of The Chicago Bar Association. The article contains his opinions and is not to be attributed to anyone else.*

## Articles of Confederation – What the Founders Thought of the Articles of Confederation and Why They Did Not Last

## Guest Essayist: Patrick Garry

The Articles of Confederation provided America's first form of government structure, in effect during the years immediately following independence from Britain and ending with the adoption of the U.S. Constitution in 1789. The Articles created a very weak national governing structure, which resembled more of a loose confederation of the different states than a single, unified sovereign entity.

The impetus for this confederation-style of government came in part from the American colonial experience. The Revolutionary War had been driven by the abuses and injustices committed by a distant and tyrannical British government. Colonists equated the centralized power of English rule with the deprivation of their liberties. Therefore, once Americans gained independence, they did not want to risk replicating such an abusive and oppressive central government.

At the same time, Americans trusted their state governments, which had been established under individual state constitutions enacted largely during the Revolutionary period. These state constitutions were highly democratic in form, reflecting as they did the new American enthusiasm for a kind of democracy unknown and unused in the world at that time. This enthusiasm provided another reason that the states were given supremacy in the governing structure of the Articles of Confederation.

Further contributing to the weak and secondary powers given the national government under the Articles was that the states did not want to relinquish their power and autonomy to some central authority. Because the states differed greatly in their interests and identities, they mistrusted how other states might join together through a national government to jeopardize those interests.

The problems and inadequacies of the Articles of Confederation quickly became apparent during its brief tenure. The weak national government proved inadequate to carry out the tasks necessary for it to perform. The Articles essentially allowed the states to go their own way on most issues. The government did not have the power to restrict liberty, but it likewise did not possess the power to unify the states on matters of national interest. Under the Articles, for instance, the government lacked taxing power, struggled to repay the war debt, and had no executive or judicial branches.

Because of these problems and shortcomings, and after the lesson of Shay's Rebellion, political leaders began debating and designing a new government structure. The resulting U.S. Constitution, implemented in 1789 and in effect today, created a strong national government of three different branches. To supporters, this structure was needed to govern the United States as a nation and not just as a collection of states, each with their own identities and agendas. But a stronger central government also renewed fears of creating the kind of abusive government the colonists had experienced under British rule.

Although the Articles had demonstrated the need for a stronger national government, the primary threat to liberty was seen as emanating from such governments. Therefore, the preeminent debate of the time involved how to limit the new federal government so as to prevent it from having the power to commit the kind of abuses once committed by the British government. Liberty was to be protected by a system of limits on government power, not simply by the absence of government power.

The debate about whether and how the proposed Constitution contained sufficient limitations on the power of the new federal government occupied a central focus of *The Federalist Papers,* America's most famous and influential political commentary on the adoption of the Constitution. Such proposed limitations took various forms. The doctrine of enumerated powers meant that the federal government possessed only those powers specifically granted it by the Constitution. This contrasted with the situation of state governments, which under their constitutions possessed all powers not specifically denied them by those constitutions. Other structural limitations on federal power under the Constitution included the doctrines of federalism and separation of powers, which place an array of checks and balances on the ability of each branch and level of government to overstep their boundaries.

Opposition to the Constitution came from the Antifederalists, who did not think the Constitution contained sufficient limits on federal power. The Antifederalists reflected the suspicion of centralized governments that underlay the Articles of Confederation.
Ultimately, the U.S. Constitution was ratified and the Articles of Confederation abandoned, because while liberty was important, so also was the effective governance of the new American nation. Although the Articles gave almost exclusive consideration to preventing central government overreaching, the U.S. Constitution tried to balance the preservation of liberty with the effective governance of a growing nation through a sufficiently strong federal government.

*Patrick M. Garry is Professor of Law at the University of South Dakota.* [*http://patrickgarry.com*](http://patrickgarry.com)

## Bill of Rights: Placing Limits on Congressional Governing, Part 1

## Guest Essayist: Andrew Langer

"Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference." – Thomas Jefferson, in a letter to James Madison, December 20, 1787

It was not America's victory over England in 1781 that was a revolutionary miracle—for following the surrender at Yorktown any one of a number of things could have gone (and in some cases did do) wrong in the creation of our new nation. No, it was the creation of our Constitution and the adoption of the first ten amendments as a "Bill of Rights" that was the true miracle—since both, taken together, were based on a premise that had been unheard-of until that point.

The U.S. Constitution is an enumeration of powers, originally conceived as narrow and exacting. But because men like Jefferson and Madison foresaw the possibility of that careful cession of power to a federal government being expanded over time, both saw it as necessary to further constrain those powers through a "Bill of Rights".

In his December 20, 1787 letter to Madison, Jefferson laid out some of his concerns for the Constitution that had been drafted over the course of the previous summer's convention in Philadelphia. One of his most-serious concerns, and one of the deep concerns of the "Anti-Federalists" (a term now turned on its head—since Anti-Federalists in the late-18th Century were those who were high suspicious of concentrated federal power, while we now consider such advocates for diffused federal power to be aptly described as "federalists"), was that no further explanation of how government ought to be constrained vis-à-vis the rights of individuals was laid out.

In this letter, Jefferson went on to talk about the importance of ensuring that the citizenry was well-aware that their individual rights to such things as freedom of the press and freedom of religion were being explicitly guaranteed—and Madison took these concerns, working with his Anti-Federalist colleagues, to develop and propose the Bill of Rights as the Constitution was being debated among the several states in preparation for its ratification.

There is no small amount of irony in Madison's advocacy of a Bill of Rights, since Madison was fairly unique amongst his Virginia colleagues (like Patrick Henry and George Wythe) for being initially opposed to such an enumeration. It was correspondence with his friend and mentor, Jefferson, as well as the debate during and after the Constitutional Convention of 1787 that swayed him to the cause of a Bill of Rights.

One of the primary concerns of men like Madison was that enumerating rights might imply, absent some explicit declaration, that an individual's natural rights began and ended with such an enumeration—and thus underscoring the importance of the 9thAmendment in the Bill of Rights itself.

As important as the first five amendments in the Bill of Rights are (guaranteeing, as they do, things like the right to speech, to practice religion, to keep and bear arms, to hold and enjoy property, etc.), the final two amendments are, to the opinion of many, of even greater import. The 10th Amendment ensures that those powers not given to the federal government can, in turn, be given to state governments or held by the people themselves (all that is not surrendered is retained, as the Supreme Court has said).

But the 9th Amendment is equally as important (if not more so), since it underscores that the mere enumeration of rights in the Bill of Rights is not meant to deny the existence of other rights.

Such a concept is especially important given some of our nation's modern political debates. With some calling for sidestepping, limiting, redefining, or out-and-out eliminating the 2nd Amendment (guaranteeing an American's right to keep and bear arms), it is important to point out that even absent the 2nd's explicit language, the 9th Amendment makes it clear that one

retains a right to defend one's self, one's property, and those people who are important to an individual, since those rights are not surrendered to the government in any federal or state constitution.

These debates continue to underscore just how forward-thinking proponents of an explicit Bill of Rights were. By drawing a clear line between the Constitution, which lays out the powers of the government, and the Bill of Rights, which lays out a series of further restraints on government power, the founders completely changed the posture of the individual versus his government, making the individual paramount and forcing that government to have to overcome that individual's rights in order to expand or exercise that government's power (in theory, anyway).

Thus, when calls come to expand that government's power in the wake of a crisis, this explicit line becomes a "look before you leap" exercise. As the Supreme Court said in 1992's *New York v United States* decision,

> The Constitution protects us from our own best intentions. It divides power among sovereigns and among branches of government precisely, so that we might resist the temptation to concentrate power in one branch as the expedient solution to the crisis of the day.

The Bill of Rights ensures this protection. It ensures the concept that power is divided and flows from the people to the government, not the other way around. Thomas Jefferson understood this, which is why he advocated so strongly for its inclusion. Thankfully, it was his advocacy and the wise counsel of others which swayed James Madison to his position. Absent the Bill of Rights, one wonders if our republic could have endured as long as it has.

*Andrew Langer is President of the Institute for Liberty, a Senior Fellow with Constituting America, and host of The Andrew Langer Show on WBAL NewsRadio 1090.*

## Bill of Rights: Placing Limits on Congressional Governing, Part 2

## Guest Essayist: Gary R. Porter

### A Bill Of Rights Is What The People Are Entitled To … — The People Limit Their Government

> In questions of power,… let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution. – Thomas Jefferson, 1798.

Sunday, 8 April 1787

Young "Jemmy" Madison, frustrated by what he had observed over the last six years, sat down at his writing desk in his New York City boarding room. After an unseasonably severe winter, the spring of 1787 was finally becoming pleasant. But Madison had little time to reflect upon the fair weather.

A new design for the government of the "united" states was needed – imperative really; the decrepit confederation, weakened beyond hope even before it was put to ratification, was showing its manifold defects. "[N]o money comes into the public treasury, trade is on a wretched footing, and the states are running mad after paper money," Madison wrote. Shay's Rebellion had exposed the impotence of both the Confederation Congress and the state militias; the "perpetual league of friendship" was a mess; talk of reforming the states into several new confederacies was heard in the city taverns.

Madison had seen the problem from both sides these last six years, three as a delegate to the Confederation Congress followed by three as a Virginia Assemblyman. The states simply enjoyed too much power, they had to be brought under tighter control; yet consolidating the states into a single republic was unacceptable. Madison sought middle ground.

Through careful pushing and prodding he had been able to obtain sufficient support for a meeting at Annapolis the previous September, which, though failing to meet its primary goals — owing to the absence of several key states — was nevertheless able to call for a convention of the states to be held the following May in Philadelphia. Madison finished his essay, added the title "Vices of the Political System of the United States," set down his pen and began packing for the trip to Philadelphia.

Wednesday, 12 September 1787

As the delegates neared the end of four long months of vigorous argument and compromise, George Mason of Fairfax County, Virginia, rose to address the delegates. Madison recorded in his notes: *"[Col. Mason] wished the [Constitution] had been prefaced with a Bill of Rights…. It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours."*

Roger Sherman of Connecticut spoke next. He *"was for securing the rights of the people where requisite."* But he pointed out that *"The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient.*" A motion to create a committee to draft a Bill of Rights was defeated and the convention went on to sign the document five days later without one.

Madison was nonplussed. As he later explained to his friend Jefferson:

> My own opinion has always been in favor of a bill of rights; provided that it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others. I have favored it because I suppose it might be of use, and if properly executed could not be of disservice.

These "*parchment barriers"* had proved ineffective wherever they encountered a "*popular current."* Could the rights in question even be described with the *"requisite latitude,"* particularly the *rights of conscience*?

Hamilton had been even more blunt as "Publius:" "*[W]hy declare that things shall not be done which there is no power to do?"* In other words, why declare there shall be freedom of the press when no power to infringe upon the rights of the press has been provided this new government?

But Jefferson had been insistent. The previous year he had written: *"A bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inferences."*

At the Virginia Ratifying Convention in June 1788, Madison began to see the political necessity of a Bill of Rights. Although a bill of rights had been mentioned occasionally in the first two weeks of the convention, it received great attention in the final days. Federalists repeatedly argued that it was unnecessary. George Mason reprised his remarks of the previous September: The Virginia Constitution contained a Declaration of Rights (drafted by none other than Mason himself), "*why should it not be so in this Constitution?*" Patrick Henry, once Madison's friend, now his nemesis, stoked the fires against ratification. Even wavering delegates like William Dawson expressed their reluctance to vote for ratification without, among other things, protection for *"[t]hat sacred palladium of liberty, the freedom of the press.*" Madison reminded the delegates of the process in Article V to amend the Constitution. His friend and neighbor, James Monroe, repeated the called for conditional ratification, ratification predicated on acceptance of proposed amendments. Henry wondered why the Philadelphia Convention had dismissed a Bill of Rights; "*would it have consumed too much paper*?" Without a Bill of Rights, he insisted, federal agents would *"go into your cellars and rooms, and search, ransack and measure, everything you eat, drink and wear."* Back and forth it went.

The central question was this: could government be trusted to protect individual rights without being explicitly required to do so? As they all knew: "*the essence of government is power, and power, lodged as it must be in human hands, will ever be liable to abuse*."

It finally came time to vote: would Virginia ratify with or without conditions, or not at all? Unbeknownst to the Virginians, New Hampshire had voted to ratify four days earlier, putting the Constitution into effect. In Richmond, the motion to ratify <u>with</u> conditions was defeated, 88 to 80. It was next moved that Virginia ratify with amendments <u>recommended</u> but not required; this passed 89 to 79.

On the last day of the convention, the delegates approved a final motion, asking their future representatives in Congress *"to exert all influence and use all reasonable and legal methods"* to obtain ratification of their recommended Bill of Rights articles *"in the manner provided by the fifth article of the said Constitution."* But who would be Virginia's first representatives under the new Constitution?

Patrick Henry worked behind the scenes to ensure Madison was not nominated to fill either of the two new Senator positions. Madison would have been reluctant to accept in any case: the

lifestyle expected of a senator was sure to stretch his meager income beyond its limits. Next came the election of Representatives. To oppose Madison for even a seat in the House of Representatives, Henry convinced Madison's friend and neighbor, James Monroe, to run against him. Both men now had to convince the voters of Virginia's newly-drawn 5th District that each was the better choice. By a margin of 336 votes, Madison prevailed. America was one step closer to its Bill of Rights. But Madison still had to convince a reluctant, Federalist-dominated Congress.

It was not until 4 May that enough new Congressmen had assembled in New York to provide a quorum. The next day, Madison rose to announce his intention to introduce a Bill of Rights later that month. The Federalist-dominated House was not keen on making changes to the Constitution right away. James Jackson of Georgia compared the new Constitution to a newly christened ship:

> Our constitution, sir, is like a vessel just launched, and lying at the wharf; she is untried, you can hardly discover any one of her properties. It is not known how she will answer her helm, or lay her course; whether she will bear with safety the precious freight to be deposited in her hold. But, in this state, will the prudent merchant attempt alterations? Will he employ workmen to tear off the planking and take asunder the frame? He certainly will not.

But Madison was persistent, as probably no one else could have been at that time; he had made a promise; a promise he would keep. Slowly the other members began to see that they couldn't just ignore this man, they would have to listen and consider the amendments he was proposing. The House finally passed 19 of Madison's proposals and sent them to the Senate, which wordsmithed and whittled them down to 12. Back to the House they went for a final vote. Finally, on 28 September 1789, these 12 proposed amendments, comprising a "Bill of Rights," were forwarded to the states for ratification. It would be a long two years before the requisite ¾ of the states approved them — some of them at least.

This time, Virginia would have the honor of being the key state whose ratification would put the ten of the amendments into effect. The rest, as they say, is history.

Zipping forward to the present, let us consider the Bill of Rights. In hindsight, was it necessary?

Perhaps the greatest argument in support of the Bill of Rights arises from considering the state of our nation today.

Despite our squabbles, people from all over the globe still flock to America's shores to savor the freedom provided by this Bill of Rights. Although the freedoms it encompasses have sometimes been "discovered" by the courts instead of "We the People," these first ten amendments stand yet today; un-repealed, un-modified, and un-bowed.

True, the courts have been called upon all too often to interpret and re-interpret the sparse meaning of those ten amendments, but they remain…

None of this, of course, answers the question of whether the Bill of Rights was necessary. In a practical sense, it certainly was. Without the tacit promise that proposed amendments would be considered, it is probable that the Constitution would not have been ratified by Massachusetts, Virginia, New York, North Carolina and Rhode Island. Without the ratification of at least one of these states, the document would have fallen short of the necessary nine ratifications.

But in light of the massive growth of the federal government since 1787 and its intrusiveness into our individual lives, the Bill of Rights today seems well justified. The Constitution, which began as a document of limited and enumerated powers, no longer is. As James Madison warned in the Virginia ratifying convention:

> There are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.

Even as early as 1825, Thomas Jefferson was able to observe:

> I see,… and with the deepest affliction, the rapid strides with which the federal branch of our government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic; and that, too, by constructions which, if legitimate, leave no limits to their power…

Was the Bill of Rights necessary? Yes. Was it appropriate? Yes. Is it still needed today? Yes, yes, and…yes. Three huzzahs for our Bill of Rights.

*Gary Porter is Executive Director of the Constitution Leadership Initiative (CLI), a project to promote a better understanding of the U.S. Constitution by the American people. CLI provides seminars on the Constitution, including one for young people utilizing "Our Constitution Rocks" as the text. Gary presents talks on various Constitutional topics, writes a weekly essay: Constitutional Corner which is published on multiple websites, and hosts a weekly radio show: "We the People, the Constitution Matters" on WFYL AM1140. Gary has also begun performing reenactments of James Madison and speaking with public and private school students about Madison's role in the creation of the Bill of Rights and Constitution. Gary can be reached at gary@constitutionleadership.org, on Facebook or Twitter (@constitutionled).*

## Bill of Rights: Placing Limits on Congressional Governing, Part 3

## Guest Essayist: Patrick Garry

The Bill of Rights comprises the first ten amendment to the U.S. Constitution. These amendments — containing provisions addressing such matters as freedom of speech and religion, and freedoms from search and seizure and compelled self-incrimination – are often seen as concerned with individual liberties and hence reflecting a different focus than that of the U.S. Constitution, which primarily addresses government structure and powers. Under this view, the Constitution and the Bill of Rights are seen as separate documents with separate aims. However,

both the Constitution and the Bill of Rights focus on limiting the power of the federal government, although in somewhat different ways.

The debate over ratification of the U.S. Constitution occurred primarily between two groups, known as the Federalists and the Antifederalists. The former supported passage of the Constitution, with its creation of a strong federal government, while the latter opposed the Constitution, on the grounds that it gave too much power to a potentially abusive central government. To secure passage of the Constitution, and to address the concerns of the Antifederalists, the Federalists promised that a Bill of Rights would be adopted once the Constitution was ratified. Thus, the Bill of Rights came into existence through a compromise reached between the Federalists and Antifederalists over the issue of constitutional limits on federal power.

The limitations on government power imposed by the Bill of Rights differ from the limits imposed by the original Constitution. Provisions on freedom of speech and religion, for instance, as contained in the First Amendment, place substantive restraints on the federal government. These provisions restrict the federal government from acting in certain substantive areas – e.g., individual speech and religious exercise. On the other hand, the limitations contained in the original Constitution tended not to deal with substantive areas or issues, but instead created structural limitations that restricted the exercise of government power in general.

Structural limits on government power consisted of the checks and balances imposed by the Constitution's separation of powers, in which each branch of government could check the power exercised by the other branches, preventing those branches from overstepping their bounds. Federalism also amounted to a structural limitation, since it allowed the various levels of government – e.g., state, local and federal – to serve as checks and balances on the other levels.

The Bill of Rights provided substantive limits that existed in addition to the structural limits provided in the original Constitution. For instance, even if the federal government possessed the power to act in a certain way, it could not, pursuant to the First Amendment, use that power to infringe on the freedom of speech or religious exercise. Consequently, as demanded by the Antifederalists, the Bill of Rights provided yet another level of control and restraint on the use of federal government power under the U.S. Constitution.

Although the Antifederalist concern about limiting the power of the federal government provided the initial impetus for the Bill of Rights, the Bill does more than simply provide a restraint on government action. It seeks to preserve liberty by protecting particular areas traditionally considered essential to individual freedom and dignity.

In preserving these areas of individual freedom and autonomy, the Bill of Rights also helps to strengthen the democratic fabric of the American political system. It does so by maintaining the foundations of a democratic society, which in turn sustains a democratic political order. Individuals can hardly participate in the political process if they do not possess the freedom to speak out on public matters and to hear the viewpoints of others who possess a similar freedom. Likewise, a political system can hardly be healthy and vibrant if the society

underlying it does not reflect the full concerns and values of the individuals living in it. A society in which individuals are unable to exercise their religious beliefs, for instance, cannot be a free and vibrant society that will produce a healthy democratic governance.

By restricting government's power to encroach on various areas of liberty, the Bill of Rights attempts to preserve the freedom of individuals to shape and influence the democratic society to which they belong, which in turn shapes and influences the political culture of society, which in turn shapes and influences the actions of the government and the content of the law. Thus, through the operation of the Bill of Rights, citizens possess greater opportunity to exercise the sovereign and democratic powers envisioned by the U.S. Constitution.

*Patrick M. Garry is Professor of Law at the University of South Dakota. http://patrickgarry.com*

## James Madison: Guiding the Bill of Rights Through the U.S. House of Representatives

## Guest Essayist: Tony Williams

### James Madison and the Bill of Rights

On June 8, 1789, a few months after the convening of the First Congress, Representative James Madison arose on the floor and made a speech introducing amendments that would come to be known as the Bill of Rights. Madison delivered a masterpiece of rhetorical statesmanship that attempted to persuade the Congress to pass a Bill of Rights to protect liberty and produce unity in the new government.

Madison had surprisingly opposed a Bill of Rights when it was introduced at the Constitutional Convention by George Mason and advocated by the Anti-Federalists throughout the ratification debate in the states. During a long exchange with Thomas Jefferson, then in Paris, Madison privately articulated his reasons for opposing a Bill of Rights.

Most of the Madison's reasoning was based upon the fact that he believed, along with James Wilson and Alexander Hamilton, that the Founders had created a natural rights republic with enumerated powers in a written constitution. The rights of mankind were built into the fabric of human nature by God, and government had no powers to alienate an individual's rights. He also had witnessed that they were often just "parchment barriers" that overbearing majorities violated in the states.

Although he enumerated several reasons for his opposition, Madison then gave his friend hope when he stated that most important reason in favor of a Bill of Rights was that, "The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the National sentiment, counteract the impulses of interest and passion." Madison thought the liberties would become engrained in the American character.

When he arose to give the speech on June 8, Madison faced hostility from several Federalists who thought the House of Representatives had more pressing business. Most representatives and senators thought that the Congress had more important work to do setting up the new government or passing tax bills for revenue. Many thought it was a "tub to the whale," or a distraction, like the empty tub that sailors would use to draw away a whale's attention. They were forgetting their promise during the ratification debate to add amendments safeguarding liberties while setting up the new government. Madison wanted to ensure that obligation was fulfilled because he knew that failing to do so sure would strengthen the Anti-Federalist push for a second Convention to alter the Constitution and that it would stir up continuing opposition to the new republic.

Madison began his speech by stating that a Bill of Rights would prove to the Anti-Federalists that the Federalists were "as sincerely devoted to liberty and a republican government." In an act of reconciliation and magnanimity, he also reached out to the Anti-Federalists because, "We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution."

Madison magnanimously completed his lengthy speech by asserting, "If we can make the constitution better in the opinion of those who are opposed to it, without weakening its frame, or abridging its usefulness, in the judgment of those who are attached to it, we act the part of wise and liberal men."

Even though Madison had been one of the strongest opponents of the Bill of Rights, he became the "Father of the Bill of Rights" as he skillfully guided the amendments through the Congress during the summer of 1789. He reconciled all the various proposals for amendments from the state ratifying conventions and discarded any that would alter the structure of the Constitution or new government. Keeping the amendments protecting essential liberties, Madison developed a list of nineteen amendments and a preamble. He wanted them to be woven into the text of the Constitution, and sought a key amendment to protect religious freedom, a free press, and a trial by jury against violation by state governments. The attempts to have the amendments inserted into the text and applied to the states lost, but he forged ahead anyway. On August 24, the House sent seventeen amendments to the Senate after voting by more than the required two-thirds margin. By September 14, two-thirds of the Senate approved twelve amendments, removing the limitations on state governments. President Washington sent them to the states endorsing the amendments even if he did not have a formal role in their adoption.

Over the next two years, eleven states ratified the Bill of Rights to meet the three-fourths constitutional threshold including North Carolina and Rhode Island. Virginia became the last state to ratify on December 15, 1791. While we rightfully celebrate the Bill of Rights as essential to our liberties, we should not forget that the Constitution created a limited government that is the best guarantee of individual liberties.

*Tony Williams is Senior Teaching Fellow at the Bill of Rights Institute; a Constituting America Fellow; author of Washington and Hamilton: The Alliance that Forged America, and Hamilton: An American Biography.*

# FEDERALIST PAPERS ON CONGRESS

## Federalist 10: Political Stability and Good Governance

## Guest Essayist: Richard Wagner

### Federalist No. 10: Controlling the Violence of Faction

The central idea behind the American constitutional republic is expressed in her first constitutional document, the Declaration of Independence: governments derive their just powers from the consent of the governed. This idea is simple to state and hard to implement.

We must recognize that ideas can't implement themselves. They can be implemented only within some political structure. All political structures entail a tendency for governments to act on behalf of factions within the population, and then to assure us that they are promoting the common interest all the same.

In *Federalist* No. 10. Madison tells us that "by faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."

Madison was referring to the ability of some people to use the powers of government to their advantage by imposing disadvantages on other people. Faction is a quality of human nature that resides in our abilities to see our favored projects as especially beneficial for society. Someone might think a marshland would make a wonderful wildlife refuge. That person could always buy the land to create the refuge, perhaps forming a corporation to do so. Doing this, however, would be costly to those who desire the refuge. A cheaper alternative might be to petition a legislature to fund the refuge. In this way, taxpayers who do not value the refuge would be forced to support the refuge. This situation illustrates faction at work: a small but influential group of people can secure support for their favored projects by forcing other people to pay for them.

To some extent, virtue within the citizenry can limit the reach of faction as people refrain from using their powers to exploit other citizens. Yet interest could always override virtue, due to the ability of people to convince themselves that their pet projects are invariably publicly beneficial. For this reason, Madison looked to the constitutional structure of government as an instrument for limiting the reach of faction.

In this respect, the American Constitution featured a strong preference for local government, where people knew one another, over national government where most people were strangers. The American Constitution sought to limit faction by explicitly enumerating the powers of the federal government, with everything not enumerated being limited to states and to individual citizens. For the past century or so, however, this Constitutional limitation has pretty much given way to plenary authority by the federal government.

Between the Revolution initiated in 1776 and the Constitution established in 1789, America was governed under Articles of Confederation. The Articles recognized 13 independent states along with establishing a Continental Congress. That Congress, however, had no ability to tax and regulate individual citizens. All it could do was request support from state legislatures. In February 1787, the Continental Congress established a Convention to meet in Philadelphia to recommend repairs to the Articles. What emerged from that Convention, however, was not repair but a new Constitution that established a national form of government.

What ensued was a two-year period of intense controversy over ratification of the new Constitution. The 85 essays that comprise what we now know as *The Federalist* were a series of newspaper articles written to support the Constitution against opposition from those who wanted to continue with the Articles. Despite the ensuing controversy, we should note that both proponents and opponents of the new Constitution agreed that the prime purpose of government was to secure individual liberty. They also recognized that intrusive government was the prime danger to liberty, even though it was also recognized that some government was necessary to preserve and protect the American system of liberty.

Madison sought to explain how the proposed Constitution entailed a structure of fragmented and limited powers that would limit the damage created by faction. In being founded on a Constitution of liberty, the American republic expressly rejected the system of feudal duties and obligations that characterized the European societies of the time. Starting around the time of Theodore Roosevelt, however, the Progressivist movement within America has been striving to reinstate some of the status-based relationships of feudal times. This fits the Progressivist vision of government as the principle source of goodness in society. A battle for the soul of America has been underway for about a century, with the principle fault line being whether government is a virtuous artifice that is central to human flourishing, and with faction enabling governments to do their inherently good work, or whether government is a necessary evil that is always in danger of trampling on individual liberty.

*Richard E. Wagner is Holbert Harris Professor of Economics at George Mason University.*

## Happy Birthday, James Madison! March 16, 1751 – Federalist Papers 51 and 53: How the American People Hold Congress Accountable

## Guest Essayist: Joerg Knipprath

*Federalist 51* is part of a series of essays in which James Madison addressed the principle of separation of powers and its relation to the preservation of liberty and prevention of tyranny. *Federalist 53* discusses the significance of the length of service of the House of Representatives to competent republican government.

In preceding essays, Madison examines various suggested mechanisms by which government might be constrained and liberty preserved. Drawing on the Americans' experience with the British government as well as their own state governments, he rejects all as insufficient. Thus, formal declarations in state constitutions of the legislative power being vested in the legislature,

the executive in a chief officer, and the judicial in the courts, are "a mere demarcation on parchment of the constitutional limits of the several departments" and would not suffice to prevent dangerous concentration of power. That is especially true as those same state constitutions had other provisions that allowed members of the legislative branch to exercise executive power. For similar reasons, a mere formal listing of discrete substantive powers to be exercised by each department would be insufficient, because of the tendency of the legislative branch to rely on its connection to the people and its power of the purse to expand its domain and intrude into the affairs of the other branches.

In his *Notes on the state of Virginia*, Thomas Jefferson proposed "that whenever any two of the three branches of government shall concur in opinion each by the voices of two thirds of their whole number, that a convention is necessary for altering the constitution or *correcting breaches of it* [Emphasis as written by Madison in *Federalist 49*], a convention shall be called for that purpose." Madison criticizes that proposal as at once too weak to prevent combinations by two branches against the third, and as too politically risky because constitutional conventions are prone to stir up the entire body politic. Recourse to the people through conventions would result in the exercise of passion rather than reason. Madison recognizes that his position as a defender of the new constitution and as a member of the convention that had brought it into existence would leave him open to charges of hypocrisy for these remarks. Accordingly, he demurs, "Notwithstanding the success which has attended the revisions of our established forms of government…the experiments are of too ticklish a nature to be unnecessarily multiplied."

The solution, then, was to "[contrive] the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." This required both assuring the independence of each branch from usurpations by the others (separation) and tying them together in exercising the powers of government (blending and overlapping of functions). Further support lay in the division of power in the "compound republic of America…between two distinct governments," federal and state.

Most important, the structure must harness human nature, especially that of *homo politicus*, to the task. In the most famous passage of *Federalist 51,* Madison declares:

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

These "auxiliary precautions" are particularly needed in a republic, due to what the Framers saw as the inevitable predominance of the legislative branch. Thus, Congress had to be divided. While the chambers have a common function of legislating, they must be elected differently–the

House by the people, the Senate by the state legislatures–and operate under different principles, presumably based on the smaller number and longer terms of Senators versus Representatives.

The rest of the essay concerns itself with an issue already thoroughly explored in *Federalist 10,* the problem of an entrenched majority faction that tyrannizes a defenseless minority. Madison explains that there are only two ways to prevent this evil. One is to "[create] a will in the community independent of the majority." By that, he means a hereditary system, which he rejects. The other method to prevent factional domination is "by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole very improbable." The requisite diversity of interest groups and the beneficial instability and impermanence of their self-interests is more manifest in the large United States than in its smaller component states and districts.

Running through Madison's discussion is a questioning of the classic republican faith in a virtuous people selecting virtuous rulers and of the assumption that republics can only work as long as the people retain that virtue. His skepticism reflects the classic liberal approach rooted in 18th century pragmatism that private vices and interests motivate human action, and that it is best "to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a centinel over the public rights." A virtuous people and, more pointedly, virtuous rulers, are to be welcomed and fostered, but reliance on virtue is neither necessary nor sufficient to guarantee the success of the American experiment. For the republic to endure requires the new constitution's Newtonian machinery of separated, yet blended, powers.

Not all were convinced. As with other essays of *The Federalist*, Madison was responding to critics of the new constitution, who saw the document as the product of a self-appointed aristocratic elite that threatened republican self-government. One such attack was a pamphlet by the pseudonymous Aristocrotis. In a slashing and sarcastic tone, its writer assumes the persona of an aristocratic "defender" of the constitution, but one who lampoons the balancing of powers in the Constitution as a contrivance made devoid of substance by the document's oligarchic artifices. He begins with a back-handed endorsement of the "self-evident truth" that there are those who by nature are designed to rule (such as Thomas Jefferson's "natural aristocracy"). Examining the separation of the Congress into two chambers, he finds the Senate "agreeable to nature," but the House as resting on a "most dangerous power"—election every two years by the people. Fortuitously, however, that power is blunted by "proper checks and balances." Aristocrotis sees those checks in a rather creative distortion of Congress's constitutional power over federal elections, which members could use to perpetuate their position and to "exterminate electioneering entirely."

According to Aristocrotis, another check on the people and self-government is Congress's power to tax individuals directly, which can be used two-fold. First, taxes laid by states will impede the collection of federal revenues and thus be found unconstitutional under the Supremacy Clause. The states will be "deprived of the means of existence, [and] their pretended sovereignties will gradually linger away."

Second, the people will have to labor to pay the taxes, which "will make the people attend to their own business, and not be dabbling in politics—things they are entirely ignorant of; nor is it proper they should understand." If the "refractory plebeians" should refuse, because "(such is the perverseness of their natures)…to comply with what is manifestly for their advantage," Congress has the power to fund the army to enforce its will.

Finally, in that critic's view, the House will control the election of the president. Thus, Congress can reward an obedient president with re-election. "[T]hough the congress may not have influence enough to procure him the majority of the votes of the electoral college, yet they will always be able to prevent any other from having such a majority." Then the process will move to the House for the selection of the president. "The congress having thus disentangled themselves from all popular checks and choices…will certainly command…obedience and submission at home."

Another political axiom for republicans was that legislators must be responsive to their constituents' wishes, lest the government become oligarchic. One aspect of this was the length of legislators' terms. Such term limits (as the Americans then understood the concept) were often set at one year or less. Six-year terms of Senators and two-year terms for the House caused wide-spread concern about accountability to the people.

Madison in *Federalist 53* attempts to disarm the critics. He notes that terms for the lower houses of the state legislatures vary greatly, though for most it was one year. To be an effective legislator, though, requires not only honest intention and sound judgment, but knowledge. State legislators deal with local matters, with which they tend to be quite familiar by virtue of residing there. Congress attends to diverse national and international matters. As to those, acquiring proper knowledge requires more time and greater exposure to the experiences of Congress's other members. To the critics' objection that delegates under the Articles of Confederation served annual terms, he notes–somewhat disingenuously–that they were re-elected almost as a matter of course.

A related principle was "rotation in office," what today is called term limits. The Articles of Confederation limited a delegate's service to no more than three years in any six, yet the new constitution lacked such protection. The Constitution is silent on the point. In a clever, perhaps too-clever-by-half, discussion, Madison argues both in favor of the potential of long legislative service and of biennial elections as a constraint on the dangers from extended service. A few members will, due to their superior talent, be frequently re-elected and be "thoroughly masters of the public business." On that basis, they might seek to gain advantage for themselves. If the bulk of the body were elected only to annual or shorter terms, those novices would not have the requisite knowledge to resist "fall[ing] into the snares that may be laid for them" by the veterans.

The Articles of Confederation had also recognized the states' power to recall their delegates. No such safety valve existed under the new plan. A South Carolinian Antifederalist writing under the name Amicus pleaded for an amendment to the Constitution that would allow the citizens to recall those who, "so wise in their own eyes,…would if they could, pursue their own will and inclinations, in opposition to the instructions of their constituents." Such an amendment would not be forthcoming, however.

In 2010, the New Jersey Supreme Court opined that an attempted recall of Senator Robert Menendez through a provision in the New Jersey state constitution would violate the United States Constitution. Combined with the U.S. Supreme Court's decision in *U.S. Term Limits v. Thornton* (1995), which found an Arkansas state constitutional term limits provision unconstitutional as applied to the Senate and House of Representatives, these cases leave only the process of regular elections at two- or six-year intervals as the means of popular control. To many today, these terms in office may appear just fine, or even too short for the House, given that politicians have to spend much time campaigning for re-election. To many Americans of the early republic, however, such long terms, the absence of both compelled rotation in office and recall of "unfaithful" representatives, and the modern evolution of the position as a full-time occupation, rather than a "second calling," would demonstrate the oligarchic nature of the system and the people's inability to heed Benjamin Franklin's admonition to keep their republic.

*An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: http://www.tokenconservative.com/.*

## Federalist 62 and 63: Senate Powers for Soundness, Order, Stability of the Congress

## Guest Essayist: Joseph M. Knippenberg

In *Federalist* #62 and #63, Publius (the pseudonym adopted by authors Alexander Hamilton, James Madison, and John Jay) makes the case for and deals with objections to the Senate as the second of Congress' two legislative chambers. Then, as now, our author (in this case, scholars presume, James Madison) has to address a presumption in favor of straightforward and simple democracy, which would mandate a popularly elected legislature, offering proportional representation, whose members serve terms short enough to remind them of their dependence upon the voters. While those characteristics adequately describe the House of Representatives, Senators were then to be elected indirectly, by state legislatures, for relatively long (six year) terms. What's more, each state was entitled to two Senators, so that the largest states had no more influence in that chamber than the smallest states.

Why should our democratic republic have within it a legislative body whose constitution seems to depart so far from democratic principles? In making his case, Madison first concedes that the character of the Senate is the result,

> not of theory, but 'of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable.'

A simply consolidated national government that reflected the popular weight of the larger states would not have gotten the consent of the smaller states. Without the Senate, which treats all states—large and small—equally, there would be no new Constitution, and hence no government with powers adequate to meet the exigencies of the time.

The United States is not only a *democratic* republic, but also a *federal* republic, whose national government should have power adequate to deal with the limited set of responsibilities that we the people, in forming our more perfect union, have given it. The states as states still have a very important role to play in the lives of American citizens. Their equal representation in the Senate reflects the federal character of the government, acknowledges the importance of the states, and gives them a mechanism (about which more in a moment) by means of which to defend themselves from the encroachment of the national government.

In defending the apparently pragmatic compromise that created the Senate, Madison indicates that its character actually adds certain great strengths to our constitutional system of government.

- A second legislative chamber "doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy." The more hoops that have to be jumped through, the more groups that have to be coordinated, the harder it is for men (and women) bent on tyranny to accomplish their aims.
- A smaller Senate, whose members serve longer terms than their counterparts in the larger House, is supposed to be less susceptible to "the impulse of sudden and violent passions" and less likely "to be seduced by factious leaders into intemperate and pernicious resolutions."
- The longer Senate terms also make it much more likely that Senators will gain a "due acquaintance with the objects and principles of legislation."
- The longer terms also mean that Senate membership will be more stable than that of the House, which militates against a "mutable policy," which is bad for the country abroad and for people at home. A healthy politics emphasizes and promotes stability, not constant change, enabling people to plan in a predictable environment. The Senate contributes to the former and tends to resist the latter.
- Similarly, good legislation typically involves planning for the long term. Legislators who serve long terms do not need to rely on short term successes to win reelection. The Senate, more than the House, encourages a longer time horizon in its members.
- Because they do not have to respond to immediate political passions, Senators make it more likely that "the cool and deliberate sense of the community" will "ultimately prevail," as opposed to the heated passions of the moment.

I emphasize that these are Madison's judgments and predictions regarding the role of the Senate. They tell us a lot about what he and his colleagues want from republican government, even if the expectations are not necessarily realized in this day and age. Thus it is important to note that Madison was very concerned to guard against eruptions of popular passion, above all, as he argues at great length in *Federalist* #10, tyranny of the majority. He was also very concerned about legislative factionalism, about a small cabal of politicians who could manipulate the process and have their way against even the reasonable and just wishes of the people. Good government, for Madison, is indeed "representative" government, but it is also stable and intelligent government. A government that merely reflects the heated passions of the moment,

mirroring as closely as possible the current state of public opinion, is not thereby good government. Sometimes "we the people" have to be brought up short, to be slowed down so as to calm down, and to be forced to consider some perspective other than the one closest to our passions or our interests.

As we consider the Senate in 2018, a number of things have changed, some quite dramatically. In the first place, since the ratification of the Seventeenth Amendment in 1913, the people of each state, not the state legislatures, have elected Senators. They are thus less explicitly and self-consciously "representatives" of states as states, and much more representatives of larger electoral units serving longer terms of office. With equal state representation, the Senate still exemplifies the federal character of our constitutional government, but the Senators' most immediate constituency is not the state legislatures, which are presumably more concerned about protecting state authority (and hence the federal character of our government), than are the people who, as Madison perhaps hoped (see, for example, *Federalist* #46), would give their attention and principal allegiance to whichever level of government—state or federal—provided "manifest and irresistible proofs of a better administration." Senators will care about protecting state authority from federal encroachment largely because, and to the extent that, their constituents care about that.

A second significant change has less immediately to do with the Constitution and more with the character of Congressional elections. For a number of reasons connected with the relative homogeneity of Congressional districts, the assiduity with which members of Congress serve the needs and interests of their constituents, and the expense of running for office, the overwhelming majority of seats in the House of Representatives are "safe"; most members of Congress who seek reelection win reelection. Because states are typically more diverse than Congressional districts, because Senate seats are larger political prizes that attract more able and better funded candidates, and because a six year term provides time enough for a changing mood in the public to shift the ground under an incumbent, Senators are actually less politically secure than their counterparts in the House. As a result, much of what Madison says about political stability and the benefit of having a long time horizon applies at least as much to the House (if not more so) than it does to the Senate.

Still, political diversity at the state level and the consequent competitiveness of Senate elections makes the upper house different from its counterpart on the other side of Capitol Hill. We are in the middle of a national conversation about partisan gerrymandering that has even made its way to the Supreme Court. Among the arguments made about districts expertly crafted to favor the political fortunes of one or another political party—make no mistake, both sides do it—is that essentially uncompetitive races in relatively homogeneous districts encourage politicians to move toward the ideological extremes of their parties. With nothing to be gained electorally from building bipartisan or ideologically diverse coalitions, they are less inclined to compromise. In Madisonian terms, partisan gerrymanders in House districts facilitate factionalism while Senate elections help combat the "mischiefs of faction." While it might be desirable from the point of view of *The Federalist* to have a relatively wide array of interests in every electoral district, having that feature in most states and hence in most Senate races is surely better than nothing.

I will close by noting the implications of a couple of additional observations Madison makes in the course of defending the Senate from its overzealously democratic critics. As I said above, he believed that the Senate would militate against the likelihood and deleterious effects of a "mutable policy." Here's what he says in *Federalist* #62:

> It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.

Self-government, Madison reminds us, requires that we the people understand more than a little about what government is doing and how it is regulating our lives. Changeability is indeed a problem, but so is the sheer breadth and detail of contemporary legislation. Anyone who has tried to make sense of our healthcare legislation or our tax code should feel the force of this argument. Perhaps the complexity of contemporary life requires this, but we also have to recognize then how this situation challenges our capacity to govern ourselves. We sometimes complain that, as the old joke goes, "as pro and con are oppositions, *Con*gress is the opposite of *pro*gress." But it is not clear, to Madison at least, that too much legislation about too many things serves the cause of republican self-government.

In a similar vein, he also observes that legislative hyperactivity gives an "unreasonable advantage" to "the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue…presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens." Any critic of the political influence of lobbyists could profitably cite this passage written by one of our great founders. But Madison might suggest that a good point of departure in thinking about how to limit the influence of the sagacious, enterprising, and moneyed few is to consider how many and complicated laws regulating, say, campaign finance actually play to the strength that we are trying to counteract.

We sometimes lose patience with a government, and especially a legislature, that does not move as quickly as we would like. But for the "cool, *deliberate* [my emphasis] sense of the people" to prevail, institutions like the Senate, providing one more (and indeed different) hurdle for legislation to jump, ought to be embraced and cherished. Reconsidering Madison's arguments in *Federalist* #62 and #63 might prompt the kind of sober second thoughts about our impatience that we need.

*Joseph M. Knippenberg is professor of politics at Oglethorpe University, in Atlanta, GA.*

## Federalist 62: The Structure and Role of the Senate

## Guest Essayist: Forrest Nabors

The notes of the Federal Convention that framed the Constitution of the United States in 1787 show that from the beginning of their deliberations the delegates generally assumed that the legislative branch of the general government would be bicameral. They did debate how the legislators of each house would be chosen and how legislative districts would be drawn, which was settled by the so-called "Great Compromise" between the large and small states. But they did agree without debate that the national legislature would be divided into a lower and upper house. The next two essays are about the upper house, the Senate of the United States.

The Latin word *senatus*, worn by the famous Roman legislature that produced so much greatness, means "old" or "venerable." The meaning of this word that the framers of the Constitution borrowed from Rome gives us a hint of the intended character of the Senate. The requirements for eligibility confirm that intention. The minimum age of members in the Senate is thirty, or five years older than the minimum age required for membership in the lower house, the House of Representatives. When the Constitution was drafted, lifespans were shorter and lives were more vigorous; hence, these additional five years provided adequate insurance that Senators would possess "greater extent of information and stability of character," as Publius explained in Federalist 62. Senators had to be citizens for nine years, two more years than Representatives. The framers added those years as a safeguard, because Senators were directly involved in "foreign transactions" – such as the ratifications of treaties and the confirmation of ambassadors – and needed to be "thoroughly weaned from the prepossessions and habits incident to foreign birth and education."

Before the Seventeenth Amendment moved the selection of senators to the direct choice of the people in 1913, the Constitution required the state legislatures to choose them. This original mode of selection was not appropriate for the House of Representatives because that body was intended to supply the general government with the most accurate representation of the popular will. But because the framers intended to emphasize wisdom rather than popular will in the Senate, the selection by state legislatures made sense. Members of state legislatures were already engaged in the business of government, had close knowledge of their peers and could better espy weakness and talent than could Americans generally, who were busy with their own lives and remote from government. Since the state legislatures were drawn directly from the people, the selection of senators still remained lodged in the people, but indirectly so, rather than directly. Therefore, the composition of the Senate sacrificed some popular control, but not all, in the interest of collecting wisdom tested by experience and confirmed by the choice of peers who already knew the best candidates.

Although the states were not completely sovereign within the Union, they did retain some sovereignty. Therefore, the fixed allotment of two senators to each state rather than a varying allotment based on population recognized, as Publius wrote, "the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty." Sovereignty, or the supreme governing authority, was diffused throughout the composite system, divided into state and national government and each further subdivided into three branches. The

allotment of two senators to each state and selected by each state legislature linked the state and national governments together, and gave the states a means of directly representing their interests as one political society to the larger political society of which each state was a part. By requiring the concurrence of each house in legislative measures, both a majority of the people (the House of Representatives) and the states (the Senate) had to agree, which reflected the composite nature of the Union.

Two legislative houses, Publius argued, would provide a safeguard in the event that one house undertook "schemes of usurpation or perfidy." The difference in character between the two houses further diminished the likelihood that both might become contaminated by corruption at the same time. Composed of a smaller number of members who were older, served longer, and were chosen by their peers in state government, the Senate was intended to give another important check against the more populist, younger and more frequently rotating members of the House of Representatives. The Senate would be less likely to yield to an ephemeral, passionate impulse which produces mutability of laws, and this infirmity in turn erodes popular respect for laws and the rule of law. With their greater experience, senators would stop ill-informed bills that might do some harm unforeseen by the other house. Their coolness, experience and wisdom would balance the passions, inexperience and hastiness in the other body. Thus, the planned role of the Senate was vital to enacting wholesome and necessary national legislation, was indispensable to the general government and placed the American republic in a likely position to gain an estimable reputation among the nations.

*Forrest Nabors is Associate Professor of Political Science at the University of Alaska Anchorage and is the author of From Oligarchy to Republicanism: The Great Task of Reconstruction.*

## Federalist 63: The Senate and Our National Character

## Guest Essayist: Forrest Nabors

Perhaps the most important advantage of the Senate to the United States was that it would become the repository of our national character, which is explained in Federalist 63. By intention Americans would be able to recognize themselves in the Senate because senators would be of themselves, but because they would be chosen from among the best of us, the Senate would become an example for the nation and the jewel of the American republic.

The Senate was the place, John Adams wrote, where the naturally talented could be gathered and made useful to the country. Nature, he observed, deposits talent at random in all parts of human society, but the practice of the world had been to raise into high places only the favored progeny of the rich and titled. America would put a new and different rule into practice. Rather than frustrating the ambitions and wasting the talents of the naturally gifted, free America would welcome their rise from whatever precinct of American society into which they might be born. Merit and not birth would be the basis for acceptance into high place. Any might enter the Senate with sufficient years of age and citizenship and whose ability had earned the recognition of peers in state government. Because other nations suppressed the rise of natural talent, the talented were alienated, could became dangerous enemies of their own country and had to be watched and

sometimes repressed. But because high position in America was open to merit, the government befriended the naturally talented. Gratitude would bind them more closely to country; patriotism would reinforce ambition. For these reasons the members of the Senate in republican America, it was hoped, might even out-perform the best of old-world aristocracies.

The ancient republics that had endured the longest were Carthage, Sparta and Rome, Publius reminds us in Federalist 63. All had senates and the other republics that did not have them, perished. In these senates the unique character of a nation was distilled, developed and emerged as something of the people but better than the people. That refined national character was then transferred back into the people, improving them. For example, the customs of Roman senators were distinctively Roman, but their outstanding conduct refined those customs, which they gave back to the people in better form, as Livy's History of Rome shows us.

Once, a rare military disaster by a massive army of Gauls left Rome nearly defenseless. Unable to prevent the investiture of the city, the people retreated to higher ground on the Capitol. But many of their old senators chose to remain below in front of their estates, resplendent in their richest clothes, wearing the insignias of their high rank, seated in thrones, waiting to die. When the Gauls entered the city and met them, the splendor and calm of these Romans made them pause. One Gaul stroked the beard of Papirius, who, in return, brought down his ivory staff on the invader's head. This defiant act broke the charm over the Gauls and precipitated the slaughter. One by one, Livy wrote, the senators calmly met their fate in this dignified pose. All of this was in full view of the people, who thereafter rallied and utterly destroyed the Gauls.

In contrast to the Roman people, Jefferson wrote, the American people were less ferocious and more magnanimous, less harsh and more gentle. We were free and brave without the Roman tendency to oppress. All of those qualities can be found in the proceedings of the American Senate in the nineteenth century, but they are found in a refined shape and form a uniquely American eloquence. As the framers of our Constitution intended, the intelligence and education of those senators rivaled the best in the world but a great many of them began their lives as impoverished of life's comforts as Lincoln and Jackson were. In those remembered and many forgotten speeches delivered in our Senate during the great crises of bygone times, a literate American cannot fail to see two things; first, our parentage; second, the wellspring of our national pride. We can see ourselves in them and we can see that they are the best of us.

The Senate is one of the few places in America where the individual virtues peculiar to aristocracy were intended to persist and did last for a long time, for the good of the country. When our greatest crisis was tearing our nation in half just before the Civil War, senatorial decorum was preserved, though the differences between the two sides were severe and touched the fundamental principles of our government. In contrast, order was often lost, sometimes approaching bedlam, in the House of Representatives. Upon the commencement of secession, American senators graciously took their leave of each other as friends, like Palamon and Arcite in *Two Noble Kinsmen*, each knowing that soon they would face off against each other in a struggle to the death. To a thorough democrat, such conduct is madness or stupidity, but in national crisis, these peculiar virtues produce and inspire steadiness and check brutishness. In crisis Americans are famous for forgetting their differences and pulling together, but the Senate was designed to be our natural rallying point. In the members of that body we were meant to see

the best of our country, calmly reminding us of who we are as a people, and inspiring us by their example to follow the path of our duty.

*Forrest Nabors is Associate Professor of Political Science at the University of Alaska Anchorage and is the author of From Oligarchy to Republicanism: The Great Task of Reconstruction.*

# THE GREAT DEBATES

## Culture of Debates on the House and Senate Floors

## Guest Essayist: Scot Faulkner

Patrick Henry cautioned, "The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them." In their respective chambers, the U.S. Senate and U.S. House of Representatives have developed unique ways to air differences and make sure information is shared. The Legislative Branch's culture of debate hold's power accountable and preserves our nation's civic culture.

The differences between the U.S. Senate and U.S. House of Representatives are very apparent after just watching them for a few minutes.

The U.S. Senate is informal. Senators and staff wander about, mingle, and many conversations are happening at once. Most procedural actions are by unanimous consent. Speeches can go on and on.

The U.S. House of Representatives is very structured. Everything is governed by rules that govern how time is spent, down to minutes. It is the only way 435 voting, and five non-voting, Representatives can balance discourse with action.

Since the first Congress, the differences between the Senate and House have framed important national debates.

The Senate evolved into the chamber for debate. Less people, drawn from the political elite until the 17th Amendment to the Constitution, allowed for greater latitude in allotting time for discussion.

The years 1810 through 1859, were a period known as the "Golden Age" of the Senate. Three of the greatest senators and orators in American history served during this time: Henry Clay (Kentucky) articulating the views and concerns of the West, Daniel Webster (Massachusetts) representing the North, and John C. Calhoun (South Carolina) representing the South.

During these years, these Senate "giants" debated and resolved major issues, holding a divided nation together before the Civil War: the Missouri Compromise of 1820, the nullification debate of 1830 (Haynes-Webster debates), and the Compromise of 1850.

During this "Golden Age" Washington's elite gathered in the Senate chamber to watch the impassioned oratory and the great compromises take place. The public filled the Senate's "Ladies' Gallery" and even sat on couches along the walls of the Senate Floor.

A major step toward supporting this debate culture occurred in 1806, when the Senate dropped using a simple majority to move "Previous Question" to stop debate. The first "filibuster", from the Dutch term "vrijbuiter" – pirate or pirating the proceedings, happened on March 5, 1841 over the firing of Senate printers. Grinding Senate proceedings to a halt was viewed as an important way to highlight concerns and force a more in-depth consideration of policy.

In 1917, the Senate established "cloture" as a way to limit debate. Initially, cloture required a 2/3 vote. This was changed in 1975 to 3/5, the current 60 votes required.

The House found other ways to expand debate within its strict rules. Members can "revise and extend" their remarks. This means that a one minute speech can become a multi-page discourse in the "Congressional Record", the permanent and official record of Congressional activities.

On March 19, 1979 the Cable-Satellite Public Affairs Network (C-SPAN) began live broadcast of the House of Representatives. Live coverage of the Senate began on June 2, 1986. Television fundamentally expanded the Congressional audience. Now people, beyond the small public viewing galleries, could watch what happened instead of reading about it.

Republicans embraced the role of television faster and more effectively than the Democrats. They turned the opening one minute speeches into street theater. They used posters and model war planes to create riveting moments highlighting major issues. Republicans also took the obscure device of the "Special Order" to spend hours educating the electorate on issues after official House business ended for the day.

During the first years of C-SPAN Republicans strategically orchestrated their message through an informal group called the Chesapeake Society. This weekly gathering, co-lead by senior legislative staff and Members, developed themes, wrote talking points, and assigned roles for the House's "Golden Age" of conservative advocacy.

Representatives John Ashbrook (R-OH), Bob Bauman (R-MD), and John Rousselot (R-CA), and their top advisors, collaborated with Phil Crane (R-IL), Bob Dornan (R-CA), Jack Kemp (R-NY), Larry McDonald (R-GA), Don Ritter (R-PA), Gerald Solomon (R-NY), Bob Walker (R-PA), and seventy other Members, to dominate C-SPAN in opposing President Jimmy Carter and House Democrats. Their effective use of the media is credited with helping lay the ground work for the Reagan Revolution.

A second "Golden Age" of House conservatives was led by Newt Gingrich (R-GA) and his Conservative Opportunity Society. They exposed an array of scandals that grew to symbolize the corruption of forty years of Democrat rule in the House. Their most famous use of visuals came on October 1, 1991. Rep. Jim Nussle (R-IA) addressed the House wearing a paper bag over his head. He tore off the bag stating he was ashamed to show his face in the wake of House

corruption. These dramatic moments led to the 1994 landslide that propelled Republicans to power for the first time since 1954.

Democrats found their own ways to use the power of the camera. On June 22, 2016, sixty Members staged a sit-in on the House Floor to dramatize the lack of gun control legislation. Republicans turned off the cameras and the lights. Democrats used their cellphone cameras in a social media phenomenon. On February 7, 2018, Nancy Pelosi (D-CA) used her unlimited time prerogative as Minority Leader to turn the usual "house keeping" procedures of the House into an eight hour marathon speech focusing attention on Deferred Action on Childhood Arrivals (DACA).

Formal procedures, precedents, and tradition, linked to ever evolving technology, guarantees that the role of debate remains a viable part of America's representative democracy in the 21st Century.

*Scot Faulkner served as Chief Administrative Officer of the U.S. House of Representatives and as a Member of the Reagan White House Staff. He earned a Master's Degree in Public Administration from American University, and a Bachelor's Degree in Government from Lawrence University*

## Statesmanship and the Distinguished Oratory of Daniel Webster, Henry Clay, John C. Calhoun

## Guest Essayist: Brian Pawlowski

Taken together, the political debates of Henry Clay, Daniel Webster, and John Calhoun guided American politics like no other group save the Founding generation. As Merrill D. Peterson put it, "their arrival on the political stage announced a new era of American statesmanship… they were representatives, spokesmen, ultimately personifications, of their respective sections: East, West, and South."[i] History would proclaim them the "Great Triumvirate" in recognition of the awesome influence and sway they held for so long in national politics. They led every great debate about the union and its future from the Missouri Compromise of 1820 through the Compromise of 1850. Like John Adams and Thomas Jefferson, who Benjamin Rush famously called the north and south poles of the Revolution, they became the voices of American geography and symbolized the sectional strife always sitting ominously atop the union. Yet within two years of the 1850 compromise all three titans would be gone, passed from the scene just as the searing sectional debate about Kansas and Nebraska was taking shape. The union was about to be swallowed up in the maelstrom of sectionalism they had worked for so many decades to forestall.

Abraham Lincoln in a eulogy for Clay, said that "In all the great questions which have agitated the country, and particularly in those great and fearful crises, the Missouri question—the Nullification question, and the late slavery question, as connected with the newly acquired territory, involving and endangering the stability of the Union, his has been the leading and most conspicuous part" and with allusion to Pericles and Shakespeare said that Clay's "career has

been national—his fame has filled the earth—his memory will endure to `the last syllable of recorded time.'" Lincoln would claim Clay as his idol of statesmanship. Many others from different parts of the country would claim Webster or Calhoun. Even in death their ideas continued to shape the contours of debate.

Each man earned various monikers in his life. Clay of Kentucky was "the Great Compromiser" or the "Star of the West" and was "independent alike of history, or the schools… He has never studied models, and, if he had, his pride would have rescued him from the fault of imitation. He stands among men in towering and barbaric grandeur, in all the hardiness and rudeness of perfect originality, independent of polish and beyond the reach of art."[ii] He was a fiery orator, quick on his feet, never utilizing notes or text, and utterly dedicated to preservation of the union.

Webster of New Hampshire was "the Yankee Demosthenes" or "Godlike Daniel" and was "a man of deep sentiment, so sentimental about the past, ancestors, the common law, hearth and home, his college, Washington, and the Constitution."[iii] He was conservative in politics, a passionate orator, and utterly dedicated to preservation of the union.

Calhoun of South Carolina was the "Young Hercules", "a fervent nationalist who took the whole country as his constituency" and "one of the master-spirits who stamp their name upon the age in which they live."[iv] His "mind and character – hard, grave, inflexible – were all one" and he had attained his station through "tenacious self-discipline and driving ambition."[v] He was the spokesman of the South, a stern orator who meticulously prepared his speeches, and was utterly dedicated to the preservation of a union that recognized the rights of the states and those of his fellow southerners. In the absence of that recognition, he was prepared for peaceable disunion.

From the first, their fame emanated from their oratory, which once held a far more prominent place in politics than it does today. To be sure, thirty second soundbites and poll-tested stump speeches are a product of current technology, never-ending news cycles, and the perceived attention span of voters. But the Triumvirates' time was different. Addresses spanned hours, sometimes days, and were printed often verbatim in newspapers or pamphlets. Senate and House galleries would be packed, standing room only being too generous a description to describe the nooks and crannies people contorted themselves into just to hear one of the Triumvirate speak.

Perhaps none spoke with more at stake than in 1850. The union had held, navigated through the choppy sectional waters of the territorial, tariff, and slavery questions. But fear of disunion in 1850 was palpable. California was now American territory as were New Mexico and Utah, all got from the Mexican Cession. California was filled with gold, immigrants, but *not* slaves, and was ready for statehood. Utah and New Mexico were more barren but also had to be organized. And so the question: would slavery be allowed in these new places? The sectional balance between free and slave states was threatened.

Clay spent three weeks in thought and came to the floor of the Senate on 29 January to present his compromise measures. In brief, and presented as the first "omnibus bill", they consisted of the admission of California as a free state, the settlement of the boundary between Texas and New Mexico, federal assumption of Texas public debt, allowance for the slavery question to be decided in New Mexico and Utah territories through popular sovereignty, abolition of the slave

trade in Washington DC, and a stronger fugitive slave law. Clay knew many of the provisions would be unpalatable for many but he urged their passage and did so with a remarkable visual aid: a piece of George Washington's coffin. Both Clay and Webster venerated Washington. Clay told the Senate that "it was a warning voice, coming from the grave to the Congress … to beware, to pause, to reflect before they lend themselves to any purposes which shall destroy the Union."[vi] He went on for two days, at every turn stressing the vital importance of preserving the union.

There was, indeed, something in this mix for everyone to hate. And John Calhoun hated almost all of it. Old, frail, and unable to write or speak Calhoun dictated his (and largely the South's) response to Clay's measures. Touching up the draft with his own pen he then turned it over to Senator James Mason of Virginia to deliver it on the floor. On 4 March Calhoun was literally carried into the Senate chamber where he sat, cloaked in black, as Mason gave the speech.

Calhoun's words mirrored his physical state. They were dark, haunting, ominous. They portrayed a south beaten down by the weight of northern opinion and economic interests. His speech put blame for the crisis squarely on the north and its disrespect, disregard, and disdain of southern ways. He stated candidly, "I have, Senators, believed from the first that the agitation of the subject of slavery would, if not prevented by some timely and effective measure, end in disunion." His proposed solution was for the north to "do justice by conceding to the South an equal right in the acquired territory, and to do her duty by causing the stipulations relative to fugitive slaves to be faithfully fulfilled–to cease the agitation of the slave question, and to provide for the insertion of a provision in the Constitution, by an amendment, which will restore to the South in substance the power she possessed of protecting herself". Calhoun believed that peaceful separation was possible and, now, likely. He closed, "I have now, Senators, done my duty in expressing my opinions fully, freely, and candidly, on this solemn occasion. In doing so, I have been governed by the motives which have governed me in all the stages of the agitation of the slavery question since its commencement. I have exerted myself, during the whole period, to arrest it, with the intention of saving the Union, if it could be done; and, if it could not, to save the section where it has pleased Providence to cast my lot, and which I sincerely believe has justice and the Constitution on its side."[vii] It would be his last speech in the Senate. Calhoun would die by the end of March before the compromise measures finally passed.

Only three days later on 7 March Daniel Webster sought to stem the tide of pessimism and disunion. As usual, the galleries were overflowing, people eager to hear Webster persuade the country to save their union. He spoke for nearly four hours. He began, "I wish to speak to-day, not as a Massachusetts man, nor as a Northern man, but as an American, and a member of the Senate of the United States… I have a part to act, not for my own security or safety, for I am looking out for no fragment upon which to float away from the wreck, if wreck there must be, but for the good of the whole, and the preservation of all; and there is that which will keep me to my duty during this struggle, whether the sun and the stars shall appear, or shall not appear for many days. I speak to-day for the preservation of the Union. "Hear me for my cause."[viii]

Knowing he would reap a whirlwind of scorn from northern and abolitionist supporters he pleaded for compromise by asking that northerners recognize slavery as a reality where it existed, that they respect this reality and the south, and that they play their part in fulfilling the

requirements of the fugitive slave law. The only alternative was disunion and war. Webster would go on in July of that year to give another speech, his farewell address, which was more sympathetic to the antislavery cause and in which he again urged the compromise measures be adopted. These two speeches moved opinion in the Senate as ultimate passage of the compromise would indicate but his own political reputation was severely damaged.

At the end of July Henry Clay watched as the measures failed to pass. In debilitating condition from tuberculosis, Clay vowed not to abandon his effort. But he could not continue. He left the Senate and traveled east to try and recuperate from the illness wracking his body. The task of passing the compromise fell to a young Senator from Illinois, Stephen A. Douglas. With Clay's influence, he determined to vote on each part of the compromise individually and successfully put together majorities for every measure. All passed by the end of September and were signed into law. For many, the union seemed safe.

Clay, Webster, and Calhoun would not live to see the debate revived over the Kansas-Nebraska Bill. And as historian David Potter has rightly observed, the Compromise of 1850 was ultimately more like an armistice, marking time until the next territorial question brought the union under threat once again. Then, and in 1860, there were those who said that had the Triumvirate been still in the Senate the crises would have been averted. They were not there. And the country would endure a brutal Civil War over the very same issues Clay, Webster, and Calhoun had debated themselves. And it can be said that all three were, then and ultimately, wrong in their view of and the compromises they made with the moral evil of slavery. But in their hands, from the early to mid-1800's the continued existence of the union, though in imperfect form, had been secure.

*Brian Pawlowski is a member of the American Enterprise Institute's state leadership network and was a Lincoln Fellow at the Claremont Institute for the Study of Statesmanship and Political Philosophy. He has served as a Marine Corps intelligence officer and is currently pursuing a Master's Degree in American History.*

[i] Merrill D. Peterson, *The Great Triumvirate: Webster, Clay, and Calhoun* (New York: Oxford University Press, 1987), 5.
[ii] Ibid. 8
[iii] Ibid. 37
[iv] Ibid. 27
[v] 27
[vi]https://www.senate.gov/artandhistory/history/minute/Clays_Last_Compromise.htm
[vii]http://college.cengage.com/history/ayers_primary_sources/calhoun_speech_compromise_1850.htm
[viii] https://www.dartmouth.edu/~dwebster/speeches/seventh-march.html

# The Decision of 1789: Congress, the President and Removal of Presidential Appointees

## Guest Essayists: David Alvis and Flagg Taylor

Article II Section 2 of the Constitution lays out a very detailed procedure for appointment: "and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments." (U.S. II.2.2) While the appointment of executive officers is very important to the administration of government, equally, if not more important, is the issue of who can remove these officers. Unfortunately, Article II says nothing about the removal of officers. In fact, there was no discussion of the removal of executive officers in the debates of the Constitutional Convention of 1787. Not until the first Congress was the issue of the removal power debated. Those debates, known commonly today as "the Decision of 1789," serve as the touchstone for almost all subsequent arguments in American politics over who controls the administration.[1]

### The Decision of 1789

Near the beginning of its very first session, Congress proposed to create its first executive departments in order to attend to the critical business facing the infant nation: Treasury, War, and Foreign Affairs. With the Foreign Affairs (later the Department of State) on the table first, James Madison offered a motion that would prove to be the keystone for the discussion: "that there shall be established an executive department, to be denominated the department of foreign affairs; at the head of which there shall be an officer, to be called, the secretary to the department of foreign affairs, who shall be appointed by the president, by and with the advice and consent of the senate; *and to be removable by the president*…" (emphasis mine). [2] For the next six days, the First Congress would undertake one of the nation's most sophisticated and informative constitutional debates over the organization of the executive branch in American history. During the course of their discussion, a total of four positions on the issue of removal evolved:

(1) *Impeachment*: impeachment is the only mode of removal recognized by the Constitution and Congress cannot confer any other mode;
(2) *Advise and consent*: the Constitution vests the removal power jointly in the president and the Senate and Congress cannot confer any other mode;
(3) *Congressional delegation*: the Constitution is silent or ambiguous about where it vests the removal power, so:
(a) Congress is free to decide but prudently it ought to vest it in the president, or
(b) Congress has some latitude but ought not vest it in the president alone
(4) *Executive power theory*: the Constitution vests the removal power in the president alone.[3]

Within each position above lies a particular interpretation of the balance of power between the legislative and executive branch that could have fateful consequences for constitutional government in the United States. The members appeared to clearly understand the ramifications

of their position. They were not just deciding the level of accountability for the Secretary of Foreign Affairs; they were determining whether executive power would lie squarely within the president's authority or if Congress would control it, at least in part.

According to adherents of the first position, impeachment was the only mode of removal recognized by the Constitution. This position rested on a literal construction of the Constitution. Since the Constitution does not mention anything about removal, then there is no removal power. Impeachment, however, *is* mentioned in the Constitution. Consequently, impeachment is the only means by which the removal of an executive officer could be done. While this argument seems plausible on the surface, the consequences of this position would have dramatically altered the institutional development of the American presidency. As one scholar puts it:

> To have declared the magistracy permanent except for the right of removal by impeachment would necessarily have made the department heads the real executive. An incoming President would have found in office [individuals] whose position, so far as he was concerned, was assured. They would have ideas of their own and connections of their own. Since he could not control them, they would very naturally act in accordance with these ideas in carrying out their duties.[4]

Proponents of this view clearly understood this. They were not just strict constructionists; they had an underlying motive. Supporters of the impeachment theory feared the concentration or expansion of executive power at the expense of the other branches. As James Jackson of Georgia noted, "If he [the president] has the power of removing and controlling the treasury department, he has the purse strings in his hand; and you only fill the string box, and collect the money of the empire, for his use. The purse and sword will enable him to lay prostrate the liberties of America."[5] If removal of executive officers were limited to impeachment by Congress, the president would have very little control or influence over the administration.

Proponents of the second position, "advise and consent," believed that the Constitution vested removal power jointly in the president and the Senate. The removal process should follow the same procedure as that explicitly described in the appointment process under Article II. To appoint an officer of the administration requires the consent of the Senate, so should the removal of an executive officer. As Theodorick Bland put it on the first day of the debate, "The constitution declares that the president and the senate shall appoint, and it naturally follows, that the power which appoints shall remove also."[6] After all, aren't the powers of appointing and removing related, just like hiring and firing? Like the impeachment position, proponents of this position also had a particular view of the balance of powers between Congress and the president. The president and Congress share in the duty of administration because the execution of law is ministerial to the process of law making. Elbridge Gerry of Massachusetts elaborated this view for the benefit of other members:

> We [Congress] have the power to establish offices by law; we can declare the duties of the officer; these duties are what the legislature directs, not the president; the officer is bound by law to perform these duties… Suppose an officer discharges his duty as the law directs, yet the president will remove him; he will be guided by some other criterion;

> perhaps the officer is not good natured enough…because he is so unfortunate as not to be so good a dancer, as he is a worthy officer, he must be removed.[7]

For Gerry and others this arrangement made sense in light of their view that the administration of the law is inseparable from the creation of law. Administering the law is really a joint responsibility of the president and Congress since it is the president's task to execute the law and the legislature's responsibility to see that its laws are faithfully executed. Consequently, administrators should not be removed in the same way they are appointed — with Congressional approval.

Other members of the First Congress agreed that the legislature played a central role when it comes to the administration of law, but they took a different position over the removal power process. Known as the "congressional delegation position," this group argued that the Constitution's silence over the vesting of the removal power was really an invitation to give Congress a discretionary authority over the removal power. Congress could either retain the removal authority solely for itself or it could vest this power wherever it pleases. Roger Sherman of Connecticut explained the rationale behind this position: "As the officer is the mere creature of the legislature, we may form it under such regulations as we please, with such powers and duration as we think good policy require; we may say he shall hold his office during good behavior, or that he shall be annually elected; we may say he shall be displaced for neglect of duty, and point out how he should be convicted of it—without calling upon the president or senate."[8] What Congress creates, Congress can take away. Administering the law, moreover, is not really a shared responsibility with the president; it is ultimately the responsibility of Congress. Proponents of this position were actually divided into two groups when it came to deciding where to vest the removal power over the secretary of Foreign Affairs. Some thought Congress should retain the power while others thought it would be more convenient to permit the president to exercise the power in this particular situation. In either case, however, their fundamental assumption was the same: the power of removal fundamentally belongs to Congress.

Finally, one group of representatives argued that the Constitution vested the removal power in the president alone. This position is often labeled "the executive power theory."[9] Elected by the people, the president is alone accountable to the public for the execution of the law. As James Madison put it, "If the president should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the president, and the president on the community. The chain of dependence therefore terminates in the supreme body, namely, in the people."[10] According to this view, Congress has the power to make law but it does not have the authority to interfere with the execution of law. If Congress participated in the removal process either by exercising the removal power itself or by requiring its advice and consent to removal, the legislature would have overstepped its bounds within the separation of powers. As the vesting clause of Article II states: "The executive power shall be vested in a president of the United States of America." True, as the proponents of the advice and consent position would maintain, the Constitution does occasionally blend the powers as when it includes the Senate in the appointment process. But those occasions are really exceptions to the rule that ought to be construed strictly where the

Constitution makes the role of Congress explicit.[11] Because the Constitution is silent on the removal power, it should be assumed that this power belongs to the president alone. Asked in the House whether he thought removal was executive "by nature," Madison responded: "I conceive that if any power whatsoever is in its nature executive it is the power of appointing, overseeing and controlling those who executive the laws. If the Constitution had not qualified the power of the president in appointing to office, by associating the senate with him in that business, would it not be clear that he would have the right by virtue of his executive power to make such an appointment."[12]

Scholars who have looked to the debates of the First Congress for a conclusive statement on the issue of the removal power have unfortunately been disappointed. To avoid a stalemate over the legislation, the House carefully developed a compromise that would give the president power to remove in effect while leaving the constitutional logic for vesting this power in the president unclear – Congressional delegation or inherent executive power? This clever parliamentary maneuver successfully garnered enough votes to get the bill through Congress, but it did not resolve the issue of the removal power in terms of principle.

At stake in this struggle over removal power was more than the interior design of a particular department; this debate would shape the way in which the two elected branches of the federal government would relate to one another under the system of the separation of powers. For those who favored a significant role for Congress in the removal power, the concern was to at least check, if not entirely control the executive's enforcement of law. Supporters in this camp believed that Congress had a major stake in law enforcement because the execution of law should complement the intention of the lawmaker. Unchecked, the executive might be able to rewrite the law merely by controlling how the law was enforced. Supporters of the executive power theory on the other hand believed that execution of law was entrusted solely to the discretion of the executive. If the enforcement of law deviated from the intentions of certain lawmakers, it was the task of either the Courts or voters to correct the interpretation. While no one member of the House offered a compromise that satisfied all parties, it is clear that any mutual accommodation between the pro-Congress and pro-executive sides of this issue would require an arrangement whereby Congress could prevent the executive from contravening the clear intent of the law while at the same time recognizing the independent discretionary authority of the president. Of course, the simple solution would be to make very specific laws, but this is easier said than done particularly in a very complex world of regulatory administration. Given that most laws do not execute themselves, administration often requires discretionary choices. How to preserve the balance of powers in light of the growing complexity of federal administration remains an unsettled question.

*David Alvis is an Associate Professor of Government at Wofford College. He has published two books including The Removal Power Controversy, 1789-2010 from University of Kansas Press (with Jeremy Bailey and Flagg Taylor) and Statesmanship and Progressive Reform from Palgrave MacMillan Press (with Jason R Jividen), along with numerous articles on American politics and political theory.*

*Flagg Taylor is Associate Professor of Political Science at Skidmore College.*

[1] This essay is adapted from our book: *The Contested Removal Power, 1789–2010*by J. David Alvis,. Jeremy D. Bailey, and F. Flagg Taylor IV. (Lawrence, University. Press of Kansas, 2013).
[2] De Pauw, Linda Grant, Charlene Bangs Bickford, Kenneth R. Bowling, and Helen E. Veit. 1972. *Documentary history of the First Federal Congress of the United States of America, March 4, 1789-March 3, 1791*. Baltimore: Johns Hopkins University Press, 726. (*DHFFC)*
[3] See Saikrishna *Prakash*, "New Light on the Decision of 1789," 91 *Cornell L. Rev*. 1021 (2006)
[4]C. *Thach*, Jr., *The Creation of the Presidency*, *1775–1789* (*Baltimore*, Md.: *Johns Hopkins* University *Press*, *1969*)
[5] Ibid., 1002.
[6] *DHFFC, Debates I*, 737. Bland made a motion on May 19 to add "by and with the advice and consent of the senate" which was defeated. See Ibid., 738.
[7] *DHFFC, Debates II* ,1022-1023.
[8] *Ibid.*, 917.
[9] Prakash
[10] Ibid., 925.
[11] *DHFFC – Debates II*, 869
[12] ibid., 868

## The Role of Congress in Creation and Constitutionality of the National Bank, Part 1

## Guest Essayist: Joerg Knipprath

In July, 1790, Congress approved removal of the national capital ten years hence from New York City to an as-yet undetermined location on the Potomac River. The vote was the result of a political maneuver to accommodate a matter of much more immediate impact, the realization of Alexander Hamilton's economic salvage blueprint for the new nation. That blueprint proved crucial to the country's economic and political fortunes. At the same time, it opened fissures of sectional conflict, constitutional theory, and political partisanship that had remained below the surface, if barely, during the preceding decade.

The impact of the first Secretary of the Treasury can hardly be overstated. His figure loomed so large over the country's political and economic affairs even after he left office in 1795 that some historians have dubbed the era "Hamilton's Republic." It was a felicitous combination of man and office. The evolution of Anglo-American constitutional doctrine that emphatically placed the power over the purse in the legislature put the head of the treasury in a category distinct from the rest of the executive cabinet. Alone among those officers, he was required by law to issue reports directly to Congress. At the time, the Treasury Department had by far more officials in the capital and functionaries in the field than other civilian departments had.

Hamilton played into this role by treating the position as a sort of prime ministership, through which he would oversee the other cabinet heads under the reign and guidance of the president, as well as act as a liaison between the executive and legislative branches. The childless President

George Washington, for whom Hamilton had become a surrogate son, abetted this stance. Washington not only typically took Hamilton's side in political disputes, but also gave him tasks and requested his opinions in matters outside the Treasury Department's domain.

Following a meteoric rise that saw him form his own New York militia artillery company at age 19, become adjutant to General Washington with the rank of lieutenant colonel at 20, command a critical assault at the Battle of Yorktown at 24, and found the Bank of New York at 27, Hamilton became Secretary of the Treasury at 32. In September, 1789, Congress requested that he prepare a series of reports on the credit of the United States. Hamilton delivered his recommendations to Congress in January, 1790.

The "Report on the Public Debt" proposed three broad policies: to fund the national debt (including interest payments in arrears) at par through 6% bonds, to assume payment of the remaining state war debts, and, in a separate report in January, 1791, to create a central banking institution akin to the Bank of England. Each policy engendered vocal opposition. As to the first, the debt was owed about one-third to European creditors. The rest was owed to Americans, typically merchants who had supplied goods and individuals who had supplied service, typically military, and been paid with these debt certificates. The value of the debt instruments had decreased significantly due to currency devaluation and the long-running uncertainty about the government's ability to repay them at all. As a result, wealthy individuals had purchased much of the outstanding debt at deep discount from those holders who, over the years, needed cash. Many denounced Hamilton's plan as a wealth transfer from the middle and lower classes, who would have to pay taxes needed to retire the debt, to the upper-class "speculators." Their criticisms were not entirely unfounded, as Hamilton made clear in various statements. He believed that the success of the United States ultimately lay in tying the self-interest of the leading members of the community to the nation rather than their states. Nothing would do so more than to align their economic future with that of the general government and to direct their energy to expanding the country's commerce and manufacturing. Repaying their financial bonds at par would, in turn, create personal and class bonds that would transcend state loyalties.

As to the second, Virginia and some other states objected because they had paid down, or even eliminated, their war debts through prudent financial policies. Those states saw the debt assumption by the federal government as rewarding profligacy and irresponsibility by debtor states and balked at the idea that their own citizens would now be taxed to cure the results of that mismanagement. Others viewed the assumption as creating a perception of a "bail-out" of abject states by a benevolent and efficient general government. Thus, they rejected the policy as a dangerous surrender of state power.

The establishment of the proposed central bank proved to be the most controversial of all, both as to the particular policy and the more general constitutional questions it raised. The Bank of the United States would be funded through the sale of stock, with 80% of the initial shares bought by private investors and the rest by the general government. Directors of the Bank would be selected in like proportion by the private and government interests. The Bank would act as a depository for government funds, and the government would draw on its account to pay its bills. Operating in various cities, the Bank's prestige would attract private deposits and stock purchases throughout the nation. Foreigners also could buy stock but could not vote. Further, the Bank

would extend credit to state banks under terms that would allow it eventually to control the national money supply as needed for economic stability. Through loans for large commercial or productive undertakings, the Bank could promote economic growth and internal improvements. Finally, its notes, backed by a reserve of gold and silver and circulated nationally, would provide a safe and effective medium of exchange.

Profits from its loans would be paid in dividends as a return on investment for the stockholders. The government's share would be used to help pay interest and principal of all outstanding public debt. The Bank's charter would expire after twenty years unless renewed.

The project was not novel. Hamilton had proposed such a system to the Confederation's powerful Superintendent of Finance, Robert Morris, in 1781. Morris, who entertained similar ideas, set up the Bank of North America, chartered by the Congress under the Articles of Confederation. However, doubts were raised about that bank's charter, because the Articles did not expressly confer such a power on Congress, and all powers not expressly given to Congress under that charter were reserved to the states. Hence, Morris also obtained a state charter for that bank from Pennsylvania. Four years later, the Pennsylvania legislature repealed that charter. Although the state reversed itself again in 1787, the damage was done. The vagaries of state legislatures undermined the very concept of a central bank. At the same time, the salutary effects on national finance demonstrated by that bank in its first several years affirmed Hamilton's beliefs in the project. Hamilton himself had written about the issue of the public debt and generally admired Morris's management of the matter. The admiration was reciprocated. President Washington first offered the Treasury position under the new government to Morris, who declined and recommended Hamilton–not that Washington needed much persuasion.

As with the Bank of North America, arguments quickly arose that Congress lacked the power to charter the Bank of the United States. After all, the Philadelphia Convention had rejected James Madison's proposal to allow Congress to charter banks and corporations. Some had opposed this as a dangerous grant that would lead to a "consolidation" of the government in Congress. Others, looking at traditional English chartering of corporations, opposed it as unnecessary, because such a power already was inherent in sovereignty.

Faced with the controversy, Washington asked Madison, who served as a close adviser to the President even as he became a leader in the House of Representatives, to draft a veto message against the Bank Bill. In two speeches before the House, Madison opposed the proposal. He asserted that Congress could only exercise powers expressly granted or those that were a mere incident "evidently and necessarily involved in an express power." Washington also submitted the issue to Attorney General Edmund Randolph and Secretary of State Thomas Jefferson. All three of his fellow-Virginians assured the President that the bill was unconstitutional in that Congress lacked the express authority to charter the Bank. Further, Congress could not rely on "implied" powers.

Jefferson delivered his opinion on February 15, 1791. He rejected arguments that the proposal could be upheld under Congress's powers to tax, borrow, or regulate commerce. More significantly, he read both the "general welfare" language and the "necessary and proper" clause narrowly. The former was not a separate grant, but one tied to the taxing and spending power for

Congress to spend only for the objectives listed in Article I, Section 8, of the Constitution. As to the latter, "necessary" did not mean mere "convenience," but only "those means without which the grant of the [express] power would be nugatory." Otherwise, "there is not one [non-enumerated power] which ingenuity may not torture into a *convenience* in some instance *or other*, to *some one* of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase," namely, to give Congress "power to do whatever would be for the good of the U.S. … or whatever evil they pleased."

Hamilton quickly drafted a 15,000-word response, which he delivered on February 23, 1791. He urged a flexible interpretation of Congress's powers because of the "*general principle* [that] is inherent in the very *definition* of government … [t]hat every power vested in a government is in its nature *sovereign*, and includes, by *force* of the *term*, a right to employ all the *means* requisite and fairly applicable to the attainment of the *ends* of such power, and which are not precluded by restrictions and exceptions specified in the Constitution …."

As to the "necessary and proper" clause, it was but a restatement of the "implied powers" principle and defined the means the government might choose to achieve its constitutionally authorized objectives. He rejected Jefferson's restrictive interpretation as unprecedented and radical. The proper constitutional test, he wrote, was, "If the *end* be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that *end*, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority." Within those broad boundaries, all discussions were about expediency, not right.

Jefferson, Madison, and Randolph lost the argument when Washington signed the Bank Bill. Jefferson sarcastically characterized Hamilton's views in a letter to Senator Edward Livingston in 1800, after Congress chartered a mining company. He derided the exercise by comparing the constitutional claims of the law's supporters to a popular nursery rhyme: "Congress are authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines, necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at 'This is the House that Jack Built'? Under such a process of filiation of necessities the sweeping clause makes clean work."

It was clear to all that the debate was not just about the Bank, but about the extent of Congressional power and, indeed, about the nature of the Union itself. That debate would continue, although the forum shifted from the Congress and cabinet to the Supreme Court. The Bank's charter expired in 1811, just in time for the War of 1812 to begin. The straightened financial situation in which the essentially bankrupt Madison administration eventually found itself stood in sharp contrast to the order that the Bank of North America had produced in the latter years of the Revolutionary War. Calls went out to charter the Second Bank of the United States. Even President Madison had once more changed his mind and, after one veto over practical objections, signed the bill to charter a new bank in 1816. Madison conceded that he repeated actions of the different branches of the government in support of the authority of the federal government to charter corporations had mooted his constitutional scruples over the matter, especially since those actions were supported "by indications…of a concurrence of the

general will of the nation." Jefferson never overcame his suspicion of the Bank, but, once retired from public office, agreed with Madison's reasoning.

The Bank law was eventually challenged in *McCulloch v. Maryland* in 1819 and *Osborn v. Bank of the United States* in 1824. Chief Justice John Marshall, as was his wont in other important cases, once more borrowed extensively from Hamilton's constitutional reasoning in upholding Congress's power to charter the Bank. There the matter stood until the last round, between the Whig-controlled Senate and President Andrew Jackson in 1832. Jackson's veto message was a ringing indictment of the financial interests that the Bank's opponents since at least Jefferson had seen as the malevolent invisible hand directing the Bank's actions. His economic provincialism favored hard money over paper. Moreover, Jackson dismissed the Supreme Court's view on the constitutional issue as non-binding on him as the head of a co-equal branch. Finally, Jackson's general inclination in favor of states' rights and limited and defined powers of the central government made a central bank suspect.

The Jeffersonian strict constructionists of federal power thus won the battle over the central bank, a result not reversed until 1913 through the creation of the Federal Reserve Bank system. Of more significance and permanence, however, has been the across-the-board triumph of the Hamiltonian view of Congress's powers. This is manifested not just in the broad reading of "implied" powers and the necessary-and-proper clause, but in the expansive reach of Congress's express powers to tax and spend for the general welfare and to regulate interstate commerce. Add to that the general acceptance of broad implied powers for the executive branch, and it becomes obvious how thoroughly Hamilton's nationalism has overwhelmed Jefferson's romanticism about a republic of yeoman farmers and artisans governed by their state and local bodies and by a national Congress with strictly limited powers.

*An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: [http://www.tokenconservative.com/](http://www.tokenconservative.com/).*

## The Role of Congress in Creation and Constitutionality of the National Bank, Part 2

## Guest Essayist: Tony Williams

### Hamilton v. Jefferson: Taking the Constitution Seriously

The First Congress was deeply divided over policies at the very start of the new nation. The debates generally centered around the economic policies and financial plans of Secretary of the Treasury Alexander Hamilton. The contention about the National Bank in particular generally

revealed a sectional and increasing partisan divide between the Hamiltonians and Jeffersonians. While the debates revealed the tensions in the new nation, they also properly took place regarding interpretation of the Constitution.

In August 1790, Hamilton was preparing to move the treasury department to the new capital at Philadelphia. He had recently won the battle over the federal assumption of state debts and helped establish the soundness of the public credit. That month, Congress asked him to prepare a report on a National Bank. In December, he submitted a masterful blueprint for the National Bank and focused on its contribution to the growth of the American economy.

The National Bank would provide a means of taking deposits and lending out money for investment in business ventures, which would in turn stimulate the economy. Hamilton wrote, "By contributing to enlarge the mass of industrious and commercial enterprise, banks become nurseries of national wealth." Hamilton believed that a bank was necessary not only to economic growth but to national security by funding armies in times of war.

The proposed bank encountered immediate opposition in both houses of Congress. Opponents were primarily southerners and those who feared centralized power and aristocracy—those who would become Jeffersonian Republicans. One member of Congress predicted, "This bank will raise in this country a moneyed interest at the devotion of government; it may bribe both states and individuals." James Jackson of Georgia argued the bank was "calculated to benefit a small part of the United States, the mercantile interest." Senator William Maclay predicted it would become "an aristocratic engine" and a "machine for the mischievous purposes of bad ministers."

Despite the fierce opposition, the Senate easily passed the bill on January 20, 1791. James Madison led the opposition to the bank in the House. On February 2, Madison delivered a lengthy speech questioning the constitutionality of the proposed bank. Madison objected that it was not an enumerated power of Congress, nor was it a power Congress could legitimately exercise under the Necessary and Proper Clause in Article I, section 8. Madison's arguments were to no avail. The House passed the bill by an overwhelming margin of 39 to 20.

President George Washington was a firm advocate of a stronger national government and economy, and usually sided on policy with Hamilton. However, the objections of Madison, and Thomas Jefferson and Edmund Randolph in the cabinet, troubled the president. He also took the Constitution seriously when considering signing bills into law, and he was concerned about the absence of a specific constitutional clause allowing Congress to create a National Bank. Therefore, he solicited opinions from the members of his cabinet to help him decide whether to sign the bill into law.

Jefferson produced a stronger paper arguing against the bank than Randolph's rambling opinions. Jefferson argued for limited government when he stated that to "take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition." The power to establish a bank was not one of the delegated powers of Congress, nor did the Necessary and Proper Clause apply because he thought the powers of the bank were unrelated to any other powers in Article I, Section 8. Jefferson argued that it was neither strictly necessary nor proper: "A bank therefore is

not *necessary*, and consequently not authorized by this phrase." He advised Washington to veto the bill because it was an "invasion of the legislature."

On February 16, Washington weighed the arguments contained in the papers and then forwarded them to Hamilton for consideration while composing his paper. Five days later, Hamilton produced a brilliantly-crafted tour de force, burying his opponents in an avalanche of words and logic. Hamilton argued that the federal government had implied powers based upon having the means to execute the ends of its authority under enumerated powers. Moreover, Hamilton articulated numerous powers that Congress had that were related to the powers of a National Bank and therefore it was a constitutional exercise of power under the Necessary and Proper Clause. President Washington agreed with Hamilton's constitutional reasoning and signed the bill into law on February 25.

The debate over the National Bank would be one of the disputes that helped create the Democratic-Republican and Federalist political parties. The differing perspectives on constitutional interpretation divided the Democratic-Republicans who had a strict construction of the Constitution from the Federalists who had a loose construction of the Constitution. The 1790s were consequently characterized by a wide partisan divide over economic policies, constitutional interpretation, and foreign policy.

Whatever the divisions caused by the debate over the National Bank, the quarrel was ultimately rooted in the Constitution. Members of Congress considered the constitutionality of the bank bill during its passage. President Washington carefully weighed the Constitution when deciding to sign the bill, and its supporters and opponents made constitutional arguments for their rival views. The politicians and statesmen of the early republic took the Constitution seriously.

*Tony Williams is a Constituting America fellow, a Senior Teaching Fellow at the Bill of Rights Institute, and the author of six books including Hamilton: An American Biography and Washington and Hamilton: The Alliance that Forged America.*

## The Great Debates – Congress and the Missouri Compromise of 1820

## Guest Essayist: Daniel A. Cotter

When the United States Constitution was ratified in 1789, debates over slavery and how to count slaves for purposes of legislative representation and tax apportionment threatened to derail an agreed upon new constitution. The Three-Fifths Compromise resulted and while it led to the ratified Constitution, the issue of slavery continued to be a major issue of tension between the North and South. In 1820, those tensions intensified when Missouri sought admission to the Union. The Missouri Compromise was the solution that pushed civil war back several decades.

### The Missouri Compromise

The Missouri Compromise was an effort by the United States Congress to address slavery and create balance between the slaveholding and free states. Congress struggled with the issue for

some time starting in 1819, when the Missouri Territory applied for statehood. The Missouri Territory had been part of the Louisiana Purchase in 1803. The Spanish and French sanctioned slavery in the Louisiana territories prior to the sale, and Louisiana, the first state carved from the Louisiana Purchase, was a slave state when it entered the Union. If it were admitted, Missouri would throw off the eleven to eleven balance between slaveholder and free states. On February 3, 1819, New York Jeffersonian Republican Representative James Tallmadge, Jr. proposed two amendments to Missouri's application for statehood, providing:

> And provided, That the further introduction of slavery or involuntary servitude be prohibited, except for the punishment of crimes, whereof the party shall have been fully convicted; and that all children born with in the said State, after the admission thereof into the Union, shall be free at the age of twenty-five years.

The Tallmadge Amendment passed the House but failed in the Senate. The debates in the two chambers of Congress pitted the northern restrictionists against anti-restrictionists from the south. To further the Tallmadge Amendment in the House, a fellow House member, proposed splitting Tallmadge's amendments into two separate votes and, despite a 101 to 81 northern advantage in the House, the House voted 87-76 in favor of the further migration into Missouri and 82 to 78 on emancipation at age twenty-five. But the three days of debate prior to passage have been described as "rancorous" and "fiery" and "blistering," with rhetoric such as "which seas of blood can only extinguish" and "If a dissolution of the Union must take place, let it be so!" When the House passed bill made it to the Senate, the Senate rejected both parts, 22-16 and 31-7, respectively.

The Congressional debate on admitting Missouri continued for a year, until Maine (which was part of Massachusetts) sought statehood. The agreed upon deal was to admit Maine as a free state and Missouri as a slave state- states would be admitted in pairs to keep the balance. The Senate linked the two bills for Missouri and Maine and Senator Jesse B. Thomas from Illinois introduced a compromise amendment, which excluded slavery from remaining lands of the Louisiana Purchase north of the 36◦, 30' parallel.

The measure passed the Senate but faced resistance in the House by Northerners who wanted Missouri to be a free state. Speaker of the House Henry Clay, the "Great Compromiser," divided the Senate bills and on March 3, 1820, the House voted to admit Maine as a free state, Missouri as a slave state, and made free soil western territories north of Missouri's southern border, excluding Missouri. The debate did not end in 1820, however.

When Missouri submitted its new constitution, it excluded "free negroes and mulattoes" from the state. Clay again saved the matter, approving an act of admission that the exclusionary clause would "never be construed to authorize the passage of any law" that impaired the privileges and immunities of any United States citizen. Referred to as the Second Missouri Compromise, it helped save the Union for several decades.

**Conclusion**

The Missouri Compromise was a necessary action to avert continued battles over the balance of power in Congress. However, Thomas Jefferson predicted the peace gained by the Missouri Compromise could not last, writing to a friend:

> [B]ut this momentous question, like a fire bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union. it is hushed indeed for the moment. but this is a reprieve only, not a final sentence. A geographical line, coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated; and every new irritation will mark it deeper and deeper.

The Missouri Compromise helped to issue a "reprieve" as Jefferson noted, and for the next three decades, the issue continued to be debated, but the balance of power remained, until the admission of California as a state in 1850 with no offsetting slaveholding state admitted at the same time. Effectively overruled by the Kansas-Nebraska Act in 1854, the Missouri Compromise was also found to be unconstitutional by the much-denounced 1857 Supreme Court decision, *Dred Scott v. Sandford*, which held that Congress had overreached in its enactment of the Missouri Compromise. Civil war would come four years after *Dred*.

*Dan Cotter is a partner at Latimer LeVay Fyock LLC and an adjunct professor at The John Marshall Law School, where he teaches SCOTUS Judicial Biographies. He is in the process of writing a book on the seventeen Chief Justices. He is also a past president of The Chicago Bar Association. The article contains his opinions and is not to be attributed to anyone else.*

## The Great Debates – Robert Hayne's 1830 Senate Speech and Daniel Webster's Reply, Part 1

## Guest Essayist: Joerg Knipprath

Over the course of approximately a week in late January, 1830, a debate occurred in the United States Senate that historians consider the greatest ever in that chamber. Before a gallery packed with listeners, under the animated gaze of Vice-President John C. Calhoun, Senators Robert Hayne of South Carolina and Daniel Webster of Massachusetts waged an oratorical battle. Astonishing is that it was precipitated by a skirmish over an intellectually rather dry, though politically charged, topic–the sale of public lands in the American West to settlers.

The previous month, Senator Samuel Foot of Connecticut had proposed that Congress investigate the desirability of curtailing the sale of public lands by the federal government. Senator Thomas Hart Benton of Missouri, representing the Western interests, denounced the proposal as another attempt by Eastern economic interests to prevent the migration of workers from their states. From his perspective, keeping those workers tied down in their locales suppressed the cost of labor and increased the industrialists' profits. The Westerners wanted free migration and federally-financed "internal improvements" and the economic and political benefits that would accrue from them.

The country was increasingly riven by sectional tension, not just the familiar one between North and South, but, as significantly, between Northeast and West. Gone, it was lamented, was the ethos of sectional compromise forged by the exigencies of the Revolutionary War. Western politicians, such as Benton, sought to increase their political importance by aligning themselves with one section's interest against the other. On this particular matter, as comically described by the historian Samuel Eliot Morison, Benton "summoned the gallant South to the rescue of the Western Dulcinea, and Senator Hayne of South Carolina was the first to play Don Quixote."

Hayne was an accomplished lawyer, speaker, and writer. He was well-educated, with handsome features, and unfailingly polite. He was elected to the Senate at 31, barely over the minimum age, a fitting champion for his Southern aristocratic class. His first speech in the debate, on January 19, chastised the Northeast for its protectionism of nascent industries and linked that policy to Benton's claim about the industrialists' obstruction of Western migration.

Hayne's attack dovetailed with increasingly determined and desperate Southern opposition to the national tariff policy during the 1820s and 1830s. Import duties on European finished goods, such as textiles, protected the weavers of New England, but increased the price of such goods to consumers. Moreover, these duties invited British retaliation against American commodities, including cotton, by tariffs and by expanded reliance on alternative suppliers, such as cotton growers in Egypt and India.

Thus, the "Tariff of Abominations" of 1828, was so economically damaging and politically volatile, that a Member of Parliament, William Huskisson, delivered a speech that laid out clearly for the South the British policy. Huskisson predicted that the failure to lower the tariff would lead inevitably to Southern secession. Then-Congressman George McDuffie of South Carolina, popularized the "forty-bale theory." Due to British retaliation, Southern cotton prices fell, and the South became a captive supplier for Northern mills. As well, consumer goods prices were artificially high. In such combination, the tariff so decreased Southern purchasing power that, McDuffie claimed, of every hundred bales of cotton produced, forty went into the pockets of Northeastern industrialists. Many Southerners saw themselves as the victims of a "colonial" policy by Northeastern financial, industrial, and political interests. As Western grievances complemented theirs, it is no wonder that Benton's charge resonated with Southerners.

In a historical irony, the protective tariff of 1816, which got protectionism rolling, was the work of two South Carolinians, one of them then-Congressman John C. Calhoun. But by 1830, with the Tariff of Abominations in full force, Calhoun was Vice-President and was crafting his theories of nullification and concurrent majorities, from his 1828 *Exposition and Protest* to his 1831 *Fort Hill Address*. Historians have debated the extent to which Hayne's speeches were merely the words of Calhoun, who, by virtue of his role as the Senate's president, was debarred from speaking. Clearly the two men, bound by state residency, party affiliation, intellectual prowess, and cultural and class affinity, saw eye-to-eye. Most likely, Calhoun's philosophical depth and systematic mind helped Hayne craft his argument. But, ultimately, Hayne was his own man.

The next day, Senator Daniel Webster rose to respond. At age 48, he was ten years older than Hayne. Though not as pleasing of looks as his opponent, Webster had his own advantages,

physical and intellectual. Morison described him as "the most commanding figure in the Senate…with a crag-like face, and eyes that seemed to glow like dull coals under a precipice of brows….His magnificent presence and deep, melodious voice gave distinction to the most common platitudes; but his orations were seldom commonplace." Webster was possessed of a powerful intellect, one that, combined with his oratorical talents, had made him a successful lawyer, Supreme Court advocate, and politician. He argued well over 200 cases before the Supreme Court, litigating some of the most important constitutional disputes, such as *McCulloch v. Maryland*, *Dartmouth College v. Woodward*, *Gibbons v. Ogden*, and *Luther v. Borden*.

Webster rejected Hayne's attacks on New England's alleged selfishness and its placing of sectional self-interest over the common national good. Not content merely to parry Hayne's political attacks and to reject emphatically any suggestion that the Northeast opposed Western development, he broadened the debate to criticize Southern states' rights doctrines. He charged the South with insufficient gratitude for, and pride in, the Union and denounced recent political movements in South Carolina calling for a state convention to nullify the tariffs. Webster also injected slavery into the debate to play on the discomfort of many Westerners (though not of Senator Benton) over the expansion of the South's "peculiar institution." He praised the swift growth of Ohio over the past generation and goaded Hayne about the inferiority of Kentucky, a distinction he attributed to the latter's protection of slavery. Webster sought to tar Hayne with the spirit of disunion, scolding Hayne's apparent willingness to "preserve the Union while it suits local and temporary purposes" and to "dissolve it whenever it shall be found to thwart such purposes." This was particularly galling because Calhoun and Hayne had restrained the nullification efforts of more radical elements in South Carolina led by McDuffie and state leaders, such as Robert Barnwell Rhett.

Hayne was not about to let the gauntlet lie. On January 21 and 25, the South Carolinian went on offense. In a blistering, often sarcastic, and impassioned speech delivered in a tone of "scarcely contained bitterness and rage," he extolled the South's patriotism and contrasted it with New England's conduct during the War of 1812. In the Federalist Party-controlled Hartford Convention of 1814, the (then) five New England states had challenged the constitutionality of federal war policy that harmed them and had pledged to interpose themselves between the federal authority and their people. Webster had not taken part in that gathering, but he was a long-time Federalist Party member and had made anti-war speeches. Hayne launched into a long and detailed indictment of Massachusetts's perfidies against the United States during that war.

Hayne also vigorously defended the practical aspects of Southern slavery. He urged those, like Webster, who did not understand the conditions in which the system operated, to heed the South's desire simply to be left alone. Taking the argument to slavery's opponents, Hayne described the miserable conditions under which free Blacks often lived in Northern cities.

Hayne explained, analyzed, taunted, and exhorted relentlessly over portions of two days. He struck rhetorical and analytical blow after blow. Through it all, Webster sat impassively. To his friends, concerned that Webster had but one night to prepare his response, Webster grimly offered the assurance that he would "grind [Hayne] as fine as a pinch of snuff."

*An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: http://www.tokenconservative.com/.*

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## The Great Debates – Robert Hayne's 1830 Senate Speech and Daniel Webster's Reply, Part 2

## Guest Essayist: Joerg Knipprath

On January 26 and 27, Webster returned fire. In a speech equally aroused as Hayne's, and laced with historical references, constitutional argument, and heavy doses of sarcasm, Webster rejected Hayne's attacks and painted a picture of an optimistic nationalism that stood in stark contrast to Hayne's defensiveness.

Relying on only a few notes, and using his sonorous voice to full effect, Webster spoke hour after hour. It was clear that the matter had become personal for Webster, as it earlier had for Hayne. He devoted considerable energy to chastising Hayne for alleged violations of decorum in Hayne's speech. On substance, he listed numerous votes by the East in favor of the West. He extolled the South Carolinians' support for tariffs and internal improvements during the 1810s, using their own votes and speeches to make his point about their opportunistic reversal and baseless objections to those policies in the 1820s.

However, most of his effort was directed at defending the Union and rejecting Hayne's vision of the country: the South Carolina Doctrine was an illegitimate form of revolution; the Constitution's source was the people, not the States severally; the general government was one of limited powers, but the Supremacy Clause of the Constitution made that government's laws immune from state interference; the Constitution placed in the Supreme Court the power to patrol the lines between the general government's specified powers and the reserved powers of the several States; the States had lost crucial incidents of sovereignty, such as making war or coining money; the Constitution was a government, not a treaty, so Hayne's analogy to judicial incompetence to decide cases between national sovereigns was inapt. Using language later popularized through Abraham Lincoln's Gettysburg Address, Webster declared, "It is, Sir, the people's Constitution, the people's government, made for the people, made by the people, and answerable to the people." The remedy for unconstitutional action lay not with a single state, but

with the people as a whole, through the legislative process, by appeal to the judiciary, or through a constitutional convention. Ultimately, in case of "intolerable oppression…the people might protect themselves, [even] without the aid of the State governments" (i.e. a right of revolution).

Reaching the oration's climax, Webster implored,

> "When my eyes shall be turned to behold for the last time the sun in heaven, may I not see him shining on the broken and dishonored fragments of a once glorious Union; on States dissevered, discordant, belligerent; on a land rent with civil feuds, or drenched, it may be, in fraternal blood! Let their last feeble and lingering glance rather behold the gorgeous ensign of the republic, now known and honored throughout the earth, still full high advanced, its arms and trophies streaming in their original lustre, not a stripe erased or polluted, nor a single star obscured, bearing for its motto, no such miserable interrogatory as 'What is all this worth?' nor those other words of delusion and folly, 'Liberty first and Union afterwards'; but everywhere, spread all over in characters of living light, blazing on all its ample folds, as they float over the sea and over the land, and in every wind under the whole heavens, that other sentiment, dear to every true American heart,–Liberty *and* Union, now and forever, one and inseparable!"

Hayne immediately rose once more to speak at length. In his second speech, Webster had accused the South of wanting to replicate the efforts of the discredited war-time Hartford Convention. Hayne contemptuously rejected the "advice." "[W]hen South Carolina shall resort to such a measure for the redress of her grievances, let me tell the gentleman that, of all the assemblies that have ever been convened in this country, the Hartford Convention is the very last we shall consent to take as an example; nor will it find more favor in our eyes, from being recommended by the Senator from Massachusetts. Sir, we would scorn to take advantage of difficulties created by foreign war, to wring from the federal government redress even of our grievances."

There followed a lengthy exposition of the "South Carolina Doctrine." Hayne examined in fine detail the founding of the country, the basis of government under the Constitution, and the nature of dual sovereignty in our federal system. Revisiting contentions made numerous times in various forums over the previous half-century, Hayne insisted that the Union is a compact among the people of the states. Both–the Union and the States–retain their sovereignty, and neither can be the judge over the other. Congress cannot be a judge in its own cause over the extent of its own powers, and the federal Supreme Court can no more assert jurisdiction to act as umpire than it can in a dispute between sovereign nations. The Constitution was established to constrain the majority. Governing powers were separated and distributed. Congress was given only limited powers. If Congress ventures beyond those powers, their actions are void. States have the power to declare when such violations have occurred and, as the 10th Amendment confirms, have never surrendered their plenary power "to interpose for arresting the progress of evil." Appealing to the respect given to James Madison and Thomas Jefferson, Hayne used their Virginia and (revised) Kentucky Resolutions against the Alien and Sedition Acts to justify also nullification.

What about resolving inevitable conflicts? Starting with a statement by Jefferson from 1821, Hayne placed the onus on Congress to call a convention and have the disputed matter addressed

by constitutional amendment. The requirement that three-fourths of states must approve such an amendment provided enough protection to disaffected minorities without holding the country hostage to every whimsical objection one state might make.

Seizing on Webster's ringing conclusion in the second speech, Hayne needled him, "The gentleman is for marching under a banner studded all over with stars, and bearing the inscription *Liberty* and *Union*. I had thought, sir, the gentleman would have borne a standard, displaying in its ample folds a brilliant sun, extending its golden rays from the centre to the extremities, in the brightness of whose beams, the 'little stars hide their diminished heads.' Ours, Sir, is the banner of the Constitution, the twenty-four stars are there in all their undiminished lustre, on it is inscribed, *Liberty–the Constitution–Union*…."

Webster then offered a brief rebuttal on the salient issue of the nature of the Union. He presented a summary of his earlier argument, but added that even Hayne's compact theory would not permit unilateral action by one state. Instead, it would require decision by all, as under the Articles of Confederation. The debate had laid bare the fundamental contrast between the two conceptions of the Union, and its spectacle had driven the issue into the public consciousness.

Webster's words are better known today than Hayne's. Even had the armed conflict of the following generation over slavery and the nature of the Union turned out differently, that might yet be the case. Hayne argued on behalf of an aristocratic social and classic republican political order tied to the soil and local custom. That order could not survive the material dynamic of the Industrial Revolution, the economic rise of the capitalist class, and the influx of immigrants who lacked an intellectual tether to the Founding and who had loyalties to the nation to which they were drawn rather than to the particular states in which they happened to settle. Nationalism was on the rise, and it was Webster who extolled its benefits. Webster firmly tied Union to the Constitution itself, and evoked the imagery of its presumed majesty. Opposition to that Union by a single state was cleverly and clearly branded treason by Webster's stark portrait of how nullification would inevitably result in armed conflict.

That said, Hayne's exposition of states' rights–or, more starkly, each state's rights–may have lost its contest for constitutional dominance, but it has not been defeated as an idea. Even now, cities and states seek to limit traditional federal power over immigration and other aspects of national sovereignty by interposition and nullification. A pertinent example is California's "sanctuary state" policy to frustrate federal enforcement of immigration laws. As the country's sharp division into inflexible factions and identity groups continues to harden, the republicanism that rests on compromise and accommodation becomes increasingly difficult to sustain on a national scale. The ever-growing reach of the federal government and its metamorphosis into the "consolidated government" that Hayne feared and Webster dismissed is likely to renew interest in theories that–while they preserve union–might provide a political safety valve short of armed action against federal laws that counter strong local customs and deeply-held beliefs of a portion of the Union. The speculations of Hayne–and more fundamentally, John C. Calhoun, the great intellectual exponent of this constitutional vision–may well rise again to prominence. One doubts, however, that in an age when 140-letter "tweets," sensationalist press releases, and "hashtags" count as substantive political discourse, we will soon see the likes of the Hayne-Webster debate.

*An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: [http://www.tokenconservative.com/](http://www.tokenconservative.com/).*

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## Freedom of Speech Within Congressional Debates: John Quincy Adams and the Gag Rule, 1840s

## Guest Essayist: Tony Williams

### "Am I gagged?" – John Quincy Adams and His Struggle Against Slavery and the Gag Rule

In December 1835, Massachusetts Representative William Jackson presented a petition to end slavery and the domestic slave trade in the District of Columbia where Congress had constitutional authority over slavery. Outraged southern representatives protested any consideration of the provocative petition. They felt that abolitionists had insulted southern institutions by sending hundreds of thousands of anti-slavery pamphlets through the mail to the South. South Carolinian James Henry Hammond complained he would not "sit there and see the rights of the Southern People assaulted day after day, by the ignorant fanatics." Many southerners defended their "peculiar institution" against the barrage of assaults and developed the idea that slavery was a "positive good" that was beneficial for slaves, masters, and the country because it preserved a natural order rooted in the inequality of the races. They blocked abolitionist literature from reaching southern states and were preparing to block consideration of any abolitionist petitions in Congress.

John Quincy Adams was an unlikely member of the House of Representatives. He was a statesman and a former one-term president who had decided it would hardly be a demotion to represent the people in the Congress. Elected for the first time in 1830, he would eventually serve nine terms in the House and became a firm advocate for justice, constitutional rights, and natural rights.

In February 1836, South Carolinian Henry Laurens Pinckney offered a resolution stating that the House of Representatives would table any petition mentioning slavery and ban any discussion or

referral to committees. In effect, the resolution was a "gag rule" that would prevent the reception and consideration of any petition protesting slavery. In May, the House soon passed the resolution by a vote of 117 to 68. Adams immediately rose from his seat to protest the gag rule. When shouted down by colleagues and not recognized by the Speaker of the House, James Polk, Adams was exasperated and yelled, "Am I gagged?" He argued that the gag rule was a "direct violation of the Constitution of the United States, the rules of this House, and the rights of my constituents." He declared the gag rule a threat to free, deliberative government: "The freedom of debate has been stifled in this House to a degree far beyond anything that ever has happened since the existence of the Constitution."

While he did not embrace radical abolitionism, Adams did think that slavery was a grave moral evil that contradicted the ideals of the Declaration of Independence. For Adams, the right to petition was essential to republican self-government by the consent of the governed and was a sacred, traditional right. He asserted, "The right of petition . . . is essential to the very existence of government; it is the right of the people over the Government; it is their right, and they may not be deprived of it." Adams would persist in battling the gag rule and defending the just cause of a right to petition for the rights of others.

In January 1837, the House renewed the gag rule, and Adams quickly protested the rule by introducing hundreds of petitions including those from women and even free blacks and slaves. The southerners in the House were irate and declared their honor insulted. The House moved to censure (a formal reprimand) Adams for his supposed outrages. Adams seized the opportunity to attack the gag rule and defend the right of petition. It belonged not merely to the rich and powerful, but most especially to the powerless. The right of petition was not the exclusive provenance of the "virtuous, the great, and the mighty," he averred. "The right of petition belongs to all." The attempt to censure Adams failed.

In early 1838, when the House voted to renew the gag rule yet again, Adams stood and argued that it violated "my right to freedom of speech as a member of the House." He also made the courageous stand to fight for women's right of petition even though they could not vote. "Are women to have no opinions or action on subjects relating to the general welfare?" he asked.

Adams continued to present hundreds of petitions with signatures from citizens opposed to slavery, and still his fellow representatives shouted him down. Later that year, he resorted to a parliamentary trick by avoiding the word "petition" and stated he was introducing a "prayer" that all would enjoy their God-given rights. "Petition was prayer," he argued. "It was the cry of the suffering for relief; of the oppressed for mercy." Therefore, to the great shock of Southerners, he asserted that he would therefore "not deny the right of petition to a slave."

When he stated that summer that slavery was "a sin before the sight of God," Adams received several death threats. "I promise to cut your throat from ear to ear," read one. Another had a picture of a large Bowie knife, threatening, "Vengeance is mine, say the South!" Finally, one warned of a "hangman to prepare a halter for John Quincy Adams." He confided to his diary that, "I walk on the edge of a precipice in every step that I take." Sometimes, he felt overwhelmed by the burden he was assuming for the cause of justice. "I stand in the House of

Representatives . . . alone." But he was not deterred from his path and only fought harder against the gag rule and for the right to petition against slavery.

Over the next two years, Adams introduced thousands of petitions. All were tabled without debate. Pro-slavery representatives even instituted a harsher gag rule in 1840 to shut Adams up. The House agreed that it would not even receive the petitions, but the new gag rule only passed by a narrow majority of six votes. Adams saw that his perseverance was bearing fruit. Still, in 1842, he saw a "conspiracy in and out of Congress to crush the liberties of a free people of the Union."

Adams revered the Declaration of Independence (which his father, John Adams, had helped create) because of the self-evident truth that "all men are created equal, that they are endowed by their Creator with certain unalienable rights." It also asserted the principle of popular sovereignty, that all authority in a popular government resides in the people. Consequently, Adams had the clerk of the House read the Declaration. Adams then stated that, "I rest that petition on the Declaration of Independence."

On December 3, 1844, Adams's diligent efforts were finally rewarded when the House voted to abolish the gag rule. He had fought and won a long struggle for constitutionalism and for the rights of others. Even his enemies grudgingly admitted his diligence to the cause of justice. Henry Wise of Virginia called Adams "the acutest, the astutest, the archest enemy of Southern slavery that ever existed." He had fought the gag rule, pursuing the ideal of justice and fighting to preserve American ideals: the right of petition for all Americans and the natural rights of enslaved Americans.

*Tony Williams is a Constituting America Fellow and a Senior Teaching Fellow at the Bill of Rights Institute. He is the author of six books including the newly-published Hamilton: An American Biography.*

## Stephen A. Douglas and Abraham Lincoln in Congressional Debate: The Compromise of 1850, Kansas-Nebraska Act of 1854

## Guest Essayist: Daniel A. Cotter

### The Great Debates – Stephen A. Douglas (1813-1861)

Known as "the Little Giant," Stephen A. Douglas was a politician from Illinois who designed the Kansas-Nebraska Act and served as a member of the House of Representatives and the Senate, and was the Democratic Party nominee for president against Abraham Lincoln in the election of 1860. Lincoln and Douglas also faced each other during the 1858 race for Senator from Illinois, and the two engaged in a series of famous debates on the question of slavery and the future of our nation. Named the Little Giant because he was small in stature, he was not little when it came to politics and his place in our history as a great debater.

### Early Life and Rise in Politics

Born in Vermont, Stephan Arnold Douglass, he eventually dropped the second s. Douglas' father died when Douglas was a baby. His mother remarried and they moved to western New York. Eventually Douglas made his way to Illinois and was admitted to the bar. He courted Mary Todd, who married Lincoln, and the two faced off against each other on many other occasions. In 1847, he and his wife, Martha Martin, moved to Chicago.

Douglas became active in Illinois politics in the Democratic Party, serving as State's Attorney of Morgan County in 1834. He served in the Illinois House of Representatives, served as Illinois Secretary of State and then at age 27, was appointed to a position as Associate Justice of the Illinois Supreme Court when the number of justices was expanded. In 1843, Douglas was elected as a United States Representative and served in that capacity until 1847, after the Illinois General Assembly voted elected him as a United States Senator. Douglas would serve the rest of his public career in that position, serving from 1847 until June 3, 1861, when he died at the age of 48.

**Congressional Work**

In 1850, a sectional crisis ensued when California was admitted as a free state with no slaveholding state admitted at the same time. Douglas was a strong advocate for compromise, supporting the efforts of Henry Clay. Clay was a political rival, but Douglas took Clay's bill for a compromise that had failed to garner adequate support and split it into separate bills, helping to navigate the successful approval of the Compromise of 1850, which reaffirmed the compromise on territories and slavery from the Missouri Compromise.

Douglas strongly advocated popular sovereignty, allowing the people rather than the national government to determine positions on slavery. Lincoln used this position to try to distinguish himself in 1858 in the United States Senator race. In 1854, Douglas invoked popular sovereignty during a dispute over the admission of the Nebraska Territory.

Various proposals for a transcontinental railroad were being made, with one potential route going through Chicago that would benefit Douglas. Southern leaders offered a deal to Douglas- they would support the central route that went through Chicago if Douglas allowed slavery in the new territories. The agreement effectively repealed the Missouri Compromise and the Compromise of 1850. Douglas defended his position with popular sovereignty, winning over many from the north. Lincoln criticized Douglas' position in a series of speeches. Despite some critiques, Congress passed the Kansas-Nebraska Act, effectively overruling the Missouri Compromise.

In 1856, Douglas was a candidate for the Democratic Presidential nomination but was not the nominee. In 1857, the United States Supreme Court issued the *Dred Scott v. Sandford* decision, striking down key provisions of the Missouri and 1850 Compromises and made the Kansas-Nebraska Act largely moot. Douglas attempted to take a weak position on the decision to keep support from both the North and the South.

Douglas faced Senate reelection in 1859 by the Illinois legislature. Douglas represented the Democrats and the Republicans chose Lincoln. The two eventually agreed to a series of a joint

appearances, which became known as the Lincoln-Douglas Debates. Douglas stood behind his popular sovereignty views. Lincoln argued that slavery was a moral issue that the nation must decide. In what became known as his "House Divided" speech, Lincoln stated in June 1858 (prior to the Lincoln-Douglas Debates, but consistent message):

> A house divided against itself cannot stand. I believe this government cannot endure, permanently, half slave and half free. I do not expect the Union to be dissolved — I do not expect the house to fall — but I do expect it will cease to be divided. It will become all one thing or all the other.

In one of the speeches, at Galesburg, Illinois, Douglas asserted the Declaration of Independence did not apply to non-whites, stating, "This Government was made by our fathers on the white basis."

At a debate in Freeport, Illinois, Lincoln pressed Douglas on his support of *Dred Scott.* Douglas took the position that the Supreme Court had explicitly prohibited states from not allowing slavery, but people of Territories had the ability to exclude slavery by "unfriendly legislation." This position came to be known as the Freeport Doctrine and Douglas was re-elected to the Senate, defeating Lincoln.

**Conclusion**

In the Presidential election of 1860, the two nemeses would face off again. Douglas was the Democratic nominee, but the split on slavery positions resulted in splintering of the Democrats, with Southern Democrats nominating John C. Breckinridge and the Constitutional Union Party nominated John Bell. Lincoln won and the Southern states quickly seceded. Post-election, Douglas attempted to make compromise to avert secession and denounced it. Douglas died on June 3, 1861, of typhoid fever.

*Dan Cotter is a partner at Latimer LeVay Fyock LLC and an adjunct professor at The John Marshall Law School, where he teaches SCOTUS Judicial Biographies. He is in the process of writing a book on the seventeen Chief Justices. He is also a past president of The Chicago Bar Association. The article contains his opinions and is not to be attributed to anyone else.*

## Henry Cabot Lodge Senate Debate of 1919 and the Treaty of Versailles

## Guest Essayist Tony Williams

### "Breaking the Heart of the World" – Henry Cabot Lodge and Constitutional Objections to the Treaty of Versailles

**Background**

World War I was fought from 1914-1918 and claimed the lives of nearly 9.5 million combatants. The United States entered the war in April, 1917, when Congress voted to declare

war based upon President Woodrow Wilson's war message arguing for American intervention with the expansive and idealistic foreign policy goal to "make the world safe for democracy." The armistice was signed in November, 1918, and the war concluded on the eleventh hour of the eleventh day of that month.

The Allies of Great Britain, France, and Italy sought a punitive peace against Germany and blamed that nation for starting the war. President Wilson, on the other hand, argued in his "Fourteen Points" for a lenient peace settlement that would prevent future wars by promoting international freedoms and self-determination. At the core of his proposal was destroying the old balance-of-power diplomacy by establishing a League of Nations that would help prevent war through deliberation as well as an Article X that would commit member nations to go to war to stop an "aggressor nation."

On November 19, 1919, the Senate was abuzz with activity from an early hour since all observers expected a critical debate and vote to take place after a twelve-hour debate the previous day. Spectators flooded the gallery, jockeying for a good vantage point to view the historic event. Members of the press eagerly awaited news to report for their newspapers and spoke to their contacts about what to expect. The Senators gradually entered the chamber and exchanged pleasantries in a civil manner before the day's vigorous debate ensued. Most eyes focused on sixty-eight-year-old Massachusetts Senator Henry Cabot Lodge.

The Senate was considering the Treaty of Versailles. The Senators did not disappoint the spectators and debated the treaty through lunch and dinner. After a ten-hour marathon debate in which they heard the arguments of their supporters and opponents, the Senators prepared to vote on the treaty. President Woodrow Wilson needed an affirmative two-thirds vote according to the Constitution to win ratification of the treaty he had personally negotiated for six months in France. On the first vote, the Senators rejected the treaty with reservations by a vote of 55-39. Another vote was taken on the treaty without reservations as the Wilson administration wanted and it was also defeated by a nearly identical vote of 53-38.

Lodge had reason to be satisfied with the defeat of the treaty. He was furious when President Wilson did not consult with him in his position as chairman of the Senate Foreign Relations Committee before heading to Paris. Moreover, Wilson had made blatantly partisan appeals in the congressional elections of 1918 in which Republicans had won control of both houses and Lodge became the Senate Majority Leader. Wilson also did not include any Republicans on the peace delegation.

President Wilson had traveled to France to make peace in December, 1918, and Lodge questioned Wilson's idealistic goals by asserting that the treaty should only focus on making it "impossible for Germany to break out again upon the world with a war of conquest." The president briefly returned briefly in February, 1919, and on the evening of February 26, Senator Lodge and other members of the Foreign Relations Committee attended a dinner at the White House. Lodge sat impassively while the President spoke about a League of Nations to keep the peace. Lodge did not like what he heard. He peppered the president with a series of questions, and the answers confirmed many of Lodge's fears that Article X of the League of Nations in the treaty would commit the United States to a war against any aggressor and bypass the

constitutional requirement of a congressional declaration of war. After the dinner, Lodge told the media, "We learned nothing," meaning that nothing new was presented. He was opposed to the United States being forced to "guarantee the territorial integrity and political independence of every nation on earth."

Lodge believed in American constitutional principles and not committing U.S. troops to every conflict around the world. He was not opposed to a postwar treaty or even to a League of Nations, but he could not abide international commitments that violated the Constitution. He had the integrity to speak courageously and consistently to oppose the treaty with an international body that would compel America to go to war.

On the evening of Sunday, March 2, Lodge invited two other senators to his home to draft a resolution for their fellow senators to sign expressing their opposition to the League of Nations. Thirty-nine Republicans would sign the resolution and even some Democrats would express support.

On March 3, Lodge gave an important speech expressing his opposition to the League of Nations. Two weeks later, Lodge spoke in Boston and focused his attention on opposing Article X for violating American sovereignty, Congress's prerogative to declare war, and the danger that Americans would be forced "to send the hope of their families, the hope of the nation, the best of our youth, forth into the world on that errand [to stop aggressor nations]." He continued, "I want to keep America as she has been – not isolated, not prevent her from joining other nations for these great purposes – but I wish her to be master of her fate." In the Senate, Lodge made sure that any new members of the Foreign Relations Committee were opposed to the League of Nations.

When President Wilson returned to the United States with the signed Treaty of Versailles, he broke with precedent and presented the treaty to the Senate in person. As the president walked into the chamber with the bulky treaty under his arm, Lodge joked with Wilson and asked, "Mr. President, can I carry the treaty for you?" Wilson retorted, "Not on your life." It was funny but revealed a truth that Lodge was the Senator who would determine the fate of the treaty and that Wilson would not entrust it to anyone and not accept any changes. During his address, President Wilson asked the Senate rhetorically, "Dare we reject it and break the heart of the world?"

In August, Lodge reiterated to the Senate that Article X violated the principles of the Constitution. He stated that no American soldier or sailor could be sent overseas to fight a war "except by the constitutional authorities of the United States." In addition, Lodge thought that the United States could not fight in every war around the globe and only needed to protect American interests. He said, "Our first ideal is our country . . . . We would not have our country's vigor exhausted or her moral force abated, by everlasting meddling and muddling in every quarrel, great and small which affects the world."

President Wilson had probably suffered a small stroke while in he was negotiating in Paris, and his health troubles caused him to be uncompromising. In September, Wilson further angered Lodge and the other opponents by taking the case for the League of Nations directly to the American people on a train-stop speaking tour. That tour was soon cut short when the president

suffered a massive, debilitating stroke on October 2 back at the White House that incapacitated him for months. When the vote on his beloved League of Nations and Treaty of Versailles took place in the Senate, the president could not even get out of bed and walk.

Throughout the debate over the Treaty of Versailles and League of Nations, Senator Lodge stood firmly for the American Constitution and its principles. He did support world peace and hoped to avert another world war, but he would not sacrifice American principles in an attempt to achieve it. He sought to do what was right according to the Constitution.

*Tony Williams is a Constituting America Fellow and a Senior Teaching Fellow at the Bill of Rights Institute. He is the author of six books including the newly-published Hamilton: An American Biography.*

## The Great Debates – The Nineteenth Amendment

## Guest Essayist: Cleta Mitchell

On Aug 26, 2020, we will celebrate the one hundredth anniversary of the ratification of the Nineteenth Amendment to the United States Constitution, guaranteeing the right to vote to America's women citizens. It is a short and simple statement of law:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. – Amendment XIX, United States Constitution.

It may seem unusual in post-modern America of 2018 to think that there was ever a serious doubt or question about whether or not women should be granted the right to vote, but in the immediate aftermath of the Civil War, extending voting rights to women was as contentious as the fight over citizenship and voting rights for former slave African-American men.

The struggle to achieve women's voting rights began at a conference in Seneca Falls, NY in 1848, when a group of men and women gathered to discuss the laws and legal status of women. Elizabeth Cady Stanton, who became one of the national leaders of the women's suffrage movement in the last half of the 19th century, wrote the report of the Seneca Falls meeting, signed by the participants. She patterned it after the US Declaration of Independence, and it contained the first recorded demand for the right to vote for American women. Her compatriot in the women's suffrage movement was Susan B. Anthony, often referred to as the mother of woman suffrage in America. Indeed, the Nineteenth Amendment was referred to at the time of its ratification as the "Susan B. Anthony Amendment".

Following the Seneca Falls proclamation in 1848, there was a slow but steady growth of the national movement to pressure lawmakers in state legislatures, state constitutional conventions, and in Congress as well as newspaper publishers and the American public to support voting rights for women.

The movement gathered steam in earnest following the Civil War. There came to be a bitter struggle within the women's suffrage movement, as some believed that any voting rights conferred on former slaves should simultaneously extend to women. Others, including the leading abolitionists of the day, argued that it was the time of the "Negro Man" and that women's voting rights would have to follow in time. That debate split the women's suffrage movement into two groups, which remained divided until 1890, when the two rejoined their efforts, and worked together over the remaining thirty years until securing the passage and final ratification of the Nineteenth Amendment in 1920.

The struggle for women's voting rights went on for 72 years from that original meeting in Seneca Falls, NY in 1848. From the first (unsuccessful) state referendum on women's suffrage in Kansas in 1865, the womens' suffrage movement engaged in 480 petitions and lobbying drives in state legislatures, 277 campaigns at state party conventions to get woman suffrage endorsed by the state parties, and 56 separate state referendum campaigns to persuade male voters to enact women's suffrage.

In addition, the suffragists targeted nineteen sessions of Congress in their quest to get Congress to approve a federal woman's suffrage amendment and send it to the states for ratification.

Of all the state efforts, the suffrage movement in New York was perhaps the most disappointing but two years later, it may have been the most significant.

In 1915, the male voters in New York defeated the woman's suffrage proposal but in 1917, that same referendum was approved by the most populous state in the country, and that victory made politicians take notice, including President Woodrow Wilson. Never an ardent supporter of woman suffrage, President Wilson nonetheless made the political calculation that support for a federal suffrage amendment would be a politically smart decision and, in 1918, announced his support for a federal constitutional amendment to grant women voting rights.

By the time Congress finally passed the Nineteenth Amendment and sent it to the states for ratification in 1919, all but a handful of states had enacted some form of woman's suffrage, either for all purposes or for certain elections such as in school board or other local elections, or solely in presidential elections. Many western states had come into the Union in the late 19th and early 20th Centuries with woman suffrage as part of their state constitutions and Jeannette Rankin from Wyoming was elected to Congress in 1916, the first woman ever to serve in the United States Congress.

Thirty six states were needed for ratification of the Susan B Anthony Amendment. By August 1920, thirty five states had approved the ratifying resolution and after some surprising defeats in Delaware and Maryland, the last best hope for ratification rested in Tennessee.
The battle could not have been more vicious or intense. And in the end, despite all the arguments and political shenanigans, the Tennessee legislature passed the ratification resolution on August 18, 1920. It was enrolled by the Secretary of State, Bainbridge Colby on August 26, 1920 — who announced at 8 am that morning that the struggle for women's suffrage was finally over. The Nineteenth Amendment was the law of the land.

One hundred and thirty years after ratification of the United States Constitution, women were, at long last, granted full citizenship and voting rights in America. The Nineteenth Amendment is a piece of the struggle for freedom that had eluded half of America's population for more than a century.

*Cleta Mitchell is a partner in the Washington, DC office of Foley & Lardner, LLP, where she practices election and political law.*

## Entry Into WWII and the America First Debate, Part 1

## Guest Essayist: James Legee

In an address to Congress on July 4, 1821, then Secretary of State John Quincy Adams voiced opposition to American interference in European affairs, "Wherever the standard of freedom and independence has been or shall be unfurled, there will her heart, her benedictions and her prayers be. But she goes not abroad in search of monsters to destroy. She is the well-wisher to the freedom and independence of all." The ideal of America as a nation rarely departing the safety of the Atlantic and Pacific oceans on adventures abroad is strewn throughout competing political ideologies, parties, and interest groups in American history. Isolationism is the doctrine that a nation should avoid foreign entanglements such as (non-defensive) wars and treaties (particularly mutual defense, foreign aid, etc).

The revolutionary generation saw this manifest in Washington's 1793 Neutrality Proclamation, and the early republic in John Quincy Adams' quote above. The nativist isolationism familiar from 19th century Know Nothings was even brought to life and transposed into New York's draft riots in Martin Scorsese's *Gangs of New York*. Indeed, it seems less a debate and more a part of American culture to assume America's isolationism, at least until the 20th Century, despite books like *Dangerous Nation* by Robert Kagan of the Brookings Institution seeking to provide a contrary historical narrative.

Regardless of which reality or narrative dominated American history, nowhere were the stakes of this tension between isolationism and interventionism higher than in the late 1930s. As war again swept across Europe, this time in the form of the Wehrmacht, democracies quickly fell to the tyranny of the Nazi fascists. Remilitarization in Germany was concurrent with a resurgence of isolationism in the United States, especially among Midwestern Republicans, including Gerald Nye (R-ND), Arthur Vandenberg (R-MI), and William Borah (R-ID, though he passed in 1940), as well as the odd Democrat, such as Burton K. Wheeler (D-MT). President Roosevelt sought to aid allied forces in their fight against the Nazis, but a sizable number of the electorate, major public figures, and a number of prominent Congressmen opposed any American involvement in another European war.

After the Great War, pro-war sentiment and anti-German sentiment waned as the 1920s gave way to the Great Depression and the 1930s. A significant public outcry grew over the American expedition in Europe in WWI; so many young lives lost to a war so far from the shores of America. How was it American boys wound up casualties in places like the Argonne Forest and

the Marne? Some began to believe that America was not pulled into war by a necessity to defend democracy, but instead was pushed to war by arms manufacturers. In April of 1934, the Senate convened a committee to investigate war profiteering by large manufacturers such as DuPont, Colt, Westinghouse, and other military contractors. The committee was chaired by Republican Senator Gerald Nye of North Dakota. Nye, initially supportive of the New Deal, became a staunch opponent of Roosevelt, an outspoken isolationist, and critic of big business. The Nye Committee, or Senate Munitions Committee, ran afoul of the powerful Senator Carter Glass, then Appropriations Chair. After interviewing hundreds, Nye made the unsubstantiated contention in a speech that Wilson withheld information from the Congress and American people about the entry into World War I. Democrats, led by Glass, were outraged and cut funding to the Nye Committee. The final report of the committee, from February of 1936, provides little of substance, but this would not be the last investigation Nye led and it certainly bolstered the status of Isolationists in Congress.

Isolationists certainly did not want for influence in the Capital. As the Nye Committee publicized and questioned the "Merchants of Death" that brought America to war, Hitler consolidated power in Germany. June of 1934 brought the Knight of Long Knives, where SS and Gestapo members assassinated Hitler's political rivals, solidifying his political and military hold over Germany. One of Hitler's first actions was to leave the League of Nations and continue to remilitarize. Despite this, just over a year later Isolationists in America won a major political battle in passing the Neutrality act of 1935. The thrust of the 1935 Neutrality act outlawed arms trade with any combatants should hostilities commence. For enforcement purposes, the Office of Arms and Munitions Control was created under the Department of State and chaired by Joseph Coy Green (a former professor who taught future diplomat George Kennan). The office registered manufacturers of military arms and material around the United States.

October of 1935 witnessed Nazi ally Italy, under the dictatorship of Mussolini, invade Ethiopia. Arms shipments were prohibited to combatants, though neither the United States nor Great Britain took any further action to stem aggression. Congress in 1936 passed another neutrality act which continued the ban on arms sales to combatants, and extended the prohibition to loans to combatant nations. Shortly thereafter, Hitler seized the Rhineland along Germany's western border. 1937 brought yet another Neutrality that reaffirmed the munitions ban, but added an interesting caveat. Belligerents were allowed to purchase arms, so long as they paid cash and transported them out of the United States in non-American vessels, the advent of the so called "cash and carry" program. With the consent of isolationists, America added kindling to arguably the greatest catastrophe of the 20th Century.

1938 brought continued German aggression as Hitler orchestrated the Anschluss of Austria and later demanded that the Sudetenland, a Germanic area of Czechoslovakia, be ceded to Germany. While Roosevelt and his closest advisors were largely unified in their opposition to the Nazis, the Executive branch was hardly unified, as one of the most important diplomats in the political chess match, Ambassador to Great Britain, Joseph Kennedy, was a staunch isolationist. The father of future President John F. Kennedy (himself a proponent of intervention who penned *Why England Slept* as an undergraduate Harvard student), Joseph Kennedy insisted war was not in the near future, even in a lunch with Winston Churchill where Churchill

expressed concern over a militarizing Germany and comparatively vulnerable British Empire March of 1938. Kennedy continued to marginalize himself from the administration and drift from its position over the course of 1938. As the drift from Roosevelt continued, Kennedy took the irregular step of communicating outside official channels in order to directly reach Senators Burton Wheeler, Pat Harrison, Key Pittman, James Byrnes, and other government officials with his assessment and recommendations on the . Author Nicholas Wapshott points out that "The president was conspicuously not on the list."

As Neville Chamberlain's policy of appeasement failed to mollify Hitler, Kennedy further alienated himself from the administration when, in a draft of prepared remarks, Kennedy wrote "I cannot for the life of me understand why anybody would want to go to war to save the Czechs." Chamberlain's government, of course, would not last much longer, nor would peace. As the 1940 election approached, Ambassador Kennedy continued to operate in step with Congressional isolationists rather than the administration, and mulled a run at the White House himself.

As the pace and seriousness of events quickened, a broad coalition of isolationists and anti-war activists came together to form the America First Committee. The America First Committee brought together Democrats and Republicans, pacifists and veterans, businessmen and farmers, Midwesterners and East Coasters, to oppose any American role in a European war.

*James Legee, Visiting Lecturer, Framingham State University Department of Political Science*

## Entry Into WWII and the America First Debate, Part 2

## Guest Essayist: James Legee

At its height, the America First Committee had 800,000 members, with membership concentrated in the Midwest. Senators Nye (a founding member), Wheeler, and David Walsh (D-MA) were members, as were future Supreme Court Justice Potter Stewart, and businessman and notorious anti-Semite Henry Ford. One of the chief spokesmen for AFC was famous aviator Charles Lindbergh. After the murder of his child, Lindbergh left the United States for Great Britain and made frequent visits to Nazi Germany. A stalwart isolationist, Lindbergh saw in Germany not only a military opponent that would be almost impossible to defeat, but a society in some ways superior to that of America.

Lindbergh wrote in his journal in 1938 that "I did not find real freedom until I came to Europe. The strange thing is that of all the European countries, I found the most personal freedom in Germany, with England next, and then France." Lindbergh was unmoved by the plight of European Jews under the Nazis, even after Kristallnacht. While certainly anti-Semitism was not a belief of every isolationist, it became an unfortunate hallmark of the movement even as Nazi aggression towards civilians intensified. In September of 1941, Lindbergh went so far as to insinuate that American Jews in favor of European intervention had the best interest of Jewish Europeans rather than America in mind.

In 1941 Senator Nye, not yet tired of investigations and hearings, launched an inquiry into the role of Hollywood in agitating for war and producing pro-democracy films. At an AFC rally, Nye called Hollywood "the most gigantic engines of propaganda in existence to rouse war fever in America and plunge the nation to her destruction." As he listed studio heads, in a dark moment of American history, the audience cried, "Jews!" Nye went on to claim Hollywood was comprised of refugees from occupied nations and British actors who agitated for American intervention. His committee called Wendell Willkie, 1940 pro-intervention Republican candidate, who asserted that anti-Nazi films actually reflected the sentiments of the American people and offered witnesses to the committee to testify on Nazi crimes. Nye's committee declined, and after several weeks concluded without a report or ever reconvening. Rather than damage Hollywood, the hearings gave voice to a variety of pro-intervention anti-Nazi activists.

The battle over isolationism and interventionism largely culminated in the fight over Roosevelt's Lend-Lease program. 1940 saw Roosevelt achieve an unprecedented third term as president, a campaign in which he vowed to attempt to avoid war. By 1941 public opinion had shifted from isolationism to over 60% of Americans favoring aid to Great Britain. For isolationists, though, important questions hung around Lend-Lease. Would American ships transport goods? Would the American Navy protect them? For some, such as Burton Wheeler, the Lend-Lease act dripped with hypocrisy, "If it is our war we ought to have the courage to go over and fight it. But it is not our war…" Wheeler's most blistering critique came later when he said of Lend-Lease "the New Deal's 'Triple A' foreign policy [would] plow under every fourth American boy … Never before has the United States given to one man [Roosevelt] the power to strip this nation of its defenses. Never before has a Congress coldly and flatly been asked to abdicate."

Wheeler wasn't alone in his disdain for Lend-Lease and the potential excesses granted a single individual. Senator Arthur Vandenberg, known as an internationalist today, but an isolationist before the war called Lend-Lease "war by proxy." Congressman Hamilton Fish (R-NY) who had received the Silver Star in WWI said in a speech in March of 1941 that "I do not believe the President has the right to order the convoying of ships into the war zones without the consent of Congress. The use of convoys, on the authority of the President, would be a deliberate attempt to drag us into war, and would make President Roosevelt the foremost repudiator of his word in American history. It would constitute a brazen betrayal of the millions of loyal Americans who had faith in his assurances and plighted word and voted for him. Somewhere between 83 and 90 per cent of the people, according to the various Gallup polls, are opposed to our entrance into war unless attacked." Despite this, with public approval, Lend-Lease passed and military material flowed across the Atlantic to Great Britain (with a token amount of aid to Stalin).

On December 4 of 1941 the Chicago Tribune ran details of a leaked top secret war plan, code named Rainbow Five. Roosevelt, who had pledged not to send American boys to die, was exposed as having drafted a plan that to create aten-million-strong army to confront the Nazis in 1943. Massachusetts Republican Congressman George Holden Tinkham, who had compared Roosevelt to Hitler and Stalin over the Destroyers for Bases program in 1940 ("there is no difference between his [FDR's] action from either Hitler, Mussolini, and Stalin.") stated Roosevelt "betrayed" the American people.

The America First Committee and its supporters, including Lindbergh, Kennedy, and Nye persisted though 1941. In an anecdote, reported by historian Richard Ketchum in American Heritage Magazine in 1989, Senator Nye was speaking at an America First event in Pittsburgh, Pennsylvania on December 7, 1941. As Nye accused the Roosevelt administration of "picking a war" with Japan, he was handed a piece of paper that informed him the Empire of Japan had declared war on the United States, and that the Pacific Fleet at Pearl Harbor had suffered a surprise strike from the Japanese Navy. Nye remarked to the crowd "I have the worst news that I have had in twenty years to report, the Japanese Imperial Government at four P.M. announced a state of war between it and the United States and Britain." When asked about Pearl Harbor by reporters, Nye responded "It sounds terribly fishy to me."

On December 10, 1941, the America First Committee dissolved. Shortly beforehand, on December 8 of 1941, Congress voted for war with Japan. The vote was nearly unanimous and the sole vote against war came not from a member of America First. It was not even cast by an isolationist. Instead, Progressive Montana Republican Jeannette Rankin, the first woman in Congress, an advocate for the 19th Amendment, and a lifelong pacifist cast the no vote, just as she had in 1917 against the First World War.

*James Legee, Visiting Lecturer, Framingham State University Department of Political Science*

## The Great Debates – Civil Rights Act of 1964

## Guest Essayist: Daniel A. Cotter

On June 11, 1963, President John F. Kennedy issued his Report to the American People on Civil Rights, calling on Congress to pass a civil rights bill to address discrimination and segregation against African Americans. Kennedy's civil rights bill included a ban on discrimination in places of public accommodation and tackled segregation in schools, but did not address many other issues affecting African Americans, especially in the South. Kennedy was assassinated before the bill was approved by Congress. President Lyndon B. Johnson made passage a priority.

### The Congressional Debates

Prior to his televised appearance to discuss his Report, President Kennedy met with Congressional Republicans to discuss the legislation. On June 13, 1968, Senate Minority Leader Everett Dirksen and Senate Majority Leader Mike Mansfield expressed support for Kennedy's proposal, except for the portion dealing with public accommodations. President Kennedy submitted his bill as originally drafted to Congress on June 19th. The House Judiciary Committee discussed the bill and held hearings, adding provisions to the bill to enhance protections. In addition, the Judiciary Committee added Title III, which authorized the Attorney General to pursue legal remedies.

In late October, Kennedy met with the House leadership to figure out a path to sufficient votes for House passage. The House Judiciary Committee reported the bill out in November and

referred to the Rules Committee, chaired by Virginian Howard W. Smith, a segregationist, who promised that the bill would not emerge from his committee. On November 22, 1963, President Kennedy was assassinated and LBJ was sworn in as President. President Johnson supported the bill and used his experiences in the Senate to find ways to ensure passage.
On November 27, 1963, President Johnson made clear his position on passage of the civil rights bill when he made his first joint session of Congress, stating:

> No memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long.

In a rare parliamentary procedure, Judiciary Committee Chair Emanuel Celler filed a petition to discharge the bill from the Rules Committee and the premises of Chair Smith. When the winter recess arrived, the petition was short of required signatures. Upon return from recess, sensing the strong support in the North for the bill, Smith permitted the bill to pass through his Rules Committee.

President Johnson then navigated the Senate. The Senate Judiciary Committee Chair James O. East land, a Democrat from Mississippi, strongly opposed the bill. Senator Mansfield invoked a procedural tool to avoid referral to the Judiciary Committee, reading the bill a second time after it had initially been waived, permitting the bill to reach the Senate floor directly for debate.

On March 30, 1964, the bill came for debate on the Senate floor. The Southern Bloc implemented a filibuster, led by Senator Richard Russell, a Democrat from Georgia, who stated:

> We will resist to the bitter end any measure of movement which would have a tendency to bring about social equality and intermingling and amalgamation of the races in our states.

Senator Strom Thurmond, who had set a record filibuster of more than twenty-four hours against the Civil Rights Act of 1957, strongly opposed the bill, stating:

> This is the worst civil-rights package ever presented to the Congress and is reminiscent of the Reconstruction proposals and actions of the radical Republican Congress.

The filibuster continued for 54 days. Finally on June 10, 1963, Senator Robert C. Byrd finished his 14 hours, 13 minutes speech. Senator Russell made final opposition comments, then Senator Dirksen from Illinois spoke for the bill proponents, declaring, "the time has come for equality of opportunity in sharing government, in education, and in employment. It will not be stayed or denied. It is here!" During roll call on cloture, Senator Clair Engle from California did not respond verbally, having lost his ability to speak from a brain tumor. However, he pointed to his eye to affirmatively vote. Cloture passed, 71 to 29, four more votes than needed for cloture. The resulting vote on cloture of the filibuster was the first time in the Senate's history that a filibuster on a civil rights bill had been brought to cloture.

On June 19, the compromise bill passed the Senate, 73-27, and then quickly passed through the House-Senate Conference Committee. On July 2, 1964, President Johnson signed the law, and the long road to passage was complete.

Despite its historic nature, the Civil Rights Act of 1964 had limited impact at the time of its passage, but has been influential on subsequent civil rights bills and was upheld generally in the Supreme Court decision, *Heart of Atlanta Motel v. United States*.

*Dan Cotter is a partner at Latimer LeVay Fyock LLC and an adjunct professor at The John Marshall Law School, where he teaches SCOTUS Judicial Biographies. He is in the process of writing a book on the seventeen Chief Justices. He is also a past president of The Chicago Bar Association. The article contains his opinions and is not to be attributed to anyone else.*

## BIOGRAPHIES OF PROMINENT CONGRESSMEN IN AMERICAN HISTORY

### John Quincy Adams (1767-1848) – Sixth U.S. President, Massachusetts House and Senate Member

### Guest Essayist: Brian Pawlowski

While John Quincy Adams was not an exact contemporary of the Founding Fathers he was, in more ways than one, their offspring. Indeed, his bond with the generation of 1776 was familial as well as philosophical. And his sense of duty to that generation, the project they set in motion, and the preservation of the union they birthed was as deeply embedded in his body as the marrow in his bones. Also in his bones was a strong aversion to party politics, a trait John F. Kennedy would later admire in his book *Profiles in Courage.* Every action of John Quincy's life revolved around a higher sense of duty and service to country. A prolific diarist, he wrote, "We are sent into this world for some end. It is our duty to discover by close study what this end is and when we once discover it to pursue it with unconquerable perseverance."[i] One could understand this sentiment coming from a man like John Quincy, a man who had served his country as a diplomat, ambassador, Congressman, Senator, and President of the United States over the course of a public life spanning over 50 years. But John Quincy wrote these words long before he held any post. He was *11.* At that age he found himself crossing oceans with his father in pursuit of independence. From his youth to his old age he would, as he later wrote to his children, "Let the uniform principle" of his "life be how to make your talents and your knowledge the most beneficial to your country and most useful to mankind."[ii]

Perhaps no one in American history served in so many federal posts. John Quincy was first named Minister to the Netherlands by President George Washington and later as Minister to Prussia (Germany) by his father John Adams when he was President. In both capacities he sought to expand America's trade and loan relationships and created a broad and effective network of diplomats and influencers he would draw upon in the future.

It was during this time abroad that John Quincy married his wife, Louisa Catherine. They would be together the rest of their lives, enduring multiple miscarriages together, the political fray, and prolonged periods of separation. They did not have the marriage of John and Abigail, but then, perhaps no one could. They would have four children together and John Quincy would push them in the same way he was pushed, encouraging his children to be productive members of society. For some of the children the pressure would be too much. Others would rise to their father's expectations. All, however, benefited from their parent's love.

Returning to the states after Thomas Jefferson ascended to the Presidency he entered, albeit with a modicum of foreboding, Massachusetts politics and in short order found himself elected Senator. He had been elected as a Federalist, the party of his father, although he preached the doctrine of independent judgement and country before party. When the time came to vote on Jefferson's Embargo Act, a measure Federalists vehemently opposed, John Quincy supported it. While he knew the act would hurt Massachusetts industry, he felt it served the country well by keeping it out of a war with England America was ill equipped to fight. This endeared him to no one. The Federalists made their disappointment well known and John Quincy resigned his Senate seat early. He did not back down from his decision, however. He steadfastly proclaimed the ills brought on by partisan loyalties which in his mind too often trumped what was best for the country.

John Quincy, it seemed, was headed for the political wilderness. Taking up a professorship in rhetoric at Harvard he devoted himself utterly to the preparation and presentation of his lectures. But his time in the forests was short lived. A man with his experience, judgement, and lineage would not be on the political bench for too long.

James Madison actually offered John Quincy an appointment to the US Supreme Court, but he declined citing his wife's heath. Still, Madison kept at it and asked him to become Ambassador to Russia. John Quincy accepted and sojourned to St. Petersburg in hopes of establishing a good relationship with Alexander I. While there the War of 1812 between the Americans and British broke out. The result was that John Quincy found himself paired with Henry Clay and others in Belgium negotiating the Treaty of Ghent in 1814 which brought an end to the war. Because of his work on the treaty John Quincy became Minister to Great Britain, the very same post his father had held years before.

James Monroe would also not serve as President without the tapping into the knowledge, experience, and wisdom he saw exhibited by John Quincy and in 1817 named him Secretary of State. Thomas Jefferson, James Madison, and Monroe himself had all served as Secretary of State before going on to become President. The table seemed set for John Quincy.

As Secretary of State John Quincy ushered in an era of almost unprecedented geographic expansion through the Adams-Onis Treaty with Spain which ceded the Floridas to the United States, a joint agreement on the Oregon Territory with Britain, and his clear enunciation of American hegemony in the America's in what would become known as the Monroe Doctrine.

The Presidency came next. But it would not be achieved with ease. Nor would it be achieved without a deal that essentially doomed any chance John Quincy had of enacting his legislative

vision. In addition to John Quincy, contenders for the Presidency in 1824 included Speaker of the House Henry Clay, former Secretary of War John C. Calhoun who would go on to become the spokesman for the South, General Andrew Jackson, and Secretary of the Treasury William Crawford. In the event, none of the candidates received an outright majority and thus the tie had to be broken in the House. While no record of any conversations between John Quincy and Henry Clay survive, Speaker Clay backed him in the House and encouraged others to do the same. A short while later, John Quincy named him Secretary of State. That Clay was qualified for the post did not matter. The politics, however, did. Allegations of a "corrupt bargain" hounded John Quincy throughout his Presidency and destroyed any chance he had of pushing an agenda. John Quincy became the second President in American history up to that point to not win re-election to the highest office in the land. The other had been his father.

Adams seethed but ultimately decided to dedicate the rest of his life to pursuing his love of literature and possibly writing a biography of his father. But this was not to be. For the only time in American history, a former President was headed back into the political arena. Influential members of his Massachusetts congressional district approached him to run for the House of Representatives. Adams agreed.

The story of John Quincy's House career can be summed up with one word: antislavery. The story of the "gag rule" will be rightly told in another Constituting America essay. Suffice it to say here, however, that Adams had been antislavery his entire life. In Congress his focus on agitating on the slavery question and the Southern response to it served as an opening salvo in what would become the abolitionist movement. While he never became an abolitionist himself he understood the struggle over slavery. Before most others, John Quincy foresaw that conflict was inevitable. In a diary entry in 1820 he wrote,

> If the dissolution of the Union must come, let it come from no other cause but this. If slavery be the destined sword in the hand of the destroying angel which is to sever the ties of this Union, the same sword will cut in sunder the bonds of slavery itself. A dissolution of the Union for the cause of slavery would be followed by a servile war in the slave-holding States, combined with a war between the two severed parts of the Union. It seems to me that its result must be the extirpation of slavery from this whole continent; and, calamitous as this course in events in its progress must be, so glorious must be its final issue that, as God shall judge me, I dare not say that that it is not to be desired.

John Quincy served in the House from 1830 to his death, on the floor of the Capitol, in 1848. As William J. Cooper has wonderfully put it, "Adams' defeat ended one political era and ushered in another. The advent of Andrew Jackson signaled the beginning of a popular politics buttressed by organized, vigorous political parties" which John Quincy had deplored. And perhaps more important, "never again could a presidential contender wear a mantle that had literally been possessed by the Founding Fathers."[iii] John Quincy's life had been a testament to what the Founders envisioned and in service to the ideas that emanated from the Revolution they fought so nobly to advance.

*Brian Pawlowski is a member of the American Enterprise Institute's state leadership network and was a Lincoln Fellow at the Claremont Institute for the Study of Statesmanship and Political Philosophy. He has served as a Marine Corps intelligence officer and is currently pursuing a Master's Degree in American History.*

[i] Fred Kaplan, *John Quincy Adams: American Visionary* (New York: HarperCollins, 2014), 26.
[ii] William Cooper, *The Lost Founding Father: John Quincy Adams and the Transformation of American Politics* (New York: Liveright Publishing Corp, 2017), 18.
[iii] Ibid. 258.

## Henry Clay (1777-1852) – House Speaker, Whig Party Leader, Kentucky Senate Member

## Guest Essayist: Sam Postell

### Henry Clay: The Man for a Crisis

Henry Clay led a political career that spanned almost fifty years and was Speaker of the House for almost ten. According to some, Clay was a hero, and to others, he was a villain. For example Abraham Lincoln described Clay as his "Beaux ideal of a statesman", while Andrew Jackson described him as "the basest, meanest, scoundrel that ever disgraced the image of his god", and "void of good morals… ambitious and regardless of truth when it comes in the way of his ambition". Although opinions regarding his character are conflicted, all understood that he shaped Congress in fundamental ways. He was the first to understand that Congress was in need of leadership and order to be considered an important power rather than a mere servant of the president.

Before Clay became speaker he was nominated to fill a vacancy in the Senate. After his second term he decided to leave the Senate and run for election to the U.S. House of Representatives. As he announced his candidacy all other candidates withdrew their names from the ballot.

Before Clay had attended a single session as a Representative in the House, he was elected Speaker on the first ballot. Many representatives in the House were intimated by John Randolph, a Representative from Virginia who "ran roughshod" over the proceedings of the House. He would often bring his hunting dogs into the House, and he would filibuster in order to derail its proceedings. It was said that Randolph "disregards all rules" and Clay's supporters decided that the Speaker "must be a man who can meet John Randolph on the floor or on the field, for he may have to do both" (Sargent, Public men and Events, I,130).

Henry Clay fulfilled the wishes of the members of the 12th Congress and was reelected Speaker for the next ten years. The clearest demonstration of his promise to enforce, and even manipulate, the rules of the House is his role in the passage of the Missouri Compromise. There were three separate bills to be considered: first, Missouri's application for statehood as a slave state, second, Maine's application for statehood as a free state, and third was an amendment prohibiting slavery north of the 36'30' parallel with the exception of Missouri.

The House at first rejected the bill that tied the three together. Clay decided that he would separate the three bills and attempt to pass each individually. On February 8, 1820, Clay gave an unrecorded speech that lasted over four hours attempting to persuade the Northern abolitionists to pass the compromise in order to quell Southern threats of secession. Although deliberation upon the three bills lasted the entire month of February, on March 2nd each bill was passed individually.

However, Clay's work was not yet done. John Randolph rose in the House and asked that the vote be reconsidered. Henry Clay announced that it was late and that the motion would be postponed until the following day. The next day Randolph again rose to have the vote reconsidered. Clay ruled him out of order until the routine business had concluded. Meanwhile, Clay signed the Missouri Bill and had the clerk deliver it to the Senate for a vote. When Randolph rose once more Clay announced that the bill could not be retrieved- the vote was final. On March 6th President Monroe signed the Missouri bill. Clay's role in the passage of the Missouri bill demonstrates a principle that survives to this day: the principle of majority rule and the Speaker's role in ensuring that the majority cannot be undermined by the actions of a single representative or a faction.

Later in the Senate, Clay endeavored to advance the same principle but with less success. Not only was Henry Clay an actor in the questions of the Missouri Compromise and the War of 1812, but he also played a role in the debate regarding the rechartering of the Bank of the United States. Early in his career he argued that the National Bank was unconstitutional, but after experiencing the difficulties of financing the War of 1812 he began to view it as a necessity. Andrew Jackson claimed that Clay was inconsistent, to which Clay responded in an impassioned speech claiming that "the constitution has not changed… I was at first wrong."

When the Senate came to vote on the Bank Bill in June of 1841, Clay became upset to see many representatives dragging their heels. Rather than discuss and vote upon the bill, many members of the minority filibustered, speaking on issues not pertaining to the bill. This led Henry Clay to introduce a motion to amend the rules to prevent the minority from delaying the proceedings of the Senate. Many members of the minority party, included John Calhoun and president *pro-tempore* William King, argued that the minority had the Constitutional right to speak in session, and that any attempt to "gag" members of the minority was unconstitutional. Clay eventually buckled under the pressure of the other members and relented on his motion to change the Senate rules; however, the Bank Bill was finally voted upon and passed the Senate on July 28th.

Not only was Henry Clay the man for a crisis and a controversial figure in his day, but he left his mark on the way that Congress deliberates upon and passes legislation. Clay was the first to understand that Congress was in need of leadership if it were to be understood as an important power of the government rather than a mere servant of the president. Although he was a man of action, his speeches bequeath a rich knowledge of constitutional theory that allow us to appreciate the importance of the rules and orders of the legislature.

*Sam Postell is a doctoral candidate in Politics at the University of Dallas.*

## John C. Calhoun (1782-1850) – Seventh U.S. Vice President, South Carolina House and Senate Member, Part 1

## Guest Essayist: Joerg Knipprath

For nearly the first half of the nineteenth century, three men dominated the debates over the great issues of the day. They were the "Great Triumvirate," Henry Clay of Kentucky, Daniel Webster of Massachusetts, and John C. Calhoun of South Carolina. Each joined the Congress between 1806 and 1813, each served in the Cabinet as Secretary of State, and each indulged his ambition to become President in at least three campaigns. Clay came closest, with three party nominations. Calhoun, however, gained the highest honor. He served as Vice-President for nearly eight years with two different Presidents, John Quincy Adams and Andrew Jackson, one of only two men to do so.

John C. Calhoun was born on March 18, 1782, in the South Carolina Piedmont. After preliminary schooling, he attended Yale University, graduating in 1802. He spent the following year studying law at the then-preeminent law school in the United States, the pioneering Litchfield Academy of Judge Tapping Reeve in Connecticut. Upon returning to South Carolina, Calhoun practiced law in Charleston. As were several other Southern states, South Carolina was divided politically between east and west, the Tidewater and the Piedmont, with the former inclined towards Federalism and the latter towards Jeffersonian Republicanism. Because of political manipulation, the eastern minority controlled the state in its early years, and South Carolina had approved the Constitution by a 2-1 margin, despite the losing side representing a majority of the state's population. Charleston was as Federalist and nationalist as any city in the North. However, times were changing. Within a generation, the state would become the leader of Southern sectionalism and, after another generation, the first to secede from the Union in 1860.

The state's political and constitutional metamorphosis is reflected in Calhoun's own philosophic journey. Yet, despite his well-earned reputation as a leading intellectual figure of the "South Carolina Doctrine" regarding the nature of the Union and the rights of the states, Calhoun always seemed to lag behind his state's political evolution. He was never the firebrand driving the train of revolution, but always the brakeman seeking to slow it down. He was never a committed political partisan, instead wandering from faction to faction and party to party and best described as he saw himself, an independent for whom broader principles were a better guide than fleeting political association. That said, he also used this willing flexibility in political affiliation to maximize his personal standing and that of his state and section.

Calhoun was influenced by the Federalism of Yale's president, Timothy Dwight, and of Judge Reeve. While it is difficult to assess the extent to which any particular intellectual mentor or personal experience affected Calhoun's later views, it was there that he first heard systematic defense of the states' rights doctrine. The Virginia and Kentucky Resolutions of 1798 against the Sedition Act clearly influenced his later doctrinal analysis. But those were events from his youth, whereas he lived the Federalism of his teachers who were reacting against the political revolution of the election of 1800 that saw Jefferson become President and consign the Federalist Party to a diminishing regional status.

Within a few years of his return to South Carolina, he was elected to the state legislature. In 1811 he entered the House of Representatives, where he became a "war hawk" who fervently backed the War of 1812 against Great Britain. That war saw the hardening of states' rights views among the politically disaffected New England Federalists whose sea-faring and commercial communities were ravaged economically by the British naval blockade. Their politicians, including Daniel Webster, denounced the war and praised their states' resistance to it. Eventually, their opposition coalesced into the Hartford Convention of 1814, which debated what forms of opposition states might undertake against unconstitutional federal laws. Secession, while not officially sanctioned, was put on the table for future discussion, should lesser measures fail. Calhoun and others later would use the Hartford Convention as a precedent to hurl at Northerners who attacked similar Southern sentiments.

In the meantime, chastened by the disastrous impact the war had on the financial stability of the country, Calhoun supported numerous measures that would have made Alexander Hamilton and other earlier Federalists proud. He introduced the bill to charter the Second Bank of the United States in 1816. He was a strong supporter of House Speaker Henry Clay's "American System" of internal improvements directed by the federal government, which fit not only the South's political alliance with the West, but also Calhoun's (failed) dream to have South Carolina become a textile manufacturing center that would compete with Massachusetts. Most awkward for Calhoun and the South Carolinians for their anti-tariff posture a decade later, Calhoun led the move to enact the tariff of 1816 to pay off the government's debts and reestablish solid public credit.

His political ambition was soon focused on executive office. Calhoun had been shocked by the generally poor performance of the militia during the War of 1812, as well as by what he perceived as the poor management of the War Department. In 1817, he began his tenure as Secretary of War, in which he supported a strong navy and, again in contrast to traditional republicans, a standing peace-time army. His success boosted his chances for the Presidency, and, in another ironic twist, a group of Northern congressmen placed his name in nomination for that office in 1821. He undertook a more concerted campaign in 1824, which was derailed in part because Southern support went to the more states' rights oriented William Crawford of Georgia. Indeed, due to his perceived nationalism, Calhoun could not even get the support of his own state's legislature, which, at that time, still selected presidential electors. Calhoun then turned his sights on the vice-presidency, and the Electoral College overwhelmingly selected him.

It was at that point that Calhoun's determined nationalism began to give way over the next decade to an equally committed sectional loyalty. South Carolinians, who had suffered severely from the economic depression that followed the Panic of 1819, in increasingly radical sentiments opposed various tariffs enacted in the 1820s. Up-and-coming politicians such as Congressman George McDuffie and state representative Robert Barnwell Rhett (Calhoun's successor as Senator in 1850 and the leader of what came to be known as the "Fire-Eaters") campaigned not just for repeal of the tariffs, but for more active opposition to federal power.

The final blow was the massive "Tariff of Abominations" in 1828. Rebuked by other Southern states and unable to get a united front against the measure, South Carolina went on her own. Nullification became a respectable political topic. The most voluble among local politicians went

further. Thus, Rhett, emulating Samuel Adams's rhetoric during the struggle for independence from Britain, sounded the revolutionary clarion:

> But if you are doubtful of yourselves–if you are not prepared to follow up your principles wherever they may lead, to their very last consequence–if you love life better than honor,–prefer ease to perilous liberty and glory; awake not! Stir not!–Impotent resistance will add vengeance to your ruin. Live in smiling peace with your insatiable Oppressors, and die with the noble consolation that your submissive patience will survive triumphant your beggary and despair.

Alarmed at such radicalism, Calhoun anonymously penned his *Exposition and Protest* against the Tariff of 1828, at the request of leaders of the state legislature. It accepted the constitutional power of the general government to enact tariffs to raise revenue–thereby glibly endorsing Calhoun's support for the tariff of 1816–but not for protection of local industry. It further set down the basics of Calhoun's theory of nullification, that a state retained its authority to veto unconstitutional federal laws. While the pamphlet's authorship soon became known, Calhoun and the state's senators, Robert Hayne and William Smith, publicly opposed or were non-committal about undertaking nullification. As a result, the movement stalled.

However, the radicals defeated the moderates in South Carolina's elections in late 1830. Nullification leader James Hamilton was elected governor, and Smith was replaced by the more radical Stephen Miller. Calhoun, struggling to control the anti-tariff movement in the state, published his foundational *Fort Hill Address* on July 26, 1831. There, he systematically laid out the constitutional case for nullification. Calhoun acknowledged that within its delegated powers, properly exercised, the general government was immune from state interference. However, the same principle applied to the states' reserved powers, reciprocally immune from *ultra vires* acts of the general government. The problem was what to do when a conflict arose.

*An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: http://www.tokenconservative.com/.*

## John C. Calhoun (1782-1850) – Seventh U.S. Vice President, South Carolina House and Senate Member, Part 2

## Guest Essayist: Joerg Knipprath

Relying primarily on the Virginia and Kentucky resolutions of 1798 and 1799 against the federal Sedition Act, Calhoun defended the right of a state to interpose itself between its citizens and federal authority and, as Thomas Jefferson had made plain, to nullify the law within its territory.

Echoing sentiments that had been expressed by many others since the debates over the ratification of the Constitution, Calhoun posited that the charter was a compact among the states. Addressing the argument that the Constitution had been adopted by the people of the United States, Calhoun pointed out that it had been the people in conventions in their respective states, and that the ratification by the people in one state bound only them. The general government was not a party to the compact, but its creature. Therefore, it could not be the judge of its own powers, whether done through the agency of the Congress, the President, or the Supreme Court. The general government had the character of a joint commission that oversaw and administered the collective interests of the states.

Significantly, Calhoun incorporated the major contribution of 18$^{th}$century Americans to political theory, the role of the constitutional convention. An act of such foundational character as nullification cannot proceed from mere legislative action. Sovereignty lies in the people, not the government, and an ultimate act of political association or disassociation requires action by them. Since it is not realistic for the people as a whole to gather, such action has to be undertaken by a special body elected and assembled for only that purpose. If the people's convention votes to nullify the law, the legislature might enact an ordinance of nullification. It is then incumbent on the general government to resolve the conflict peaceably by referring the matter, "as in all similar cases of a contest between one or more of the principals and a joint commission or agency … to the principals themselves," that is, to a constitutional convention as provided in Article V of the Constitution. If that convention and the subsequent vote of the states supports the nullifying state, fine; if not, that state then, on further reflection, can rescind its nullification or vote to secede from the Union.

It is important to note that a state has no right to secede simply because it changed its mind about belonging to the Union. The Union is more than a contract, it is a political partnership with an existence outside the individual partners. However, if there has been an alteration of the compact, to which the state has not consented, "constitutional secession" is permitted. That was the extent to which Calhoun justified secession. Beyond that lay revolution. As historian Marco Bassani has explained, at that point, "secession would not be impossible, but would amount to a Lockean appeal to Heaven; such cases would arise, not from the nature of the Union, but from the right of self-government of all communities of free human beings. In essence, a 'pre-political' right of secession exists, shading over into the right of revolution; there are no significant differences on this point between Webster, Calhoun, Jackson, and the entire American tradition. Institutionalization of power does not eliminate the people's right to rebel against a despotic government." Webster himself characterized the address as "the ablest and most plausible, and therefore the most dangerous vindication" of the nullifiers' argument.

Ultimately, the political application of Calhoun's nullification theory played itself out in the Henry Clay-crafted compromise over the tariff and the political theater between President Andrew Jackson and the South Carolina state government. The South Carolina convention's nullification vote over the Tariff of Abominations was followed by Jackson's threat to use the military to insure compliance with federal law as authorized in the Force Act, which was followed by the convention's rescission of its tariff nullification after Clay's compromise, which was followed by its nullification of the Force Act. The tariff issue was allayed, but many understood that to be merely palliation of a symptom, not cure of the ailment. Jackson wrote that

the real issue was disunion and that the next symptom would be the struggle over slavery. Calhoun, the moderate, and Rhett, the fire-eater, concurred.

After service as Senator from 1832 to 1844, an abortive campaign for President in 1844, and an interlude as Secretary of State from 1844 to 1845, Calhoun returned to the Senate from 1845 until his death in 1850. He devoted considerable time to further systematic development of his political theory in the *Disquisition on Government* and the *Discourse on the Constitution and Government of the United States*. As other political theorists had done, Plato and Cicero coming to mind, Calhoun delved into theoretical exploration of the nature of man and society in the former and into more concrete and empirical application of his theory to American political experience in the latter.

As death approached, Calhoun roused himself once more to a defense of his culture and class. He wrote a blistering speech against Henry Clay's Compromise of 1850 and the admission of California. Too frail to deliver the speech himself, his friend Senator James Mason of Virginia read it for him. The valedictory's topic was somber and brooding, a rhetorical reflection of Calhoun's physical appearance portrayed in contemporary drawings and photos: The stronger (North) would not be deterred from its subjugation of the minority (South); compromise was no longer possible; secession was in the air. He assured the North, "[W]e shall know what to do, when you reduce the question to submission or resistance." To a friend, he predicted that disunion would follow within twelve years.

Calhoun died shortly thereafter, on March 31, 1850. Because of his strong defense of slavery–he went so far as to describe it as a positive good–and the historical current of nationalism over the past two centuries, Calhoun's works have not resonated in public debate. Still, his has been described as the only authentic and systematic American political theory, a sentiment that readers of Senator John Taylor of Caroline's examination of American agrarian republicanism might challenge. It is fair to say, however, that Calhoun's approach to consent of the governed, as expressed through concurrent majorities of the whole *and* of its affected constituent minorities, presents a relevant model for peaceful resolution of fundamental political questions that well preserves both "Liberty and Union" in a large, diverse, and divided country.

*An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: http://www.tokenconservative.com/.*

## Daniel Webster (1782-1852) – Secretary of State, New Hampshire House and Senate Member, Known as the "Great Orator," Part 1

## Guest Essayist: Joerg Knipprath

Daniel Webster, alongside Henry Clay and John C. Calhoun, was a member of the "Great Triumvirate," that remarkable group of speakers whose grand and widely-circulated speeches enlivened debates in the Senate and electrified the American people. Webster, the "Great Orator," in the words of the historian Samuel Eliot Morison, "carried to perfection the dramatic, rotund style of oratory that America then loved." Webster is primarily known for his role in the Senate during the tumultuous debates over the nullification controversy, the Texas annexation and resulting Mexican War, and the emerging crisis over slavery and the Compromise of 1850. However, he also served as Secretary of State under Presidents William Henry Harrison and John Tyler, and, subsequently, under President Millard Fillmore. He ran unsuccessfully for the Whig Party's nomination for President in 1836, 1848, and 1852. Of more lasting practical effect even than his Senate speeches were Webster's numerous appearances as an advocate in great constitutional cases before the Supreme Court.

Webster was born in 1782 in New Hampshire. Through his parents, his education at the Phillips Exeter Academy and Dartmouth College, and his association with the lawyers for whom he clerked, he was steeped in an upbringing that admired Federalist republicanism. That adherence to Federalist principles has often been used to portray Webster as a "nationalist," a point that he himself used to political advantage, though he called himself a "Union" man. Yet, it is more illuminating to explain Webster as a politician dedicated to the political and economic interests of his section, New England. As those interests changed, so did the political program of the Federalist Party and its eventual successor, the Whigs. And so did Webster. He "evolved" from general skepticism about policies that strengthened national sovereignty against state powers in his tenures in the House of Representatives between 1813 and 1817 (for New Hampshire) and 1823 and 1827 (for Massachusetts) to ringing endorsements of such policies after entering the Senate in 1827. As in a mirror, one sees Webster's frequent nemesis, Calhoun, move contemporaneously in the opposite direction, from ardent nationalist to foremost theoretician of state sovereignty.

Thus, in 1814, Webster could rail against the abortive proposal by Secretary of War James Monroe to draft 100,000 men to shore up the army during the militarily adverse and financially calamitous War of 1812:

> *"*The operation of measures thus unconstitutional & illegal ought to be prevented, by a resort to other measures which are both constitutional & legal. It will be the solemn duty of the State Government to protect their own authority over their own Militia, & to interpose between their citizens and arbitrary power. These are among the objects for which the State Governments exist; & their highest obligation binds them to the preservation of their own rights & the liberties of their people….Both [my constituents] and myself live under a Constitution which teaches us, that 'the doctrine of non-resistance against arbitrary power & oppression, is absurd, slavish, & destructive of the good & happiness of mankind.' With the same earnestness with which I now exhort you

> to forebear from these measures, I shall exhort them to exercise their unquestionable right of providing for the security of their own liberties."

This is a far cry from his famous second reply to Senator Robert Hayne in 1830 on the occasion of the "Great Debate" over South Carolina's nullification of the Tariff of 1828. There, Webster declared, "Liberty *and* Union, now and forever, one and inseparable!" It was Hayne who on that later occasion appeared to recall the Webster of 1814, with "Liberty—the Constitution—Union."

Six days after that 1814 speech, the Hartford Convention met. While its final product did not call for immediate secession by New England over the economic difficulties caused by "Mr. Madison's War," the topic was discussed and tabled for the future. Webster did not attend that gathering, but had raised secession in his *Rockingham Memorial*, a remonstrance against the War of 1812 sent to Madison by a state convention of Federalists. The *Memorial* did not directly urge secession but threatened, "If a separation of the states shall ever take place, it will be on some occasion, when one portion of the country undertakes to control, to regulate and to sacrifice the interest of another." The Calhoun of the 1830s might have said this with more systematic theoretical grounding, but he would heartily concur with the message.

In similar manner, Webster opposed the tariff of 1816 as being not for the sound and constitutional purpose of raising revenue, but for the improper object of protection of industry. He likewise opposed the tariff of 1824. Yet, by 1828, with the national debt dwindling, he supported the "Tariff of Abominations," because it protected New England's textile industry. By 1833, he even opposed Henry Clay's proposed tariff reduction, because to compromise was to embolden Southerners to threaten nullification and disunion. Perhaps in self-reflection, Webster declared, in another context, "Inconsistencies of opinion, arising from changes of circumstances, are often justifiable." Calhoun, meanwhile, had supported the 1816 tariff because, he claimed, it was a constitutional revenue measure, not a protectionist one. By 1828, Calhoun opposed the tariff because it hurt the South economically.

The early Webster also opposed Henry Clay's federally-financed "American System" of internal improvements to develop settlement of the West (which Calhoun initially supported). Once again, by 1828, Webster supported Clay's plans, with Calhoun now opposed.

One area of great policy dispute during the first half-century of the Republic was the congressional chartering of the Bank of the United States. In contrast to his "flexibility" in other matters, Webster was steadfast regarding the Bank. He was a "sound money man," who eulogized Alexander Hamilton for his vision about the First Bank, chartered in 1791, and the stability it brought to American finance and the public credit: "He smote the rock of the national resources, and abundant streams of revenue gushed forth. He touched the dead corpse of Public Credit, and it sprung upon its feet."

To restore that stability after the humbling experience of the War of 1812, Webster supported Calhoun's initiatives to charter the Second Bank in 1816 and Clay's move to re-charter it in 1832. He also vigorously opposed Jackson's anti-Bank policies, not just because they were Jackson's as much as he feared the economic dangers from irresponsible issuance of paper money by undisciplined local banks. "Of all the contrivances for cheating the laboring classes of

mankind, none has been more effective than that which deludes them with paper money," he charged during the debate on re-chartering the Second Bank. Contemplating the demise of the Second Bank following Jackson's veto of the re-charter bill, Webster mourned, "We are in danger of being overwhelmed with irredeemable paper, mere paper, representing not gold nor silver; no sir, representing nothing but broken promises, bad faith, bankrupt corporations, cheated creditors and a ruined people." At times, he was branch director, legal counsel on retainer, and advocate in Congress for the Bank. His penchant for luxurious living beyond his means and his financial speculations and gambling habit caused him to be frequently in debt and led to conflicts of interest, not just with the Bank.

His political support for the Bank was felicitously aligned with his constitutional argument in one of the most significant cases about Congressional power, *McCulloch v. Maryland* in 1819. Webster represented James McCulloch, the branch cashier (a key officer) of the Bank. The Court held that a state tax on a federally-chartered instrumentality was unconstitutional. In a wide-ranging argument, almost entirely adopted point-for-point by Chief Justice John Marshall, Webster claimed broad federal power to enact laws that were useful or convenient to achieve the objectives expressly delegated to Congress in the Constitution. Webster's argument tracked Hamilton's in the debate over the constitutionality of the original Bank. It was startlingly different than the constitutional argument about federal power Webster had made five years earlier in his speech against military conscription, "To talk about the unlimited power of the Government over the means to execute its authority, is to hold a language which is true only in regard to despotism. The tyranny of Arbitrary Government consists as much in its means as in its ends … All the means & instruments which a free Government exercises, as well as the ends & objects which it pursues, are to partake of its own essential character, & to be conformed to its genuine spirit."

*An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: http://www.tokenconservative.com/.*

## Daniel Webster (1782-1852) – Secretary of State, New Hampshire House and Senate Member, Known as the "Great Orator," Part 2

## Guest Essayist: Joerg Knipprath

Webster's fame as a constitutional lawyer, orator, and political leader was enhanced by his arguments in other cases. In one, *Gibbons v. Ogden* (1824), Webster represented Thomas Gibbons, who operated a ferry boat under a federal license. Webster argued that Congress had exclusive power over interstate commerce. While Marshall stopped short of Webster's position, he interpreted the federal power broadly and agreed that Congress could reach the internal

commerce of states. Again, as in *McCulloch*, a state law was found unconstitutional as an infringement on federal power.

In *Dartmouth College v. Woodward* (1819), Webster represented his alma mater against the attempt by New Hampshire to revoke its charter as a private institution and turn it into a public entity. This time, there was no direct national government interest at stake. Still, Marshall's opinion, that the state's action violated the Contracts Clause of the Constitution by impairing the obligations and vested rights under the existing charter, was yet another restriction on state power. Webster's impassioned advocacy for the protection of rights in property against legislative infringement fit his belief that political participation must be strongly tied to property ownership. Thus, in the Massachusetts constitutional convention of 1820, Webster argued, albeit unsuccessfully, against eliminating property qualifications for voters.

In yet another famous case, *Luther v. Borden* (1851), Webster represented Luther Borden, a state militia officer who had searched the house of Martin Luther, a leader of an abortive new government for Rhode Island. That state's colonial charter operated as its constitution even after independence. Due to popular dissatisfaction in the 1840s with the charter's restrictive property qualifications for voting and the malapportionment of the legislature, a movement under the leadership of Thomas Dorr sought to replace the charter by appeal to the people acting in convention. The movement was initially peaceful, and its new constitution was approved in a popular vote. However, eventually an armed clash occurred between forces allied with the rival "governments," which the old charter militia won.

The Supreme Court was called on to decide which was the state's legitimate government. Chief Justice Roger Taney demurred, opining that the Constitution's command that the United States shall guarantee to each state a republican form of government presented a political question that could not be decided by a court. Of considerable public interest were the two sides' lengthy arguments. Luther's attorneys embraced the constitutional view of James Madison and others during the ratification debates over the Constitution that the sovereign people had an unrestricted right to change their constitution at any time, for any reason, and by any (peaceful) means. Webster agreed with this principle as a theoretical proposition only. Ever fearful of revolution, he insisted that such fundamental change could only come through the prescribed means in the state's constitution or, if none existed, through action by the constituted state government, in this case the old charter government.

His argument in that case paralleled his position against nullification. A single state could not nullify federal law; certainly it could not secede. Therein lay revolution. A dissatisfied state's recourse against federal power was to follow the procedures set out in the Constitution and persuade the other states to require Congress to call a constitutional convention. There remained, Webster acknowledged, the ultimate right to remove by whatever means a tyrannical government; but this was a right of the American people, not of a particular state government.

Near the end of Webster's political career occurred yet another spasm in American politics over slavery. In the debate over the Compromise of 1850, crafted by Clay and pushed through the Senate by Stephen Douglas of Illinois, the ailing Calhoun had his speech in opposition to the Compromise read to his colleagues. Three days later, Webster spoke in support of the measure.

He began, “I wish to speak today not as a Massachusetts man, nor as a northern man, but as an American ….” He dismissed the very notion of “peaceful secession” advocated by Calhoun. Secession was revolution, and revolution is violent. However, despite his personal opposition to slavery, he criticized the abolitionists and acknowledged the South’s right to have the federal fugitive slave law diligently enforced. This aroused a wave of opposition to him. He resigned his Senate seat within a few months to become, once more, Secretary of State.

During his two-year stint as Secretary of State, he vigorously enforced the new Fugitive Slave Law. His final campaign for President failed at the Whig Party convention. By then, he was also increasingly debilitated from cirrhosis of the liver. He never saw the result of the election, because he died in October, 1852, the immediate cause being head injury suffered from falling off a horse.

Webster’s legacy as a “Union” man is deserved. Still, as a successful politician, his positions changed dramatically over time and, unsurprisingly, tracked the material interests of his constituents. Technological innovations, structural changes in economic relations, settlement of new lands, and the need to assimilate diverse ethnic and religious immigrants all favored development of a national ethos. New England’s and the North’s commercial and industrial rise aligned with that development. Still, Webster’s speeches helped create the political framework for these amorphous forces, and his flair for oratory made this framework intellectually and emotionally accessible to the people. After the nullification debates, in particular, “Union” was no longer defended as just a useful arrangement to assure liberty from foreign domination and to promote harmonious interaction among state sovereignties. It became, instead, the idea of the *American* republic made real.

There is one more noteworthy point. Despite Webster’s inclination toward political order, his innate conservatism also made him cognizant of human fallibility and skeptical of those who would exercise political power. In a speech in 1837, he issued a warning free citizens must never forget, “There are men, in all ages, who mean to exercise power usefully; but who mean to exercise it. They mean to govern well; but they mean to govern. They promise to be kind masters; but they mean to be masters.”

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## Thomas Hart Benton (1782-1858) – Missouri House and Senate Member

## Guest Essayist: Ben Phibbs

### "For the President and the Party: The Loyal Career of Senator Thomas Hart Benton"

"Now you…rascal, I am going to punish you. Defend yourself!"[1]The taunt ferociously barreled into the infant autumn air of Nashville, Tennessee, flying comfortably from the tongue of a notorious brawler with a slender, scarred frame that lamented yet another submission to a fearless ego. The day was September 4, 1813, and young Andrew Jackson had just challenged a man to a duel. But the victim cautiously retreating from an advancing Jackson's pistol was concealing his own proclivity for mischief. In fact, when he was only 16, he had threatened to shoot a fellow student while attending the University of North Carolina and had even been expelled for stealing from the Philanthropic Society.[2]In the intense street battle that ensued, Jackson sustained a bullet wound in his shoulder that would accompany him to death, and his opponent, after tumbling down a flight of stairs, emerged to break the general's sword over his knee.[3] But while any man who dared to tussle with Jackson undoubtedly demonstrated a strong will and foolish tenacity, the one who subdued the American Lion in 1813 would later distinguish himself as an even stronger man. For, anyone who selflessly relinquishes prejudice to free himself for an unshakable defense of his former enemy against the advances of the Bank, the censure of the Senate, and even the fragility of his legacy, is truly called loyal. Senator Thomas Hart Benton was loyal.

Benton's thirty years in the Senate testify to his unshakable devotion to President Jackson; not even two terms into his career, Benton was confronted by one of the most infamous constitutional debates in the nation's history: the bank battle. President Jackson hated the national bank, for, since its establishment in 1791, Alexander Hamilton's creation had morphed into a financial control center for the nation's available credit. Rallying his base, Jackson determined to halt Congress's effort to re-charter the bank, asserting the monopolistic tendencies of the "hydra-headed monster of corruption," and the superiority of hard money (gold and silver coins) over paper currency.[4] The battle, however, would be uphill. In 1819, the Supreme Court had declared the bank to be constitutional; furthermore, the bank directors boasted powerful allies in the Republican Party, including Henry Clay and Daniel Webster. Aware of the mounting opposition from such senators of the North, Senator Benton, the faithful Democrat and first senator of Missouri, resolved to aid the president.

With a thundering voice, Benton protested the renewal of the charter through Jackson's bipartite stance. First, he declared that the bank was "an institution too great and powerful to be tolerated in a government of free and equal laws,"[5] reflecting the Western skepticism of the Democratic Party toward the powerful business practices of the North. As a recent immigrant to the West, Benton believed that the power of the purse, which affords extensive influence over public loans, should not be concentrated in a body disparate from the people, lest the temptations of collusion and favors should "aggravate the inequality of fortunes" and injure the "laboring classes."[6]Second, he warned against the dangers of paper currency, insisting that "gold and silver is the best currency for the republic."[7] The bank's "unlimited supplies of paper," he contended, exacerbated the debt, and its fluctuations had the capability to "make and break

fortunes."[8] In fact, Benton's defense of hard money soon earned him the nickname, "Old Bullion."[9] Old Hickory considered Benton a leader in the Senate and beckoned him to regularly visit the White House to provide detailed accounts of the debates.[10] Indeed, Benton was the voice of Jackson's party. His concern for the local banks and state governments, particularly in the South and West, appealed to a democratic ethos. Benton's loyal defense of the masses against the conniving few represented in Congress what Jackson was in the White House. Strengthened by Benton's alliance, and the popular sentiments which he represented, Jackson vetoed the re-charter bill in an unprecedented constitutional stroke.

The ripe constitutional question provoked by Jackson's veto invites the scrupulous attention of historians; indeed, Jackson's purely political strike upset the understanding of the executive's veto as a constitutional check, not a partisan strongarm. However, the bank veto lamentably overshadows a suspenseful scene in the final months of Jackson's presidency—one in which Senator Benton was the star. Two years after Jackson denied the re-charter of the national bank, he unilaterally determined to slay the "hydra-headed monster" once and for all by removing all of its deposits and redistributing them to state banks. Predictably, Jackson's enemies in the Senate were enraged at his rash decision, and under the leadership of Senator Clay, officially censured the president for his act. Now Benton, having proved himself loyal during the bank battle, not only viewed the Senate's condemnation of Jackson as retaliation to the veto, but also as an affront to Jackson himself in the final year of his public service. So then, determined once again to defend both the policies and the honor of his party leader, Benton confidently rose, surrounded by the piercing glares of Whig men, and proposed a resolution to expunge the censure of President Jackson from the record.

Benton eloquently supported his resolution on two fronts. First, the Missouri senator attacked the legality of the censure, claiming that it was "illegal and unjust." Benton reminded his colleagues that any criminal charge against the president was prescribed by the Constitution to originate in the House and that, by avoiding the impeachment process, the Senate had condemned the president without a fair trial.[11] Second, and more importantly, Benton built a constructive case for the reputation of President Jackson. He chronicled the successes of the ambitious president's administration, touting peace in foreign policy and financial security in domestic policy. Truly, Jackson had assured that merchants were not again robbed, intimidated, or impressed by foreign powers on the sea and had kept the debt and taxes low, allowing domestic industry to thrive and causing Benton to conclude, "At home and abroad, the impress of his genius and of his character is felt."[12] For his defense, Benton was met with a furious mob of opponents. In fact, during the proceedings, the Bank men and other enemies of Jackson collected in the galleries directly above Benton's head so that some of his friends even sent for guns.[13] Nevertheless, the untried Benton stood, advancing the "ball" that "the people have taken…up and rolled…forward."[14] For it was the people whom Benton had in mind when he rose to defend the president. Indeed, that is why he supported Jackson. Benton overcame the bitterness of the duel because Jackson bolstered the popular voice with his achievements, including his bank veto. So then, when he saw that those achievements were in danger, Benton resolved to loyally demonstrate his faith in the credibility of Jackson's democratic ideals. The president embodied the people; thus, by defending the president, Benton defended a movement that transcended one man.

Senator Benton, in two dramatic showdowns, exemplified great loyalty for President Jackson and for the Democratic Party movement. However, Benton did not cease his devotion when the American Lion retired. Rather, the aging senator understood that the legacies of great men are fragile things, subject to defamation and even abandonment if not vigorously protected. In fact, the threat to Jackson's memory in the final days of his presidency taught Benton that the democratic ideals which his party leader espoused must outlive the president himself. For this reason, Old Bullion spent 14 more years as a senator, seeking ways to more deeply entrench the popular roots of Jackson's presidency. He decided to work upon a foundation that he had already established from the beginning of his career in Washington: the facilitation of westward expansion.

As an immigrant to the newly annexed state of Missouri, Benton is perhaps best remembered for his energetic advocacy of westward expansion and the "manifest destiny" of the United States. He had developed this enthusiasm early in his public career, and it never waned until his retirement. His first objective had been to ensure that eager settlers were able to purchase land cheaply—a democratic virtue—which he accomplished through supporting pre-emption and graduation. Pre-emption was designed to protect the claims of "squatters," those desiring to settle a piece of land, from "speculators," those who wanted to purchase the land without settling it[15]; graduation stipulated that the price of land would gradually decrease "according to actual valuation," ensuring that settlers did not pay more for less quality.[16] Benton's greatest achievement, however, was the negotiation of the Oregon territory, through which he demonstrated a final measure of loyalty to president and party. Jackson, Benton, and the Democrats preached manifest destiny, the divinely ordained duty of the United States to expand its influence to the Pacific Ocean. And while Jackson did not witness its fulfillment, Benton ensured that the president's ambition was carried on through "Young Hickory,"[17] President James K. Polk. Working closely with the president, Benton assured him that the rash demands of the radicals, who were prepared to violently confiscate the 54$^{th}$ parallel from Britain, did not upset the delicate negotiations process.[18] Carefully counting his support in the Senate, Benton stood upon the 49$^{th}$ parallel, and, along with 40 of his colleagues, advised the president to reject the radicals and sign the treaty. Of course, "It was a new thing under the sun to see the senator daily assailed"[19] for his position; nevertheless, Benton retired confidently, knowing that the Jacksonian democracy which he had defended for thirty years would reach from sea to shining sea.

During the furious debate regarding President Jackson's veto, Senator Clay charged that Benton had preserved an "adjourned question of veracity" between himself and the president. Benton, recalling the duel, replied, "We fought, sir; and we fought, I hope, like men. When the explosion was over, there remained no ill will, on either side…If there [had], a gulf would have separated us as deep as hell."[20] Benton, like Jackson, was a fighter. If he desired, his heart could have harbored an unquenchable vengeance and bitterness toward the president. However, Benton's thirty years in the Senate testify to his even stronger desire to satisfy his more noble convictions. He understood that Jackson was the charismatic voice of the people who exhibited a Jeffersonian trust in their virtue and that any personal prejudice wielded against him would only suspend the accomplishment of a democratic agenda. In this way, Senator Benton surrendered his pride to loyalty, and when the Bank, the censure of the Senate, and the passage of time threatened President Jackson, Benton fought back with the same intensity that he exerted in Nashville

decades ago. To Benton, an affront to Jackson was an affront to the people whom he trusted to govern rightly. Sadly, when he departed from this loyalty on the question of slavery, his constituents rejected his sixth term.[21] However, as a true delegate, Benton could still write near the end of his life, "I have seen the capacity of the people for self-government tried at many points, and always found equal to the demands of the occasion."[22]

*Ben Phibbs, winner of Constituting America's "We The Future" Contest for Best Essay, is a 18-year old homeschool senior from North Carolina who plans to attend Patrick Henry College in preparation for a career in constitutional law. Inspired by his parents to revere the treasured tradition of American Republicanism, Ben has, from a young age, admired the rich history of the Founding and laudable structure of the Constitution. For enrichment and service, Ben participates in debate and moot court and leads his church youth band.*

[1] Jon Meacham, *American Lion: Andrew Jackson in the White House*. (New York: Random House, 2008), 29-30.
[2]https://shsmo.org/historicmissourians/name/b/bentonsenator/
[3] http://www.americanheritage.com/content/%E2%80%9Cnow-defend-yourself-you-damned-rascal%E2%80%9D
[4] George Tindall and David Shi, *America: A Narrative History*. (New York: WW Norton and Co., 2013), 345-46.
[5] Thomas H. Benton, *Thirty Years' View Vol.1*. (Project Gutenberg Ebook, 2014), 191.
[6] Ibid, 193.
[7] Ibid, 187.
[8] Ibid, 193.
[9]https://shsmo.org/historicmissourians/name/b/bentonsenator/
[10] Meacham, 278.
[11] Benton, 532.
[12] Ibid, 722-23.
[13] Meacham, 336.
[14] Benton, 727.
[15] Paul Johnson, *A History of the American People*. (New York: Harper Collins, 1997), 292.
[16] Donald Cole, *Martin Van Buren and the Political System*. (Princeton: Princeton University Press, 1984), 327.
[17] Tindall and Shi, 442.
[18] Thomas Benton, *Thirty Years' View Vol.2*. (Project Gutenberg Ebook: 2014), 675.
[19] Ibid, 677.
[20] *Thirty Years' View Vol.1*., 264.
[21]https://shsmo.org/historicmissourians/name/b/bentonsenator/
[22] *Thirty Years' View Vol.2*., 777.

# James G. Blaine (1830-1893) – House Speaker and Senate Member From Maine, Secretary of State, Presidential Candidate

## Guest Essayist: Daniel A. Cotter

**The Great Debates - James Blaine (1830-1893)**

James G. Blaine was a politician from Maine who first served in the Maine House of Representatives and then moved to the federal stage, where he became Speaker of the United States House of Representatives, a United States Senator, Secretary of State and Republican nominee for President. Nicknamed "the Magnetic Man," Blaine was one of the leaders of the Republican Party during the late 19th Century and one of the great debaters.

### Early Life and Rise in Politics

Blaine was born in Western Pennsylvania. His father was a Whig party supporter and his great grandfather was Ephraim Blaine, who served as a Commissary-General under General Washington. Blaine's mother was Irish Catholic and Blaine's parents brought their daughters up Catholic and their sons, including Blaine, Presbyterian.

Blaine enrolled in Washington College (now Washington & Jefferson College) at the age of thirteen, graduating four years later near the top of his class. Blaine considered attending law school but decided to get a job. He was hired at Western Military Institute as a professor of math and ancient languages, and married a teacher, Harriet Stanwood, on June 30, 1850. In 1852, Blaine took a job at the Pennsylvania Institution for the Instruction of the Blind (now Overbrook School for the Blind). In 1853, Blaine left teaching to become editor and co-owner of the *Kennebec Journal*, a strong supporter of the Whigs. Upon that party's demise, Blaine turned his attention to the newly formed Republican Party.

In 1856, Blaine was elected to the first Republican National Committee. In 1858, Blaine made his first run for an elected position, winning his race for the Maine House of Representatives and winning each of his reelection efforts in 1859, 1860 and 1861, winning a healthy majority of the vote. In 1859, Blaine also became chairman of the Maine Republican state committee. In 1861 and 1862, Blaine was elected Speaker of the Maine House of Representatives.

### Congressional Work

In 1862, Blaine successfully ran for a seat in the United States House of Representatives, one of the few Republicans to win in the midterm elections. In the 1860s, those elected in an even year began their actual congressional duties the following December. In his first term, Blaine was relatively quiet. Blaine advocated for the commutation provision contained in the military draft law, and he also made a proposal for a constitutional amendment that would have permitted the government to impost an export tax.

Blaine won reelection in 1864 and that Congress focused primarily on Reconstruction. Blaine took the position that the Fourteenth Amendment required three-fourths of the states that had not

seceded, losing the argument to the majority who agreed that it required three-fourths of all states. Blaine did vote in favor of harsh measures on the South but voted against a bill barring Southerners from attending the United States Military Academy. When the House voted on the impeachment of President Andrew Johnson, Blaine voted in favor of impeaching the president.

Blaine was a strong advocate for the strength of the dollar, rejecting the efforts to issue additional greenbacks to pay interest on pre-war bonds. In 1869, Blaine was elected Speaker of the House, winning unanimous Republican support. Blaine was elevated to the position in part because of his strong parliamentary skills and President Ulysses S. Grant thought he was a skillful leader. Blaine served six years in the Speaker role. During the 1872 campaign, rumors and accusations were leveled against Blaine that he had received bribes in the Credit Mobilier scandal, charges that were never proven but continued to haunt Blaine.

On February 4, 1875, after much debate and great watering down of its contents, the Civil Rights Act of 1875 passed the House by a vote of 162 to 99. Speaker Blaine worked hard and cooperated with President Grant to get the act through the House.

In December 1875, Blaine proposed a joint resolution, the Blaine Amendment, to address the separation of church and state by prohibiting direct federal government aid to religiously affiliated educational institutions. The bill followed a speech by President Grant at a veterans meeting. The Amendment would have been an amendment to the United States Constitution. Despite Blaine's efforts, which were successful in the House, by a vote of 180 to 7, the bill failed in the United States Senate by four votes. It never became law at the federal level, but 38 of the 50 state constitutions in the United States contain versions of the Amendment.

Blaine was considered a favorite for the 1876 Republican presidential nomination, but a scandal involving railroad bonds emerged. Blaine denied the accusations and was believed until some letters were discovered. Blaine was able to reclaim the letters, but the damage was done. Although Blaine was nominated at the Republican convention and referred to as "an armed warrior, like a plumed knight," he lost to Rutherford B. Hayes.

In 1876, Blaine was appointed by Maine Governor Seldon Connor to a vacant Senate seat. Blaine served five years but did not have any significant leadership role. In 1880, Blaine was again nominated at the convention, but lost to Garfield. In 1881, President Garfield nominated Blaine to Secretary of State, which he accepted.

Blaine eventually was the Republican nominee in 1884 but lost to Grover Cleveland.

**Conclusion**

Blaine had influence during Reconstruction in his role as Speaker of the House and was a leader of the newly formed Republican Party for many years but fell into obscurity not long after his death in 1893. His most lasting contribution might be the Blaine Amendment, which many states adopted, and which laws are now being reviewed as part of the current discussion of school vouchers and impact of the tax reform bill.

*Dan Cotter is a partner at Latimer LeVay Fyock LLC and an adjunct professor at The John Marshall Law School, where he teaches SCOTUS Judicial Biographies. He is in the process of writing a book on the seventeen Chief Justices. He is also a past president of The Chicago Bar Association. The article contains his opinions and is not to be attributed to anyone else.*

## Thomas Brackett Reed (1839-1902) – House Speaker From Maine Known for "Reed's Rules"

## Guest Essayists: Joseph Postell and Samuel Postell

Once upon a time the House of Representatives was dominated by party leaders, especially the Speaker of the House. The Speaker had extensive power to set the agenda and extensive tools to enforce that agenda. While every representative in the House was elected by a distinct group of constituents, the majority was united in pursuing a common goal thanks to this leadership.

The man who was most responsible for this party organization in Congress was Thomas Brackett Reed. Sometimes called "Czar Reed" because of his immense power, he was primarily responsible for the implementation of the "Reed Rules" adopted in 1890.

A Republican from Maine, Reed was Speaker of the House of Representatives from 1889-1891 and again from 1895-1899. He was known for his quick wit in legislative debates and his understanding and deployment of parliamentary procedure. During one legislative debate, a Democrat invoked Henry Clay's quote that he would rather be right than be president. Reed replied, "The gentleman needn't worry. He will never be either." Henry Cabot Lodge later called Reed "the finest, most effective debater that I have ever seen or heard."

Reed approached the rules of the House of Representatives with a simple, fundamental principle in mind. "The best system," as he put it, "is to have one party govern and the other party watch." And this system required two things: a strong, unified, cohesive set of parties, and procedures that allowed the majority to rule rather than be delayed continually by the minority.

Upon being narrowly elected Speaker over William McKinley, Reed set out to implement this system in the House. When Reed gained the gavel, the House did almost nothing on an average day. Through the use of dilatory motions and tactics (uses of parliamentary procedure to delay the majority from getting things done) Democrats in the House were able to obstruct the Republican Party prior to Reed's speakership.

One of these tactics was the "disappearing quorum." Because the House must have a quorum to conduct business, the Democrats who were in the minority would frequently object that a quorum was lacking. In response, the House would have to call the roll, which caused considerable delay. In addition to the delay, the rules of the House stated that if a person did not respond, they would not be counted as present. Therefore, Democrats in the minority would simply refuse to answer the roll call, making the quorum "disappear."

The disappearing quorum was Reed's first target. In January of 1890, facing a disappearing quorum over a contested election, Reed ordered the House Clerk to record Democrats not responding as present. In response, many Democrats scrambled under their desks to hide from the Clerk, and they objected vigorously to Reed's change. Reed ordered everyone in the room to be counted, and after several days, his decisions were upheld and the disappearing quorum was over.

Reed's rules changes put the majority, acting through the Speaker as its leader, firmly in control of the House. The Reed Rules limited the use of dilatory tactics, lowered quorum requirements, and put the majority in charge of considering and amending legislation. Reed explained the rationale for these changes:

> The object of a parliamentary body is action, and not stoppage of action. Hence, if any member or set of members undertakes to oppose the orderly progress of business…it is the right of the majority to refuse to have those motions entertained, and to cause the public business to proceed.

The Speaker's powers had also grown during the late 19th Century, so that the Speaker was able to use his power, combined with the majority's power to act, to exert tremendous control over the House. Three of the Speaker's powers, in particular, were critical: (1) the power to appoint all members and chairs of committees, (2) the power of recognition, which allowed him to recognize members wishing to speak on the floor of the House, and (3) the chairmanship of the Rules Committee, which was nearly the only way that a bill could actually reach the floor of the House for an up-or-down vote.

At the time, many people objected to the accumulation of power in the majority, and in the majority party leadership. They called Speakers "czars" and tyrants. The *New York Times* ran headlines such as: "Bolder in his Tyranny: Heaping Fresh Indignity on the Minority: Reed Confirmed as Dictator of the House – Refusing Even to Recognize the Democrats." But Reed defended these changes as necessary reforms to allow the majority party, which received its powers from the people, to implement the laws that the people desired.

There were many advantages to the Reed Rules. They promoted party accountability, which meant that the people could be confident that if they gave one party or the other a majority in the House, legislation would follow. In addition, power stayed with Congress, rather than shifting over to the President, because the House set the legislative agenda instead of waiting for the President to suggest which bills should be passed.

Today's Congress accomplishes a lot less than the one over which Reed presided because party leaders no longer have the powers that Reed created. Majority party cohesion has been undermined, and the leaders of the majority party are increasingly incapable of advancing necessary reforms. As a result, the people increasingly look to the President. Studying Reed's vision for the House of Representatives reveals another possibility: with stronger parties, Congress can maintain its own authority, and accomplish the business of the people more efficiently, than it does today. Reed and his rules illustrate a potential solution for the disappearing role of Congress in contemporary American politics.

*Joseph Postell is Assistant Professor of Political Science at the University of Colorado-Colorado Springs. He is the author of the forthcoming book Bureaucracy in America: The Administrative State's Challenge to Constitutional Government. He is also the editor of Rediscovering Political Economy and Toward an American Conservatism: Constitutional Conservatism during the Progressive Era. Follow him on Twitter @JoePostell.*

*Samuel Postell is a Ph.D. student at the University of Dallas.*

## Samuel Rayburn (1882-1961) – House Speaker From Texas

## Guest Essayist: Patrick Cox

### Sam Rayburn of Texas – The Longest Serving Speaker of the U.S. House of Representatives

Samuel Taliaferro Rayburn was one of the most influential and respected leaders in American history. Rayburn served with distinction as he achieved many important changes to American society, government and the nation's economy. Rayburn holds the record for serving longer than any other Speaker of the House in U.S. history. According to longtime friend and colleague Congressman Richard Bolling, Rayburn was cleverly described as the "baldest and levelest head in Washington." He served fifty years from his northeast Texas 4th Congressional District in the House and seventeen as the House Speaker.

As the House Speaker, Rayburn served during the administrations of four different presidents – Franklin Roosevelt, Harry Truman, Dwight Eisenhower, and John Kennedy. Rayburn was fond of saying that he served "with" four presidents, not "under" any chief executive. During his years as Speaker, he was at the epicenter of monumental decisions during World War II, the Cold War, the modern Civil Rights movement, the early years of the Space Age, and the emergence of the United States as a leader in international affairs. Historians recognize Rayburn as among the most influential House Speakers and political leaders in American history. He was born in the small community of Flag Springs near Bonham, Texas in 1882 and died of cancer in Bonham in 1961 after serving 48 consecutive years in Congress.

*The way to get ahead in the House is to stand for something and to know what it is you stand for.*

Rayburn first was elected to the Texas Legislature as a State Representative in 1906. He became Speaker of the Texas House of Representatives at the age of 29. Interestingly, Rayburn served in the Texas House and became friends with Sam Johnson from Central Texas – the father of Lyndon Johnson. He then decided to run for the U.S. Congress in 1913 when Woodrow Wilson was President of the United States. Rayburn worked his way up the leadership ladder and came into his own as a legislator during the presidency of Franklin D. Roosevelt in the 1930's. The impact of the Great Depression during this decade led to the creation of the most significant legislative effort to reform and regulate economic life that America had yet experienced. Rayburn was a protégé of fellow Texas Congressman John Nance Garner of

Uvalde, Texas. Garner served as House Speaker and then became Vice President for the first two terms of the Roosevelt Administration in the 1930's. Rayburn and Garner remained friends and political allies even after Garner retired to his Uvalde home in 1942.

Working closely with President Roosevelt and Vice President Garner, Rayburn played a pivotal role in the passage of major legislation that composed the essence of the New Deal. In his capacity as chair of the Committee on Interstate and Foreign Commerce, Rayburn's legislation led to the regulation of the sales of stocks and bonds through creation of the Securities and Exchange Commission (SEC). Thomas Corcoran, legal counsel for the Reconstruction Finance Corporation, later recalled: "The first people to stand up against Wall Street were the Texans—Garner and Rayburn."

Among other New Deal regulatory measures, Rayburn co-authored the Emergency Railroad Transportation Act, the Truth-in-Securities Act, the Stock Exchange Act, the Federal Communications Act and the Public Utility Holding Company Act. Although all these acts were important in creating a framework of public safeguards and economic regulations, most important to Rayburn was his involvement in establishing the Rural Electrification Agency (REA). The REA changed the way rural Americans lived more than any other New Deal agency. In 1935, when the REA, was created, less than ten percent of American farms had electricity. By 1950, ninety percent of American farms and rural America had electricity supplied by electric cooperatives. To this day, electric cooperatives remain popular and are widespread throughout the entire nation.

*There is no degree in honesty. You are either honest or dishonest.*

As a politician and citizen, Sam Rayburn was a plain talker and widely known for his honesty and integrity. Although he lived an almost monastic life as a politician and lawmaker, he loved interacting with people and enjoyed the simple pleasures of farm and ranch work. He was frank and known for his extensive knowledge of the Constitution and the governing process. "I have found that people respect you if you tell them where you stand," he often stated. He was often referred to as "Mr. Sam" by his friends and colleagues. Beyond his Texas home and his congressional district, he was widely recognized and respected by members of both political parties, by the media, and by foreign leaders. His foremost protégé was Congressman Lyndon Johnson, who would rise to become U.S. Senator, Vice-President and President in 1963 following the Kennedy assassination. Johnson publicly referred to Rayburn and praised him for his fatherly image and guidance. When the two leaders met in the hallways of the Capitol, the taller Johnson would often "bend over and kiss him on his bald head."

The rise of Hitler to power in Germany and his invasion of Poland in 1939 turned American attention away from domestic matters and towards the global threat of right-wing totalitarian regimes. While Americans looked on in distress as country after country in Europe and Asia fell to the Nazis, Rayburn provided Roosevelt with crucial support for the Lend Lease Act, which granted the president wide powers to aid the Allies, and for the extension of the draft for the U.S. military. Rayburn obtained his lifelong goal when he became Speaker of the House in 1939. In 1941 the Japanese attack on Pearl Harbor propelled the United States to a declaration of war. Speaker Rayburn mobilized the Congress to address the pressing needs of America's global

commitments in the war. "Without vision, nations perish," Rayburn said. He recognized that the United States had a pivotal role to play in international affairs during war and in peace.

Rayburn became the first member of Congress to be told about the Manhattan Project during World War II, the secret government plan to develop an atomic bomb in advance of Germany. He used his considerable political expertise to keep the enormously expensive project secret, concealing it even from the House Committee on Appropriations, until after the atomic bombs fell on Japan in August 1945 and World War II finally ended.

*We are not going to play politics – the country comes first*

After World War II the attention of the nation turned back to domestic issues, but in an era of prosperity, tensions focused less on economic regulation and more on social justice. In a time of racial segregation, the emerging civil rights movement proved a tangled problem for southern Democrats such as Sam Rayburn. His friend Cecil Dickson once observed, "Rayburn is always watching out for what he calls 'the real people'—those who come into life without many advantages and try to make a living and raise their families. The other people, well-born and with advantages, can get just about everything they want without government help, but 'the real people' need the protection of the government."

Yet Rayburn, along with the vast majority of Southern Democrats in this era, had supported segregation and resisted real civil rights for African Americans throughout most of his career. During the Civil Rights Movement of the 1950s Rayburn's position on this matter changed; as his Congressional career entered its final stage, Sam Rayburn came to extend his support for government protection for ordinary Americans to include those Americans who were people of color. Rayburn lent his support to the Civil Rights Act of 1957 that created the United States Commission on Civil Rights to investigate systematic discrimination, such as voting discrimination. The 1957 legislation set the stage for the pivotal civil rights acts of the 1960's when his friend and protégé Lyndon Johnson became President.

In October 1957, President Harry S. Truman traveled to Bonham to dedicate the Sam Rayburn Library, a white marble structure that continues to house Mr. Sam's books, papers and memorabilia. Rayburn continued to serve in Washington until his failing health forced him to return to Bonham, the place "where people know it when you're sick and where they care when you die," Rayburn said. Speaker Rayburn died from pancreatic cancer on Nov. 16, 1961 and was buried in Bonham. More than 30,000 people crowded into Bonham for Mr. Sam's funeral at the First Baptist Church. In attendance were three U.S. presidents—then-President John F. Kennedy, former President Harry Truman, former President Dwight Eisenhower—and then Vice President and future president Lyndon Johnson.

*I have always been a disciple of the doctrine that people are good folks, and I have great faith in them.*

The Sam Rayburn Library and Museum in Bonham, Texas, was completed in 1957 to house the books, papers, and political artifacts of Speaker Rayburn. The building served as Speaker Rayburn's district office from 1957 until 1961. The Dolph Briscoe Center for American History

of the University of Texas at Austin owns and operates the museum, which is a national and state historic landmark. The historic museum houses his office, an exact replica of the Speaker's office at the U.S. Capitol. The Rayburn Museum's mission is to preserve and exhibit photographs, cartoons, documents, paintings, sculptures, and artifacts documenting Rayburn's life and to educate the public about one of the most significant political figures in Texas and American history.

*Dr. Patrick Cox of Wimberley, Texas in an award-winning and acclaimed historian, author and conservationist. A sixth generation Texan, he resides in Wimberley, Texas and is President of Patrick Cox Consultants, LLC. His firm specializes in historical research, writing projects and oral histories for individuals, corporations, public agencies and nonprofit organizations.*

## Howard Worth Smith (1883-1976) – House Member From Virginia, Rules Committee Chairman

## Guest Essayist: Bruce Dierenfield

Howard W. Smith, a Virginia Democratic congressman, was one of America's most powerful politicians from the New Deal to the Great Society. A master obstructionist who chaired the House Rules Committee, he used his power to fight the liberal agendas of presidential administrations from Franklin D. Roosevelt to Lyndon B. Johnson. He was particularly concerned about the influence of Communists and wrote the Alien Registration Act of 1940, legislation that eventually paved the way for government targeting of radicals during the Cold War. He also saw Communism at the heart of the civil rights movement and attempted to kill the Civil Rights Act of 1964 by introducing an amendment to include women under its provisions. Ironically, this helped the measure pass and stands as an important part of Smith's legacy.

Howard Worth Smith was born on February 2, 1883, in rural Broad Run, Fauquier County. He attended public schools and graduated from Bethel Military Academy in Warrenton, Virginia. After graduating from the University of Virginia, he opened a law practice in Alexandria. During World War I (1914–1918), he served as assistant general counsel to the Federal Alien Property Custodian, which administered claims relating to the seizure of foreign-owned property. From 1918 until 1922, Smith was commonwealth's attorney for Alexandria, before becoming a corporation court judge. As his career in law and politics blossomed, "Judge" Smith also pursued interests in farming, dairying, and banking, as well as part ownership of the Alexandria Gazette. He married Lillian Proctor on November 4, 1913, and they had two children—Howard Jr. and Violett. After his first wife died in the worldwide flu pandemic of 1919, Smith married Ann Corcoran in 1923.

In 1930, Smith won election to the United States House of Representatives from Virginia's Eighth Congressional District and advocated states' rights, fiscal responsibility, and white supremacy. As the Great Depression pushed the federal government to embrace liberal solutions to the fiscal crisis, Smith found himself increasingly at odds with the direction of national policy.

His ire was particularly drawn toward Communists, whom he believed were behind the push for social welfare, organized labor, and the civil rights movement.

To fight subversion, Smith wrote the Alien Registration Act, or Smith Act, of 1940, which required aliens to register with the federal government and which made it a crime to advocate the overthrow of the federal government. It was this law that became a crucial weapon in targeting radicals during the Cold War, culminating in the U.S. Supreme Court decision Dennis v. United States (1951), which upheld the convictions of several Communist Party leaders. The law remains in effect.

At the same time, Smith tried to redress the balance of power between organized labor and business. He held hearings on the National Labor Relations Board in 1940, which was established under the pro-union Wagner Act of 1935. The well-publicized hearings' recommendations ultimately resulted in the Taft-Hartley Act of 1947, which outlawed compulsory unionism and secondary boycotts, among other provisions.

Smith used his considerable parliamentary skills to delay, sabotage, or kill legislation for government assistance and civil rights. As an obstructionist, he was an acknowledged master, leading the one-hundred-member conservative coalition of southern Democrats and northern Republicans and chairing the powerful House Rules Committee, which set the conditions under which bills could be considered. So vast was Smith's influence that U.S. president John F. Kennedy supported successful efforts to reduce the powers of the Rules Committee.

When the monumental Civil Rights Act of 1964 was proposed, the Rules Committee had been largely emasculated. Nevertheless, Smith used every trick at his disposal to try to sink the measure. When passage nevertheless seemed likely, Smith, at the urging of members of the National Woman's Party, volunteered to introduce an amendment to give women, especially white women, equal rights in employment. In this respect, Smith can be called a midwife of the modern feminist movement, although his impact can be considered ironic given the fact that some claim he added the word "sex" to the bill's language as a way to draw votes away from the proposed legislation, which he detested. Smith later insisted that he sincerely supported women's rights, but the Congressional Record notes that there was laughter when Smith introduced his amendment.

In a half-century of politics, Smith lost only two elections. When U.S. senator Carter Glass died in 1946, Smith ran unsuccessfully to replace him. But the Byrd Organization, the state's powerful Democratic political machine to which Smith belonged, threw its weight to a rival candidate, A. Willis Robertson. Smith's long career ended with his second defeat twenty years later. In a shocking upset, the eighty-three-year-old Smith lost his bid for party renomination to George C. Rawlings Jr., a little-known liberal challenger, who in turn lost the general election to Republican William L. Scott.

Smith, a longtime Episcopalian, died on October 3, 1976, and is buried near his ancestral home in Broad Run.

Time Line

February 2, 1883 – Howard W. Smith is born in Broad Run.

1930 – Howard W. Smith wins election to the U.S. House of Representatives, where he advocates for states' rights, fiscal responsibility, and white supremacy.

1940 – Howard W. Smith authors the Alien Registration Act, or Smith Act, which requires aliens to register with the federal government and makes it a crime to advocate the overthrow of the federal government.

1964 – Howard W. Smith introduces an amendment to the civil rights bill that gives women equal rights in employment. Though the measure is intended to slow the bill's passage, it is now considered a crucial part of the Civil Rights Act.

1966 – Howard W. Smith's long career ends when he loses his bid for party renomination to George C. Rawlings Jr., little-known liberal challenger, who in turn loses the general election.

October 3, 1976 – Howard W. Smith dies.

*Bruce Dierenfield is a professor of history at Canisius College in Buffalo, New York. Entry originally contributed to Encyclopedia Virginia. Reprinted with permission.*

Categories

Twentieth Century History (1901–2000) Civil Rights Movement Women's History

Jim Crow Era Representatives of Virginia (U.S.)

Further Reading

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# Lyndon Baines Johnson (LBJ) (1908-1973) 36th U.S. President, Vice President, House Member, Senate Minority and Majority Leader From Texas

## Guest Essayist: Daniel A. Cotter

Author Robert A. Caro has been at work for years writing his definitive biography of Lyndon Baines Johnson. In Volume 3, "Master of the Senate," Caro explores the twelve years that LBJ spent in the Senate and truly became the Master of that body, the youngest majority leader in history. But as the title of this installment notes, he held several other powerful positions in his long political career that Caro continues to chronicle.

### Early Life and Career

LBJ was born on August 27, 1908 in Texas, to Samuel Ealy Johnson Jr. and Rebekah Baines. He graduated from Johnson City High School, then in 1924 enrolled at Southwest Texas State Teachers College but left shortly after to move to Southern California. After working for a few years, he returned to Southwest (later became Texas State University) and obtained his degree while working, including teaching at a segregated school teaching Mexican-American children. He then began his career teaching public speaking.

### Politics

LBJ began his long career in politics in 1931, after Richard Kleberg won election as a United States Representative from Texas, naming LBJ his legislative secretary. It was the perfect job for the politically aspiring LBJ because Kleberg handed most of the day-to-day duties to LBJ. LBJ was a strong supporter of President Franklin Delano Roosevelt and FDR's "New Deal."

LBJ married "Lady Bird" in 1934. In 1935, he was named the head of the Texas National Youth Administration but resigned to run for Congress. From 1937 until 1949, LBJ served in the House of Representatives. In 1949, he began his tenure as a United States Senator, where he would serve until 1961, when he became President John F. Kennedy's Vice President. LBJ served as the Majority Whip from 1951 until 1953, Minority Leader from 1953 to 1955, and then Senate Majority Leader from 1955 until he left the Senate.

While in the House, he was appointed a Lieutenant Commander in the U.S. Naval Reserve and served active duty starting in December 1941, just after the attack on Pearl Harbor. LBJ earned the Silver Star, the American Campaign Medal, Asiatic-Pacific Campaign Medal, and the World War II Victory Medal. He was released from active duty on July 17, 1942.

The 1948 Senator race has in retrospect alleged to have been rigged by LBJ, and he received an assist in his efforts to be declared the winner by Abe Fortas, a friend who he would later reward with a Supreme Court seat.

As soon as LBJ arrived, he began his efforts to gain the respect and trust of senior Senators and gained favor early. He was appointed to the powerful Senate Armed Services Committee and soon created the Preparedness Investigating Subcommittee. When he became the Minority Leader in 1953, he was the youngest person to hold that position. He eliminated seniority as the criteria for committee appointments, giving him added power. LBJ as Majority Leader worked closely with President Dwight D. Eisenhower to pass his agenda.

According to Caro, LBJ was the most effective Senate Majority Leader that we have ever had in our history, understanding who each Senator was and what it would take for a vote on a piece of legislation. He would use his mastery demonstrated in the Senate to great advantage when he became President.

**Vice President and President**

The Kennedys knew they needed the votes of Southern Democrats if JFK was to be successful and LBJ became his Vice President. Due to a change in Texas law LBJ requested, he became not only Vice President but also was re-elected to the Senate. He withdrew from the Senate as required on inauguration.

LBJ sought to maintain the powers he held as Majority Leader, but the Democratic Caucus rejected his efforts. JFK kept him busy with various task forces and committees. On November 22, 1963, on *Air Force One*, he was sworn in as President after JFK was assassinated. President Johnson strongly pressed for passage of the Civil Rights Bill to honor JFK and his legacy. LBJ created the Warren Commission to investigate JFK's assassination.

LBJ knew how to get things through Congress and used various techniques and his ability to convince members of the Senate to vote to get the Civil Rights Act of 1964 and the Voting Rights Act of 1965 passed. LBJ pushed for his "Great Society" legislation and began a "War on Poverty" as well.

The LBJ presidential years were productive on the legislative front, with the Immigration and Nationality Act of 1965, the Elementary and Secondary Education Act of 1965, Head Start legislation, and many other pieces of legislation.

LBJ's presidency also saw steep escalations of our presence in Vietnam. On March 31, 1968, he surprised the nation when he announced, "I shall not seek, and I will not accept, the nomination of my party for another term as your President." A variety of reasons are given for LBJ's decision, including Vietnam, his failing health, and his nomination of Thurgood Marshall as the first African-American to sit on the Supreme Court of the United States.

**Conclusion**

LBJ died of a massive heart attack on January 22, 1973. LBJ is remembered for his significant legislative achievements both as a member of Congress over a long period of time and in his Vice President and President roles. That legacy is offset by his Vietnam War strategy and results. Few if any senators in the last fifty years have demonstrated the mastery that LBJ possessed.

*Dan Cotter is a partner at Latimer LeVay Fyock LLC and an adjunct professor at The John Marshall Law School, where he teaches SCOTUS Judicial Biographies. He is in the process of writing a book on the seventeen Chief Justices. He is also a past president of The Chicago Bar Association. The article contains his opinions and is not to be attributed to anyone else.*

## Michael Mansfield (1903-2001) House Member and Senate Majority Leader From Montana

## Guest Essayist: James Legee

Michael Joseph Mansfield served as both representative and senator from the state of Montana, and would go on to serve as United States Ambassador to Japan. Mansfield was born March 16, 1903 in New York though his life soon took a turn for the difficult. By the age of seven, Mike Mansfield's mother had passed away and he was sent to live with an aunt and uncle in Great Falls Montana. At fourteen he dropped out of school and joined the Navy during WWI. Mansfield would serve on Naval convoys until his real age was discovered and he was discharged. Mansfield would rejoin the military and serve with the Army and Marine Corps until 1922; while a Marine, Mansfield would serve in China and the Philippines which fostered a lifelong interest in the East.

After his military service, the would-be Senator Mansfield returned to Butte, Montana and found a job in a mine. Mansfield's wife Maureen Hayes encouraged him to pursue his education and by 1934 he had completed his high school, bachelor's and master of arts. Passionate about politics and history, he taught courses on Latin America and East Asia until 1942 when he won the house seat for MT-1 as a Democrat, formerly held by Jeanette Rankin (a committed pacifist and the sole vote against entry into World War Two).

As a member of the House, Mansfield sat on the Foreign Affairs Committee and quickly garnered a reputation as an expert on Asia. In 1944 he served on several congressional trips to China. His report to the House criticized Chang Kai Shek's nationalist movement as only tacitly democratic and in practice oppressive, while Mao's communist forces retained broader popular support. Despite what in hindsight seem to be accurate statements, they were magnified in the partisan politics of the 1950 Senate campaign, as well as in the context of the "loss" of China in May of that year to Mao's forces. He ran again in 1952 for Senate and was successful, despite the opposition of incumbent Republican Zales Ecton and the campaigning of the infamous Senator Joseph McCarthy.

Remembered today for his staunch opposition to the Vietnam war, Mansfield, alongside fellow Catholic, and fellow junior Senator John F. Kennedy of Massachusetts, aided in the ascension of

Ngo Dinh Diem. A devout Catholic, Diem resided at a seminary in New Jersey as a guest of Cardinal Spellman; while he was an efficient bureaucrat in Vietnam, he had a deep hatred for communism and resentment of French colonial rule which led to exile in America. Supreme Court Justice William O. Douglas organized the 1953 meeting between Kennedy, Mansfield and Diem which was deeply influential for the two Senators. Douglas assured Kennedy and Mansfield that Diem was wildly popular in Vietnam, while Diem convinced them that the French would falter in their struggle against Ho Chi Minh's guerillas.

The next year brought Diem's predictions to life when the French garrison at Dien Bien Phu was besieged and destroyed by General Vo Nguyen Giap. Mansfield, among a handful of other senators, recommended Diem to Eisenhower's Secretary of State John Foster Dulles, as the solution to the impending power vacuum in South Vietnam, as France worked to negotiate with Minh and the communists.

Diem's tenure as Prime Minister was quickly challenged in 1956, when a conflict between his government and several sects (some criminal, some backed by the French) broke out. A memo from Kenneth T. Young a state department advisor on Vietnam to Walter S. Robertson Undersecretary of State (included in the Pentagon Papers Pentagon Papers V B 3c, 946 ) notes Mansfield "would have us stop all aid to Viet-Nam except of a humanitarian nature…" should State withdraw its support of Diem.

Outside of Asia, Mansfield was a strident critic of abuses and failures by the intelligence community. He grilled CIA director Allen Dulles after their failure to anticipate the Hungarian uprising, as well as British and French involvement in the Suez Canal crisis in 1956. Mansfield went so far as to call for a joint congressional committee to investigate and oversee the CIA. Senate Majority Leader Lyndon B. Johnson put this plan on ice when he appointed Mansfield Assistant Majority Leader.

In 1961, with Johnson as Vice President, Mansfield became Senate Majority Leader. To this day, Mansfield is the longest serving majority leader. A far different man from the browbeating Johnson, Mansfield brought the demeanor of a scholar to the Senate, where despite strong ideological convictions, sought a collegial and professional environment. Mansfield sought a sharp break from the way business had been done under Johnson, though he'd go on to shepherd and support President Johnson's great society initiatives.

Conditions under Diem's leadership in Vietnam deteriorated. In 1962 President Kennedy sent Mansfield (as well as a morose Vice President Johnson) to Vietnam in an attempt to understand conditions on the ground. Mansfield returned with a damning report on the progress of the South Vietnamese government and efficacy of American foreign policy there. While he praised his old friend Ngo Dinh Diem as "a dedicated, sincere, hardworking, incorruptible and patriotic leader" he noted that "Viet Nam, outside the cities, is still an insecure place which is run at least at night largely by the Vietcong. The government in Saigon is still seeking acceptance by the ordinary people in large areas of the countryside. Out of fear or indifference or hostility the peasants still withhold acquiescence, let alone approval of that government. In short, it would be well to face the fact that we are once again at the beginning of the beginning." Mansfield concluded his 1962 report with this sobering question: "…how much are we ourselves prepared to put into Southeast

Asia and for how long in order to serve such interests as we may have in that region? Before we can answer this question, we must reassess our interests, using the words 'vital' or 'essential' with the greatest realism and restraint in the reassessment."

Kennedy continued to expand America's role in South Vietnam, despite little to show for the billions already spent. Mansfield's friend, President Diem was assassinated in a military coup on November 2, 1963. His friend, President John F. Kennedy would fall to an assassin's bullet a mere 20 days later.

Mansfield increased in his skepticism of American intervention in Vietnam to outright opposition. He offered controversial Amendments to Military Authorization act in the 1970s which limited how research funds were spent. In 1976 he retired and in 1977 was appointed by President Carter to serve as Ambassador to Japan. He would remain in the role until 1988, and in 1989 was awarded the Presidential Medal of Freedom by Ronald Reagan. The Senator passed away on October 5, 2001 and is interred with his wife at Arlington National Cemetery.

*James Legee, Visiting Lecturer, Framingham State University Department of Political Science*

## Robert Taft (1889-1953) – State Representative, U.S. Senator From Ohio; Son of President William Howard Taft

## Guest Essayist: Tony Williams

Leadership styles can often impact how political leaders and statesmen are remembered. FDR and Reagan were excellent communicators and exhibited great charm, Harry Truman was a man of the people and tough, JFK wrapped himself up in the myth of Camelot, Lyndon Johnson was a political operator and a master of the Senate.

Senator Robert A. Taft had none of these characteristics and is largely forgotten today. He seemed distant because he was often a master of facts and statistics rather than a masterful politician. As a result, he could seem cold and aloof. Yet, he was an important political figure of the mid-twentieth century whose career and political philosophy helped define the Republican Party of that era.

Taft was a scion of a leading Cincinnati family and the son of William Howard Taft who served as a Governor of the Philippines, Secretary of War, President, and later Chief Justice of the Supreme Court. They established a minor political dynasty, though not quite that of the Roosevelts, Kennedys, or Bushes.

Taft was raised in a life of affluence in Cincinnati and around the country and world. He may have inherited many opportunities but worked hard to succeed in becoming the valedictorian at Yale University and Harvard Law School. He became a corporate lawyer, married, and engaged in local philanthropic activities. He never tried to win over friends and political allies with a congenial personality but was more interested in a good character and strong work ethic.

World War I was a defining event in Taft's life and his political philosophy. He opposed American intervention but wanted to defend American neutral rights and national security. He served with Republican Herbert Hoover in the Food Administration during the war and the American Relief Administration in Europe helping to feed the shattered and starving populations there after the war. During his time in Europe, he developed an antipathy to becoming involved in European affairs and hated both the collective ideologies of bolshevism and fascism that took hold in Europe. Above all, he opposed the unlimited global commitment that seemed to come with the Treaty of Versailles and League of Nations. He developed a lifelong aversion to the crusading foreign policy spirit of Wilsonianism to "make the world safe for democracy."

Despite being a relative introvert, Taft ran for public office out of a sense of family and personal duty to serve the public. He served in the Ohio state legislature from 1920 to 1926, where he was interested in tax reform and resisted the influence of the Ku Klux Klan.

The Great Depression that gripped the nation and the New Deal that FDR conceived to battle the economic crisis continued to shape Taft's thinking and serving in public office. He opposed the New Deal political philosophy that expanded the federal welfare state and powers of executive agencies. He thought that the New Deal was substituting "an autocracy of government for a government of law." He feared that the growth of government would negatively impinge upon personal liberty, upset the balance of federalism, and create a massive state with huge budget deficits.

Nevertheless, Taft was a midwestern conservative Republican who was often equally suspicious of Wall Street as he was of Washington, D.C. While he opposed massive regulatory intrusion in the private market and confiscatory taxes, he fought against monopoly and was not a believer in laissez-faire. He supported reasonable regulation, higher taxes (and lower spending) to balance budgets, and a basic social safety net.

Taft was elected to the U.S. Senate in 1938, and quickly established himself as a hardworking, if somewhat dull and lackluster, member. Characteristically, he studied hard to become an expert on the issues rather than spending time making backroom deals and pressing the flesh. He served on several committees including the Education and Labor Committee.

As tyrannies marched their war machines across Asia, Africa, and Europe during the 1930s, the New Deal gave way to foreign policy issues. Unsurprisingly, Taft adopted a thoughtful and relatively flexible isolationist stance. He did not want to get involved in the coming war, but supported preparedness to defend American shores. He supported selling other countries arms so that they could defend themselves without American intervention. He feared that the wily FDR was leading the country into war and opposed the peacetime draft because of its impact on individual liberty.

Taft supported American entry into World War II after Pearl Harbor and the German declaration of war. During the war, he was just as concerned about the rise of the warfare state with its budget deficits, wage and price controls, huge government spending, and threats to civil liberties as he was in peacetime with the New Deal welfare state. Taft consistently defended the principles of limited government to protect individual liberty in a democracy.

During the war, Senator Taft had presidential aspirations but always seemed to lack the political skills necessary to win the Republican nomination or attain the highest office. Moreover, FDR was simply too popular as commander-in-chief even if Republicans and conservative Southern Democrats began chipping away at the New Deal electoral coalition.

Taft entered the postwar world with his persistent doubts about liberal internationalism and government programs at home. Taft opposed the United Nations much as he had the League of Nations and was a voice against American commitments abroad during the early Cold War. He did not want to impose democracy on any nation or tell them how to govern their foreign policy decisions. Indeed, he was a strong anti-imperialist who warned against America putting "Our fingers…in every pie" with unlimited global interventions.

In 1947, Taft was the co-sponsor of the Taft-Hartley Act that is synonymous with his historical reputation. Contrary to historical opinion, he was not antilabor and even supported the right to strike. Even President Truman called for controls on strikes and federal power to intervene during a wave of postwar strikes across the nation. Taft's expertly guided his bill through Congress. It banned the closed shop in which workers were forced to join the union as a condition of employment, banned secondary boycotts, and allowed both employers and unions to seek federal injunctions. Truman vetoed the bill, but the Republicans controlled both houses of Congress after the 1946 elections, and overrode the veto.

After his reelection for a third term in the Senate, Taft reached the height of his power as he nearly won the Republican presidential nomination in 1952 and was elected Senate majority leader. True to his principles, he denounced Joseph McCarthy's anti-Communist smear tactics and American intervention to save the French war effort in Vietnam. However, in 1953, he discovered he had cancer and was dead within the year.

Taft was known as "Mr. Republican" because of his allegiance to limited government at home and a non-interventionist foreign policy that represented mainstream Republican thinking during the mid-twentieth century. While not the most gregarious politician, he was a well-respected, diligent statesman who dedicated his life to an ideal of public service.

*Tony Williams is a Constituting America Fellow and a Senior Teaching Fellow at the Bill of Rights Institute. He is the author of six books including the newly-published Hamilton: An American Biography.*

## Thomas Phillip, Jr. (Tip) O'Neill (1912-1994) – House Speaker, Democratic Whip and Majority Leader From Massachusetts

## Guest Essayist: Daniel A. Cotter

As noted in the Daniel Patrick Moynihan column in this series, the press and media are full of reports of extreme partisanship and acrimony in Congress and with the White House in recent times. But not that long ago, the parties at least appeared to work together to solve national

problems regardless of party affiliations. Like Moynihan, Thomas Phillip (Tip) O'Neill was one of those who was able to work with the other side at least when it came to foreign affairs.

**Early Life and Career**

Tip was born on December 9, 1912, to Thomas Phillip O'Neill, Sr. and Rose Ann (nee Tolan), in North Cambridge, Massachusetts. His mom died when he was nine months old and his father was a bricklayer who became Superintendent of Sewers. Tip's nickname came from a Canadian baseball player whose last name was O'Neill and whose nickname was "Tip." Tip graduated from Boston College in 1936. Tip ran for a seat on the Cambridge City council as a college senior, the only election he ever lost. It was from that campaign that he learned the lesson that would become his most famous quote- "All politics is local."

Fresh from Boston College, Tip ran for and won election to the Massachusetts House of Representatives. Tip became the Minority Leader of the Massachusetts House from 1947 to 1949 and was Speaker of the Massachusetts House from 1949 to 1953, becoming the first Democratic Speaker in Massachusetts' history.

**National Politics**

Tip ran for the United States House of Representatives vacated by John F. Kennedy in 1952 when Kennedy ran for the Senate. He won and was re-elected 16 more times. During his second term in the House, he was selected to the House Rules Committee. Tip bucked President Lyndon B. Johnson's support of the Vietnam War, coming out opposed to the United States intervention.

Tip was elected House Majority Whip in 1971 and, in 1973, was elected House Majority Leader. In that role, he called for the impeachment of President Richard M. Nixon. A scandal in the House caused the then-Speaker, Carl Albert, to retire, and Tip was elected Speaker in 1977. He would hold that position for the next ten years, until he retired from Congress on January 3, 1987.

Tip was a proponent of universal health care and tackling jobs and poverty. When Jimmy Carter became President in 1977, expectations were that there would be much accomplished. However, while President Carter was focused on reducing government spending, Tip had other ideas as Speaker, including rewarding party members. When Ronald Reagan became president, Tip and the new president collapsed, and the Senate had shifted to a Republican majority. Tip called President Reagan "the most ignorant man who had ever occupied the White House" and was otherwise very critical of President Reagan. Despite the public vitriol, the two were always on friendly terms. In one interview, President Reagan mentioned that he had seen Tip make unflattering comments about Reagan. Reagan called Tip to ask why the attacks, that he thought these two were friends. Tip is reported to have replied, "Buddy, it is just politics. After 6 p.m. we are friends." After a visit between the two early in Reagan's first term, the two were able to navigate social security reform and a tax reform plan and other legislation.

When it came to foreign affairs and our involvement in the Soviet-Afghan war, Tip gave his approval and through his House positions ensured that billions went to the Mujahideen. When

Reagan was shot, Secretary of State Alexander Haig asserted he was in charge, O'Neill was the next in line after Vice President George H.W. Bush.

Tip was also very involved in the peace efforts in Northern Ireland. He and several other congressional leaders helped to achieve peace between Northern Ireland and England. Tip died on January 5, 1994, of cardiac arrest. His wife of many years, Mildred "Millie" Anne Miller, outlived him by almost a decade. President Bill Clinton said of Tip at his death:

> Tip O'Neill was the nation's most prominent, powerful and loyal champion of working people…

**Conclusion**

While Tip and Reagan had different political views and approaches, they showed that great debates and the efforts of compromise sometimes can result in good end results for the nation. Tip is the third longest serving Speaker in United States House history and was a strong "New Deal Democrat" who believed strongly that through public service he truly could positively affect the lives of working people.

*Dan Cotter is a partner at Latimer LeVay Fyock LLC and an adjunct professor at The John Marshall Law School, where he teaches SCOTUS Judicial Biographies. He is in the process of writing a book on the seventeen Chief Justices. He is also a past president of The Chicago Bar Association. The article contains his opinions and is not to be attributed to anyone else.*

## Henry J. Hyde (1924-2007) (R-Il) – House Majority Leader, Judiciary Committee Chairman

## Guest Essayist: Gary R. Porter

**A Matter of Conscience: Henry J. Hyde, Congressman**

> One of the great errors of modern politics is our foolish attempt to separate our private consciences from our public acts, and it cannot be done. At the end of the 20th century, is the crowning achievement of our democracy to treat the weak, the powerless, the unwanted as things? To be disposed of? If so, we have not elevated justice; we have disgraced it. – Congressman Henry Hyde, speaking on partial-birth abortion.
>
> The right of conscience and private judgement is unalienable and it is truly the interest of all mankind to unite themselves into one body for the liberty, free exercise, and unmolested enjoyment of this right. – Ezra Stiles (1727-1795).
>
> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience by in any manner, or on any pretext infringed. – James Madison, original draft of the First Amendment.

James Madison failed at his task of securing an explicit right of conscience in the Constitution. Nevertheless, it is comforting today to encounter men and women of conscience. Such was Henry J. Hyde.

Henry Hyde (April 18, 1924 – November 29, 2007) was an American politician best known for sponsoring an amendment, now bearing his name,[1] which outlawed the use of federal funds in performing abortions. Over the years, Congress altered the Hyde Amendment several times, but repeatedly passed it nevertheless.

**Although the Hyde Amendment was immediately challenged in the courts, the Supreme Court upheld its constitutionality** in Harris v. McRae. The Court stated:

> The funding restrictions of the Hyde Amendment do not impinge on the "liberty" protected by the Due Process Clause of the Fifth Amendment held in *Roe v. Wade*, 410 U.S. 113, 168, to include the freedom of a woman to decide whether to terminate a pregnancy. . . .
>
> Regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, supra, it does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.

On July 21, 2016, the Democratic Party of the U.S. issued its 2016 platform, containing, for the first time, an explicit call to repeal the Hyde Amendment.[2] Seemingly in response, six months later on January 24, 2017, the House of Representatives passed H.R. 7, which, according to the press office of Speaker Paul Ryan, "makes the Hyde amendment permanent."

For his steadfast opposition to abortion, after announcing his retirement from Congress in 2006, Representative Hyde was named a Papal Knight of the Order of St. Gregory the Great by Pope Benedict XVI. After leaving office the following year, he received the Presidential Medal of Freedom, the nation's highest civilian honor from President George W. Bush. Hyde could not attend the award ceremony in person as he remained hospitalized after open-heart surgery, complications of which shortly led to his death at age 83. The Presidential Medal of Freedom citation read:

> A veteran, a lawyer, and a public servant, Henry Hyde has served his country with honor and dedication. During his 32-year career in the House of Representatives, he was a powerful defender of life, a leading advocate for a strong national defense, and an unwavering voice for liberty, democracy, and free enterprise around the world. A true gentleman of the House, he advanced his principles without rancor and earned the respect of friends and adversaries alike. The United States honors Henry Hyde for his distinguished record of service to America.[3]

"Veteran" referred to Hyde's service in the U.S. Navy during WWII and his continued service in the Naval Reserve from 1946 to 1968, ending in command of a U.S. Naval Intelligence Reserve Unit in Chicago and retirement at the rank of Commander (O-5).

As a public servant, Hyde served first in the Illinois House of Representatives (1967-1974) including a stint as Majority Leader from 1971 to 1972, and then represented Illinois' 6th District in Congress for the next 32 years, from 1975 to 2007.

Beyond the 1976 Hyde Amendment, Hyde is perhaps best known for his efforts in leading the impeachment of President Bill Clinton in 1998. When the Lewinsky Scandal[4] first became public, Hyde apparently did not take calls to impeach Clinton very seriously; he considered the issue to one of be sexual misconduct and not a concern of Congress.[5] That changed after Clinton boldly lied to the House Judiciary Committee, stating that he had not had sexual relations with "Ms. Lewinsky" — with Hyde sitting before him as chairman of the committee! Hyde skillfully led House "managers" in successfully passing an impeachment resolution and sending the case to the Senate for trial where, despite Hyde's efforts as chief prosecutor, Clinton was acquitted of perjury and obstruction of justice charges. Hyde ended his closing argument in the Senate trial by stating:

> A failure to convict will make the statement that lying under oath, while unpleasant and to be avoided, is not all that serious…We have reduced lying under oath to a breach of etiquette, but only if you are the President…And now let us all take our place in history on the side of honor, and, oh, yes, let right be done.

Once more, a call to conscience.

Over the years, Hyde also waged vigorous battles against flag-burning, doctor-assisted suicide, and same-sex marriage. Speaking out about partial-birth abortion, Hyde eloquently stated:

> This is not a debate about sectarian religious doctrine or about policy options. This is a debate about our understanding of human dignity, what does it mean to be human? Our moment in history is marked by a mortal conflict between a culture of death and a culture of life, and today, here and now, we must choose sides.

A graduate of Georgetown University, Hyde later earned his law degree from Loyola University Chicago, a Jesuit Catholic University. In 1947, Hyde married the former Jeanne Simpson. Together they had four children, who brought them four grandchildren. Jeanne died in 1992 and Henry soon married the former Judy Wolverton. No further children issued.

When Hyde died on November 29, 2007, Crisis Magazine began a collection of online condolences. They paint a picture of a remarkable patriot:

*"… one of the rarest, most accomplished, and most distinguished Members of Congress ever to serve."*

*"… one of the great leaders of America's modern age."*

*"…the most eloquent defender of the right to life who ever served in the United States Congress."*

*"…the greatest Catholic statesman of our generation."*

*"His courage should be an example for us all."*[6]

Perhaps this short bio should end, as it began, with the words of Congressman Henry Hyde:

> "When the time comes as it surely will, when we face that awesome moment, the final judgment, I've often thought, as Fulton Sheen wrote, that it is a terrible moment of loneliness. You have no advocates, you are there alone standing before God – and a terror will rip through your soul like nothing you can imagine. But I really think that those in the pro-life movement will not be alone. I think there will be a chorus of voices that have never been heard in this world but are heard beautifully and clearly in the next world – and they will plead for everyone who has been in this movement. They will say to God, 'Spare him because he loved us,' – and God will look at you and say not, 'Did you succeed?' but 'Did you try?'" – Congressman Henry Hyde, speech on abortion.

Amen.

*Gary Porter is Executive Director of the Constitution Leadership Initiative (CLI), a project to promote a better understanding of the U.S. Constitution by the American people. CLI provides seminars on the Constitution, including one for young people utilizing "Our Constitution Rocks" as the text. Gary presents talks on various Constitutional topics, writes a weekly essay: Constitutional Corner which is published on multiple websites, and hosts a weekly radio show: "We the People, the Constitution Matters" on WFYL AM1140. Gary has also begun performing reenactments of James Madison and speaking with public and private school students about Madison's role in the creation of the Bill of Rights and Constitution. Gary can be reached at gary@constitutionleadership.org, on Facebook or Twitter (@constitutionled).*

[1] This "Hyde Amendment" should not be confused with the Hyde Amendment of 1997, which dealt with an entirely different matter.
[2] http://www.presidency.ucsb.edu/papers_pdf/117717.pdf
[3] https://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071105-7.html
[4] https://en.wikipedia.org/wiki/Clinton%E2%80%93Lewinsky_scandal
[5] Hyde had himself confessed to an adulterous affair that had taken place in the early 1960s before he entered public life, calling it a "youthful indiscretion[]."
[6] https://www.crisismagazine.com/2007/remembering-henry-hyde-2

# Daniel Patrick Moynihan (1927-2003) – Senate Member From New York, Democratic Party Leader

## Guest Essayist: Daniel A. Cotter

The press and media are full of reports of extreme partisanship and acrimony in Congress and with the White House in recent times. But not that long ago, the parties at least appeared to work together to solve national problems regardless of party affiliations. By no means did they agree on everything or make a president with different political party affiliation struggle to achieve his agenda easy when the Congressional power was in the other party's hands. But when Daniel Patrick Moynihan retired in 2001, we lost one of those able to navigate across party lines.

### Early Life and Career

Moynihan was born on March 16, 1927 in Tulsa, Oklahoma to John Henry, who was a reporter for a local paper in Tulsa, and Margaret Ann (nee Phipps). When he was six, the family moved to Hell's Kitchen in New York City. Moynihan worked an odd assortment of jobs as a child and graduated from Benjamin Franklin High School in East Harlem. After a short stint as a longshoreman, Moynihan attended the City College of New York, which provided free education for New York residents. After one year at the city school, he joined the United States Navy in 1944 and then enrolled at Tufts University, where he received a degree in naval science in 1946.

After his military service, Moynihan obtained a second undergraduate degree from Tufts in 1948 and then received an M.A. from its Fletcher School of Law and Diplomacy. Moynihan attended the London School of Economics from 1950 to 1953 as a Fulbright fellow. Moynihan became politically active in the 1950s, serving in various capacities for New York Governor Averell Harriman. In 1960, Moynihan was a Democratic National Convention delegate.

### National Politics

Shortly after the 1960 DNC Convention, Moynihan began to serve in the national government, something that he would continue for the next fifty years. He served the Kennedy administration as special then executive assistant to the Department of Labor from 1961 to 1963, and then was appointed the Assistant Secretary of Labor for Policy, Planning and Research from 1963 to 1965. He worked primarily during that time on what became known as the "War on Poverty." In this role, Moynihan issued a report, *The Negro Family: The Case for National Action*, known also as "The Moynihan Report," that was attacked by the left and by the right. Moynihan would later receive some criticism when in 1994, after the Republicans swept Congress, when he noted with respect to the welfare system, "The Republicans are saying we have a hell of a problem, and we do."

Moynihan left the Johnson administration in 1965, returning to academics. In January 1969, Moynihan became Assistant to the President for Domestic Policy and executive secretary of the Council on Urban Affairs under President Richard Nixon. From late 1969 until the end of 1970, Moynihan served as Counselor to the President. In 1973, Moynihan became Ambassador to

India and, in June 1975, he became United States Ambassador to the United Nations. The United Nations post was by President Gerald Ford, another Republican.

**Senator Moynihan**

In 1976, Moynihan was elected to the United States Senate, and would serve for the next twenty-four years. As a Senator, Moynihan supported the ban on partial-birth abortions, and opposed President Bill Clinton's universal health care coverage push. He also opposed NAFTA and the flat tax. He also voted against the Defense of Marriage Act and the Communications Decency Act.

Despite his working for previous Republican administrations, Moynihan was not a supporter of President Ronald Reagan's hawkish Cold War policies. However, during the time that Moynihan served in the Senate, the Democrats controlled the Senate for much of that period. Despite that party difference, Moynihan was someone who could effectively work across the aisle and work with Republican presidents and congressional members to address various issues of national import.

In a 2010 *Daily Beast* column (available at https://www.thedailybeast.com/daniel-patrick-moynihan-letters-we-need-more-like-him), John Avlon wrote:

> The Moynihan that emerges in these letters is engaging and unfailingly civil, armed with statistics and a sweeping view of history. He could be surprisingly thin-skinned—unlike many politicians, his was a sensitive soul. But it is clear that his counsel was sought by presidents because he brought more light than heat to the conversation. He thought with a sense of historic perspective and he always felt the possibility as well as the limits of government action. He believed that government could improve the lives of its citizens, but he recognized that government overreach could create unintended consequences and provoke political backlash.

**Conclusion**

Moynihan is one of a dying breed in Washington- someone who effectively could interact with members and presidents from the opposing political party and who as Avlon notes tried to bring the long perspective to various issues. He was not always right and could take umbrage at those who did not agree with him, but he tried.

*Dan Cotter is a partner at Latimer LeVay Fyock LLC and an adjunct professor at The John Marshall Law School, where he teaches SCOTUS Judicial Biographies. He is in the process of writing a book on the seventeen Chief Justices. He is also a past president of The Chicago Bar Association. The article contains his opinions and is not to be attributed to anyone else.*

## Barbara Jordan (1936-1996) (D-TX) – Congresswoman and Judiciary Committee Member

## Guest Essayist: Patrick Cox

> My faith in the Constitution is whole, it is complete, it is total. I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction of the Constitution. It is reason and not passion which must guide our deliberations, guide our debate, and guide our decision. – Congresswoman Barbara Jordan (D-TX) speaking during the House Judiciary Committee impeachment hearings on President Richard Nixon, July 25, 1974.

Barbara Jordan is recognized as one of the most eloquent, powerful speakers and a spirited advocate for democratic principles and humanitarian ideals in the long history of the U.S. House of Representatives. Among the first African American women elected to Congress and the first black Congresswoman ever from Texas, Jordan became a forceful presence whose influence extended well beyond our nation's capital. Her fame and prestige rose as people throughout the nation heard her speak for the first time during the nationally televised impeachment investigation of President Richard Nixon in 1974.

> People always want you to be born where you are. They want you to have leaped from the womb a public figure. It just doesn't go that way. I am the composite of my experience and all the people who had something to do with it. – Barbara Jordan

Barbara Charline Jordan was born in Houston, Texas, on February 21, 1936. She was one of three daughters of Benjamin M. Jordan and Arlyne Patten Jordan. A graduate of Tuskegee Institute, Benjamin Jordan became the pastor of Good Hope Missionary Baptist Church. Arlyne Jordan was an accomplished public speaker. Barbara Jordan attended Houston public schools during the era of Jim Crow segregation. She graduated from the all black Phyllis Wheatley High School in 1952. She obtained her B.A. from Texas Southern University in 1956 and her law degree from Boston University in 1959. She then moved back to Houston and began her law practice in 1960.

Growing up in Houston during the era of segregation, Jordan lived with her family in the Fifth Ward near downtown. The area at that time was termed a "Negro district." Jordan recalled that her maternal grandfather John Ed Patten provided important lessons and education beyond what she learned in the classroom. Patten read to the young Barbara by kerosene light while sitting in an old stuffed chair in his simple frame house. Readings included verses from the King James Bible and Webster's Pronouncing Dictionary. Grandfather Patten was her idol as a child and an inspiration for her to pursue her education and to break many barriers during her adult years. From her childhood through the remainder of her life, Jordan followed her grandfather's advice.

Barbara Jordan ran two unsuccessful races in the Democratic Primary in the early 1960's for the Texas House of Representatives in her home district in Houston. In 1966 she ran for the Texas Senate following a court ordered redistricting case that created a Houston senate district

composed of mainly minority voters. Jordan's gamble succeeded. She won the Senate contest and became the first African–American state senator in the nation since 1883. She was the first black woman ever elected to the Texas Senate. On March 28, 1972, Jordan's peers elected her president *pro tempore* of the Texas Senate, making her the first black woman in America to preside over a legislative body. One of Jordan's responsibilities as president *pro tempore* was to serve as acting governor when the governor and lieutenant governor were out of the state. When Jordan filled that largely ceremonial role on June 10, 1972, she became the first black chief executive in the nation.

As a State Senator, Jordan gained a reputation for her ability to befriend officials regardless of their political beliefs and party. She was known for her work ethic, to be approachable and to compromise on legislation, and socialize with the "good old boys" of the Texas Legislature. East Texas Senator Charles Wilson, who would later become famous after he was elected to Congress, invited Jordan to his annual quail hunt – the first woman elected official to receive an invitation into the traditional male bastion of hunting. She was admired for her oratory, knowledge of the law, and her sense of fairness and compassion. All of these were traits that would carry her forward in her political career in the U.S. House of Representatives. Some critics believed she was too friendly with established politicians and too eager to compromise. Nevertheless, she continued on her path that would lead her from Austin, Texas to Washington D.C.

Following the congressional redistricting plan after the 1970 census, the state legislature created a new congressional district in downtown Houston. The district contained many of the voting precincts in Senator Jordan's district, thus making her the likely candidate for the new congressional seat. However, during the 1971 legislative session, Senator Jordan served as Vice Chair of the Redistricting Committee. Critics charged, including incumbent African American legislators, that she had acted out of self-interest and neglected efforts to create more state legislative seats where minorities would have a chance to compete and win elections. Acknowledging this criticism, Jordan filed to run in the Democratic Primary for the Eleventh Congressional District. During a campaign fund raising dinner for Jordan, former President Lyndon B. Johnson attended the Houston event. Johnson told the audience he admired Jordan as a "woman of keen intellect and unusual legislative ability."

> She is a symbol proving that We Can Overcome – President Lyndon B. Johnson on Barbara Jordan

Jordan won the congressional campaign and easily defeated her Republican opponent in the 1972 election. She became the first African American woman from the American South to be elected as a member of the U.S. House of Representatives. She also won in the same election where President Richard Nixon overwhelmed his opponent, Democratic Senator George McGovern, to win reelection to a second term. The paths of Congressman Jordan and President Nixon would soon cross with dramatic consequences.

Taking office in 1973 as a freshman representative, Jordan worked to establish relationships with older, more senior members of Congress. With assistance from her friends and from former President Johnson, she obtained a highly coveted position on the House Judiciary

Committee. The timing was important for in the coming year the committee would take on issues relating to illegal actions conducted by the Nixon Administration that became known as the Watergate Scandal. The 1972 break-in at the Democratic National Headquarters offices in the Watergate Building resulted in a criminal investigation by special prosecutor Leon Jaworski. The trail of evidence led to the White House and President Nixon along with attempts to conceal the act and obstruct justice. As the case moved forward in the federal courts, the House Judiciary Committee began debate on whether President Nixon could be impeached for "high crimes and misdemeanors" as stated in the U.S. Constitution.

> "'We the people' – is a very eloquent beginning. But when the constitution of the United States was completed . . . I was not included." – Barbara Jordan at the 1974 House Judiciary Impeachment Hearing on President Richard Nixon.

After hearing the impeachment case behind closed doors for several months in 1974, the House Judiciary Committee began its debate in open session. Judiciary Chairman Peter Rodino provided each of the 38 members of the committee a fifteen-minute presentation on the impeachment investigation. The statements received extensive coverage by television and the print media. Jordan did not prepare her remarks until a few hours before her timed appearance.

On the evening of July 25, 1974, Jordan delivered her remarks during prime time on live television. Her statement would make her a household name throughout the nation. Her discussion centered on the Constitution, the responsibilities of the Congress, and the rule of law. The tone of her voice, the power of her rationale, and her ability to explain the Constitution impressed people throughout the country. She had expressed her feelings in words that people could easily understand on a very difficult and controversial topic. "Thank you Barbara for explaining the Constitution to us," was among many of the thousands of congratulatory messages that poured into her Congressional office.

The House Judiciary Committee did not vote on the articles of impeachment as President Nixon announced his resignation a few weeks later on August 8, 1974. For her remaining years in Congress in the 1970's, Barbara Jordan worked on legislation to support civil and voting rights for all Americans and to end discrimination in the workplace and throughout the nation. In a controversial move, she defended former Nixon Treasury Secretary and Texas Governor John Connally in the bribery case known as the "milk fund scandal." Many people criticized her for being a character witness for Connally, but Jordan replied, "I wouldn't have done it if I didn't feel it was the right thing to do."

At the 1976 Democratic National Convention, Jordan became the first African American woman to provide a keynote address at a national political convention. During the nation's bicentennial, she called for better equality and more opportunity for all Americans. "We cannot improve on the system of government, handed down to us by the founders of the Republic, but we can find new ways to implement that system and to realize our destiny," she said in her highly acclaimed speech. She reminded Americans in the prime-time speech that her appearance was "one additional bit of evidence that the American Dream need not be deferred." Although she was considered a strong contender for appointment to a national office by President Carter in 1977, she decided to stay in Congress. She delivered the 1977 commencement speech at Harvard

University. But she did not stay long as she announced after three terms in Congress that she would not run for reelection in 1978.

> Ethical behavior means being honest, telling the truth, and doing what you said you would do. – Barbara Jordan interview in 1995 shortly before her death.

From 1979 until her death at age 59 in 1996, Jordan held the Lyndon B. Johnson Centennial Chair in National Policy at the Lyndon B. Johnson School of Public Affairs at the University of Texas at Austin. As a professor, her classes were very popular and she had an excellent reputation as an educator. In fact, "Teacher" is part of her epitaph. Her long list of awards and accolades is as impressive as her career. In 1991 Texas Governor Ann Richards appointed her to the newly established ethics commission. President Bill Clinton presented the Presidential Medal of Freedom to Jordan in 1994. *Texas Monthly* magazine in 1999 named her the "Role Model of the Century." She received thirty-one honorary doctorates and many national awards that include: Time Magazine's "Woman of the Year," the Distinguished Alumnus Award of the American Association of State Colleges and Universities, and selection to the National Women's Hall of Fame.

Jordan's health deteriorated in the 1990's and she was confined to a wheel chair due to her long fight with multiple sclerosis. Although she reduced her public appearances, Jordan remained in great demand. Jordan passed away at her Austin home on January 17, 1996, a month shy of her sixtieth birthday from a combination of pneumonia, leukemia and multiple sclerosis.

Barbara Jordan was a humanitarian and believer in democracy. She provided many firsts and a legacy of service, integrity, honesty, grace and a vision of a better America. At her memorial service at the University of Texas on January 28, 1996, author and commentator Bill Moyers said, "She heard the voice of the people, and she gave the people a voice."

Author's Note –

As a young student in Houston in the 1960's, my first involvement in a political campaign was to serve as a volunteer on Barbara Jordan's successful Texas Senate campaign in 1966. I have always enjoyed saying that she won her first political race in spite of my assistance. Years later, after she had retired from politics and was a Distinguished Professor at the Lyndon B. Johnson School of Public Affairs in Austin, she very graciously volunteered to serve as a member on my history dissertation committee at the University of Texas at Austin. Following her death in 1996, I joined in the university's endeavors to assist with her archives and records so that they are preserved for posterity.

*Dr. Patrick Cox of Wimberley, Texas in an award-winning and acclaimed historian, author and conservationist. A sixth generation Texan, he resides in Wimberley, Texas and is President of Patrick Cox Consultants, LLC. His firm specializes in historical research, writing projects and oral histories for individuals, corporations, public agencies and nonprofit organizations.*

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## Newt Gingrich (1943) – House Speaker, Republican Whip From Georgia; Led the 1994 Contract With America

## Guest Essayist: Scot Faulkner

Newt Gingrich is the most consequential Republican Speaker in history. He revitalized a failed Republican Party, forging the first GOP Congressional majority in forty years.

During his tenure, Gingrich revolutionized House operations, including bringing the Legislative Branch into compliance with all federal laws.

Republican Speakers have a rich history of shaping Congress. Two of the three House Office Buildings are named after Republican Speakers. Rep. Joseph Cannon (R-IL) remains the single most powerful Speaker in House history (1903-1911). Rep. Nicholas Longworth (R-OH) broke with Teddy Roosevelt to defend the Republican Party in the 1912 election and then broke with President Herbert Hoover to defend American taxpayers against the growth of big government (1925-1931).

Rep. Thomas Reed (R-ME) comes closest to Gingrich's impact on the Legislative Branch. Reed was known for his communication ability, and his mastery of parliamentary procedure. As speaker (1889-1891/1895-1899) he mastered both of these skills to bring the House of Representatives back into alignment with the original rules written by Thomas Jefferson. Many consider his success assured the "survival of representative government". [1]

Newt Gingrich was born and raised in Georgia. His early career as a professor of history and geography at the University of West Georgia well prepared him for the many times he would reference America's founding principles during his political career.

In 1978, Gingrich became the first Republican to win Georgia's 6$^{th}$Congressional District. Once in office, he learned parliamentary combat and the power of well-timed words from Rep. John Ashbrook and the conservatives of the Chesapeake Society. [2]

When many of Chesapeake conservatives followed President Reagan into the Executive Branch, Gingrich formed the "Conservative Opportunity Society" (COS). This became a rallying point for those wanting to make the House Republicans stand for something. [3]

COS members took the skills learned from Rep. John Ashbrook and the older conservative "street fighters" and added their own knowledge of using the media. Live coverage of House sessions had only been available to cable television audiences since March 1979 when CSPAN began to broadcast the House signal.

Through ingenious use of the one-minute speeches, that led the daily sessions, and the special orders, which ended the legislative day, Gingrich and the COS began to build a television audience. In the days before Rush Limbaugh and other conservative media personalities, the COS shows obtained a conservative "cult" following. The COS members became popular icons to a new generation of young conservative activists. Speaker O'Neill, in an attempt to humiliate the COS, ordered the House cameras to show the empty chamber that the COS was addressing late at night. This only added to the COS mystique as activists outside of Washington saw the empty chamber as a metaphor for COS members standing courageously alone against the powerful forces of big government.

In 1988, Gingrich launched an ethics complaint against then House Speaker Jim Wright (D-TX). He questioned the financial arrangements around Wright's book, *Reflections of a Public Man.* Controversy swelled around Gingrich as Democrats attacked him for similar problems with his own 1977 book deal. Such attacks only added to Gingrich's following among "grassroots" conservatives outside of Washington, DC.

The election of George Bush as president in 1988 led to a historic opportunity for Gingrich. Rep. Dick Cheney (R-WY) had been tapped to become Secretary of Defense. This happened in the wake of the unsuccessful confirmation fight for former Senator John Tower (R-TX). With Cheney leaving the Minority Whip's position in March 1989, the opportunity presented itself for a conservative insurgency against Michel's candidate, Rep. Edward Madigan (R-IL).

Madigan had been the chief deputy minority whip and was viewed as the natural successor to Cheney. Republicans tended to reward people in turn and to shy away from insurgency candidates. This tradition of planned succession was symbolized by having conservative Rep. Tom Delay (R-TX) act as Madigan's campaign manager against Gingrich.

On March 22, 1989, the tradition was shattered as Gingrich was elected by a two-vote margin. "The issue is not ideology; it's active versus passive leadership," said Rep. Weber. [4]

Gingrich immediately set about reshaping the opposition of the House. Along with the organizational resources of GOPAC, his personal political action committee, Gingrich built what became known as "Newtworld". Joe Gaylord, Gingrich's top lieutenant and then head of GOPAC, ran this interlocking structure behind the scenes. Dan Meyer moved from Gingrich's personal office to head the Whip's office. Tony Blankley, a veteran of the White House and active member of various conservative networks during the Reagan years, became the

spokesman. A GOPAC consultant, John Morgan, an expert at tracking polls, began weekly assessments of how this new operation, and its aggressive strategy, were working.

The new organization moved the COS's combative style to center stage. There were weekly "themes" for Members to focus on. This meant floor speeches backed up by fact sheets and talking points that Members could use back in their districts. An "echo-chamber" of opposition, linked to conservative grassroots groups, was becoming a machine. Its goal was to topple the Democrats in 1992 or '94.

The elections of 1992 disappointed some House Republicans who had hoped for more voter outrage over the scandals of the 102nd Congress. The Republicans were left to ponder both their minority status in the House, and having to deal with a Democrat in the White House.

On December 7, 1992, the Republicans met to sort out their leadership in the 103rd Congress. Michel remained a declining figure among the insurgent House Republicans, but his popularity gave him another two years as minority leader. Gingrich would have to run his opposition effort as Minority Whip. However, Gingrich's strategy of aggressive opposition received another major boost. Rep. Richard "Dick" Armey (R-TX) defeated Rep. Jerry Lewis (R-CA) for Chairman of the Republican Conference. Another moderate/nonconfrontationalist was defeated and another conservative in favor of total warfare with the House Democrats was elevated to a key leadership position. [5]

Bolstered at the top by Gingrich and Armey, and by Rep. Jim Nussle's (R-IA) House Reform group – the "Gang of Seven", the COS, the 103rd Congress witnessed daily exposes of Democrat scandals and malfeasance.

On September 27, 1994, Gingrich launched the first "European-style" parliamentary election, by crafting the "Contract with America". For the first time in American history, a party ran its Congressional candidates based on an inspirational and visionary manifesto.

The "Contract with America" ignited the Republican base, leading to a 54 seat swing propelling the Republicans into power for the first time since 1954.

As Speaker, Gingrich drove the House's agenda to pass the major elements of the "Contract" within 100 days. This was accomplished. However, Senate inertia and President Clinton's vetoes prevented most of the "Contract" from becoming law.

Two "Contract" items did become reality, and these changed the Legislative Branch forever. HR 1, the Congressional Accountability Act of 1995 was the first order of business and the first bill passed in the 104th Congress. For the first time, the Legislative Branch was required to comply with all the laws it had passed. True accountability was achieved as Members had to live under the same laws they had thrust onto Americans. [6]

The other action was creating the Office of the Chief Administrative Officer (CAO), which consolidated all non-parliamentary and non-security functions within one office. Its mandate was to reinvent the operations of Congress to make it run like a business, while being completely

transparent and accountable. This became the most comprehensive rethinking of Legislative Branch operations since the first Congress met in 1789. Obsolete functions were abolished, others were privatized.

Business practices were institutionalized by a team of corporate transformation experts, with the assistance of major accounting firms. Another team of computer experts implemented the "Cyber Congress", which thrust House communications into the 21st Century in one giant leap. The result was a lean, customer-focused, accountable operation that saved $186 million and became the model for support services in 44 parliaments around the world. The reforms were so thorough and effective, that they remain in place to this day.

Gingrich's policy and budget confrontations with President Bill Clinton defined the balance of his tenure. Government shutdowns and other brinksmanship forced reforms in welfare and taxes, and reduced the federal budget deficit.

Conservatives became concerned over Gingrich's seeming loss of focus and the mounting attacks by Democrats. House Appropriators angered conservatives over being increasingly enamored with spending and earmarks. House "revolutionaries" tried to reverse things. On July 16, 1997 a small band of "true believers", along with Delay and Armey, mounted a revolt against Gingrich. This ill-fated "palace coup" weakened both the plotters and the Speaker. [7]

In December 1998, after a disappointing showing in the November elections, Gingrich announced he would not seek re-election as Speaker and would resign from the House. [8]

The looming impeachment of Clinton over the Monica Lewinsky scandal further confused the situation. Rep. Bob Livingston (R-LA), the Chair of the Appropriations Committee and assumed to be the next Speaker, shocked the Chamber by resigning as his own extramarital affair became public. Amongst the chaos, Rep. Dennis Hastert (R-IL) became Speaker. [9]

Since leaving the House of Representatives, Gingrich remains an insightful commentator and provocative thinker. Returning the House to the rule of law, and being highly responsive to the will of the voter, remain lasting historic achievements that strengthened our democracy.

*Scot Faulkner served as Chief Administrative Officer of the U.S. House of Representatives and as a Member of the Reagan White House Staff. He earned a Master's Degree in Public Administration from American University, and a Bachelor's Degree in Government from Lawrence University*

**NOTES**

[1] A vivid chronicle of Reed's battle for parliamentary integrity and accountability can be found in Barbara Tuchman's, The Proud Tower. Ballantine Books, 1962; pages 125-130
[2] Faulkner, Scot, Naked Emperors. Rowman & Littlefield, 2008; pages 81-82.
[3] Ibid., page 25
[4] Komarow, Steven (March 22, 1989). "House Republicans Elect Gingrich to No. 2 Spot, Chart Battle with Democrats". Associated Press

[5] Op. Cit. Faulkner p. 27.
[6] www.Govtrack.us. "H.R. 1 (104th): Congressional Accountability Act of 1995"
[7] Op. Cit., Faulkner p. 294.
[8] Gingrich, Newt (1998). Lessons Learned the Hard Way. Harper Collins Publishers. pp. 159–160.
[9] http://www.nytimes.com/1998/12/20/us/impeachment-overview-clinton-impeached-he-faces-senate-trial-2d-history-vows-job.html?pagewanted=all&src=pm

## BOOKS

## The Challenge of Congressional Representation (2013) by Richard Fenno: A Summary

## Guest Essayist: The Honorable Frank Reilly

In *The Challenge of Congressional Representation*, Richard Fenno studies the activities of five members of the U.S. House of Representatives in their home districts. The book follows-up on Fenno's 1978 *Home Style: House Members in Their Districts*, in which he outlined Fenno's Paradox, which posits that while people generally dislike Congress as a whole, they like their own Member of Congress.

Fenno studies the representational activities of House members, rather than their activities in Washington, which differentiates the study from others. Fenno describes the study as "one small-step effort to help redress a research imbalance" in which much is known about how House members operate in Washington, but little is known about their activities back home.

The book recognizes that no research standards exist — listening and observing are very personal and do not lend themselves to standardization — and that future studies will be difficult. In fact, the best that political scientists can hope for in the short term would be to create an inventory of connection questions and connection patterns for use in later studies. The long-term goal would be to transform the questions and patterns into explanations.

Fenno's first subject was Congressman Barber Conable, Jr., a New York Republican. Conable had "a strong sense of identification with" the more rural, small-town part of his district, having been raised there in a family with deep roots.

Conable connected with his constituents by going home at least 40 times every year, usually travelling alone without staff, adding to his credibility and visibility. Conable also sent out a weekly printed newsletter, a frequency then-unheard of in Washington. Conable noted that he focused his time on those who agreed with him, and to whom he was obligated. He used his newsletter to educate undecided voters.

To protect his independence and engender trustworthiness, he limited campaign contributions $50 from any group or person.

"There's a natural tension between being a good representative and taking an interest in government," said Conable. Toward the end of his Congressional career, he began to believe his interest in government was beginning to overtake his desire to be a good representative.

Fenno next studied Congressman Glenn Poshard, an Illinois Democrat, who also had deep roots in his district.

Poshard noted that the district was difficult to represent because "[t]he issues change every 50 miles…." To keep in touch, Poshard travelled home most weekends, even though he rarely missed a House floor vote. He preferred town hall events where he could explain his positions. He diligently answered constituent mail, but did not send newsletters. Even though he expanded his district offices from 1 to 6, he was frugal with his official office budget, spending less than any other member from his state.

He refused PAC contributions, and limited others to $500. He kept his campaign promise to serve no more than 5 terms, saying that term limits provide "a greater sense of freedom to do what you want to — and a certain sense of security."

Fenno's next followed Congresswoman Karen Thurman, a Florida Democrat, who served a sprawling district.

Thurman initially ran as a moderate with legislative experience, then after the Democrats lost control of the House in 1994, she shifted her strategy and ran as a partisan Democrat.

Due to the lack of political constituencies or power bases in her district, she relied heavily upon PAC and Democratic Party funding.

Fenno noted a tension between party influences in Washington and the strength of a legislator's constituency outside of Washington, and observed that the party's pull on Thurman increased through the years.

Fenno next studied several campaigns that Congressman Jim Greenwood, a moderate Pennsylvania Republican, ran in a very compact district.

Greenwood's campaign prepared different direct mail brochures separately targeted to specific areas, individually tailored by issues of importance to the recipient constituency.
Greenwood visited the district's four major newspapers' editorial boards every six months, and focused his campaign activities at shopping centers (he called it "going retail"). There he would seek to "meet voters and change minds." He avoided town meetings, finding that they were not well attended.

After his first election to Congress, he lobbied early and hard for a position on the Energy and Commerce Committee, which was important to his district.

Greenwood used his refusal of PAC contributions as a campaign pitch and provided good constituent casework service.

Greenwood's success within the Republican Party leadership as a moderate leader yielded positive new coverage at home for his activities.

Fenno's final subject was Congresswoman Zoe Lofgren, a Northern California Democrat with strong ties to her diverse, but liberal, district.

To reach her constituents, she promptly responded to mail, and handled citizen case issues. In her first campaign, she explained an unusual campaign tactic, saying "[s]ometimes we go out, unannounced, and set up an ironing board in front of a grocery store, and invite people to come talk." In later years she held more town hall meetings.

As a Judiciary Committee member, she earned media coverage and raised her profile nationally and at home with interviews on the Clinton impeachment hearings.

To better serve her Silicon Valley high tech constituency, Lofgren sought and obtained a position on the Judiciary Committee's Subcommittee on Courts and Intellectual Property Rights.

Fenno relates that a change in the local economy from the growth of Silicon Valley impacted her votes in Washington — land values skyrocketed and people who had been of modest means were now being subjected to the burdens of the federal estate tax, so Lofgren supported reductions and repeals of that tax.

Calling it a "chicken or the egg stalemate," Fenno closes by postulating that until more studies are performed in home districts, proper questions that will formulate the research cannot be framed.

*Frank M. Reilly teaches constitutional law, election law, and other political science courses at Texas Tech University. He is also a lawyer in private practice in Horseshoe Bay, Texas, and serves as a municipal judge for two Texas cities. Follow him on Twitter @FrankReilly or on Facebook at JudgeFrankReilly.*

# REPRESENTATIVE GOVERNMENT

## Magna Carta (The Great Charter), Parliament and the Origins of Representative Congress

## Guest Essayist: Marc Clauson

The English Parliament was one important inspiration for the Founding Fathers in designing our own Constitutional system. In this essay I will explore in more detail the origins of our Congress in the English parliamentary system and the relationship of Magna Carta to our own Founders' ideas. Magna Carta is argued to be at the root of the English parliamentary system, so we wish to look to it to find the beginnings of representation.

Magna Carta (or The Great Charter) was subscribed in 1215 after a conflict between certain nobles and King John. It essentially affirmed a variety of already-traditionally asserted rights in a written document. But Magna Carta had nothing to say about a parliament. The actual Parliament would not come into existence until decades later. So what is the connection between the two? Peter Boyce has shown the connection when he writes that "Clause 61 of Magna Carta…promised that 'the barons shall elect twenty-five of their number to keep and cause to be observed with all their might, the peace and liberties granted and confirmed by this charter'. That body would evolve into the House of Lords."[1] Over time, the kings, after Montfort, would begin to meet with both nobles and "commoners." Thus emerged around 1265 the House of Commons in its infancy. Eventually the House of Commons came to see itself as the repository and guardian of the rights granted in Magna Carta.[2] It also began to function to channel grievances from the people to the king and to bring petitions to the king.[3]

But that is not the whole story. If the Parliament began to view itself as a preserver of rights under the so-called "Ancient Constitution," how does that function translate to law making, the basic legislative activity as conceived by the Founding Fathers?[4] Hanna Pitkin helps here. She notes that over time from the 14th to the 17th century, the parliamentary "members" began first to receive grievances from their people toward the king, then began to be thought of as servants of their communities, and finally developed a collective mentality, presenting common petitions. Common petitions easily translated into general laws, and the Parliament therefore took on this law making function.[5]

A political theory of Parliament also developed in parallel with events, reaching a culmination in the seventeenth century. By the fifteenth century the members were acting as a unified body and were called "attorneys…of all the people of the realm."[6] Each member acts for the whole nation. From this developed two other important ideas: (1) that all men are present in parliament (virtually) and (2) that the ruler embodies the entire realm.[7] In 1642 King Charles I refers to Parliament as the "representative body of the people."[8] Thomas Hobbes in his *Leviathan* (1651) saw Parliament as an agent of the people, acting on their behalf, and called the members "representatives."[9] Parliament is an artificial person and its actions are to Hobbes undertaken by virtue of the consent of the people in the social contract. John Locke would largely agree. Though he was indifferent as to the specific form of government, he saw the "legislative" as the predominant power and generally a House of Commons as embodying that power of making laws and representing the people whose consent it required to continue.[10]

We know the Founders looked to England to a great extent for ideas for the new government. In fact, the Colonies were products of English political practice. Each colony already had at least one chamber of representatives, and most two, obviously modeled after the English Parliament.[11] Representation by a Congress is intended by the Founders to replace direct democracy, since it would be impossible to assemble all the people in one place at one time. It is a "substitute for the meeting of the citizens in person."[12] If we look in more detail at the structure of Congress, we can see a bicameral legislature much like England's. The Senate is the more "aristocratic" body, chosen by (at this time) the state legislatures, as the House of Lords members were appointed by the Crown in England. The House of Representatives on the other hand is elected by the people, and its makeup is based on population, so that there would be, as

much as possible, a proportional correspondence between each House representative and the people whom he represents (though not obviously a one-to-one correspondence).

There were differences between the English Parliament and the Congress. For example, Senate members were chosen regularly while Lords were permanent. House representatives were also elected regularly, while Commons members, although elected, held office for a greater time period and elections were sometimes more of a sham than genuine. The American Founders must have noticed these defects and others, and sought to bring a greater sense of real "standing in" to Congress on behalf of the people.[13]

The final version of the American Congress can be traced back to the Magna Carta itself, but in addition, our Founders drew on a rich source of political ideas that developed throughout the same period from Magna Carta on. The initiating event then was the core of the British "Ancient Constitution," but the foundation was the growing notion that the people ought to play a greater role in making laws. The representative body was the mechanism to achieve that goal.

*Marc A. Clauson is Professor of History, Law and Political Economy and Professor in Honors at Cedarville University. Marc holds a PhD from the University of the Orange Free State, SA, Intellectual History and Polity); JD (West Virginia University College of Law, Jurisprudence); MA, ThM (Liberty University, New Testament Studies and Church History); MA (Marshall University, Political Science); BS (Marshall University, Physics); and PhD work (West Virginia University, Economic Theory).*

[1] Peter Boyce, "Magna Carta and the Parliament," Paper presented at the Parliament of Tasmania on the occasion of its commemoration of the 800th anniversary of Magna Carta, Hobart/TAS, 16 June 2015. https://www.murdoch.edu.au/School-of-Law/_document/WA-jurist-documents/2015-Vol-6/Boyce—Magna-Carta-and-the-Parliament.pdf, 218.
[2] Ibid.
[3] See Hanna Fenichel Pitkin, *The Concept of Representation*. University of California Press, 1967, pp. 243f.
[4] On the unwritten and unenforceable "Ancient Constitution" see Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642*. Penn State University Press, 1993.
[5] Pitkin, op. cit., 244.
[6] Stanley Chrimes, *English Constitutional Ideas in the Fifteenth Century*. Cambridge University, 1936, p. 131, cited in Ibid., p. 245.
[7] Ibid.
[8] Ibid., p. 246.
[9] Edited by Richard Tuck. Cambridge University Press, 1996, Ch. Xxxvi.
[10] John Locke, *Second Treatise of Government* (1689), edited by Peter Laslett. Cambridge University, 1988, Chapter XIII, section 149.
[11] See Donald Lutz, editor, *Colonial Origins of the American Constitution*. Liberty Fund, 1998.
[12] Pitkin, op. cit., p. 191.
[13] Madison in the *Federalist Papers* does not believe the elected representatives must be exactly like the people whom they represent, but that they possess sufficient virtue and desire to

act for the common good. But they are also incentivized toward virtuous actions by frequent elections. See Federalist 57, in Alexander Hamilton, John Jay and James Madison, *The Federalist Papers*. Edited by George Carey and James McClellan. Liberty Fund, 2003, Gideon edition.

## Holding Power Accountable: Magna Carta, Parliament, and the Origins of Representative Congress

## Guest Essayist: Scot Faulkner

Our U.S. Constitution (1787), and powers of the Legislative Branch, embody the distrust of concentrated power and establish mechanisms to hold that power in check. This concern for "sovereign over reach", and the ways to prevent it, flow from the Charter or "Carta" signed on the field of Runnymede in 1215.

On May 26, 1976, in a solemn ceremony at Westminster Hall in London, the leaders of the U.S. House of Representatives and Senate received a gold-embossed reproduction of the Magna Carta. On June 3, 1976, a second ceremony, in Washington, DC, installed the gold reproduction and the original Wyems copy of the Magna Carta in the Capitol Rotunda to celebrate America's Bi-centennial.

While the original Magna Carta returned to England, the gold Magna Carta remains on permanent display in the Capitol. "Nothing could be more symbolically important to the people of the United States," stated Speaker Carl Albert during the ceremony.

Why is the Magna Carta so firmly linked to America's Legislative Branch? How are the underlying principles of the Magna Carta embodied in the operations of the Congress?

Winston Churchill, in his masterpiece, "A History of the English Speaking Peoples", explained,

> Throughout the document [Magna Carta] it is implied that here is a law which is above the King and which even he must not break. This reaffirmation of a supreme law and its expression in a general charter is the great work of Magna Carta; and this alone justifies the respect in which men have held it.

England's King John was humbled by barons at Runnymede on June 15, 1215. The King had over reached as an aspiring despot. The barons had the military force, and the political will, to assert there were limits to even a King's power. Magna Carta was the contract that re-established the rule of law and re-asserted certain rights for the ruling class. This included forbidding the King from compelling certain actions, and prevented him from imposing punishments and fines except through due process within narrowly defined cause.

England would expand upon these basic principles as Parliament gradually replaced the Monarchy in governing the nation. This process required a Civil War (1642-1647), the beheading of King Charles I (1649), and the deposing of King James II (1688).

America's Revolution (1775-1781) and Declaration of Independence (1776) arose from a similar concern over King George III's "sovereign over reach".

Magna Carta's revolutionary concept of holding the King accountable for a breach of contract with England's nobles was broadened in the Declaration of Independence. Thomas Jefferson established rights above Common Law and Medieval precedents with the famous phrase, "We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights."

The U.S. Constitution put this broader interpretation of Magna Carta into practice. Alexander Hamilton, James Madison, and John Jay, writing in Federalist 84, explain:

> "It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CARTA, obtained by the barons, sword in hand, from King John…Here [in America], in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations. 'WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a better recognition of popular rights."

The U.S. Constitution builds upon centuries of Parliamentary precedent by placing the power of legislation, and the funding of government operations, clearly in the hands of the Legislative Branch. This is why Article I begins, "All legislative Power herein granted shall be vested in a Congress of the United States…"

It is not a coincidence that Article I, the Legislative Branch, is more than double the size of Article II, the Executive Branch, in defining power and authority (2,282 words to 1,023 words). The final section on the Executive Branch establishes Congress' ultimate sanction against "sovereign over reach":

> Section. 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

From the very first, the Legislative Branch asserted its role in limiting Executive Power. Senators quickly and effectively embraced the limitation of the President to appoint only with the "the Advice and Consent of the Senate" (Article II, Section 2).

The first test was rejecting President George Washington's appointment of Benjamin Fishbourn to be a customs collector. On August 5, 1789, President Washington strode unannounced into Federal Hall in New York City, then the Capitol Building. Vice President John Adams allowed Washington to sit in the presiding officer's chair. The President, according to Ron Chernow's definitive biography on Washington, "proceeded to unbraid the twenty-two members of the Senate, demanding to know why they spurned his appointee."

Senator Ralph Izard of South Carolina spoke for the institution asserting that "the Senate had no obligation to explain its reasoning to the President". It was the last time Washington, or any other President, entered a Legislative Chamber without permission.

Battles over appointees, spending, and legislation have defined the balance of power between the Congress and the President. In each encounter, Congress has ultimately reaffirmed its power to limit "sovereign over reach". This has included censuring President Andrew Jackson (1834) and impeaching Presidents Andrew Johnson (1868) and Bill Clinton (1998-1999).

The "Lincolnia" original of the Magna Carta was displayed at the New York World's Fair in 1939. It remained safe in America during World War II, even being stored in the vault of Fort Knox after the Pearl Harbor attack.

America kept the physical Magna Carta safe, and kept Magna Carta's revolutionary legacy of holding power accountable.

*Scot Faulkner advises corporations and governments on how to save billions of dollars by achieving dramatic and sustainable cost reductions while improving operational and service excellence. He served as the Chief Administrative Officer of the U.S. House of Representatives. He also served on the White House Staff, and as an Executive Branch Appointee.*

## Virginia House of Burgesses and Colonial Legislatures as the Basis for Consent and American Self-Government

## Guest Essayist: Joerg Knipprath

In June, 1765, through the work of Patrick Henry, the Virginia House of Burgesses resolved:

> …That the Taxation of the People by themselves, or by Persons chosen by themselves to represent them…is the only Security against a burthensome Taxation, and the distinguishing Characteristick of *British* Freedom, without which the ancient Constitution cannot exist.
>
> …That his Majesty's liege People…have without Interruption enjoyed the inestimable Right of being governed by such Laws, respecting their internal Policy and Taxation, as are derived from their own Consent ….

Several months later, the Stamp Act Congress echoed those principles, which reflect several connected components of colonial constitutional theory, among them that government rests on consent of the governed and that taxes must come from those who pay them or through their representatives ("no taxation without representation").

The struggle over revenue had long occupied the king and Parliament. Matters came to a head in the 17th century, an era that began with sovereignty in the former and ended with it in the latter. Parliamentary theory rested on the idea that, while the king has certain "prerogatives," outside

those he is subject to the law. A fundamental principle of law is that one cannot take from another what is the latter's. Thus, the king cannot take the property of the people in the form of taxes. However, the people are free to make a gift to the king who is in need of funds to act for the common good. They might do so directly, but, as such a system would be difficult to administer, their political representatives might consent on their behalf. Less clear, however, was how those political representatives could give that consent on behalf of those who might object.

The same contentions arose in the colonies, long before the Stamp Act controversy. For effective governance, every political system seeks obedience to its edicts by convincing the people of their obligation to do so, i.e. not that they "must" obey or suffer the consequences, but that they "ought" to do so because it is ethically right. One way to establish the ethical basis of government is that it is essential to human society due to our nature as social beings. Another is to justify government as ordained by God for human flourishing. A third way, common in modernity, is to use voluntary human choice to institute government through a "social contract."

Colonies in British North America were established through three mechanisms, each of which is grounded in some manner in social contract theory. First came the private, for-profit colony, represented by the Virginia Company of London, which founded Jamestown, Virginia, in 1607. Investors bought shares in a joint-stock company, a concept of pooling capital somewhat akin to a modern business corporation. Under its charter, the Company was managed by a council in London. Its operations in the New World were directed by a governor and council appointed by the Company. Until 1609, there was also a Royal Council appointed by the king to look after the crown's interests in its domain.

After a period of military rule as the colony struggled to survive, the Company in 1619 ordered the creation of a representative body to attract more settlers. When the Company's charter was revoked in 1624, Virginia became a royal colony. The king appointed the governor and council, but the locals ("burgesses") chose the assembly. Though its status initially was somewhat precarious, by 1639, the king recognized the right of this House of Burgesses to meet permanently. Though there were local variations, this model of governor and council plus local assembly became the pattern for all English colonies, and the House of Burgesses (with its heir, the Virginia House of Delegates), became the longest-constituted legislative body in North America. The early history of the government of Massachusetts Bay was nearly identical, except that there the "General Court" was divided into two chambers in 1644, setting a precedent for bicameralism to represent different constituencies.

A second type of government, the compact colony, arose in New England, initially in the Pilgrim settlement at Plymouth, Massachusetts. Having obtained a patent to settle on Virginia Company land, they landed too far north and lacked political authority for their settlement. As a result, the adult males formally chose "solemnly and mutually in the Presence of God and one another, [to] covenant and combine ourselves together into a civil Body Politick …" This Mayflower Compact, augmented by customary practice, served as the form of government for the colony for its seventy-one years of existence.

Similar approaches were used in Puritan colonies founded thereafter at New Haven, in Rhode Island, and–through the Fundamental Orders of Connecticut–among several Connecticut River

Valley towns. All were new settlements created out of primeval wilderness. These "compact colonies" most purely embodied the principle of voluntary consent as the basis of legitimate government. The idea of a social contract neatly meshed with Calvinist religious doctrine based on a covenant with God and on a congregational theory of members who came together to form their spiritual assembly based on each person's free agency in his relationship with God. From there, it was but a small leap to argue that civil society and the political commonwealth, too, were created by individual consent. John Locke, writing a couple of generations later, could look to them as examples of his theory about the social contract made when man left the state of nature.

The third type was the proprietary colony, such as Pennsylvania, Maryland, New Jersey, the Carolinas, and Georgia. The king would grant a Lord Proprietor a patent to a large tract of land with the expectation that the proprietor would govern the area as it became settled. This semi-feudal arrangement usually repaid the proprietor for some favor, such as the grant of the Carolinas by Charles II to eight nobles who had helped him secure his return to the throne in the restoration following the Cromwell Directorate. The patent defined the political relationship between king and proprietor, while a further instrument drafted by the proprietor, such as the *Charter of Liberties and Frame of Government of the Province of Pennsylvania* (1682), delineated the relationship between the proprietor and the settlers.

While many of the early patents gave virtual independence to the proprietor, there were still some restrictions that protected the king's political interest. For example, the grant to William Penn required him to submit all laws to the Privy Council (a body of advisors to the king) for approval and to recognize the king's right to levy taxes. The proprietor made himself governor or appointed his agent to the office and was advised by a council. Under some patents, the proprietor need not call an assembly, but, due to the political pressures that the settlers inevitably exerted, proprietors of all colonies soon consented to elected legislative bodies.

No matter the type of colony, political instability in England caused changes in the formal constitutional relationship between various colonies and the mother country. Charters were revoked and re-granted. Eventually, all colonies formally became crown colonies and part of the king's domain. By the end of the 17$^{th}$century, a common pattern had emerged that lasted until the Revolutionary War. The colony had a governor, who, except in Connecticut and Rhode Island, was appointed by the crown. As the 18$^{th}$ century progressed, the governor often was a local leader. There was also a council of prominent locals, appointed by the crown, which advised the governor. Finally, there was a legislative body, elected by the local residents and acting with their consent. That body was typically unicameral, although Massachusetts Bay had a bicameral General Court. Qualifications of voters and representatives generally were tied to property ownership, most commonly land, and, sometimes, to religious affiliation.

On the surface, these arrangements reflected the British system of king, council (later to become the Cabinet), and Parliament. There was, however, nothing like the House of Lords, as the colonies lacked a hereditary nobility and the higher order of Anglican churchmen who composed that chamber. As well, colonial assemblies, such as the House of Burgesses, soon wrested from the governors, councils, and even the proprietors, the power to levy taxes, just as Parliament did from the king over the course of the 17$^{th}$ century.

Crucial for the colonial constitutional order was a significant characteristic. Both mother country and colonies had representative legislative bodies. However, the systems operated differently, which eventually produced incompatible theoretical principles of representation through the catalyst of the events leading up to American independence. The British system was one of careful balance of interests between different important social estates in society (king, nobility, and commons dominated by merchants and gentry). It stressed stability. Loyalty was class-based, but, as in many republican systems, the lower classes were effectively denied participation. Members of the House of Commons were to protect the interest of the commons against the other estates and were expected to vote according to their own good faith perception of what best served the interests of the commons as a whole. They held their vote in trust for the whole commons–the "trustee theory" of representation.

In the colonies, distances were greater and settlements often more isolated. The approach was to allocate representation by geography, to towns and physical estates. Local communities elected representatives from their own residents. Moreover, the colonies lacked the more defined class structure of Britain. Finally, despite limitations on the electoral franchise in the colonies, a much higher proportion of adult (usually white) males could vote than in Britain. The loyalty of those elected was foremost to their geographical constituencies, and they were expected to look to those constituents' interest, not to class affiliation, when voting. Many towns conducted their own affairs by periodic meeting of all residents, and they often carefully instructed "their" representatives how to vote on important issues–the "delegate theory" of representation.

Out of these practices developed rival theories, the British "virtual" representation and the American "direct" representation. During the controversies of the 1760s and 1770s over taxation and other internal legislation, the two sides talked past each other even as efforts were made to avoid a complete break. The British claimed that all were subjects of the king, and that the interests of the colonists were fully represented by the "commoners" in the House of Commons, even if Americans had not voted for them or had someone from their community as a representative. The Americans demurred. If they could not exercise their vote directly out of practical considerations, their franchise could be transferred only to those whom they had directly authorized to vote and over whose performance of this fiduciary duty they had actual control. Only their colonial assemblies, those closest to them in community, were authorized to legislate on their behalf, especially in the dangerous area of taxation. They had not consented to taxation by persons thousands of miles away whom they did not know and for whom they had not directly voted. To Americans, consent had lost all meaning, if the British were correct.

This much-fought-over distinction in representation was not, by itself, the catalyst for revolution. But it does portray the dissatisfaction of the Americans with laws that affected them in their personal lives and livelihoods being enacted by a body thousands of miles away and over which they had no effective control. Many currents were driving the societies apart: the large geographic size of the American possessions; the near-parity in population that was likely soon to favor the Americans; the comparative lack of class consciousness among the free population in the colonies; their greater ethnic and religious diversity; and the sense of self-identity and self-government that, while not yet complete or clearly expressed, had resulted from more than a century of benign neglect by the Crown between the 1630s and 1750s. Virtual representation works if there is a clear community of interest, and it must affect the interest of a clear

"community." In a preview of later federalism, Americans could accept Parliament's sovereignty in matters that touched all, such as foreign relations and international trade, but not in primarily local matters.

The U.S. Supreme Court in *U.S. Term Limits v. Thornton* (1995) found that members of Congress do not represent the voters of their districts or states, but, instead, the people of the United States as a whole. Thus, a state cannot place term limits on "its" representatives. This sounds remarkably like virtual representation, especially since a state also cannot require the representative to be a resident of any particular district. If Congress concerned itself only with matters necessarily national or international in scope, this view need not raise concerns. But as Congress busies itself with more and greater intrusions into personal decisions, such as health insurance, one might ponder if the same alienation felt by Americans of the 1770s towards the far-away British government is not felt 250 years later by Americans towards their own. Do such laws still meaningfully reflect the consent of the governed so emphatically proclaimed by the House of Burgesses against the Stamp Act?

*An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: http://www.tokenconservative.com/.*

## Representative Government: The Founders' Design for the American People to Rule Within a Civil Society

## Guest Essayist: James D. Best

James Madison wrote, "Ambition must be made to counteract ambition." He and his fellow delegates enabled this objective by enumerating specific, balanced powers to each branch, and then purposely giving each branch checks on the other branches.

The phrase checks and balances has become so commonplace, it is often spoken as if it were a single word, but in the eighteenth century, the phrase represented two distinctly different concepts. John Adams may have been the first coin the phrase in his 1787 publication, *A Defense of the Constitutions of Government of the United States*, but balances and checks is the phrase used in *The Federalist*, and that is the sequence Madison would have thought appropriate. First balance powers between the branches of government, and then place checks on those powers so they may not be abused.

As the first three words of the Constitution assert, the Framers felt the American people should rule the government, not vice versa. Arguably then, congressional checks on the executive are

the most important because House members and one-third of the Senate face election every two years, which should keep them attuned to the public mood.

So, what powers and checks did the Framers give Congress to preclude the president from becoming king?

- The Constitution gives the power to make laws solely to Congress. Constitutionally, the president can only enforce laws made by Congress. Recent history has seen an erosion of this check on executive powers. Congress gave away a good portion of its authority by passing vague laws which allowed the regulatory state to craft the details that determine what is legal and what is against the law. The Congressional Review Act of 1996 allows Congress to overrule an agency regulation, but it must be done within sixty days, and if the president vetoes the overruling, then congress must override the veto. Congress has also failed to curtail the abuse of executive orders that effectively make or alter laws. Stretching the concept of discretionary prosecution also weakened the lawmaking authority of Congress.

- Congressional power of the purse is the strongest check over the executive. The amount of money Congress appropriates determines what the executive branch can do and how much of it they can do. Congress eroded this power by ceasing to debate and pass individual appropriations bills. Instead, they pass omnibus packages and continuing resolutions, which aggregate spending decisions to obscure accountability.

- An axiom of Washington is that personnel is policy. Senate approval of appointees remains a potent congressional check on the president. When in disagreement with the president, Congress can withhold or delay approval of the leadership in the executive branch. Since threats to withhold funding have become mainly bluster, approval of appointments has taken on more significance.

- Foreign policy is an executive prerogative, but the Framers intended senate approval of treaties to check questionable international agreements. Recent use of a "nonbinding agreement" have effectively circumvented this check. A second, obviously weakened congressional foreign policy check is the authority to declare war.

- Other congressional checks on the president include a veto override provision; approval of appointment to fill a vice presidential vacancy, and a requirement that the president deliver to Congress a State of the Union message. From a practical perspective, these do not seriously impair a president.

- The ultimate congressional check on the executive is impeachment, but in the nation's history, there have been only two impeachments and zero convictions.

- That leaves the most powerful check of all. One that is unmentioned in the Constitution. To make new law, Congress must know how existing law is administered. This requires Congress to examine the operational side of the executive branch. This power is called congressional oversight, and although not enumerated in the Constitution, the Supreme Court has confirmed this implied power on several occasions. Investigative powers may now be the

> most important congressional check on the executive branch, but even this prerogative has been eroded in recent history by delay, redaction, and defiance of congressional subpoenas. Even a contempt of congress resolution has been brushed aside as little more than an embarrassment.

The Framers knew the country needed a stouter government than the Articles of Confederation provided, but they had only recently fought a war to escape a king and had no intention of reimposing that kind of oppressive power on the new nation. The country needed a stronger government, but not so strong it could override the will of the people. Instead of a Goldilocks government, they balanced power and designed an elaborate set of checks so government could govern adequately, but Lilliputian ropes would harness it from trampling the little people. Gouverneur Morris, the most frequent speaker at the Constitutional Convention, *said, "This magistrate is not the king. The people are the king."* Despite an artful internal design, the Framers intended the ultimate check on the national government and the executive to be the people. The ballot box is still a potent check on runaway power.

Alexander Hamilton said in Federalist 21,

> The natural cure for an ill-administration, in a popular or representative constitution, is a change of men.

John Adams wrote,

> There is a simple sense in which at every election the electorate hold their representatives to account, and replace those who have failed to give satisfaction. This fundamental check is, we might say, the essence of the liberty to be found in representative government.

*James D. Best, author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, Principled Action, Lessons From the Origins of the American Republic, and the Steve Dancy Tales.*

## Rule of Law: Meaning and Importance to Functions of Congress in Representing the American People

## Guest Essayist: Adam Macleod

### The Rule of Law Applies to Congress, Too

The phrase, "the rule of law," means that the power and discretion of those who exercise government powers is constrained. Officials may not do whatever they want. They must instead act according to rules, rights, customs, and other laws. This is the significance of John Adams's classic formulation, which he enshrined in the Massachusetts Constitution, that the goal of the Constitution was to produce a "government of laws, and not of men."

Like the other branches of government, Congress is also subject to the rule of law. Legislatures such as Congress do not make the law. Law comes from acts of human reason and natural order. Legislatures have power to change law, as executive officials have power to enforce and judges have power to adjudicate it. None of them must ever use their power to destroy the law.

The American founders achieved the rule of law in part by political means. The Massachusetts Constitution, which became a model for the Constitution of the United States, placed the legislative, executive, and judicial powers in separate branches of government. The enumeration and separation of powers prevent any one person or faction from gaining too much power over others and constrain each political actor within the bounds of law.

However, political protections for the rule of law are not enough. For one thing, officials can collude together, and often will when their interests align. King George III and Parliament acted in concert to deprive the American colonists of their customary rights. In declaring their independence from Great Britain, the colonists listed those deprivations as causes for the separation.

More fundamentally, there must be a law that rules over officials. So, the rule of law requires not only internal constraints on the powers of government but also external constraints. Officials must be constrained by law itself.

This is why all of the great American jurists insisted that the power to change law must remain only in the legislative branch, which changes the law generally—for everyone—and only prospectively. Most of them also insisted that even the legislative branch cannot retrospectively change rights that are either inherent in human nature or vested by some authoritative act, such as a contract, a conveyance, or a jury verdict. Harvard law professor and U.S. Supreme Court Justice Joseph Story insisted that government cannot "be presumed to possess the transcendental sovereignty to take away vested rights of property." For "[t]hat government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without restraint."

This means that where rights have been settled and specified according to the requirements of natural reason; or by ancient customs; or by institutions of private ordering such as the family, religious associations, property and contract; the government is obligated to defer to those settlements. Not even Congress has the power to make up law.

Congress and other legislatures *can* take away entitlements. For most of American history, jurists have distinguished between natural liberties and vested rights, which legislatures have no power to take away, and mere entitlements, which come from the government and which government has some power to alter or even abolish.

That foundational distinction is largely forgotten today. People speak of "rights" to receive education or health insurance from the government as if those had the same constitutional status as rights of life, liberty, and property. Indeed, many people want Congress and state legislatures to have *more* powers to do good things for people. But legislatures who exercise powers to create

entitlements use those same powers to deprive some people of their natural liberties and vested rights. In this way, American legislative bodies chip away at the rule of law.

As the Constitutions of Massachusetts and the United States both reflect, the whole point of government is to secure people in the enjoyment of their natural and vested rights, and thus to make possible the blessings of ordered liberty. So, the government that does not secure the natural and vested rights of the people is a bad government. And a government that actively deprives people of their natural and vested rights is a tyrannical government.

To restore the rule of law, Americans need first to re-learn law in its full and comprehensive sense. We need to recover a knowledge of the legal reasons which place external constraints on the powers of officials—including legislators—to deprive us of our natural and vested rights.

*Adam J. MacLeod is Professor of Law at Faulkner University, Jones School of Law. He is the author of* Property and Practical Reason *(Cambridge University Press 2015) and co-editor of Foundations of Law (Carolina Academic Press 2017).*

## Rule of Law: Accountable, Not Arbitrary, in Regards to Representing the American People

## Guest Essayist: Marc Clauson

### Rule of Law and Congress

The concept of a rule of law has been misunderstood throughout the history of political thought, and often ambiguous.[1] In this essay I will define the concept, trace its development, then apply it to the American situation in its relationship to Congress. In doing so, the fundamental idea of constitutionalism will become crucial to any understanding of an effective rule of law.[2]

In 1644, the English theologian and political thinker, Samuel Rutherford, published a book entitled *Lex, Rex*, which translated, means, "Law is King." The book was written during the English Civil War, which in part was fought over the issue of the power of the king (Charles I) in relation to the Parliament. Charles had asserted his divine right, absolute, authority, though he also recognized a subordinate role for Parliament. In other words, as most monarchs of that time believed, Charles essentially argued that he was above the law, even laws made by Parliament, since he sat in Parliament itself as its chief executive.[3] In fact the dominant theory through most of the seventeenth century was absolute, divine right monarchy. Legislative bodies therefore were at best the "loyal opposition" to monarchs in most cases until the English Civil War (1642-1649). But during that War and again in and after the Glorious Revolution of 1688, the English Parliament came into its own as a force to be reckoned with, even the foremost branch of government, both in practice after 1688 and in theory, for example in John Locke's *Second Treatise of Government* (1689).

But the question then remained for the "legislative," as the powers of a legislative branch were labeled, is there a limit to the power of that branch? Does it operate under a rule of law like a monarch? Here we must define the concept.

One definition runs:

> The most important demand of the Rule of Law is that people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, *ad hoc*, or purely discretionary manner on the basis of their own preferences or ideology. It insists that the government should operate within a framework of law in everything it does, and that it should be accountable through law when there is a suggestion of unauthorized action by those in power.[4]

The essential idea is that no ruler or governing body is above the law, even those who actually make those laws. The concept does not provide criteria for the content of laws, but it does require every citizen and governing official to abide by those laws if they are a part of the jurisdiction in which the particular laws are effective. Other elements have been suggested to fill out the rule of law idea, including (1) Formal aspects: generality; publicity; prospectivity; intelligibility; consistency; practicability; stability; and congruence. These principles are formal, because they concern the form of the norms that are applied to our conduct; (2) Procedural aspects: impartial hearing, evidence presented, etc.; and (3) Substantive aspects, that is, the actual content of laws is considered part of the rule of law, for example, property rights.[5] Most people would think that the procedural aspects are the heart of the rule of law, that is, the rule of law addresses a "fair procedure" without pre-determining an outcome. In the case of Congress, while procedure is no doubt important, the Constitution itself is also vitally concerned with the content of laws—what Congress may do and, by implication (or directly in the Tenth Amendment), what it may not do. At this point we move into the realm of constitutionalism as an aspect of the rule of law. There are two ways in which the Constitution impinges on rule of law issues:

> 1. By establishing rules for law making itself, that is, decision rules of various types (simple majority, 2/3 majority, etc.). These are important procedural norms designed for differing kinds of decisions that are associated with varying costs to citizens affected and for the laws themselves.[6]
>
> 2. By ratifying Article Two, which, among other things, enumerates the specific powers of Congress, implying that these are the only powers, and thereby providing a limit to Congress' powers.[7]

It may also be argued that the entire Constitutional structure implies that any law enacted by Congress also applies to its members and to any government official. After all, a constitution, properly understood, is only alterable by the people and that would imply that it governs all officials as well as citizens generally. Though such wording does not appear in the Constitution, it goes to the very heart of the rule of law. Unfortunately, laws have not always been applied to members of Congress, as evidenced especially in recent years (for example, the Affordable Care Act of 2010). Nevertheless, generally, Congress is bound by its own laws equally with any

citizen. Morally, there is no question as to the validity of that assertion. Legally, we may also point to the checks and balances concept which is the constitutional method of enforcing the rule of law on Congress in terms of its powers (though it does not speak to the issue of Congressional self-exemption from laws).

In his *Second Treatise of Government*, John Locke, in discussing the "legislative" power, clearly states that all laws must be applicable to every citizen, even the rulers.[8] Locke influenced the Founders, even during the constitution phase, though of course he was not the only important source. Not only that, but the Founders were keenly aware of the writings in England that excoriated the corruption of the Parliament in the earlier 1700s and their own day.[9] Finally, the Founders consciously designed a constitution that explicitly limited state power and provided incentives for virtuous behavior. All these, but especially the idea of the rule of law were seen as applicable to Congress itself. Without the concept in actual general practice, citizens would be subject to many abuses by governments simply because the governors would not themselves be subject to those same laws. Given human nature as self-interested at the least, this could lead to an intolerable state, even one of tyranny.[10] To the extent the rule of law is "institutionalized" the possibility of tyranny is minimized.

*Marc A. Clauson is Professor of History, Law and Political Economy and Professor in Honors at Cedarville University. Marc holds a PhD from the University of the Orange Free State, SA, Intellectual History and Polity); JD (West Virginia University College of Law, Jurisprudence); MA, ThM (Liberty University, New Testament Studies and Church History); MA (Marshall University, Political Science); BS (Marshall University, Physics); and PhD work (West Virginia University, Economic Theory).*

[1] See Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*. Cambridge University, 2004.
[2] On this topic more generally, see Ellis Sandoz, editor, *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law*. Liberty Fund, 1993.
[3] *Lex, Rex, or, the Law and the Prince: A Dispute for the Just Prerogative of King and People. Containing the reasons and causes of the most necessary … H. Grotius … In forty-four questions* (1644). Sprinkle Publications, 1982. Charles' father James I had also written about his divine right, absolute monarchy in *The True Law of Free Monarchies* (1610).
[4] Jeremy Waldron, "The Rule of Law," *Stanford Encyclopedia of Philosophy*. 2016, at https://plato.stanford.edu/entries/rule-of-law/.
[5] Ibid., Section 5.
[6] See James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*. University of Michigan, 1962.
[7] I am assuming that the enumerated powers are properly interpreted, and that other clauses have not been unduly expanded, for example, the "Necessary and Proper" Clause or the Commerce Clause. Clearly, the Federal courts have expanded the scope of the meaning of enumerated powers and those clauses.
[8] *Two Treatises of Government* (1689), edited by Peter Laslett. Cambridge University, 1988, Chapter VII, section 94.
[9] See for example, *Cato's Letters*, written by John Trenchard and Thomas Gordon in the 1720s and the works of Henry Bolingbroke during the same time period.

[10] It should also be noted that even where votes are by simple majority, the "winners" are still subject to laws, with some notable (and unfortunate) exceptions in practice.

## Rule of Law and Separation of Powers: Preservers of Liberty

## Guest Essayist: Richard E. Wagner

It is a commonplace of democratic rhetoric to assert that we residents of democracies are governed by law and not by men. To be governed by men means that those who hold power can create privileges for themselves and their allies. In contrast, to be governed by law means that holders of power gain no advantage from holding power because law pertains equally to everyone.

It is easy to see why democracies assert that they exemplify the rule of law, for it projects the image that politicians are equally subject to the same laws as everyone else. This claim on behalf of the rule of law seems intuitively obvious once democracy is defined as a system of self-governance. But the claim that the sun rose in the east and set in the west was also intuitively obvious prior to the 16th century, when that intuition was recognized as being wrong.

Claims on behalf of the rule of law must confront the inconvenient fact that law cannot possibly make and enforce itself. Only people can make and enforce law. How can law rule over people when it is people who make law? Is it possible to bridge the gap between this inconvenient fact and claims on behalf of the rule of law?

The American Constitutional Founders thought so, provided that power was divided and separated among holders of pieces of power. Rule of law and separation of powers are thus close cousins within the constitution of liberty on which the American republic was based. The original Constitution established a federal form of government where power was divided and separated in several ways. The federal government was limited to a few enumerated powers, with all other activities reserved to the states or to individual citizens. Federal power, moreover, was divided between legislative, executive, and judicial branches. Even more, the executive power was divided between the two most popular politicians in the land prior to the advent of political parties when President and Vice President were coupled.

Rule of law thus requires division and separation of powers, and in a manner that prevents collusion among holders of power. A key feature of governance through a rule of law is recognition that people should not be judges in their own causes. This recognition was robustly alive at the time of the American constitutional founding. With collusion among holders of power, however, holders of power can come to be judges in their own cause, thereby violating the central feature of any concept of rule of law.

In the original Constitution, the federal Senate was appointed by individual state legislatures. This arrangement created a form of Council of States within the federal Congress. The situation changed dramatically with the direct election of Senators in 1913. The direct election of Senators led to the establishment of what Michael Greve in *The Upside-Down Constitution* calls cartel

federalism in place of the earlier system of competitive federalism. Through cartel federalism, the federal government and the states act as a cartel to act on behalf of dominant interest groups within society.

Erosion in the rule of law can be illustrated by the ability of governments to take private property. The Fifth Amendment to the Constitution allowed for a taking of private property, but only under tightly restricted conditions. That taking must be for a genuine public use. Furthermore, the owner of the property must be justly compensated for what was taken.

It is easy to see how these restrictions on the taking of private property reflected rule of law principles. By requiring the taking to be for public use and accompanied by just compensation, governments were placed on roughly the same footing as individual citizens who sought to acquire someone else's property. Governments and their officials did not have special powers that individual citizens lacked, for anyone can always offer to buy someone's property. This is the rule of law in operation.

Rule of law is a staple claim of democratic sensibility and ideology. It is not, however, an automatic quality of democratic government; it is not a natural political condition. It is rather a variable quality of constitutional arrangements inside of which democratic governance proceeds. Rule of law requires the absence of some apex of power; however, powers distributed among the many tend to funnel into power held by the few. The 20th century Italian sociologist Robert Michels described this tendency the iron law of democratic oligarchy. A tendency is not inevitability, however, and rule of law and separation of powers are important facets of a constitution of liberty, though these must be fought for continually because they don't arise naturally, and they won't remain in place tomorrow just because they are here today. Liberty is a perpetual struggle against forces of social and political entropy.

*Richard E. Wagner is Holbert Harris Professor of Economics at George Mason University.*

## Rule of Law as the Bedrock of American Society

## Guest Essayist: Gary R. Porter

> If it be asked, What is the most sacred duty and the greatest source of our security in a Republic? The answer would be, an inviolable respect for the Constitution and Laws — the first growing out of the last.[1]

Alexander Hamilton goes on to point out that: *"The instruments by which [government] must act are either the AUTHORITY of the laws or FORCE. If the first be destroyed, the last must be substituted; and where this becomes the ordinary instrument of government there is an end to liberty!"*[2]Where there is no respect for the law, where it has no authority, liberty ends — slavery begins.

*"A Republic, if you can keep it,"* cautioned Mr. Franklin. A key ingredient of this "keeping," if Hamilton is to be believed, must certainly be a uniform respect for and obedience of the law. Said another way: the Rule of Law is the bedrock of our society.

But what does "Rule of Law" really mean? Would we know it when we saw it operating? Wikipedia answers: *"The rule of law is the principle that law should govern a nation, as opposed to being governed by decisions of individual government officials."*[3]

*"[A] government of laws, and not of men,"* is how John Adams put it.[4] But the phrase "Rule of Law" presumes we understand what law itself is. Do we?

*"…[L]aw and liberty cannot rationally become the objects of our love"* (or our respect, we might add) *"unless they first become the objects of our knowledge,"* states Founder James Wilson of Pennsylvania.[5] So as we begin this discussion of "The Meaning of the Rule of Law and its importance to the functions of Congress in representing the American people," we should first examine what "law" itself is; what does it encompass? The answer is not as simple as some might suppose.

Noah Webster provides this founding-era definition of law: *"A rule, particularly an established or permanent rule, prescribed by the supreme power of a state to its subjects, for regulating their actions, particularly their social actions."*[6] Many authorities point to the Code of Hammurabi (1754 B.C.) as one of the oldest written systems of law, predating even the Ten Commandments (~1513 B.C.), but "*Be fruitful, and multiply, and replenish the earth, and subdue it,*" God's first oral commandment to man in Genesis 1:28, predates them both.

Even earlier came the Law of Nature. As Sir William Blackstone explains:

> For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the…direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.[7]

As Blackstone argues, the Law of Nature should have been discoverable by reason and inquiry. Should have been. But man quickly showed a propensity for "missing it."[8] God took action.

*"[D]ivine providence… in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in diverse manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures."*[9] Ergo, the "Laws of Nature and [the Laws of] Nature's God."[10] Finally, along came civil laws, such as those of Hammurabi.

So there are three systems of law – natural law, revealed law and civil law — the last deriving its authority from the first. But is all civil law, "good" law? Does it automatically deserve our

respect and obedience simply because it has been created by our duly elected representatives? What if in promulgating civil law a conflict is created with natural or revealed law? Frederick Bastiat answers:

> No society can exist unless the laws are respected to a certain degree, but the safest way to make them respected is to make them respectable. When law and morality are in contradiction to each other, the citizen finds himself in the cruel alternative of either losing his moral sense, or of losing his respect for the law—two evils of equal magnitude, between which it would be difficult to choose.[11]

*"Bad laws are the worst sort of tyranny,"* said Englishman Edmund Burke.[12] The Roman historian Tacitus expressed a similar sentiment: *"Formerly we suffered from crimes. Now we suffer from laws." "[I]f the public are bound to yield obedience to laws to which they cannot give their approbation, they are slaves to those who make such laws and enforce them,"* complained "Candidus" in the Boston Gazette on January 20, 1772. Finally, a civil law which contravenes natural law is either "spoilt law" (Thomas Aquinas)[13] or of "no validity" (Blackstone).[14] Clearly, not all laws are created equal.

Which brings us to Congress. We know from Article 1, Section 1, that the Constitution gives all legislative power to Congress. According to the separation of powers doctrine put forth by Charles-Louis de Secondat, Baron de La Brède et de Montesquieu (the most quoted philosopher of law at the Constitutional Convention), law-making is thus the legitimate purview of neither the Executive nor Judicial branches of government. That's not the way things work today, but more on that later.

Congress, representing the people, makes laws for the government of the people. But it stands to reason that they should only make laws which reflect the will of the people and which are in the people's best interest. That also does not always happen today.

Finally, Congress does not have the constitutional authority to make any old laws. According to James Madison, their legislative jurisdiction is (or was) limited *"to certain enumerated objects."*[15]

The process by which Congress and the President turn a bill into a law is pretty well-known and will not be repeated here. I should point out, however, that one feature of that process, whereby a bill passed by both houses of Congress automatically becomes law unless vetoed by the President (in all but one circumstance), is a direct result of one of Jefferson's complaints in the Declaration of Independence: *"[The King] has refused his Assent to Laws, the most wholesome and necessary for the public good."*[16]Today, we no longer need the assent of the "King" before a "*wholesome and necessary"* bill becomes law, it does so automatically at the end of ten days,[17] with or without the President's signature.

Earlier I inferred that all was not well with our law-making process under today's Constitution. Since that is an integral part of the Rule of Law, let's take a closer look.

Despite the clear wording of Article 1 Section 1, Congress is today not the exclusive legislative body in the federal government. Executive branch agencies have been given the authority to promulgate "rules" which have the force of law. That they are called "rules" rather than laws is simply cosmetic: if you break a rule you will likely go to jail or be fined just as though you "broke the law." This improper law-making does not take place in a dark alley somewhere, outside the cognizance of Congress; Congress in fact authorizes it. But this delegation of Congress' law-making authority runs counter to this principle expressed by John Locke:

> For [the legislative power] being but a delegated Power from the People, they, who have it, cannot pass it over to others. . . . And when the people have said, We will submit to rules, and be govern'd by Laws made by such Men, and in such Forms, no Body else can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorised to make Laws for them.[18]

This delegation of legislative authority to unelected government bureaucrats was challenged in 1989.[19] The Supreme Court, in an 8-1 decision (Justice Scalia was the lone dissent!), stated:

> … our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. Accordingly, this Court has deemed it "constitutionally sufficient" if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.(emphasis added)

So Congress passes a skeleton of a law, containing some broad "*general policy* ," and says to the Executive Branch: "fill in the details."

To guard against the equivalent of President John Adams' "midnight judges,"[20] Congress gave itself the authority to overturn rules promulgated in the waning days of an outgoing administration; but they must use this authority within a certain "window of opportunity."[21]

These rules are no small matter. They have bloated the Code of Federal Regulations to more than 175,000 pages and it has been calculated that they add more than $2Trillion to the annual cost of business in America[22] — a cost that is simply passed on to "we the consumer," a consumer, it should be clear, who is oblivious to this breach of the separation of powers doctrine. Unless the Supreme Court one day overturns *Mistretta*, Executive Branch law-making is here to stay.

If the Executive Branch can make law, why not the Judiciary? Enter "judge-made law." *"Judge made laws are the legal doctrines established by judicial precedents rather than by a statute. In other words, [the] judge interprets a law in such a way to create a new law. They are also known as case law. Judge made laws are based on the legal principle "stare decisis" which means to stand by that which is decided."*[23] Judge-made law suffers the same defect as delegation to the Executive Branch: law created by other than our elected officials; law created by men and women unaccountable to the people.

> [T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise 'neither force nor will but merely judgment'….The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent.[24]

Judge-made constitutional law would not be much of an issue if all Justices had a respect for originalism and the intent of the Framers and Ratifiers. Sadly, such Justices are in the minority.

Turning now to whether laws passed by Congress reflect the will of the American people we can point to the example of The Patient Protection and Affordable Care Act (PPACA). The PPACA, nicknamed Obamacare, was passed in 2010 by a Democrat-controlled Congress without a single Republican vote, and was triumphantly signed by President Obama. Public polls of the time consistently showed 60% or more of Americans opposed to the measure yet the 2000+ page bill was rammed through the Congress and became law through an act of pure partisan power. While subsidizing the cost of health care for some Americans who could previously not afford it, the poorly contrived bill, admittedly intended as a step towards a single-payer health-care system, has resulted in higher insurance premiums for most other Americans.

James Madison foresaw this situation:

> It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is today can guess what is will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?[25]

*Gary Porter is Executive Director of the Constitution Leadership Initiative (CLI), a project to promote a better understanding of the U.S. Constitution by the American people. CLI provides seminars on the Constitution, including one for young people utilizing "Our Constitution Rocks" as the text. Gary presents talks on various Constitutional topics, writes a weekly essay: Constitutional Corner which is published on multiple websites, and hosts a weekly radio show: "We the People, the Constitution Matters" on WFYL AM1140. Gary has also begun performing reenactments of James Madison and speaking with public and private school students about Madison's role in the creation of the Bill of Rights and Constitution. Gary can be reached at gary@constitutionleadership.org, on Facebook or Twitter (@constitutionled).*

[1] Alexander Hamilton, "*Tully No. 3*," published in the *American Daily Advertiser*, August 28, 1794, found at https://founders.archives.gov/documents/Hamilton/01-17-02-0130.
[2] Ibid.
[3] Found at: https://en.wikipedia.org/wiki/Rule_of_law.
[4] John Adams, *Novanglus No. 7*, found at: https://thefederalistpapers.org/wp-content/uploads/2012/12/The-Novanglus-Essays-by-John-Adams.pdf.

[5] James Wilson, *Lectures on Law*, 1768, found at: http://www.constitution.org/jwilson/jwilson.htm.
[6] Noah Webster, *American Dictionary of the English Language*, New York: S. Converse, 1828.
[7] Sir William Blackstone, *Commentaries on the Laws of England*, 1765, Clarendon Press, Oxford, England. Introduction.
[8] See Genesis 4:8, for starters.
[9] Ibid. Book 1, Chapter 2.
[10] Thomas Jefferson, *Declaration of Independence*, July 4, 1776.
[11] Frederick Bastiat, *The Law*, found at https://americanliterature.com/author/frederic-bastiat/book/the-law/.
[12] Speech at Bristol, England, 6 September 1780.
[13] Saint Thomas Aquinas, Summa Theologica, I–II q. 95 a. 2.
[14] Sir William Blackstone, Commentaries on the Laws of England, Book 1, Chapter 2.
[15] James Madison, Federalist No. 14, 1787.
[16] Thomas Jefferson, Declaration of Independence, 1776.
[17] Not counting Sundays.
[18] John Locke, Second Treatise on Government, 1690.
[19] Mistretta v. United States, 488 U.S. 361 (1989).
[20] https://en.wikipedia.org/wiki/Midnight_Judges_Act.
[21] For more on the Congressional Review Act, see: https://fas.org/sgp/crs/misc/R43992.pdf.
[22] See: http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Executive-Summary.pdf.
[23] https://definitions.uslegal.com/j/judge-made-laws/.
[24] Chief Justice John Roberts' dissent in Obergefell v. Hodges (2015).
[25] James Madison, Federalist no. 62, February 27, 1788.

## Rule of Law: Do Our Laws Apply to All?

## Guest Essayist: Gary R. Porter

Another principle of the Rule of Law is that *all* laws should apply to *all* the people. *"[W]here there is no law, there is no liberty; and nothing deserves the name of law but that which is certain and universal in its operation upon all the members of the community,"* wrote Founder Benjamin Rush in a 1788 letter to David Ramsay. (Emphasis added) Do our laws apply to all?

It is not uncommon for Congress to exempt itself from complying with certain laws.[1] Congress has exempted itself from the Whistleblower Protection Act of 1989, the Freedom of Information Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, a key provision of the Patient Protection and Affordable Care Act and many others. Interpreting Benjamin Rush, do these laws deserve the name of law if they only apply to "ordinary Americans" and not the elite of Congress?

The Rule of Law should be the bedrock of our society; but this "bedrock" has the appearance today of shifting sand. If we expect the laws of our land to be respected, we must make them

respectable, and the people who make such law must act respectably in doing so, using responsibly the power the people have delegated to them and them alone.

How did we reach this point? I lay most of the blame on the American people. Our lack of knowledge of constitutional principles today is a plague upon our society. But it was not always so in this country. In 1835, Frenchman Alexis De Tocqueville visited America and noted: "*… every citizen is taught…the history of his country, and the leading features of its Constitution. … it is extremely rare to find a man imperfectly acquainted with all these things, and a person wholly ignorant of them is sort of a phenomenon*."[2] Today, unfortunately, it is extremely rare to find an American citizen who can discuss features of his Constitution. In a recent poll, thirty-seven percent of Americans could not name a single right secured by the First Amendment.[3]

Our educational system is also partly to blame for not teaching these important constitutional principles. Due to our ignorance, we then send the wrong people to represent us in Washington. We choose the wrong representatives because we don't know enough to ask the right questions as they run for office. Instead of asking them what they intend to do to "fix Washington," we should first determine their view of law, the Rule of Law, and the role Congress should play in representing "We the People" in writing our laws.

We can return to an authentic and respectable Rule of Law in this country, but it will require some effort. My suggestions:

- Insist that Congress once again exercise the exclusive legislative authority they were intended to have. If Congress insists that certain proposed legislation exceeds their technical expertise, let executive branch agencies propose rules; but those rules must first be submitted to a vote of Congress before they can take effect. This change would not require a Constitutional amendment, only a rule change within Congress.

- Require that every law passed by Congress applies to them – no exceptions. A "28th Amendment" has been making the rounds of the Internet the last few years. It reads: *"Congress shall make no law that applies to the citizens of the United States that does not apply equally to the Senators and/or Representatives; and, Congress shall make no law that applies to the Senators and/or Representatives that does not apply equally to the citizens of the United States."* Since it is unlikely Congress will make such a change voluntarily, a Constitutional amendment will likely be needed and such an amendment would likely only come from an Article V Convention.

- Taking Madison's warning to heart, the days of 2000-page bills should end. Bills should encompass a single topic and be limited to perhaps 100 pages, sufficiently short to be read in a single sitting.

- The original Constitution established only four federal crimes: treason, bribery, piracy and counterfeiting. There are estimated today to be in excess of 4500 federal crimes.[4] It has been suggested that so many unknown crimes exist in the Code of Federal Regulations that every citizen violates at least one federal law each day, perhaps as many as three, making all

of us potentially federal criminals should a federal prosecutor take interest in us.[5] This must stop. There should be a methodical scrub of the CFR and antiquated, absurd or redundant federal crimes removed.[6]

- We as a people should consider whether the principle of judicial precedent really serves republican purposes. A court's opinion should be deemed to apply only to the two litigants in a case. When the Chief Justice of the Supreme Court charges that five of his colleagues have acted like a legislature, they should take note and change their behavior/opinion.

*Gary Porter is Executive Director of the Constitution Leadership Initiative (CLI), a project to promote a better understanding of the U.S. Constitution by the American people. CLI provides seminars on the Constitution, including one for young people utilizing "Our Constitution Rocks" as the text. Gary presents talks on various Constitutional topics, writes a weekly essay: Constitutional Corner which is published on multiple websites, and hosts a weekly radio show: "We the People, the Constitution Matters" on WFYL AM1140. Gary has also begun performing reenactments of James Madison and speaking with public and private school students about Madison's role in the creation of the Bill of Rights and Constitution. Gary can be reached at gary@constitutionleadership.org, on Facebook or Twitter (@constitutionled).*

[1] See: https://nationalinterest.org/feature/congress-acts-its-above-the-law-23400.
[2] de Tocqueville, Alexis (1835). De la démocratie en Amérique. (1 ed.). Paris: Librairie de Charles Gosselin.
[3] https://www.washingtontimes.com/news/2017/sep/13/37-percent-of-americans-cant-name-any-of-the-right/.
[4]https://www.wsj.com/articles/SB10001424052748703749504576172714184601654.
[5] https://www.amazon.com/Three-Felonies-Day-Target-Innocent/dp/1594035229.
[6] You are a federal criminal if you denigrate the character of Woodsy the Owl or his motto: "Give a hoot, don't pollute."

## CONGRESSIONAL ELECTIONS

### Direct Election and How the Number of Constituents per Congressional District Affects Representation

### Guest Essayist: Joerg Knipprath

Republican government operates through voting and representation. In a geographically large polity, physical distance makes direct voting by its citizens impractical. In a populous polity, direct voting by citizens likewise becomes impractical, as it is difficult for a significant number of them to engage in proposing and debating public measures, or, as was the case even in ancient Athens, to find a place for all to gather. In both scenarios, the principle of consent of the governed as the ethical basis of the government is eroded as popular participation diminishes. Political participation must then be channeled into electing representatives who will vote on the citizens' behalf in the law-making assembly. Setting the qualifications of those entrusted with the

vote and defining the basis of the representational system thus become crucial endeavors for the polity. The focus in this essay is on the nature of representation.

As the writers of *The Federalist Papers* explained, a representational system based on population must address two conflicting pressures. The population in the relevant districts must be sufficiently small that the representative realistically may be said to reflect the concerns of his constituents, yet not so small as to increase the size of the assembly to the point of functional ineffectiveness. As James Madison observed in *Federalist 52*, "[I]t is particularly essential that the [House of Representatives] should have an … intimate sympathy with, the people." At the same time, he wrote four essays later, "The truth is, that in all cases, a certain number at least seems to be necessary to secure the benefits of free consultation and discussion; and to guard against too easy a combination for improper purposes: as on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude….Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." The Philadelphia Convention set the original apportionment among states at no more than one seat in the House of Representatives for each 40,000 residents. On the last day of the Convention, that was decreased without debate to 30,000, a number that James Madison in *Federalist 56* noted to be the ratio in the British House of Commons, as well.

The concern about districts that are too populous ties into the broader question of what constitutes a political "community." That concern is not new. In his book *The Laws*, Plato put the ideal size at 5,040 citizens. Reflecting his Pythagorean fascination with numbers and mathematical precision, that size is the product of multiplying numbers 1 through 7 by each other. Since "citizens" did not include women, children, *metics* (aliens), and slaves, the actual population of such a community likely would be between 30,000 and 50,000, with 40,320 being Plato's citizen number multiplied by 8. In what is unlikely to be coincidental, James Madison in *Federalist 57* notes that House members would be elected by 5000 to 6000 citizens each. Aristotle was less precise. He opined that the *polis*had to be large enough to be self-sufficient, yet not so large that people did not know each other and order could not be maintained. Although Athenian citizens voted directly in the democratic assembly, the same measures of community would apply in a republican system of representation by districts. To exercise wise judgment in political matters, either as a voter or representative, it helps to know your fellow citizens personally and their concerns and interests. As Madison agreed in *Federalist 56*, "It is a sound and important principle, that the representative ought to be acquainted with the interests and circumstances of his constituents."

With the large population of the United States, representation in the House is now based on districts that each have, on average, about three-fourths of a million residents, roughly the size of the largest state in the Union in 1790, Virginia. This departs grotesquely from the traditional understanding of community and calls into question how "republican" the system of governance in the United States is today. The vast majority of voters cannot personally get to know the candidates, or they the voters. Voters cannot gage accurately the general community concerns and interests, as they cannot interact extensively with a sufficient number of their fellow-residents. Campaign flyers the month before the election, occasional forums before necessarily limited numbers of constituents, and, from only a few representatives, a brief message or constituent survey once or twice a year cannot establish the requisite relationship for truly

republican self-government. Much "debate" of issues occurs either through mass distribution of brief collections of grossly distorted "facts" in campaign literature, unverifiable claims in "robocalls," and maudlin appeals to emotions in televised ads, or through the musings of "talking heads" colored by personal ideology or financial interest. As a result, voter confusion and ignorance increases. Many are turned off by the process and, from this alienation, voter participation decreases. That, then, empties "consent of the governed" of its practical content and threatens to make it an entirely theoretical construct to hide the actions of an oligarchic government of the elite, by the elite, and for the elite.

Two factors might counteract the threat that populous districts pose to the republican principle of representation. One is the technological revolution that allows participation via one's computer in virtual "town halls" with candidates and in debates among constituents through blogs or other websites. The second is that matters of national importance such as war, foreign relations, interstate commerce, immigration, and a sound currency affect all Americans. Therefore, there is less salience to the idea that a representative need be clearly cognizant of the particular sentiments of his district's inhabitants.

As to the first, Madison addressed in *Federalist 10* how the small number and physical proximity of local populations facilitates communication of ideas and conformity of interests. While he certainly did not consider this an unmixed blessing in either a democratic assembly or a legislative body, he accepted it as a traditional aspect of self-rule. However, the sheer number of potential participants and the necessarily limited time and frequency of virtual "town halls" still makes connection on a personal level among participants and with their representative unlikely.

Other versions of electronic communication have led to "virtual communities" that form apart from physical domiciles. There are several problems here. Those communities often are national, if not international. Their interests and concerns, and those of the blogger, may not reflect those of the district that elects the representative. Moreover, experience tells us that much debate on those blogs by commenters involves irrelevancies and digressions, as well as invective that, were it delivered in person rather than through the safety and anonymity of the computer keyboard in an undisclosed location, would be strongly curtailed. Such distractions would be much less likely to be tolerated in a physical meeting. The absence of an enforced agenda and the lack of civil discourse in such settings again alienates many, who then choose not to participate. Finally, there are intangible aspects to physical interactions that facilitate personal bonds and resolution of problems. Those aspects are lacking when discussion occurs through disconnected remarks among an atomized group of physically isolated commenters.

As to the second, the immediately obvious problem is that Congress no longer limits its legislation to truly national issues. Instead, the expansion of Congress's substantive powers regarding interstate commerce, taxation, and spending, approved in Supreme Court opinions, brings personal decisions and policies that have predominantly local effect within Congress's reach. For such issues, the particular needs and interests of local minorities are more likely to go unrepresented in larger, more homogenized districts. This is especially true since the Supreme Court has held that any population inequality in a state's congressional districts will be closely scrutinized, thereby making it more difficult to adjust district boundaries to give such minorities a voice. As well, the problem of very large populations within legislative districts applies to

many state and local bodies who are not dealing with national issues, but whose policies also are increasingly restrictive against personal actions. While it is admittedly an outlier, the five-member Los Angeles County Board of Supervisors makes policy that potentially affects over 10 million residents. California State Senate districts have about a million residents apiece; each Assembly district has a half-million, larger than all but one state in 1790. Some states and most localities have smaller districts, but other populous states' legislatures operate similarly.

Another aspect of republican doctrine about representation is the requirement that two legislative chambers must concur in legislation. Bicameralism is not an essential republican feature, but it is nevertheless common. Such division serves to control the passions and self-interest of the general citizenry and, therefore, of their representatives, that is, "the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions," per Madison in *Federalist 62*. The typical form is that the "lower" chamber represents the interests of the numerically predominant social or economic class, and the "upper" house represents a different class, usually deemed wiser and more dispassionate in its deliberations for the common good.

There have been many forms of bicameralism. Even the ancient Athenian democracy did not place unrestricted power in the citizenry gathered in the popular Assembly. There was a Council of 500, apportioned equally among ten districts, whose members were chosen by lot (akin to a jury system). Each month of the ten-month "Conciliar Calendar" year, a district's members would compose the 50-member steering committee that controlled the legislative agenda of the Assembly, especially in financial matters. In the Roman Republic, power was divided between the patrician Senate of the landed aristocracy and various assemblies of the plebeians. Those assemblies were further divided among six plebeian classes based on their wealth. That division maximized the power of the knights ("equites"), the wealthiest of the commoners, and minimized the influence of the poor.

Such wealth-based or status-based division has been a common form of bicameralism. When Britain controlled the American colonies, Parliament was composed of the House of Lords, whose members were certain high-level clergy of the Church of England ("Lords Spiritual") and the hereditary landed high nobility ("Lords Temporal"), and the House of Commons, which represented the gentry and commercial classes. In the early United States, the Massachusetts Constitution of 1780 specified that males meeting a set property qualification could vote. However, the two houses of the General Court (legislature) were based on different political principles and had different qualifications for the members. The state's House of Representatives was apportioned on the basis of population (actually, qualified voters) in incorporated towns. The Senate was apportioned among districts based on their wealth, as measured by the taxes collected from that district. The members of the House had property qualifications significantly higher than the voters, and the members of the Senate had property qualifications twice as high as those for the House. Such tiered property qualifications were not uncommon for voters and representatives in state legislatures for several decades after independence. As well, distinct methods of apportionment between the chambers of the legislature, as in the Massachusetts model, were common.

The Articles of Confederation provided for only a single chamber, and representation was based on the equal status of the States as constituent members. When the Framers drafted the Constitution, the Great Compromise of 1787 resulted in a House of Representatives primarily based on population and a Senate based on the same principle of state equality as under the Articles. The division was not formally class-based. Instead, it reflected a practical accommodation of political minorities in a large and diverse political entity whose residents' primary identity was with their local communities. From another perspective, the smaller number of Senators and their longer terms would provide the necessary independence from fleeting popular passions and foster the reflection and wisdom to restrain the feared reflexiveness and tempestuousness of the House. There were no property qualifications specified for *legislators*, so that the broadest pool of talent was available. As the Supreme Court found in *Powell v. McCormack* (1969), the Framers did not intend that Congress could add qualifications to age, citizenship, and state residency explicitly provided in the Constitution. In 1995, in *U.S. Term Limits v. Thornton*, the Court held, with less historical justification, that states were likewise restricted. Property qualifications for *voters* were left to the discretion of each state, as long as qualifications were not more restrictive than those the state had for voters for the lower house of its own legislature. By the mid-1960s, however, the Twenty-Fourth Amendment and the Supreme Court's decision in *Harper v. Virginia Board of Elections* (1966) made it unlikely that any wealth-based restriction on voting was constitutional.

In 1913, the Seventeenth Amendment changed the method by which Senators were chosen. Henceforth, they would be elected directly by voters. Recent critics have called for repeal of that amendment, because they view it as having caused the decline of the states' political influence relative to the general government. However, the change from the original method of selecting Senators was the product of a long trend, not a sudden upheaval. A proposal to amend the Constitution to provide for popular election of Senators was introduced as early as 1826. For a couple of decades before the Seventeenth Amendment was adopted, states had been moving to allow "preference elections" by the people that would recommend to the legislature the person to be selected, thereby putting political pressure on legislators to select the winner.

It is unlikely that such a repeal movement would succeed, given the current culture of activist government and the political inertia in favor of constantly expanding the totality of voters. It is also doubtful that the power of the federal government would be reduced, even if the movement were successful. It requires suspension of disbelief to think that the California legislature, whose members are increasingly drawn from the Democratic Party's most radical factions, is suddenly going to select Senators who favor turning off the federal spigot of funds, combatting illegal immigration, or supporting a person's right to bear arms. Politics is downstream from culture, and the majority of people favors getting government-directed largesse paid for by others. The problem for republicanism, in other words, is with the voters, not with the representatives they elect.

*An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution*

*of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: http://www.tokenconservative.com/.*

## Election of Congress: Why Election Method Matters for Stability and Continuity of Representative Government

## Guest Essayist: Gary R. Porter

The election of Congress ought not be controversial, Americans have been electing their representatives in this country off and on for four hundred years.[1] But of course it is quite controversial, made so by what's at stake: raw political power. Whichever political party controls Congress controls the most important and powerful branch of government. While some Americans view the Executive Branch as the pre-eminent, most powerful branch of the three, even a superficial comparison shows this to be incorrect – Congress rules!

The "election method" of Congress has many facets: who is entitled to vote, how they vote, even such mundane things as how votes are counted (does a hanging chad count?). As Madison reminds us: *"the essence of government is power and power, lodged as it must be in human hands, will ever be liable to abuse."*[2] And abuse we have: election fraud is a problem and growing [3]despite charges by some that such claims are a myth.[4]

Popular elections by the people were so liable to abuse that the Framers discarded this method when considering the election of the President, and decided instead on "Electors chosen for that purpose." In Speaking of abuse, in 1777, James Madison lost the only election he would ever lose, to the Virginia House of Delegates, because he refused to provide Orange County voters with "spirituous liquors," which his tavern-owner opponent could (and did) pour abundantly.

So let us consider first the question of who should be allowed to vote.

The Constitution presumes, but does not require, voting by the people. It is difficult to see how voting could be supported as a natural, inalienable right, so it must therefore be a civil right, one subject to denial or change at the whim of the government.

The Founders are repeatedly denigrated today for not allowing women to vote; and while there is some truth to the claim, unmarried women were allowed to vote in some states as long as they met the property requirements of "freeholders." Why *unmarried* women only?

Under the English common law doctrine of coverture, the husband "covered" his wife's legal identity throughout their marriage. Blackstone's Commentaries described it this way:

> By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing.

The husband's vote was thus viewed as reflective of the interests of the entire family.

The amount of property a person must own to vote varied from state to state, but the prevailing notion supporting a property requirement was that this produced a polity with "skin in the game," voters more likely to vote with care; their property potentially at jeopardy through a careless or ill-informed choice.

Today, property requirements for voting have been removed, and the franchise limited only by age and citizenship. Which provides the basis for another controversy: why limit voting to citizens? Shouldn't, every tax-payer, whether citizen or not, whether in the country legally or illegally, be able to vote? Shouldn't they also have a say, through the ballot box, in how their taxes are spent? Many on the Left certainly think so. Others see voting as not just a privilege, but a high privilege of *citizenship*.

> Let each citizen remember at the moment he is offering his vote that he is not making a present or a compliment to please an individual – or at least that he ought not so to do; but that he is executing one of the most solemn trusts in human society for which he is accountable to God and his country, wrote Samuel Adams.[5] (Emphasis added)

Our dismal voting participation rate, hovering as low as 37% in mid-term elections, vividly demonstrates the sense of hopelessness many feel when considering the effect their individual vote will likely have on the trajectory of the country. Career politicians, acting in their own self-interest, are perpetually elected thanks to powerful moneyed interests; a recipe for disaster.

With a re-election rate of well over 90% it seems hard to believe that we have an entirely new House of Representatives every two years, but that is exactly what the Framers intended. In fact, it has been said that a Representative is always running for office; no sooner does he or she catch their breath from the last (successful) campaign when they must start all over again with a new one.

Not so with the Senate; the Senate was intended to be the more stable and deliberative of the two houses of Congress. Thus, the Senate does not change personnel en masse like the House; only a third of the Senators are up for reelection each time; and this was by design as well.

Although some today decry the filibuster rule in the Senate, I think a bigger problem to the long-term health of the republic lies in the fact that Senators are no longer appointed by their states. Thanks to the 17th Amendment, Senators are elected by the people of the state and no longer vote in line with the interests of the legislature of their state as they once did. This Amendment permanently shifted the intended balance of power in Congress, to the disfavor of the states which created the government in the first place. To restore that balance of power will require the repeal of the 17th Amendment, and that proposal is shrouded in controversy.

It is important to the principle of self-government that there be continuity and stability in the Congress, and the initial Constitutional design was intended to produce just that. But the original balance of power in Congress is equally important, and that deserves our attention today.

*Gary Porter is Executive Director of the Constitution Leadership Initiative (CLI), a project to promote a better understanding of the U.S. Constitution by the American people. CLI provides seminars on the Constitution, including one for young people utilizing "Our Constitution Rocks" as the text. Gary presents talks on various Constitutional topics, writes a weekly essay: Constitutional Corner which is published on multiple websites, and hosts a weekly radio show: "We the People, the Constitution Matters" on WFYL AM1140. Gary has also begun performing reenactments of James Madison and speaking with public and private school students about Madison's role in the creation of the Bill of Rights and Constitution. Gary can be reached at gary@constitutionleadership.org, on Facebook or Twitter (@constitutionled).*

[1] The first elected government was installed at "Jamestowne" in 1619.
[2] sSpeech in the Virginia constitutional convention, 1829
[3] See: http://dailycaller.com/2016/10/20/heres-what-voter-fraud-looks-like-in-23-states/
[4] See: https://www.brennancenter.org/issues/voter-fraud
[5] in the Boston Gazette, 1781.

## A Memorial Day Message by Constituting America Founder and Co-President, Janine Turner

***Constituting America first published this message from Founder & Co-President Janine Turner over Memorial Day Weekend, 2010, the inaugural year of our organization. We are pleased to share it with you again, as we celebrate our 8th birthday!***

On this Memorial Day weekend, I think it is appropriate to truly contemplate and think about the soldiers and families who have sacrificed their lives and loved ones, and given their time and dedication to our country.

Sometimes it is beyond reach to put ourselves in someone else's shoes and feel, to the most heightened sense, what it would be like to say goodbye to our loved ones for perhaps the last time. Do we take the time to feel empathy for the soldier who has to walk away from his family – mother, father, wife, husband, daughter, son – to be potentially killed out in the field – to die away from family – in perhaps some distant land, in enemy territory, on foreign soil? How frightening this would be.

It is difficult in our daily lives that are hectic with work, pressures, commitments and family responsibilities to really pause to think about the sacrifice our men and women in uniform have made and are making to protect us. Our men and women in uniform were and are the brave, the special, the few and the truly great patriots. Without these soldiers, we, America and Americans, would not be here – plain and simple. The air we breathe, the land we walk, the sky we sketch, the country we call home, is because of the sacrifices of our men and women in uniform.

No matter which war they called their own, they all fought the enemy, whether near or far, whether boots were on the ground, in the air or on the sea, whether the enemy was present or premeditating. As Alexander Hamilton expressed in Federalist Paper No. 24, " cases are likely to occur under our governments, as well as under those of other nations, which sometimes render a

military force in the time of peace, essential to the security of the society." Thus, an actual battle or a state of ready alert has served the same purpose – the enemy was to know and knew that he would not prevail against men and women who had the Divine right of liberty in their soul, passion in their hearts and the supreme strength of military readiness.

Memorial Day is the day to set aside time and sit down with our children and teach them about our wars and war heroes. It is a time to teach them about the Revolutionary War and the reasons why we fought it. They should know about the soldiers who walked barefoot in the snow, leaving the stain of their blood on the ice and about those soldiers who died miserable deaths as POWs in the stifling bowels of the British ships at sea. They should know about heroes such as Paul Revere, Israel Putnam and Nathan Hale who said, "I only regret that I have but one life to lose for my country."

We should take a moment during our Memorial Day weekend, and everyday, to pray for our men and women in uniform. We should teach our children about those who served in the War of 1812 when the British returned, how they burned down the White House and how President James Madison's wife, Dolly Madison, ran to save the portrait of President George Washington.

They should know about the Civil War, why we fought it and how thousands of our soldiers died from a new type of bullet that shattered their bones. They should know about the horrors of slavery, how it had permeated the world throughout history and yet how, according to William J. Bennett, "the westerners led the world to end the practice." They should know about how Americans fought Americans claiming hundreds of thousands of soldier's lives.

They should know about World War I and how the soldiers lined up in rows, one after the other, to be shot or stabbed by swords. They should know about World War II and the almost inconceivable bravery of the soldiers who ran onto the beach to endure the battle of Normandy, which claimed thousands of American lives. They should understand what history has to teach us about the mistakes in politics that bred the tyrants who led millions to slaughter. As Publius teaches us, we should not rule with reason but upon the strong foundation of the lessons of history.

They should know about the Korean War, the Vietnam War and the Communist Regimes that ripped the souls from its people. They should know that our soldiers did not fight or die in vain in Korea or Vietnam because even though the enemy was physically in their field, the enemy's propaganda permeated and thus threatened our field.

They should know about the soldiers who stood on alert during the Cold War and their willingness to die. (My father was a West Point Military graduate and served in the Air Force. He was one of the first to fly twice the speed of sound, Mach II, in the 1960's. He flew the B-58 Hustler and was ready to die on his mission to Russia when his country called him to do so.) The cold war was won by the ready willingness of our brave soldiers in uniform and a country who was militarily prepared.

A prepared state is a winning state. Alexander Hamilton wrote in Federalist Paper No. 24, "Can any man think it would be wise, to leave such posts in a situation to be at any instant seized by

one or the other of two neighboring and formidable powers? To act this part, would be to desert all the usual maxims of prudence and policy."

Today, we fight in Iraq and Afghanistan (*as of original publication date, May, 2010*). We fight the insurgencies at our borders most especially in Arizona, Texas and California and we fight an elusive enemy that is creeping into our fields. They are creeping both from abroad with violence and from within with the slow usurpation of our founding principles. Alexander Hamilton warns in Federalist Paper No. 25, "For it is a truth which the experience of all ages has attested, that the people are commonly most in danger, when the means of injuring the rights are in the possession of those of whom they entertained the least suspicion."

A strong and honest government based on the Constitution and ruled by the people through the Constitutional Republic will prevail but only if we, as citizens, know about it and only if our children are raised on the fruits of this knowledge. As Alexander Hamilton states in Federalist Paper No. 25, "It also teaches us, in its application to the United States, how little rights of a feeble government are likely to be respected, even by its own constituents."

Wars are fought physically and wars are fought mentally. As civil servants we must be alert to the enemy that is amongst us. Alexander Hamilton states in Federalist Paper No. 25, "…every breach of the fundamental laws, though dedicated by necessity, impairs that sacred reverence, which ought to be maintained in the breast of rulers towards the constitution of a country…"

On this Memorial Day weekend, we begin our mission with an education of the thesis and basis of our country – what we fight for – the United States Constitution and the wisdom, freedoms, righteousness and structure that it upholds.

May God bless all of our service men and women past, present and future, who have fought valiantly for these principles.

God Bless,

Janine Turner
Constituting America Founder & Co-President
Memorial Day, 2018

## Campaign Finance: A History, Related Laws, and Impact on Running for Congress

## Guest Essayist: The Honorable Frank M. Reilly

Over the last 111 years, Congress has sought to regulate how its own elections are financed. Like most regulations, campaign finance laws have become increasingly more intensive and complex, though the U.S. Supreme Court has occasionally stepped in when Congress has overstepped either the powers granted to it in Article I of the Constitution, or the First Amendment rights of candidates, citizens, or associations of citizens.

As with most legislation, campaign finance laws result from a perceived abuse of power or of the process. And as the law changes, its subjects, like a stream of water that finds its way around an obstacle to continue its downstream flow, find new ways around the law.

While the bulk of federal campaign finance law has been enacted after the Watergate era of the early 1970s, the issue in the United States predates our Constitution. In 1758, George Washington's purchase of 144 gallons of hard cider, wine, and punch to encourage voters to support his election to Virginia's House of Burgesses was a catalyst for that very body to later ban the gifting of "money, meat, drink, entertainment or provision or …any present, gift, reward or entertainment etc. in order to be elected."[1]

The U.S. Congress first began regulating campaign finance in 1907 with the passage of the Tillman Act, 34 Stat. 864 (January 26, 1907), which banned corporate contributions to candidates for federal office.[2] Congress enacted the Tillman Act to respond to increased contributions by corporations in the 1904 election, and President Theodore Roosevelt, a key beneficiary of those contributions sought to remove corporations from the realm of political activity.

The 1910 Federal Corrupt Practices Act and its 1911 and 1925 amendments created the first campaign finance disclosures and imposed spending limits,[3] but the Supreme Court held the spending limits for primary elections to be unconstitutional.[4]

After World War II, the labor movement increased with greater unionization of employees, and many labor unions began efforts to force all employees to join the unions. During the war, the unions did not strike against the employers in a common effort to keep the nation's war response engaged. However, after the war, unions began striking against employers with greater frequency, and they became politically active.

In turn, Congress began restricting labor union political activities with the passage of the Smith-Connally and Taft-Harley Acts,[5] and also began prohibiting independent expenditures of not only labor unions but also corporations. To get around the restrictions, labor unions, and later corporations, created political action committees ("PACs"), in which individuals contributed their own funds to a PAC but the labor union leadership often controlled the donations to candidates.

In 1971, Congress passed the Federal Election Campaign Act[6] ("FECA") which instituted some campaign finance regulations on federal elections, primarily requiring disclosure of contributions and expenditures. The Federal Election Campaign Act Amendments of 1974[7] passed in the midst of Congressional hearings concerning the Watergate scandal, imposed an overall scheme of campaign finance regulations. These regulations essentially replaced the entirety of the 1971 Act and instituted comprehensive restrictions on federal campaign contributions and expenditures, enacted new registration and public disclosure requirements, created voluntary public financing of presidential campaigns, and created the Federal Election Commission to administer and enforce the new laws.

Former U.S. Senator James L. Buckley and others challenged the 1974 enactment, and the U.S. Supreme Court upheld contribution limits, public disclosure requirements, and the voluntary public funding of presidential campaigns, but struck down limits placed on spending by candidates for the U.S. Congress.[8] The Supreme Court recognized that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[9]

Similar to the reaction to the law enacted in the 1940's in which labor unions created PACs to get around the law, the individuals and groups regulated by the 1974 FECA amendments instituted new campaign practices to cope with the law.

National political parties began using "non-federal" or "soft money" accounts that were not subject to the individual campaign contribution limits for their party building activities. Other organizations, including PACs, labor unions, trade organizations, and corporations began running issue advertisements that did not fall within the restrictions FECA placed on "express advocacy" communications that advocated for the election or defeat of a particular candidate.

An example of an issue ad that might appear on television or on the radio would go like this: "Senator Jones opposes laws that would protect the environmentally sensitive Chesapeake Bay, endangering the survival of fish and birds that rely on clean water. Call Senator Jones at 202-224-3121 to tell him to support S. 2053 to protect Chesapeake Bay." These issue ads were unregulated, and no registration at or disclosure to the FEC was required.

Congress began regulating issue ads and party building with soft money by enacting the Bipartisan Campaign Reform Act of 2002[10] ("BCRA"), more commonly known as the McCain-Feingold Act. The courts have upheld most of BCRA's provisions, but the Supreme Court struck down the law's attempts to prohibit independent expenditures by labor unions and corporations.[11] Independent political expenditures are those which are made without any coordination with or prior knowledge to a federal candidate or the candidate's political committee. A later Supreme Court ruling also struck down BCRA's overall limits that individuals may give to all federal candidates and committees in the aggregate during a 2-year period.[12] The Supreme Court weighed First Amendment rights of persons and associations of persons (including corporations and unions) against the desire by Congress to prevent corruption resulting from large campaign contributions and reasoned that if expenditures are independent from a candidate, the expenditures are far less likely to have any sort of corrupting power.

After the Supreme Court decisions that pushed back on BCRA, corporations, labor unions, and even wealthy individuals were allowed to make essentially unlimited independent expenditures to support or oppose federal candidates. These associations created what are known as Super PACs. A Super PAC does not make direct contributions to candidates, but instead allows individuals, or associations of individuals such as corporations or labor unions, to create an entity that makes independent expenditures in support or opposition to a federal candidate, so long as those expenditures are not in any way controlled by, made in coordination with, or in any way in consultation with a federal candidate or the candidate's committee.

As each law was enacted, or modified by the courts, congressional candidates have adjusted their campaign fundraising. In the early days, prior to 1910, candidates faced no restrictions and could raise and spend whatever funds they needed in order to run their campaigns. With the advent of disclosure laws in 1910 and 1911, candidates would obviously be more discerning about the persons they solicited to avoid contributions from persons, or even the size of contributions that might negatively affect their campaign. With the creation of PACs, greater funds could be channeled to candidates, and with the Super PACs, virtually unlimited amounts could be raised; however the Super PAC funds have to be fully independent from a candidate or a candidate's committee.

The laws have affected campaigns in other ways. Most campaigns now engage lawyers and accountants who specialize in campaign finance law, an expense unknown to congressional candidates for the first 200 years of the republic.

With larger numbers of people to reach as our nation's population grows, and newer forms of communication, some of which remain expensive, the cost of political campaigns has grown significantly from the time that campaign finances began to be regulated. According to the website OpenSecrets.org, the average winning candidate for U.S. Senate spent about $10.4 million through the last month of the campaign, and the average winning candidate of the U.S. House spent $1.3 million.[13] Super PACs and other independent political groups spent nearly the same amount on Congressional candidates.[14] This is a long way from the $195 (in today's dollars) that George Washington reportedly spent on liquor to earn a seat in the Virginia Colony's House of Burgesses in 1758,[15] but he had far fewer voters to reach, about 2,000[16] as opposed to the approximate 710,000 persons per congressional district as set forth after the 2010 census.[17]

*Frank M. Reilly teaches constitutional law, election law, and other political science courses at Texas Tech University. He is also a lawyer in private practice in Horseshoe Bay, Texas, and serves as a municipal judge for two Texas cities. Follow him on Twitter @FrankReilly or on Facebook at JudgeFrankReilly.*

[1] Jim Moyer, "Washington Wins First Election 1758 House of Burgesses," <http://frenchandindianwarfoundation.org/event/washington-wins-first-election-1758-house-of-burgesses/>.
[2] J. Michael Bitzer, "Tillman Act of 1907," *The First Amendment Encyclopedia*, <https://mtsu.edu/first-amendment/article/1051/tillman-act-of-1907>.
[3] CQ Researcher, "Revision of Federal Corrupt Practices Act," Congressional Quarterly, <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1931070100>.
[4] *Newberry v. U.S.*, 256 U.S. 232 (1921).
[5] Pub.L. 78-89, 57 Stat. 163 (June 25, 1943) and Pub. L. 80-101, 61 Stat. 136 (June 23, 1947), respectively
[6] Pub.L. 92–225, 86 Stat. 3 (February 7, 1972).
[7] Pub.L 93-443, 88 Stat. 1263 (October 15, 1974).
[8] *Buckley v. Valeo*, 424 U.S. 1 (1976).
[9] *Id.*, 424 U.S. at 19.
[10] Pub.L. 107–155, 116 Stat. 81 (March 27, 2002).

[11] *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).
[12] *McCutcheon v. Federal Election Comm'n*, 572 U.S. ___, 134 S.Ct. 1434 (2014).
[13] Soo Rin Kim, "The Price Winning Just Got Higher, Especially in the Senate," <https://www.opensecrets.org/news/2016/11/the-price-of-winning-just-got-higher-especially-in-the-senate/>
[14] *Id.*
[15] Jaime Fuller, "From George Washington to Shaun McCutcheon:a Brief-ish History of Campaign Finance Reform,"" *Washington Post* (April 3, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon/?utm_term=.1c14f5651186>
[16] Each county in the Virginia Colony would send 2 members to the House of Burgesses, and in 1858 there were approximately 100 counties in Virginia, which then had a population of about 250,000. "Estimated Population of American Colonies,1610-1780" <https://web.viu.ca/davies/h320/population.colonies.htm>.
[17] U.S, House of Representatives, "Proportional Representation," <http://history.house.gov/Institution/Origins-Development/Proportional-Representation/>

## Counting the Personal Cost: Impact Running for Elected Office and Serving in Congress Has on Members and Their Families

## Guest Essayist: James D. Best

In his recent retirement announcement, Paul Ryan said, "It's easy for it to take over everything in your life." The Speaker of the House added, "If I am here for one more term, my kids will only have ever known me as a weekend dad. I just can't let that happen."

Many find it hard to believe that Ryan would put his family above one of the most powerful positions in our nation's capital. Most politicians never willingly forego the power that comes from high office. I have no insight into Ryan's motivations, but in preparation for this article, I interviewed the wife of an eight-term congressman, and she confirmed that public office has an enormous impact on members and their families.

First, the background. Lee Terry represented Nebraska's 2nd congressional district from 1999 to 2015. Prior to winning a house seat, he had served in Omaha city politics and had a successful law practice. When elected, his two boys were pre-school age. (Their third son was born later.) Neither Lee nor his wife, Robyn, came from wealthy families and they hadn't accumulated much savings at this point in their careers.

Being a congressperson or senator is like having three jobs that consume every waking moment. There are congressional duties, constituent services in the home district, and near continuous campaigning and fundraising. For the first few months, Lee's family lived in Omaha, but since he was seldom home, they decided to move to Washington D.C. That didn't work as expected, so they ended up returning to Omaha. In frustration, they realized that neither location allowed for a normal family life.

When they lived in Omaha, Lee spent his at-home weekends going to meetings and events. The public perception is that when a congressperson is home, they're on vacation. Not true. The life of a legislator at home is all work, and Lee couldn't even fly back and forth without other passengers interrupting him as he tried to catch up with his work. Everyone jockeys to meet their legislator, especially when they're new. During his first three months in office, Lee literally worked until 8:00 PM every night. People wanted to meet with the new congressman, and many wanted the congressman to tour their business. Events from parades to dinners to breakfast get-togethers were constant. Few invites were declined because elections fall every two years and raising campaign money becomes a constant requirement. At first, Lee and Robyn tried to set Sunday aside as a "no touch day". Then Sunday dinner as a "No touch time." Neither worked. They needed to line-out time on the schedule for family events, and at times that didn't work. Weekends became a blur. For the entire sixteen years, home life was rife with interruptions, and no holidays were private except for Christmas. Worse, when they were able to arrange a family outing, everyone felt free to approach Lee to express an opinion, ask for a favor, or merely say hello.

When they moved to Washington D.C., they assumed Lee would be home in the evenings with his wife and young children. Except that he still needed to return to Omaha most weekends, and many of his weeknights included evening events or occasionally votes. Robyn had expected an active social life with other spouses, but it was not as active as she supposed. Only about twenty percent of congressional families live in D.C., and those that did were spread all over the city. Except for friends in the immediate neighborhood, social interaction with other spouses was limited to formal events. Robyn began to feel isolated. Her large cadre of friends and relatives remained in Omaha. She had no relationship or history with local health providers. Then their oldest reached school age and she wanted her son to attend public school with his friends in Omaha.

Moving to D.C. did make Lee's Omaha-based work easier. He could perform his district duties without trying to balance family life and he felt less guilt about being pulled away from home so often. Despite this positive aspect of living in D.C., they moved back to Omaha.

As children of elected officials get older, they also sacrifice for their parent's profession. The biggest problem was loss of anonymity, which is very difficult for teenagers. On occasion, they heard criticisms of their father, in the media, at school, or at social gatherings. The boys were also admonished to always behave properly and not get in any newsworthy trouble.

Dealing with reality versus perception presented another challenge. Issues and people in the media are distorted for political purposes. Politicians understand that the opposition will build misperceptions about who they are, what they're doing, and why they're doing it. It comes with the territory. But spouses, children, and other relatives must live daily with slanted attacks on one of their beloved family members.

Money presented another sacrifice. Lee's congressional salary when elected was $136,700. Over the years, he would have done better financially if he had continued to build his law practice. He and his wife understood this when they chose public service, but it still startled them to watch

their peers out-earn them so dramatically. Even the rich sacrifice financially because they no longer have the same freedom to direct investments in their field of expertise.

Another popular perception is that when a person leaves Congress, they find abundant opportunities to make piles of money. This is seldom true in their old profession. For example, after an absence of sixteen years, Lee's professional connections and access to historic resources had diminished. It's like starting your profession all over again, but now from middle-age.

The two chambers also make different demands on families. Senators have longer terms, which lessens the need for constant campaigning, and they deal with fewer constituent services. Still, even senators are on call at all hours of the day and night.

Although we like to think that anyone can run for office, wealth makes it far more comfortable. Fundraising comes easier, two homes are affordable, travel more private and luxurious, and private schools de rigueur.

Being a congressional family is not all bad, of course. In many cases, the entire family gets to meet the president and other high officials. Children are often familiar with people in the news. A congressperson's family has access to areas, like the capitol dome, others never see. And, hopefully, there is the satisfaction of knowing you walk in the shadow of giants and have done your best to protect our country and improve the life of its citizens.

Being an elected public official is a difficult lifestyle for both the office holder and his or her family. A thank you might be in order the next time you meet your representative or senator.

*James D. Best, author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, Principled Action, Lessons From the Origins of the American Republic, and the Steve Dancy Tales.*

## Midterm Elections: Purpose and Importance for Successful Functioning of Congress

## Guest Essayist: Scot Faulkner

The definition of a Midterm Election is that it is held mid-way through the term of the President. While not on the ballot, the President's electoral mandate and actions to fulfill that mandate, are validated or challenged by voters as they elect members of the Legislative Branch.

Midterms were created as the solution to a fundamental issue in the founding of America:

What is the balance between responsive and responsible government?

The authors and advocates of the U.S. Constitution wrestled with this balance.

On the one hand, Alexander Hamilton and James Madison, writing as "PUBLIUS", asserted in their essays advocating for the ratification of the U.S. Constitution, that frequent elections guaranteed Congress' elected Members responding to the will of the people.

Federalist No. 52:

> First. As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured…. It is a received and well-founded maxim, that where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration.

Guaranteeing responsiveness and accountability also needed to be tied to short terms in office.

Federalist No. 57:

> The House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.

On the other hand, Hamilton and Madison worried that too frequent elections would create instability.

Federalist No. 62:

> The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the States is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success. The remark is verified in private life, and becomes more just, as well as more important, in national transactions.

Hamilton and Madison raised an issue they considered worse than instability – arbitrary and capricious public policy. They sought a structural solution, "necessary as a defense to the people against their own temporary errors and delusions." [Federalist 63]

Hamilton and Madison's solution was to have two separate bodies within the Legislative Branch, one of which would have longer terms of service. "The proper remedy for this defect must be an

additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.' [Federalist 63]

The Senate, having six year terms for its members, would be a defense against, "particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn." [Federalist 63]

Hamilton and Madison cited the importance of deflecting transitory and ill-thought public passion throughout history. "What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next." [Federalist 63]

They concluded that not only terms of service, but the cycles of elections would create the proper balance to assure responsive and responsible democracy: "when compared with the fugitive and turbulent existence of other ancient republics, very instructive proofs of the necessity of some institution that will blend stability with liberty." [Federalist 63]

Their solution is embedded in the U.S. Constitution.

ARTICLE I; Section 3:

> 1: The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, 3 for six Years; and each Senator shall have one Vote.
>
> 2: Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year;

The combination of having the entire Membership of the House of Representatives face the electorate every two years, and only a third of the Senate submit to re-election every two years created Midterm Elections.

Throughout American history, Midterm Elections have reshaped Presidential agendas, ended or launched new political movements, and marked watershed moments in the civic culture of the nation.

The 1858 Midterm, prior to American Civil War, showcased the fragmentation of the Democrat Party over slavery and catapulted the four-year-old Republican Party into becoming the dominant plurality faction in both the House and Senate. Sixteen years later, Republicans lost 96

House seats and their majority in reaction to the Grant Administration scandals, and the mismanagement of Southern Reconstruction.

The 1894 Midterms heralded the reemergence of the Republican Party as a new dynamic force that would bring William McKinley to the Presidency in 1896. The voters also blamed President Grover Cleveland for a major economic depression, leading to jobless workers marching on Washington demanding relief. The Democrats lost 116 seats in the House, the largest defeat in history. Fourteen years later, splits in the Republican Party, especially the falling out between old allies, Theodore Roosevelt and William Howard Taft, triggered Republicans losing 57 seats in the House and 10 Senate seats. This fragmentation worsened, leading to Woodrow Wilson winning the Presidency in 1912 with 42 percent of the popular vote in a three-way race.

The October 1930 Midterm reflected Americans reeling from the Stock Market Crash, facing a deepening Depression, and the collapse of trust in Republicans. The Republican Party lost 49 House and 8 Senate seats. The Republicans barely retained control of Congress by only two votes in the House and one in the Senate. Their Midterm debacle set the stage for the 1932 election, when Republicans lost the White House for twenty years, and lost Congressional power for three generations. Over the next 62 years, Republicans had ten years of intermittent rule in the Senate and led only two separate Congresses in the House.

America redefined itself in the 1994 Midterm elections. President Bill Clinton had overreached on universal healthcare. There was a revitalized Republican Party, fueled by Conservative Talk radio and the visionary leadership and aggressive tactics of Newt Gingrich. Democrats were shocked, losing 53 House and 7 Senate seats. This brought Republican rule to the House for the first time since the 1952 election, a forty-two year hiatus. Only one Republican Member had served in the previous Republican era – as a House page.

Since 1994, Republicans have dominated the Legislative Branch, even gaining 6 House and 2 Senate seats in the 2002 Midterm, in the wake of the 9/11 terrorist attacks. Bush Administration unpopularity and Congressional scandals led to voters ending Republican rule in the 2006 Midterms. President Obama's policy overreach, Conservative Talk Radio, and the rise of digital and social media, brought Republican majorities back to the House in the 2010 Midterms and the Senate in the 2014 Midterms.

No matter the outcome of the 2018 Midterms, the wisdom of those who struck the balance between responsive and responsible government in the U.S. Constitution will once again be vindicated.

*Scot Faulkner advises corporations and governments on how to save billions of dollars by achieving dramatic and sustainable cost reductions while improving operational and service excellence. He served as the Chief Administrative Officer of the U.S. House of Representatives. He also served on the White House Staff, and as an Executive Branch Appointee.*

# Elections and the Great Compromise of 1787: Proportional Representation and Voting Power per State

## Guest Essayist: Robert McDonald

### The Greatest Compromises Secure the Blessings of Liberty

In our current era of partisan polarization, just about any compromise can seem great. This makes all the more remarkable the Great Compromise of 1787, when so much seemed at stake.

The Great Compromise (also known as the "Connecticut Compromise") broke an impasse between large and small states as well as nationalists and localists. It made possible the eventual ratification of the Constitution.

But the compromise did more than result in the creation of the Senate, in which each state has two members, and the House of Representatives, where a state's number of seats is proportional to its population. It also strengthened the Constitution's checks and balances of competing powers and interests in order to better secure Americans' liberty.

When the Constitutional Convention gathered in Philadelphia in May of 1787, the need for compromise soon became apparent. Congress had authorized delegates to meet "for the sole and express purpose of revising the Articles of Confederation," under which states had equal representation in a unicameral assembly of delegates chosen by state legislatures. Yet on May 29, James Madison and Edmund Randolph proposed the "Virginia plan," which would scrap the Articles and institute a new constitution featuring a strong, one-man executive, as well as a bicameral legislature in which membership in both houses would be proportional to states' populations or contributions in tax revenue.

What had once been a confederation of states would be erased by a new national government in which state governments had no direct voice. This displeased localists (soon to be labeled "Antifederalists") who viewed the American Revolution, in part, as a struggle for the autonomy of the 13 former British colonies. It also put on the defensive small states, which feared that the proposed new system would allow highly-populated neighbors such as Virginia and Pennsylvania to dictate the government's direction.

In response, on June 15 William Patterson presented the "New Jersey plan." Patterson proposed to retain the Articles of Confederation and its one-house legislature in which all states had one vote. The Articles would be amended, however, to vest the central government with new powers to collect taxes and regulate commerce. In addition, a new, multiple-person executive branch would be authorized to compel compliance with the central government's laws.

It took delegates only a few days to reject the New Jersey plan. Even so, the Virginia plan lacked the support necessary for its adoption. The Constitutional Convention remained deadlocked.

The Convention regained momentum when Roger Sherman and Oliver Ellsworth, both of Connecticut, proposed combining elements of the Virginia and New Jersey plans. When

finalized on July 23, the Great Compromise had settled on a Senate in which states had equal representation and a House of Representatives where seats were assigned according to population.

The compromise did more than split the difference between the Virginia and New Jersey plans. Embracing the Virginia plan's bicameralism meant that bills would need to pass through an additional filter prior to arriving on the desk of the (one-man) executive. Embracing in the Senate the New Jersey plan's insistence on representation that was not only equal among the states but also (prior to the 1913 adoption of the Seventeenth Amendment) elected by the state legislatures meant that state governments, which had existed prior to the new national one, enjoyed a safeguard against the usurpation of their authority. Unlike under the Articles of Confederation, however, the compromise allowed senators to vote as individuals; gone would be the days when delegates cast ballots to decide their state's single vote. Yet revenue bills would originate in the proportional, popularly-elected House—in deference to the Revolutionary rallying cry of "no taxation without representation."

All this made the Great Compromise better, stronger, and more consequential than the sum of its parts. It helped to institute a plan that leveraged key features of America's Revolutionary heritage in the service of the future United States—a nation of nations that divided power within the central government and between the central government, the states, and individual citizens.

The democratic republic that resulted was to be a means to an end even greater than itself. Although the framers of the Constitution imagined different ways to achieve their goal, they refused to compromise their commitment to secure the blessings of liberty. They found a way to compromise on the new government's decision-making process in order to enjoy the best hopes of realizing its purpose. This made all the difference.

*Robert M. S. McDonald is Professor of History at the United States Military Academy in West Point, New York, and author of Confounding Father: Thomas Jefferson's Image in His Own Time.*

# CONGRESSIONAL POWERS AND RESPONSIBILITIES

## Federalism: Legislative Power of Congress and the State and Local Levels

## Guest Essayist: Patrick Garry

Following ratification of the U.S. Constitution, political philosophers described the federalism inherent in the document as America's hallmark contribution to the eighteenth century science of political governance.

Defined as a system of dual sovereignty, federalism envisions a constitutional order in which national and state governments each possess their own sphere of autonomy and authority. Whereas the concept of separation of powers operates on a horizontal level, ensuring

the autonomy of the different branches (legislative, executive and judicial) within any one level of government (state or national), federalism operates vertically, ensuring the autonomy of those different levels. Both federalism and separation of powers act as a coordinated system of checks and balances. Separation of powers checks the various branches, while federalism checks the different levels of government. Under federalism, autonomous states with their own sphere of power can help prevent a national government from abusing its power.

American federalism was not so much a deliberate political theory as it was a development of history. Throughout the colonial period, federalism evolved out of necessity. Because of the great distance between London and the American colonies, local government arose to fill the void. While the British parliament provided centralizing governance, local and colonial governments in America provided the day-to-day governance. This scheme not only allowed the colonists to address their own local concerns, it supplied a political experience and structure that would be invaluable once independence from England was declared. Consequently, when America designed its own constitutional structure, federalism naturally formed a vital foundation of that structure, ensuring the dual sovereignty of state and national governments.

Although there is no specific federalism provision in the U.S. Constitution, just as there is no specific separation of powers provision, federalism pervades the constitutional structure, which recognizes the autonomy of the states while also limiting the ability of the federal government to infringe on that autonomy. The closest to a specific federalism provision in the U.S. Constitution is the Tenth Amendment, which states that all powers not specifically granted to the federal government are reserved to the states.

The U.S. Senate, prior to the Seventeenth Amendment providing for popular election of senators, once reflected federalism concerns. Under the original Constitution, the House of Representatives was directly elected by the voters, but the Senate was chosen by the state legislatures. This system gave states a greater voice in the makeup of the federal government. It also created a sharper distinction and hence balancing function between the state-chosen Senate and the popularly-elected House.

Aside from its historical basis in the American experience, federalism also served several important values. Federalism provides a check on the abuse of national power. It also supports the diversity of a sprawling nation. Diverse state and local populations can shape local policy to their particular interests, whereas the federal government can only enact a one-size-fits-all policy for the entire nation.

Federalism enhances political accountability and trust. The smaller the governmental unit, the closer it is to the electorate and the more accountable it is. This higher degree of accountability in turn builds a higher level of trust in government. And finally, federalism creates a more flexible system of political governance, since smaller government units are more able to experiment in their policies.

From its colonial beginnings until the early twentieth century, the American political system rested on a strong belief in federalism. But this abruptly changed in the 1930s with Franklin Roosevelt's New Deal agenda, which greatly boosted national power at the expense of the

states. Congress acquiesced in this expansion of the national executive branch, as did the Supreme Court, which essentially abandoned one hundred and fifty years of constitutional jurisprudence in allowing such an expansion.

For nearly a half-century after this New Deal constitutional revolution, the Court continued to disregard the federalism mandates of the Constitution. Not until the mid-1990s did the Court reconnect with federalism. Dubbed by the media as "the federalism revolution," the Court's revival of constitutional federalism coincided with President Bill Clinton's assertion that "the era of big government is over." Nonetheless, the Court's "federalism revolution" attracted intense opposition from the advocates of an all-powerful central government. These advocates opposed federalism because of the potential limits it places on the unrestrained growth of the national government.

In *U.S. v. Lopez,* the Court upheld federalism by ruling that Congress could not invade areas traditionally controlled by state and local governments. The Court struck down a federal law prohibiting guns within a certain distance of a school, ruling that schools were historically state and local concerns. This decision contrasted with the New Deal-era decision in *Wickard v. Filburn,* where the Court ignored all distinctions between local and national. In *Wickard,* the Court held that a farmer's growing of wheat on his own land for his own use constituted an act of interstate commerce legitimately regulated by Congress.

Federalism not only limits the reach of the national government, it also allocates the use of legislative power among the different levels of government. Legislative power is shared through a system of dual sovereignty between state and national governments, and Congress cannot use its power to threaten the autonomy of the other levels of government.

*Patrick Garry is professor of law at the University of South Dakota and is the author of Limited Government and the Bill of Rights and The False Promise of Big Government: How Washington Helps the Rich and Hurts the Poor.*

## Federalism, the Senate, and the Constitution

## Guest Essayist: Andrew Langer

> **[T]he Constitution divides authority between federal and state governments for the protection of individuals…federalism secures to citizens the liberties that derive from the diffusion of sovereign power. – *New York v. United States* (1992)**

The essence of our Republic is summed up in this phrase from this 1992 Supreme Court decision. In it, Justice Sandra Day O'Connor lays out the very nature of our system of government: we have a federalist system, a system of divided powers, diffused as a check against the kinds of centralized authorities that are prone to abuse individual rights.

The founders, and their forebears, were deeply suspicious of centralized power. Britons in the pre-Magna Carta era had seen their rights abused by a series of tyrannical monarchs, and post-

Revolutionary War Americans had seen the abuses of a king an ocean away whose despotism had descended into tyranny.

It was with that in mind that the Constitution was created as a document that turned the nature of government on its head. Power, narrowly and carefully ceded, flowed from the people to their government. Those powers were carefully laid out in the Constitution, and they added a Bill of Rights as a further constraint against government power—being even more careful to add 9th and 10th Amendments to ensure that their descendants would understand that all that was not surrendered by the people was retained by them, that because certain rights were enumerated that didn't mean that other rights didn't exist, and that those powers that had ***not*** been given to government were reserved to the people.

The founders were explicit about this because they knew that over time, people would come to forget the tyrannies Americans had faced at the beginning of our nation's history (and before). They knew that successive generations would tinker with the Constitution in the inevitable quest to "form a more perfect union."

They knew that these generations would fail to understand the balance, and that power would shift between the various branches (through ignorance, or laziness, or the very-human thirst for power). Power is vested in Congress, for instance, to make law. But if Congress, because of the political pressures of elections, doesn't want to be specific in terms of legislation, they will pass vague laws and leave it to the Executive Branch to interpret—sometimes allowing that branch to make up wholly new laws.[1]

The founders created an additional diffusive check on power by making the two houses of Congress entirely different from one another. A "people's house" – the House of Representatives, representing smaller districts for two years at a time, and an "upper house"—the Senate, where they would represent whole states, and gain a greater depth of wisdom with six-year terms.

But… the Founders also recognized that a six-year term could make these Senators less-accountable to their constituents. So they added an additional check: having these senators appointed by their state legislatures instead of having them directly elected by the people.

While certainly not being as "democratic" as direct elections would be, one has to remember, again, that the United States are not a "democracy" but a "republic" – founded in the principles of federalism, representationalism, and, certainly, democracy. The founders were interested in good governance, accountability, and ensuring that power wasn't concentrated.

Having senators appointed by legislatures actually allowed for greater accountability. Consider, U.S. senators represent whole states. It becomes inordinately difficult for these senators to develop relationships with the vast majority of a state's citizens. It therefore becomes difficult for these citizens to exert pressure on their senators on key issues.

On the other hand, state legislators have close relationships with their constituents (within reason), and can distill their wishes relatively easily for translation to a senator appointed by a

state legislature. Add to this the pressure of being able to be recalled by a legislature, and you get a fairly agile check on federal legislative authority.

Unfortunately, in an era in which well-meaning but misguided activists were pushing for greater levels of democracy for democracy's sake alone[2], the 17th Amendment was introduced, passed, and ratified… and the ability of a state's citizenry to effectively check the power of the U.S. Senate was extinguished.

In the modern era, we see this in a variety of ways—both in terms of positive and negative influence on legislation. Good pieces of legislation passed by a House of Representatives still able to be activist go to the Senate and languish, while bad pieces of legislation go to the floor, immune from the pressure of local activists.

The founders had the foresight to create a federalist system where power was carefully balanced, checked and diffused. They wanted to make a Senate that was accountable to the people. The 17thAmendment changed that careful balance, and the American people are still reaping the ill-fruit of this decision today.

*Andrew Langer is President of the Institute for Liberty and host of the Andrew Langer Show on WBAL NewsRadio 1090*

[1] This is how an isolated patch of wet soil can be declared a "navigable water of the United States" for the purposes of regulation under the Clean Water Act, for instance.
[2] Despite claims that senators appointed by legislatures were more apt to be corrupted, there is scant evidence that this was actually the case. In contrast, senators that cannot be recalled by their legislatures are virtually immune from being punished by the voters for their misdeeds. *Cf.* The Keating 5 Scandal, various senators being indicted and not rejected from office, etc.

## Congressional Oversight of Federal Bureaucracy

## Guest Essayist: Richard Wagner

It is commonplace to assert that Congress exercises oversight over federal bureaus and executive agencies. But is this a reasonable assertion? Or might it represent a romantic yearning for an earlier and simpler age, or even for an age that never existed?

Article I, Section 1 of the Constitution declares that "all legislative powers herein granted shall be vested in a Congress of the United States." What is known as the nondelegation doctrine holds that Article 1, Section 1 prohibits Congress from delegating legislative authority to executive branch bureaus and agencies. A rigorous application of the nondelegation doctrine would undoubtedly overturn much of the so-called progressivist legislation of the past century, for that legislation confers on executive agencies the ability to make rules as well as to administer them, and also often to judge complaints about their actions.

Within the traditional concept of separation of powers, Congress creates the laws of the land through legislation, the President and the bureaus and agencies that comprise the executive branch executes and implements those laws, and the judiciary determines whether Congress and the President have conducted themselves properly in using their powers of office. The image of a separation of powers reminds one of a carton of Neapolitan ice cream with its three distinct zones of flavor. Actual democratic practice has a strong tendency to swirl the flavors together, rendering it impossible to get a bite of one flavor alone without obtaining all three flavors. The nondelegation doctrine seeks to restrict the ability of Congress to delegate its rule-making authority to executive bureaus and agencies.

In what is surely one of the most significant books so far this century, Philip Hamburger asked in 2014: *Is Administrative Law Unlawful?* Through some 500 pages of densely packed analysis and argument, Hamburger answers his question resoundingly in the affirmative. The reader of this book comes away with a good sense of the radical transformation our system of Constitutional government has been undergoing for the past century or so.

The American republic was founded on a constitution of liberty where people were pretty much their own bosses, as was reflected in our Declaration of Independence's recognition that "governments derive their just powers from the consent of the governed." The United States was founded on a rejection of the European feudal heritage where government was the province of the well-bred and the rest of us had no option but to mind our stations in life.

The spread of the administrative state through Congressional delegation of legislative authority to executive agencies has been establishing a contemporary form of feudal government. No longer is there a class of people who are born to be lords of the manor. But lords of the manor are spreading among us all the same. These lords attain their positions not by birth but by advancing into the higher regions of bureaucratic administration.

While Congress does sometimes inquire into executive actions without receiving responses, more common is a Congressional disinterest in the bulk of the activities of those executive agencies and bureaus. Congress delegates such powers all the time across nearly all arenas of governmental action. A few highly publicized instances arise where executive agencies defy Congressional inquiries. The usual pattern, however, is a general Congressional disinterest in the activities of most bureaucratic agencies most of the time.

This observation about the absence of strong Congressional interest in nondelegation points to a valuable insight about human nature in politics that the American Founders would clearly have appreciated. Why does Congress delegate legislative authority when it doesn't have to and, indeed, is precluded from doing so by a plain reading of the Constitution?

A good starting point for addressing this question surely resides in recognizing that increasing the amount of oversight Congress must exercise will interfere with other activities that members of Congress would prefer to do. One of those activities is providing constituent services, which occupy a great deal of time by Congressional staffs. With constituent services, Congressional staffers help constituents to deal with problems their constituents face in dealing with executive agencies and bureaus.

Without the delegation of legislative authority to executive agencies, those constituent problems would be blamed on Congress. With delegation, however, these are blamed on bureaus and agencies. Members of Congress thus receive gratitude from constituents for helping them to navigate the bureaucratic jungle they allowed to grow in the first place. Members of Congress can improve their electoral prospects by refusing to exercise the oversight that a plain reading of Article 1, Section 1 requires of Congress. Even more, exercising such oversight would reduce the ability of Congress to enact even more legislation, and yet Congress lives in large measure on enacting legislation that various interest groups in society favor.

*Richard E. Wagner is Holbert Harris Professor of Economics at George Mason University.*

## Power of the Purse and the Congressional Budget Process

## Guest Essayist: Amanda Hughes

One of the most important tasks Congress must complete is to set a budget. It is especially important for members of Congress to understand how the budget works in order to best represent and serve the American people. For this reason, our United States Constitution framers recognized the need for a system that could remain within the knowledge and control of the people who would entrust power to their elected representatives concerning the nation's finances.

The framers did not want to repeat what they observed in England where the king was able to direct funds rather than the citizenry directing funds. The framers instead put together a different form of government that left control or "power of the purse" in the hands of the people. This is how Congress, the legislative branch, was placed in charge of taxing and spending, a system by which voters could have a say in the direction of funds and hold their representatives accountable:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills. – United States Constitution, Article I, Section 7, Clause 1

By the first Monday in February of each year, the Office of Management and Budget (OMB) is required to provide a report of the president's priorities for the United States. The budget is set for the fiscal (monetary or budgetary) year that begins in October, and is required by law to cover at least five fiscal years. Currently, the federal budget covers 10 fiscal years:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. – United States Constitution, Article I, Section 9, Clause 7

By 1791, the First Congress passed the first appropriations act to fund the government. In 1865, the House of Representatives separated the duties of writing tax policy and the duties of

allocating funds into these two committees: the Committee on Ways and Means, and the Committee on Appropriations.

The House Committee on Ways and Means is in charge of writing tax policy that will determine how money is spent. The Committee on Ways and Means dates back to 1789 and is the oldest committee of the United States Congress. The Committee on Appropriations is in charge of dedicating funds for specific purposes.

Though the President of the United States starts the budget process by sending a request with the Administration's policy and funding priorities to the Office of Management and Budget, it is Congress that runs the financial numbers and reports on projections and measures policy changes that may be recommended for upcoming years.

Next, the nonpartisan Congressional Budget Office sends analyses on the economic outlook to the House and Senate Budget Committees, which then uses the information researched by the Congressional Budget Office to put together a resolution and decide on proposed policy changes.

The budget process has come a long way since America's founding. But, with the bringing in of revenue (tax money), complications and even quarrels over the integrity of the budget process and spending arose. By 1974, the Congressional Budget and Impoundment Control Act was established to reduce court suits over disputes between Congress and the President, among prior issues building up to that point, to help alleviate problems delaying the creation of each budget. The intention was to reform the process that would result in the best spending priorities rather than allow to remain a sense that the budget lacked stability.

Though changes in means to forecast economic strength and positive or negative outcomes have grown due to advancements in technology and computing, for example, Americans will undoubtedly continue to argue over spending and debt. Yet, America's founders and Constitution framers knew all too well the warning signs accompanying a lack of discernment for the public monetary trust that could result in a declining economy:

> I, however, place economy among the first and most important of republican virtues, and public debt as the greatest of the dangers to be feared. – Thomas Jefferson, Founder, Author of the Declaration of Independence, and Third U.S. President

*Amanda Hughes serves as Outreach Director, and 90 Day Study Director, for Constituting America. She is the author of Who Wants to Be Free? Make Sure You Do, and a story contributor for the anthologies Loving Moments(2017) and Moments with Billy Graham(forthcoming).*

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## Congressional Powers and War: United States Congress Versus the Confederate Congress During the Civil War

## Guest Essayist: James D. Best

The Framers interminably debated every little detail of the Constitution. Did they end up getting it right? The Civil War indicates they may have.

Nothing puts stress on government more than war. Especially, a civil war. Superficially, the Confederate Constitution appeared very similar to the United States Constitution. However, there were differences. The Confederate Constitution openly used the word slavery, where the Framers adopted the euphemic, "other persons." Many of the Framers abhorred slavery and refused to see it referred to outright in the language of the Constitution. The Confederacy made more than semantic changes. In their minds, they corrected errors they felt were decided improperly seventy-three years prior. Some of these, arguably, contributed to the South losing the War for Southern Independence.

In Philadelphia, the Framers argued numerous times over the proper length of term for the president. Some wanted a short term with re-electability, others wanted a long term with no re-electability. The Constitutional Convention settled on a four-year term with unrestricted re-electability, which the Twenty-Second Amendment limited to two terms. The Confederate Constitution adopted a six-year term with no re-electability.

In 1787, most southern delegates to the Constitutional Convention believed the executive should be nonpolitical, so when they had a chance to write their own constitution, they gave the president the liberty to abstain from politicking. With an above-the-fray executive, they then felt comfortable giving the president more power. Under the Confederate Constitution, the president had a line-item veto and Congress, without a two-thirds majority, could not appropriate money unless requested by the president. In essence, this shifted the power of the purse from Congress to the president.

Jefferson Davis never ran for president. He was selected for one six-year term and, for the most part, ignored politics. Davis was an iconic figure for the Confederate cause, while at the same time, the public held Congress in low regard. Davis used the disparity in their respective reputations to neglect Congress. He did not host meals with congressional leaders, provide patronage, help legislative candidates, speak highly of people to the press, or support bills sponsored by powerful legislators. He openly displayed impatience with people who disagreed with him. As an indicator of Davis' distain for Congress, he wrote, "Now when we require the brains and the heart of the country in the legislative halls of the Confederacy and of the States, all must have realized how much it is otherwise." A Charleston Mercury reporter wrote, "He regards any question put to him by Congress as a presumptuous interference in matters which do not concern them."

Lincoln did not have that luxury. The U.S. Congress constantly challenged his war decisions. The Joint Committee on the Conduct of the War, commonly referred to as the War Committee, used oversight powers to wield a potent check on the executive branch. The committee investigated battle defeats, war profiteering, Confederate atrocities, and generally stuck its nose in wherever it wanted. Members often leaked testimony and criticisms to the press, which caused distrust in the War Department and the Union Army. While the Confederate Congress met in secret, the Union Congress broadcast its proceedings at the top of its lungs.

Presidential politicking of congress was one of the great differences between the Union and Confederate governments, but did this affect the outcome of the war? Perhaps, and perhaps significantly.

Lincoln smooched Congress to get legislation passed, appropriations approved, and to garner support for reelection. It may not have felt good to Lincoln at the time, but this constant politicking brought many more minds to the task, built comradery, provided a vent for mistakes, and may have tamped down some ill-conceived moves. The War Committee harangued Lincoln and his cabinet throughout the conflict, but by acting as the catalyst for aggressive debate, the committee may have helped win the war. It certainly caused Lincoln to think long and hard about what needed to be done and how he would get various factions behind his proposed actions.

Near the end of the war, Lincoln won reelection and enjoyed substantial popularity in government and the states that remained in the Union, while the Confederate Congress tried to force President Davis to replace his entire cabinet, stripped him of his commander-in-chief authority, and threatened a vote of no confidence. By this time, of course, a Union victory had become obvious, affecting the respective reputations of the presidents. But Davis has gone down in history as cantankerous, aloof, and averse to taking advice. Perhaps if he had been required to build relationships with the other people in government, the South could have leveraged their early victories to achieve a different outcome.

Did the hyper-political Abraham Lincoln have an advantage over the standoffish Jefferson Davis? Probably. An engaged president knows the thinking of other players and can more easily leverage strengths and mitigate weaknesses. If this be the case, then the Founding Fathers got it right when they settled on a short presidential term with re-electability.

*James D. Best, author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, Principled Action, Lessons From the Origins of the American Republic, and the Steve Dancy Tales.*

## Congress, Declarations of War and Authorization of Force, and War Powers Act

## Guest Essayist: Andrew Langer

As discussed throughout the essays of Constituting America's 90-Day Studies of the Constitution, central to the nature of our republic is the division and diffusion of power through the various branches and levels of our government. The power of one branch of the federal government is checked by the power of another branch, and the authority to engage those powers is diffused, so that the rights of Americans are protected against abuse.

In the recent essay on Federalism and the United States Senate, I began with a quote from *New York v. United States*, a 1992 Supreme Court decision which eloquently lays out the reasoning behind our federalist system. In that essay, I talked about the diffusion of sovereign power as protecting individual rights. That case also says,

> **[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.[1]**

This is especially true when it comes to the power to wage war. Next to the power to use lethal force against its own citizens (in the most-extreme instances), the power to inflict harm against other nations is the most-serious power we, as a people, have ceded to our government.

And the founders were incredibly suspicious of the power to wage war being abused by a centralized government. They had seen firsthand the arbitrary and cavalier ways in which monarchs, and not just the British monarchy, were using war, and had used war throughout the world's history, as a way of building empire, and glory, and power.

This is NOT what they wanted these United States to be—and so they made it difficult for the nation to wage war. The imbued, under Article I of the Constitution, the power to ***declare*** war with the Congress. But the management of that war, the management of the armed forces of the United States, was vested in the President as the "Commander-in-Chief" under Article II.

Remember, as well, that as a check against abuse of military authority, the bulk of our armed forces were to be comprised of militia[2], locally-organized and locally-commanded, and that we really were to have no standing army (a posture that changed as the country grew and matured).

But the founders wanted the decision to go to war to be deliberate (and deliberated), so they vested that decision in Congress, and as a result, Congress has only "declared" war ***eleven*** times

in our nation's history, with six of those instances being related to various hostilities in and around World War II.

However, following World War II, and with the advent of the Cold War (and the associated "proxy wars" that ensued)[3], the divided powers between Congress and the Executive Branch became muddied. The President was granted considerable leeway by Congress to engage U.S. troops in armed conflicts without having it necessary for Congress to actually "declare" war.

The Korean War was, officially, a "police action"—though historically it is termed a war, U.S. troops were directly engaged in a conflict between two powers, and thousands of U.S. lives were lost. Similarly, the Vietnam War utilized thousands of soldiers, sailors, airmen and marines, but Congress never declared war against North Vietnam.

But Congress attempted to re-assert its authority because of growing public wariness with how the Vietnam War was being conducted. In 1973, the "War Powers Resolution" was passed (though not signed by President Richard Nixon, thus making fall short of an "act"), which is supposed to work as a check against the President's conducting of foreign military affairs. It requires the President to inform Congress within 48 hours of the committing of U.S. military forces to action, places time restraints on how long they can remain there (60 days of engagement with 30 days for a measured withdrawal from conflict).

Past this, Congress is supposed to pass an AUMF – an "Authorization for the Use of Military Force", or, beyond an AUMF, an actual declaration of war.

Because of the expense to the United States from engagement in hostilities abroad—both in terms of manpower and materiel, there has been renewed interest in both houses of Congress and in not just the two major political parties, but other parties as well, for legislation to reassert the separation of powers when it comes to warmaking. Those pushing for this reassertion are saying that the concerns of the founders, the reasons the founders divided these powers, are being made manifest in how that division is being ignored today—American military members dying in conflicts that are not wars, though important American participation in these conflicts might be.

The point is, the use of that force was supposed to be deliberate—and the division of power was supposed to make those waging war more directly accountable. The Constitution protects us from our own best intentions. And those intentions had better be deliberated when we're talking about waging war.

*Andrew Langer is President of the Institute for Liberty and the Host of the Andrew Langer Show on WBAL NewsRadio 1090 in Baltimore.*

[1] New York v. United States, 488 US 1041 (1992)
[2] There is much-confusion as to the definition of "militia" as referenced in the Second Amendment. Keeping in mind that the entirety of the Bill of Rights exist as a further constraint against government power, and that the Second Amendment represents only ***one*** justification for the right to keep and bear arms (absent the 2nd Amendment, the 9th makes it clear that the right to self-defense is retained, despite not being enumerated in the Bill of Rights), "militia" is currently

actually defined in the United States Code—divided into "organized" militia (the National Guard) and the "unorganized" militia—essentially all other adult citizens of the United States. 10 USC, Section 246.
[3] A "proxy" war is a conflict engaged in by two powers, who are essentially acting as proxies for other, stronger powers that do not wish to engage in direct warfare with one another. Throughout the Cold War, the United States and the Soviet Union supported parties in a number of armed conflicts, many of which could be considered "proxy" wars.

## Treaty-Making Power of Congress

## Guest Essayist: Tony Williams

In the early republic, the founding generation took the treaty-making provisions of the Constitution seriously even as they sought to define the parameters of those constitutional powers. As the first president, George Washington, in particular, tried to set the right constitutional precedents and observe the proper balance of powers with relation to the legislative branch. Although the battles over the treaty-making authority could be highly contentious, the fights took place within a constitutional framework and helped establish the principles of American foreign policy.

The treaty-making power was derived in part from the experiences of the successes and failures of the Continental Congress during the war and the Articles of Confederation. Upon declaring independence, the Americans sent commissioners to various nations and achieved its most notable success with military and commercial treaties with France in 1778. At the end of the war, the peace commissioners secured a 1783 treaty with Great Britain recognizing American independence. The precedent was set for treaties negotiated by a few individuals subject to approval by the people's representatives in Congress. In the wake of the war, however, several states challenged national authority and sought to make their own treaties due to state sovereignty.

The treaty-making power was additionally derived from the principles of the American founding and incorporated into the Constitution. In Article I, section 10, the Constitution banned states from making treaties because it was a power of national sovereignty. In the executive power of Article II, section 2, the Constitution authorized the president to make treaties: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." This provided for the energy and dispatch in the executive branch to make treaties, subject to the approval of a supermajority of representatives of the states in the deliberative and wise upper house less subject to popular passions. In addition to the principle of checks and balances, this supported federalism by allowing the states to have a say in approving or rejecting treaties.

If the constitutional boundaries of the treaty-making power were relatively clear-cut, they were anything but clear in the partisan squabbles of the new nation. Washington was a scrupulous constitutionalist and tried to follow it to the letter when he brought instructions for a commission to make peace with the Creek Indians to the Senate personally in the summer of 1789. When the

Senate bickered over the details and sought to appoint a time-consuming committee to study the matter, Washington fumed, "This defeats every purpose of my coming here." The discontented president stormed off and would later submit completed treaties to the Senate for their consideration after the fact.

After a great struggle in 1793 over whether the president or Congress could issue a proclamation of neutrality in the wars raging across Europe (settled in favor of the president, while Congress retained its power to declare war), the treaty-making power became the center of controversy over the Jay Treaty in 1795 and 1796. John Jay negotiated a treaty with Great Britain to stop the impressment of American sailors and resolve several unsettled issues from the Revolutionary War. While Jay wrangled as many concessions as he could on the latter, he failed on the former.

In the spring of 1795, Washington reluctantly submitted the treaty to the Senate and asked that it be considered in secret. The Senate narrowly ratified the treaty by a vote of 20-10 only after an unpopular clause limiting American trade with the British West Indies was removed. After Washington signed the treaty, the House tried to control the treaty and demanded Jay's papers from the negotiations. Washington refused and asserted executive privilege. The House then tried to block the treaty with its appropriations power, but then finally passed the money to implement the treaty in early 1796.

The Pinckney Treaty with Spain was also ratified during the Washington administration and gave the United States access to the Mississippi River and duty-free trade with New Orleans that was much less controversial.

President John Adams dispatched three negotiators to France when that country seized hundreds of American vessels, but foreign minister Talleyrand demanded substantial bribes and loans to the country. Outraged Americans demanded war and after mobilizing for the Quasi-War in the late 1790s, Adams also tried for peace and his negotiating team secured the Convention of 1800 that settled the issues between the two countries and negated the 1778 alliance.

President Thomas Jefferson shared Washington's constitutional scruples when deliberating over the purchase of the Louisiana Territory. He was greatly concerned that the president did not have the constitutional authority to purchase land and considered asking for a constitutional amendment. Finally, he instead reasonably found the authority under the treaty-making power, and the Senate quickly agreed and ratified the popular purchase that doubled the size of the United States.

In the new nation, the standard of diplomacy was generally the constitutional procedure of the executive signing formal treaties subject to Senate ratification by a two-thirds vote. A century later, even President Woodrow Wilson submitted the highly controversial Treaty of Versailles to the Senate despite the fierce opposition he anticipated from "irreconcilable" Republicans, and it went down to predictable defeat. In recent times, however, presidents have evaded partisan opposition and defeat by making agreements not subject to the same constitutional standard and have contributed to the "imperial presidency" by avoiding the checks and balances that mark constitutional government.

*Tony Williams is a Constituting America Fellow and a Senior Teaching Fellow at the Bill of Rights Institute. He is the author of six books including the newly-published Hamilton: An American Biography.*

## Separation of Powers, Checks and Balances, and Impeachment: Presidents Andrew Johnson, Richard Nixon, Bill Clinton

## Guest Essayist: Andrew Langer

> **The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. – The US Constitution, Article II, Section *4***

In this 90-Day series on the Constitution, many scholars, myself included, have talked about the diffusion of power as a check on sovereign authority. The power to wage war, for instance, is divided between Congress (with the power to declare war) and the Executive Branch (wherein the President serves as Commander-in-Chief).

But because of the enormous power of the Executive Branch (and of the President as Chief Executive), the founders knew it would be necessary to create a mechanism by which a President could be removed from office. Benjamin Franklin is noted to have quipped at the Constitutional Convention that prior to the existence of the United States, national leaders who had earned enmity with their peoples had been removed from power via assassination (or execution), and that it would be more preferable to have a proceduralized legal process by which such a leader would be removed in the United States.

Mirroring criminal legal proceedings, when it comes to federal impeachment, the House of Representatives engages in the process of "impeachment" which is akin to a grand jury's indictment process. Should the President be "impeached" (i.e., indicted), the case then goes to the U.S. Senate for trial—with the Chief Justice of the United States Supreme Court presiding. To date, two Presidents have been impeached: President Andrew Johnson and President Bill Clinton. Neither were convicted in the Senate.

President Richard Nixon resigned from office before the House could vote on his impeachment—but it was expected that the House would impeach him, and that the Senate would most-likely find him guilty, and thus make him the first President to be removed from office under the Constitution's guidance.

The fact that no President has been so-removed is a testament to the founders' brilliance. As I have written elsewhere regarding federalism and the separation of powers, the founders wanted the people of the United States to have a *deliberative* legislative branch—and the deliberative nature of the impeachment process hedges against a legislature that wishes to punish a President over politics.

This could certainly be argued with regards to Andrew Johnson. Johnson, who assumed office after President Lincoln's assassination, was grappling with a Congress essentially-ignoring Lincoln's Reconstruction wishes ("malice towards none, charity towards all"), putting the southern readmission process into the Union under the management of military commanders.

There were legitimate questions as to whether this was Constitutional, but President Johnson attempted to use his power as Commander-in-Chief to mitigate the use of the military in this regard. In response, Congress passed the "Tenure in Office Act", which sharply constrained the ability of the President to remove Executive Branch officials[1] when the Senate was out of session (which, at the time, was quite frequent, given the part-time nature of our federal legislature prior to the invention and installation of modern air conditioning in the U.S. Capitol and office buildings).

Johnson asserted his authority as chief executive, and Congress pushed forward to impeach him under Article II.

It is important to note that the concepts of "high crimes and misdemeanors" has never been authoritatively defined—and so it has become a ubiquitous "catch all" for a President's opponents to bandy about when calling for a President to be impeached on non-specific offenses.

In the case of Johnson, the process worked. Yes, he was impeached by the House, but when the case went to the Senate he was acquitted.

In the case of President Clinton, the "high crimes and misdemeanors" arose from allegations of perjury and obstruction of justice with regards to the Independent Counsel investigation of the President, and statements he made, under oath, with regards to a personal relationship the President had with a White House intern. Once again, the House of Representatives impeached the President, while the Senate trial resulted in an acquittal.

That President Nixon resigned from office before he could be removed is further proof that the system, and the concerns underscored by Benjamin Franklin, works as intended. Our founders had great faith in the rationality of American leaders—but they also recognized that men were fallible. As James Madison wrote in Federalist #51:

> **If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.**

There was an expectation that thoughtful leaders, when presented with the stark reality of their removal, would accept resignation rather than removal.

Which brings us to the present administration, and the great political divide in America today. The founders were aware that political tensions could run high—and that politicians might try to remove a President for political reasons. It is in environments like today that the deliberative process is of such paramount importance.

The thorough process creates a bar that insists that our representatives (in both the House and Senate) give great thought to their actions vis-a-vis removing the chief executive. In that deliberative thought process, the founders knew, rationality would rise to the top.

*Andrew Langer is President of the Institute for Liberty and host of the Andrew Langer Show on WBAL NewsRadio 1090 in Baltimore.*

[1] It is important to note that the Tenure in Office Act was sharply reformed when Ulysses S. Grant took office, and ultimately repealed by Congress two decades after it's package. When a similar law was passed in 1926 and challenged for its constitutionality, the Supreme Court commented on the Tenure in Office Act as having been potentially unconstitutional (had it been challenged).

## ROLES IN CONGRESS

## Roles: House Speaker, President of the Senate, Majority, Minority Leaders and Whips for an Effective Congress, Part 1

## Guest Essayist: Amanda Hughes

Leadership roles in the United States House of Representatives and Senate help advance the purpose of Congress and why each member was elected – to serve. Various positions bring in members who offer each Congress that convenes unique experience and abilities.

Development of leadership roles that would carry into the new, settled governing system was in the making in the years surrounding the first, second, and third Continental Congresses and into the first United States Congress.

Combined efforts throughout the 1700s held a number of the same men who crafted and/or signed one or more of our beginning or founding documents, the Declaration of Independence, Articles of Confederation, United States Constitution, and later the Bill of Rights. The knowledge, strengths, and interests of these early leaders would create congressional governing positions still in use today.

The First United States Congress which met from 1789 to 1791 is considered the most important of all of the Congresses that have convened since then. The First Congress was entrusted with an arduous task of discussing and passing all legislation necessary to get the new system of American government running and with workable precedents. This included a need to select

leadership roles among setting up rules and procedures of each chamber, or body, of the House and Senate.

Roles in Congress would develop with Representative James Madison who led the beginning Congress that would set up, for example, a revenue system, executive departments, take on state Revolutionary War debts, and decide on the future capital.

While at work setting up new roles for a new system, the first Congress moved to Philadelphia in 1789. Washington, D.C. would later become the settled, nation's capital where the three branches of government would sit: the nation's Capitol would be built for future Congresses to meet, the White House for United States presidents to reside, and home of the Supreme Court.

Each year Congress convenes in a series of meetings called a session. Congress holds two sessions per year. Article 1, Section 4 of the Constitution states:

> The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Later, the 20th Amendment to the Constitution was ratified to make the third day of January the meeting date unless Congress passes a law to appoint a different day. When the House or Senate is meeting on Capitol Hill, either is said to be "in session" each time one or both chambers meets though the two formal meetings per year, one of which must occur based on the constitutional mandate to meet at least once per year, are also called "sessions."

The House begins a new Congress at noon on January 3 each odd-numbered year following a general election with a Congress lasting two years, and each year is one session. The Senate meets for a new "Congress" every two years, divided into two annual sessions, each beginning in January and ending in December. When the House and Senate meet together, it is called a joint session, and sometimes a joint meeting depending on the reason for meeting. Starting and ending on an odd year, as of 2018, the United States Congress has convened for 114 Congresses, is currently in the second session of its 115th Congress that began in 2017 and will conclude in 2019.

Prior to the first Congress in 1789 under the new system of government, along with election as the first United States President, George Washington, was selected as president of the Constitutional Convention in the summer of 1787 in Philadelphia. It was a role that would help spur the necessary precedents to maintain a stable, effective Congress for the long-term.

Since 1789, relatively few Americans, almost 11,000, have taken a role as a member of the U.S. House of Representatives and/or Senate. The First Federal Congress convened in New York City's Federal Hall March 4, 1789. They were able to begin proceedings finally in April because at first, they did not obtain a quorum to begin conducting business. Once enough members finally arrived from long, difficult travel, they were able to begin, including to elect a first Speaker, Representative Frederick Muhlenberg (R-PA). Currently, in the 115th Congress, Representative Paul Ryan (R-WI) is serving as House Speaker.

Article I, Section 2 of the United States Constitution reads:

> The House of Representatives shall chuse their Speaker and other Officers…

The Speaker is the presiding officer over the House of Representatives in a political and parliamentary role. Though established from British parliamentary practice, Speakers have limited their positions to presiding over the House, among other duties, and serving as a ceremonial head. The Speaker is elected by a majority of the Representatives newly elected, and chosen by the majority and minority party caucuses, when a new Congress begins.

In case of a vacancy during a Congress, a majority of the House selects a new Speaker from candidates the two parties previously chose. The role of the House Speaker is part of our Constitution in Amendment 25 as a leader in line to the presidency, should the President of the United States prove disabled.

Since the Framers left the decision to Congress regarding which Officer would act as President should the Vice President be unable as first in line to the presidency, it was decided in 1791 to set the Secretary of State as next in line after the Vice President. The Vice President also serves as President of the Senate, with authority to vote in case of a tie on the Senate floor. John Adams served as the first Vice President along with duties as President of the Senate. Today, Mike Pence (R-IN) serves as Vice President and President of the Senate.

Some suggested the Chief Justice, House Speaker, or president pro tempore (meaning to serve for the time being, and in this case if the Vice President is unable) of the Senate which did serve in the succession capacity following the passage of the Presidential Succession Act of 1792. Differences in opinion over who should succeed the President and Vice President left considerable risk for upset of stability and balance of powers. In 1947, the law was changed to place the order of succession to make the Speaker in line after the Vice President, followed by the president pro tempore, then the Secretary of State and other cabinet members depending on the time each department was created. To this date, this system is still in use.

*Amanda Hughes serves as Outreach Director, and 90 Day Study Director, for Constituting America. She is the author of Who Wants to Be Free? Make Sure You Do, and a story contributor for the anthologies Loving Moments(2017), and Moments with Billy Graham(forthcoming).*

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## Roles: House Speaker, President of the Senate, Majority, Minority Leaders and Whips for an Effective Congress, Part 2

## Guest Essayist: Amanda Hughes

Along with House Speaker and President of the Senate, other important positions such as Majority and Minority Leaders, and Whips play significant roles for an effective Congress. At the outset of United States Congresses, such roles were not as formal as they are today, and have come to be defined by history and tradition. However, since the House of Representatives is a large body, having floor leadership is especially beneficial to assist members with conducting business they were elected to complete, and help one another work at their best together.

House and Senate Majority Leaders are selected for the party that has the most Members elected to the current Congress. The Minority Leader is selected for the party with the fewer Members elected to the current Congress. Each is chosen within the respective party caucus or conference every two years at the start of a new Congress.

Representative Sereno Payne (R-NY) served as chairman of the Ways and Means Committee prior to becoming the first House Majority Leader in 1899. For the current, 115$^{th}$ Congress, serving as House Majority Leader is Representative Kevin McCarthy (R-CA). Early on, the tendency was a chairman of Ways and Means or Appropriations was asked to also serve as

Majority Leader. This trend continued until the role became more distinct. While party floor leaders are not included in the Constitution, the positions developed over time. The first floor leaders for Democrats were official in 1920, and for Republicans in 1925.

Charged with scheduling legislation to be considered for a floor vote, planning short and long-term legislative agendas, and checking with Members to see how votes could go, the Majority Leader helps the party reach its goals as elected. In Congress, the "floor" is where House and Senate Members meet, discuss, and vote in favor of or against passage of legislation. Each floor is said to be in the House chamber or Senate chamber, with each chamber located on opposite sides inside the United States Capitol building in Washington, DC.

Minority Leaders serve as floor leaders like the Majority Leaders. Though many of the Minority Leader responsibilities are similar to those of the Majority Leader, the Minority Leader represents the minority party of the current Congress, speaks for and protects the rights of the minority party.

James Richardson (D-TN) was recognized as the first House Minority Leader in 1899, though it was said James Madison served as the first Minority Leader as he led the "loyal opposition" to Treasury Secretary Alexander Hamilton's policies during the First Congress. Today, Representative Nancy Pelosi (D-CA) serves as House Minority Leader.

Senate floor leaders came from standing committees that had the most power. In 1913, Senator John Worth Kern (D-IN) functioned similarly as a Senate Majority Leader would now for the Democratic Party. The same occurred for the Republican Party in 1919 with Senator Henry Cabot Lodge, Sr. (R-MA) acting as a majority floor leader. Later, official elections of Senate Majority and Minority Leaders arrived first in 1920 with the Democratic Party choosing Oscar Underwood (D-AL) as Senate Minority Leader, and in 1925, the Republicans choosing Senator Charles Curtis (R-KS) as Senate Majority Leader. Senator Mitch McConnell (R-KY) serves today as Senate Majority Leader and the current serving Senate Minority Leader is Senator Charles Ellis "Chuck" Schumer (D-NY).

Similar to Majority and Minority House and Senate leaders, Whips, borrowed from the British Parliament and a foxhunting term, or "whipper-in" would assist floor leaders with keeping the legislative agenda moving, counting Members for votes and ensuring quorums, and standing in for floor leaders as needed. Whips, also elected by both parties, are still part of floor leadership in modern Congresses, positions that grew out of necessity to maintain order during congressional proceedings.

The first Democratic Party Whip elected was in 1913, Senator James Hamilton (D-IL). In 1915, the same Whip role was created by Republicans who elected Senator James Wolcott, Jr., Wadsworth (R-NY). Currently, Senator John Cornyn (R-TX) serves as Senate Majority Whip, and Senator Richard Durbin (D-IL) serves as the Senate Minority Whip. The current serving House Majority Whip is Representative Steve Scalise (R-LA), and the House Minority Whip is Representative Steny Hoyer (D-MD).

By now, leadership roles of Congress have developed further with Parliamentarians, conferences and caucuses, Sergeants at Arms, Doorkeepers, Chaplains, among others. These also assist with maintaining order and effectiveness so those elected may arrive to their respective offices and serve as promised.

The various roles established throughout the course of American history are proving effective though some want to rid America's Congress of its Members almost immediately after an election. However, made up of imperfect people who would fail at times yet try again, America's Founders and Constitution Framers showed up for known, imminent challenges, and against just about impossible odds to succeed. They did so believing something better could exist and pursued a new type of governing that if maintained by the electorate would offer the most freedom for those it represented.

*Amanda Hughes serves as Outreach Director, and 90 Day Study Director, for Constituting America. She is the author of Who Wants to Be Free? Make Sure You Do, and a story contributor for the anthologies Loving Moments(2017), and Moments with Billy Graham(forthcoming).*

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## Congressional Aides: How Staff Assist Congress Members and Help Them Understand Bills

## Guest Essayist: Scot Faulkner

A bill becomes a law only through collaboration, communication, and teamwork.

Members of Congress are pulled in many directions. Members must be Members, which means they attend hearings, participate in legislation via debate and voting, and communicate with their constituents. Members, who want to remain Members, must be perpetual candidates, which means raising funds, working with their campaign team, involving themselves with national, state, and local officials within their political party, and engaging organized special interests that provide funds, endorsements, and resources. Members are increasingly Ambassadors to a sprawling government, meaning their offices are "embassies" representing the interests of their constituents to federal officials and guiding their constituents through the federal labyrinth to obtain government benefits, regulatory relief, and due process.

No one person can handle all these roles. That is why Congressional Staff exist.

Members during the first seventy years under the U.S. Constitution, performed their diverse duties themselves. The Federal government was small and legislative sessions were short.

Just before the American Civil War, the size, scope, and complexity of the Federal Government had grown to a point where full-time staff began supporting Members. The first staff were attached to major committees. Many of these were clerical staff to take notes and help draft legislation. Even during the busy period of Post-Civil War Reconstruction and Westward expansion, such as 1867, the Congress only passed 30 bills and 41 resolutions a year.

By the end of the 19th Century Congress had only 146 staff members: 37 Senate personal staff, 39 Senate committee staff, and 62 House committee staff (37 of whom only worked during congressional sessions). In 1893, the House approved the first personal staff for its Members.

The Populist and Progressive movements ignited government regulation of America's burgeoning economy. New federal agencies meant dramatic increases in spending and the need for vigorous Congressional oversight of Executive Branch activities.

Except for limiting government during the Administration of President Calvin Coolidge, the role, scope, and size of the federal activities grew rapidly and never stopped. Congress introduced,

considered, and passed more and more laws facilitating this expansion. By the early 1970s over 26,000 legislative bills and resolutions were being introduced during each two-year Congress.

Congressional staff expanded to support Members. Members, torn by their multiple responsibilities, deferred increasingly to their staffs.

Today, approximately 14,000 employees work on House and Senate leadership, committee, and personal staffs.

Each Congress begins, on its first day of existence, with establishing its governing rules. This includes setting personal staff levels and authorizing a standard amount funding each office to pay that staff.

The personal staff of a Senator or Representative are people who take the lead in handling the multiple roles of each Member. Staff conduct "Case work" to help constituents receive the services, benefits, and due process they deserve. Receptionists welcome visitors and help them access special tours and events through the Nation's Capital. Administrative and technical staff manage office operations and information resources. District staff provide similar services within the Members' home area, including attending countless meetings with local officials and interest groups.

The heart of a Congressional staff is the legislative team. These individuals spend sometimes 100 hours a week carrying out the original purpose of representative government. A mix of young enthusiastic newcomers, fresh from college, work closely with seasoned professionals who may spend their entire careers working in Congress.

Ideally, a Senator's or Member's legislative team become the alter-ego of those they serve. They anticipate the Member's needs. They become intimately knowledgeable of the issues most important to the Member and their constituents. As a Member gains seniority, the legislative team will grow with the Member and help them become a recognized leader on selected policies.

Legislative staff become the Member's intellectual annex. They attend briefings, cultivate relationships with policy experts, and build their own collaborative networks among other Member staffs, lobbyists, and the media. They become invaluable in alerting the Member to opportunities and threats relating to the Member's core interests and his or her constituents.

Legislative staff will collaborate with their network, including associates within Congressional leadership and committees, to manage the legislative process for their Member. At the basic level, legislative staff will "triage" pending legislation into its level of importance to the Member. This may include recommendations on how to vote on procedural motions and amendments, taking input from their Party's leadership.

Legislation that is more important to a Member may require the legislative staff to draft amendments and speeches. The best staffers are ghostwriters, whose words so closely reflect the Member's thinking and speaking, few will ever know where the staffers' words end and the Members' begin.

Ultimately, an issue requires the Member to take the initiative. The legislative staff will develop a strategy, which may include writing and introducing new legislation. At this level the legislative staff becomes a campaign team, mobilizing support from other Members, garnering endorsements and commitments from lobbyists and interest groups, engaging the media, and orchestrating hearings and media events to move the legislation forward.

It is no wonder that the most effective among the legislative staffers in Congress are highly sought after by outside interests and lobby groups. Such "super stars" can earn far more "on the outside" and some make the leap to the private sector.

Therefore, it is truly inspirational when a legislative staffer completes their career in Congress after many years of serving the Legislative Branch. They are the true "institutionalists" who maintain the culture of professionalism and pass their knowledge and commitment to the next generation.

*Scot Faulkner advises corporations and governments on how to save billions of dollars by achieving dramatic and sustainable cost reductions while improving operational and service excellence. He was the Chief Administrative Officer of the U.S. House of Representatives. He started his Congressional career as an intern for Rep. Don Young (R-AK), then served on the legislative staffs of Rep. Arlan Stangeland (R-MN) and Rep. John Ashbrook (R-OH). Faulkner later served on the White House Staff and as an Executive Branch Appointee.*

# RULES IN CONGRESS

## History and Purpose of Rules in the United States House of Representatives and Senate

## Guest Essayist: Amanda Hughes

In his Manual of Parliamentary Practice, Thomas Jefferson wrote regarding rules:

> be in all cases the most rational or not, is really not of so great importance. It is much more material that there should be a rule to go by than what that rule is; that there may be a uniformity of proceeding in business, not subject to the caprice of the Speaker or captiousness of the members. It is very material that order, decency, and regularity be preserved in a dignified public body.

Formally established by law in April of 1789 and chaired by the House Speaker until 1910, the Committee on Rules is one of the oldest standing, or permanent, committees in the United States House of Representatives. It is considered "The Speaker's Committee" as it is used to maintain order on the House Floor. The House Committee on Rules was established as a standing committee in the late 1840s.

When the First Congress of the United States House of Representatives met at Federal Hall in New York under the new Constitution in 1789, the first Senate also convened. At this time, a rules committee was established to conduct the separate business of the Senate, and in 1874, the Senate Committee on Rules was designated as a standing committee.

> Each House may determine the Rules of its Proceedings, – Article 1, Section 5, Clause 2, United States Constitution

Rules in the United States Senate contrast more than compare to rules of the House and some interesting differences exist between the House and Senate rules. Proceedings, for example, lie in how each chamber, or body, requires a quorum, conducts debate, refers measures (bills or filed legislation going through the legislative process to potentially become law) to specific committees, places measures on a specific type of calendar for consideration, and votes. The House Committee on Rules is considered powerful, able to do much of anything deemed necessary; there is no such equal committee in the Senate.

The House Speaker, being the majority party leader and presiding officer, is able to govern proceedings, to recognize or not recognize a Member to rise and debate. Requests for the purpose of recognition on the House Floor are typically made based on precedence in order to maintain soundness and continuity of Congress. Debate time on the Floor is limited in the House per Representative, while each Senator is allowed unlimited Floor time to debate including filibuster. On the Senate Floor, the presiding officer must recognize the first Senator standing and seeking recognition. Other Senate leaders determine who speaks next depending on Senate rulings and precedents.

When measures that are not controversial in nature make it to the Floor for consideration, most are approved in the House by "suspension of the rules" which is a procedure the House uses to pass widely supported measures, that prohibits floor amendments and limits debate time, and requires a two-thirds majority for the bill's passage. However, a similar measure's passage would be obtained by unanimous consent in the Senate. Another difference is that a legislative day can run for several calendar days in the Senate which tends to recess, whereas the House adjourns at the end of a legislative day. Application of a different process to begin business again depends on whether a recess or adjournment occurs.

Rules introduced in the United States House of Representatives and Senate over two hundred years ago have certainly changed through decades of Congresses. While early versions of congressional rules at times proved unruly and in need of reform as new developments often may, America's Founders recognized early the necessity for order. They moved first to set systems for properly conducting business. They continued efforts to fill needs for fair and efficient proceedings. In hopes of setting precedents that would not impede their work but instead prove beneficial to the preamble's "We the People," the Founders and Constitution Framers looked to affirm that the "First Branch" of American government would exist to serve its citizens.

*Amanda Hughes serves as Outreach Director, and 90 Day Study Director, for Constituting America. She is the author of Who Wants to Be Free? Make Sure You Do, and a story*

*contributor for the anthologies Loving Moments(2017), and Moments with Billy Graham(forthcoming).*

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# LEGISLATIVE PROCESS

## Length of Legislation: Why Bills Have Grown Significantly Longer Over the History of the United States Congress

## Guest Essayist: Marc Clauson

Why is Congressional legislation since the 1980s so lengthy and complex? Can this and should it be addressed as a problem or is it simply the product of our modern economic and political world? Those are the questions to be addressed in this essay. They are not however idle questions. It does make a difference when modern legislation is so long and sometimes extremely complex and vague, to the citizen who wishes to comply with it but cannot understand it, or to the courts who must interpret it. Not only that, but when legislation becomes so intricate, this gives the administrative agencies charged with implementing it through regulations and adjudication much more discretion and power than a constitutional system would envision.

To begin, what has happened to Congressional legislation in the last 30-40 years? It has become both more comprehensive and lengthier, to put it simply. To give a few recent examples, the Affordable Care Act of 2010 ran to over 2,500 pages in its final draft. The Dodd-Frank bill was

over 1,800 pages in length. It is not uncommon to see legislation run at least 800 pages and often over 1,000 pages. In contrast, the 1913 personal income tax bill was 14 pages long. The original Environmental Protection Act of 1970 ran to four pages. Before the end of the nineteenth century in fact, even the quantity of laws was comparatively sparse, as government intervened much less in the economic and social arenas of life.

Now we ask why the length of legislation has evolved this way. Explanations vary. Some say that in general society and its problems are simply much more complex than before. Others argue that at their root, the problems are not more complex, but rather Congress is passing more comprehensive and complex legislation in keeping with the gradual shift from classical liberalism to Progressivism or modern liberalism. In one sense, of course our Western civilization has grown more complex. Technology has evolved tremendously, markets are globalized, and government has intruded into our lives at nearly every point. However, do those shifts explain changes in Congressional legislation? To ask the question another way, even though we have seen certain changes, have the basic solutions to the problems arising from those changes themselves changed? Moreover, have areas of life that were once not considered ripe for interference by government now suddenly become areas for such intervention, even though the nature of the problems (though not the extent) has not changed?

No doubt, technological and economic changes have made even necessary legislation more complex and therefore lengthier. But let's explore the ideological shift as a causal factor. As I said, laws before the Progressive Era began (c. 1880) were generally much less frequent and shorter. Very simply, government did less, and that fact was not due simply to less developed technology or a less globalized economy. It was in great part due to a commitment to "constitutional principles" of the Founding era, which themselves were rooted in the twin ideas of limited government and free markets. It stands to reason that legislation then did not need to be complex or extended. It could remain relatively simple and, as thinkers such as John Locke and others advocated, clear and understandable to those whom it would affect. During and especially after the Progressive Era (ending c. 1925) Congressional legislation entered a period of still relative brevity until around 1935-1937, when the New Deal gained significant traction after the United States Supreme Court essentially "opened the flood gates" of legislation by refusing to strike down as unconstitutional what Congress has passed. We can mark that point roughly as the beginning of much more frequent, intrusive and complex laws.

World War II continued the trend and the post-War era saw little slowdown in legislation, though it did witness the rescinding of some of the more onerous tax laws. Lyndon Johnson's "Great Society" reinforced the New Deal and expanded welfare programs massively. As more legislation was churned out by Congress, the liberal-Progressive ideological mentality paralleled it. More issues became the focus of legislation, even those previously believed to be off limits to the state. Many or at least more of those issues were of the kinds that seemed to beg for detailed law making. In fact in some cases accounting for every possible detail of any object of legislation became the dominant approach. This was exacerbated by the tendency of members of Congress to insist that their own local or personal interests be accounted for in bills. Moreover, experts and lobbyists also increasingly were part of the legislative process, and also insisted on their own priorities. Little effort was made and little incentive existed to cut back on the length

and complexity of bills. Why not satisfy all parties after all and better guarantee passage? The result is what we see today.

I argue that nearly all of this outcome is due to the gradual but unmistakable ideological shift from classical liberalism/modern conservatism to Progressivism/modern liberalism, even among Republicans. Bills are now in many cases nearly incomprehensible, full of references to other legislation, ambiguous terms, convoluted legal language and delegation of authority to administrative agencies to issue regulations to carry out the already expansive laws (e. g., the Affordable Care Act contains about 17,000 pages of regulations). Congress does not possess the political will to reduce this expansion of law. Nor does it show signs of any desire to simplify laws to make them clearer. In the meantime, every new law, particularly those dealing with large "chunks" of the economy is destined to be huge and vague. The solution is obvious: reduce the power or scope of government to its previous constitutional limits. This may only be possible through either the courts or constitutional amendment.

See Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government*. Pacific Research Institute, 1987.

*Marc A. Clauson is Professor of History, Law and Political Economy and Professor in Honors at Cedarville University. Marc holds a PhD from the University of the Orange Free State, SA, Intellectual History and Polity); JD (West Virginia University College of Law, Jurisprudence); MA, ThM (Liberty University, New Testament Studies and Church History); MA (Marshall University, Political Science); BS (Marshall University, Physics); and PhD work (West Virginia University, Economic Theory).*

## Germane – What Should and Should Not Be Placed in a Bill to Keep Legislation Easy to Understand and Appropriate

## Guest Essayist: James D. Best

> DOLLAR LIMITATION.—The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to all individuals for whom the taxpayer is liable under subsection (b)(3) shall not exceed an amount equal to 300 percent the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

There is a reason few legislators read laws before voting. They're incomprehensible. The above snippet is only sixty-three of nearly four thousand equally confusing words prescribing the individual mandate for the Affordable Care Act. The total bill ran over one thousand pages. Do you blame Justice Antonin Scalia or House Minority Leader Nancy Pelosi for not reading the bill? This is a perfectly awful bill … and that may be the only perfect thing about it.

The ACA was not an anomaly. The Consolidated Appropriations Act, 2018, frequently called the 2018 omnibus spending bill, is 2,232 pages of similarly confusing text. No individual could possibly understand what's in the bill.

In Federalist 62, James Madison wrote,

> It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.

Forget ordinary citizens, how do we get lawmakers to understand pending legislation? The Affordable Care Act was 381,517 words, and that doesn't count the innumerable referenced laws that would also need to be read for a full understanding. In comparison, our Constitution, the supreme law of the land, is only 4,543 words, which high school students can understand (as demonstrated year after year by Constituting America).

The ACA is only one example. Most legislation today is unintelligible. Congressmen and Senators rely on staff and lobbyists to write and then brief them on the content of laws.

Who benefits from laws "so incoherent that they cannot be understood?" Lawmakers, especially, the leadership. Big, heavy, humongous bills avoid accountability. No individual member of Congress can be saddled with responsibility for a vote disliked by his constituency because dozens of other desirable elements provide camouflage and/or shelter.

Despite calls for regular order, "read the bill" movements, and legislative review-time rules, comprehensive/omnibus style bills keep burying those of us who reside outside the beltway. There is an old axiom that laws are like sausages; it's better not to see them made. But reverting to a bygone era of relatively responsible lawmaking will be difficult because getting reelected is easier when the proverbial sausage is concealed in a vast vat of stew. Politicians love to obfuscate.

How do we force easy-to-understand laws that lawmakers and law-abiding citizens can comprehend? By insisting Congress pass smaller, single issue bills. In the real world, point solutions are popular because they are doable … and results can be measured. If something needs fixing, focus legislation on the broken part, and leave the rest alone until the new law's effectiveness can be assessed. If there are multiple broken parts, Congress should avoid a comprehensive redesign that allows everyone to get their fingers into the cookie jar. Address one issue at a time. For spending bills, we need to return to the days when Congress separated the required legislation into six or seven clear packages, and then adhere to strict deadlines for each step of the annual appropriations process.

Every elected legislator professes to agree with the above, but massive comprehensive/omnibus bills have become ever more prevalent. If *We the People* want simpler, single-issue laws, then pressure must be applied to Congress. We need to keep in mind that Congress feels content with the current process, so we shouldn't demand some kind of grand solution. The big fix will never happen. Let's start simple, with a single category of law. The Consolidated Appropriations Act, 2018 provides a perfect opening. The president has stated that he would not sign another omnibus appropriations bill, so voters need to hold him to his promise. Tell lawmakers that we

support the president's pledge. The current spending bill funds the government for the remainder of the fiscal year – through September 30.

How convenient. Mid-term election occur on November 6, a mere six weeks after the next appropriations bill.

Voters need to hold everyone to their word.

*James D. Best, author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, Principled Action, Lessons From the Origins of the American Republic, and the Steve Dancy Tales.*

## Ideas of Liberty for a Free People

## Guest Essayists: W. David Stedman and LaVaughn G. Lewis

The following is excerpted with permission from the book ***Our Ageless Constitution*** [p.51]

**The Spirit That Enabled A People To Transform Their Ideas Of Liberty Into A New Concept Of Constitutional Government For A Free People**

> …one must understand something of the spirit of the people who had been experimenting successfully with liberty for over 165 years when the Constitution was framed.

From 1620, the settlers of America were motivated by a passion for liberty. British statesman Edmund Burke, in 1775, traced the astounding economic development and the unparalleled spirit of liberty of the Americans when he appealed to Parliament for conciliation with its colonies (See: Part VIII – Burke Speech on Conciliation). He said: "…it is the spirit that has made the country…

Examining some of the reasons for the spirit, he continued:

> Religion, always a principle of energy, in this new people is no way worn out or impaired; and their mode of professing it is also one main cause of this free spirit…. This is a persuasion not only favourable to liberty, but built upon it…. This religion, under a variety of denominations agreeing in nothing but in the communion of the spirit of liberty, is predominant in most of the northern provinces…. The Southern colonies are much more strongly and with a higher and more stubborn spirit attached to liberty than those to the northward.

Burke's comments shed remarkable light on the American spirit exhibiting itself, even to those in foreign lands, by the time of the American Revolution. His observations are significant for they reveal something important about a people already established in the eyes of the world as lovers of ordered liberty and participants in outstanding progress. Burke described what he called the "temper and character" of the people, saying, "In this character of the Americans a love of

freedom is the predominating feature which marks and distinguishes the whole…." Among the reasons for their "untractable spirit," he said, was their "education."

> **In other countries the people … judge of an ill principle in government only by an actual grievance; here they anticipate the evil and judge of the pressure of the grievance by the badness of the principle.**

In other words, Burke observed that in most of the world, people could only begin to understand an oppressive or bad idea in government *after* it had been employed to harm them. Americans were different, he said, for they were taught to understand the principles-ideas and principles inherent in human nature, both good and bad-bad ideas *before* they could be used to oppress them. Possessing such understanding, he said, Americans could detect "misgovernment at a distance and snuff the approach of tyranny in every tainted breeze." James Madison later expressed it this way:

> **The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it.**

It is clear that Americans were educated in the ideas of liberty for several generations. As late as 1830, Frenchman Alexis de Tocqueville observed among the general population of America the same high degree of education and understanding of basic principles. "It cannot be doubted that in the United States the instruction of the people powerfully contributes to the support of the democratic republic…." Even in outlying areas, he said, the American "will inform you what his rights are and by what means he exercises them…."

Such understanding was the primary purpose of the education provided to early generations. As Thomas Jefferson stated:

> **The most effectual [effective] means of preventing the perversion of power into tyranny are to illuminate …the minds of the people at large, and more especially to give them knowledge of those facts, which history exhibits, that possessed thereby of the experience of other ages and countries, they may be enabled to know ambition under all its shapes, and prompt to exert their natural powers to defeat its purposes.**

According to Jefferson, the people's study of history would "qualify them as judges of the actions and designs of men; it will enable them to know ambition under every disguise it may assume; and knowing it to defeat its views."

By 1787, after having endured a long and traumatic struggle for independence and freedom from a government that had become increasingly abusive and oppressive, their understanding of the nature of mankind as revealed through history and their examination of ideas and principles necessary to liberty had equipped them to undertake the establishment of a government for a free

people – a government having its very foundation set in the knowledge that the rights and liberty of people are endowed by their Creator and are, therefore, unalienable.

With this concept and these principles firmly fixed in their minds, and with a "stubborn spirit attached to liberty" they were ready, in 1787, to prepare a Constitution for the United States of America.

*David Stedman is the retired Chairman of Stedman Corporation. Stedman was a founder of the National Center for America's Founding Documents and the National Foundation for the Study of Religion and Economics. Stedman is Co-Editor with LaVaughn G. Lewis of Our Ageless Constitution and Rediscovering the Ideas of Liberty. A frequent lecturer on topics relating to the Constitution, America's free enterprise system and role of the "business statesman," Stedman holds earned degrees from Duke, Harvard, and Georgetown Universities and is a Distinguished Alumnus of Duke University.*

*LaVaughn G. Lewis is a former teacher. She served at the Stedman Corporation as Assistant to the Chairman and as researcher and writer. She is Co-Editor with W. David Stedman for Our Ageless Constitution and Rediscovering the Ideas of Liberty, and is a graduate of Pfeiffer University.*

## Introducing Legislation – How Does Congress Get Ideas for Bills?

## Guest Essayist: Amanda Hughes

Intriguing is the story of America's history and ideas at the core of its start. Involved in an interesting mix of proposals on how to meet needs for order, balance of power, and representative government, it began by making sure America on every level would be equipped to develop as free people and remain so, and run without getting in its own way.

The process used in America's Legislative Branch today came about through concerns to arrive at a type of country that could be run by its people, designed to keep a stable system of governing: the people would direct, and those working in government would respond as directed.

But it did not start out easy, and required adjustments just like governing does today. Though tumultuous at best to obtain, America's Founders and Constitution Framers wanted to try something different and began thinking outside of the box. Outside of the box meant adopting some other form of running a country besides having a king or other ruler in charge of the people. Rather, it meant having the people in charge of leaders, *chosen from among* the people, held accountable *to* the people. The road to make it happen or maintain it would not be smooth by any means. It meant observing ideas that were tried yet had a tendency to fail, and replacing those ideas with ones that tended to work wherever tried.

One could be quick to say ideas Congress gets for bills, or legislation (new laws) mainly come from this or that organization or business or interest group and others who bring desires hoping leaders will fill favors. But, while ideas do come from many sources and at times ideas wanted

only by a few, ideas also come from necessity including needs affecting the nation that are constitutionally addressed.

The important key to remember about bringing ideas to Members of Congress is first taking a step back to what the Founders learned. They knew that people are thinkers, innovators – nothing wrong with that, of course. They also knew that people are passionate – nothing wrong with that either. They also understood governing by a system of leading meant maintaining a legislative process that could take ideas to solve problems and put them through a system that enabled to look close and determine in advance the possible outcomes, including unintended consequences. This is, for example, is what the committee process helps, and Floor debate, the Senate as the "cooling factor" does so the best of ideas may come through and get passed as laws. America's Constitution has in place main checks and balances on one another, however, the branches of government: Congress, the President, or executive, and Supreme Court.

Another example comes from what the Founders learned when Americans settling in the early 1600s realized that some would work but others, though able, would not. Because of this natural tendency including varying personal initiative, each family would tend a parcel of land as their own. They learned that if everyone owns everything, no one would take care of anything, that some would take advantage and a few would do the lion's share of work, destroying any incentive to produce. They realized human nature could not be dismissed if America was going to be a land of opportunity.

In fact, recognizing that people are unique individuals with personal goals to achieve and be independent was invaluable toward coming up with more ideas that underline a thriving people. An incentive to succeed made the difference as people could take ownership, create, trade goods and skills, keep the work of their hands – tangible means and methods in which to prosper. Lessons like this made it into future ideas that would govern America, and Americans would hold accountable of their leaders to continue.

While the Founders put their heads together and pulled from their learning of the history of governing, what works and does not work, they decided it was worth it to press through. They would work until they found a Constitutional framework that could open doors not only to freedom, but a lasting freedom they were convinced a nation could have if the people of that nation wanted it.

A resolve for victory helped the new nation of America to maintain a desire of the people to want their own freedom and limit what their governing bodies could do would play a significant role in getting a type of nation that could hold fast in maintaining the good it began, scrapping ideas that did not work for ones that did. They knew the risks they were taking but realized it was worth it.

Today, it is just as worth it. Civic involvement that continues good ideas for governing can mean learning America's history or attending a town hall meeting where Members of Congress, and state and local representatives, hold meetings to listen to ideas about changes needed, and answer questions about what is being done and why.

All those who have gone before made an investment of efforts to design a Congress that could stand the test of time, including how it can be a frustrating process. It is a system that is slow and deliberate on purpose in order to prevent a slew of poor proposals from becoming law.

While at times poor laws do get passed, America has a system where the people possess many opportunities to become engaged in the process of passing or repealing laws. This is why it is imperative that each American citizen see the past investments made by America's Founders and take part in preserving what they started, in some way.

*Amanda Hughes serves as Outreach Director, and 90 Day Study Director, for Constituting America. She is the author of Who Wants to Be Free? Make Sure You Do, and a story contributor for the anthologies Loving Moments(2017) and Moments with Billy Graham(forthcoming).*

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## Committees – History and Purpose in the United States Congress

## Guest Essayists: Joseph Postell and Samuel Postell

The Constitution is entirely silent on the question of committees in Congress. It does not require the existence of any committees at all. In fact, during the first few decades of our nation's history, there were no permanent standing committees. Those early congresses, many of which contained so many of the Framers of the Constitution, decided that the nation's laws could be crafted without the assistance of committees.

In other words, we have not always had committees and we have not always needed them. Even when we have had committees in Congress, their power, purposes, and processes have changed dramatically over time. Committees began as weak bodies accountable to everyone in Congress, eventually became the most powerful institutions in Congress, and recently have seen their influence diminish. Understanding the history of committees' rise and fall helps us to see what effect they have on Congress. While committees can and should play a role in helping Congress do its work, they often have perverse effects on how our representatives behave and the laws they enact.

Originally, Congress used "Select" or *ad hoc* committees to do its work. These committees were not permanent, but merely temporary, formed only for a single purpose. When an issue was presented to the whole House of Representatives for debate, the members would discuss it and

come to agreement *before* sending it to a select committee. Once the select committee wrote a bill based on the agreement reached by the entire House, it would dissolve, and the bill would go to the floor of the House for further discussion and passage. In this process, the committees' role was minimal, and serving on a committee did not give a member any additional power.

During the 1810s and 1820s, Congress saw the need to create permanent committees with settled jurisdiction. These "Standing" committees, which remain in existence today, took on more authority, including the ability to write and amend legislation. Members sought to be assigned to the committees that gave them more influence over the issues that mattered to their constituents. For instance, members from farm districts might wish to be on agricultural committees so that they could influence legislation that affected their constituents' interests.

These standing committees, therefore, present both advantages and problems for Congress's functioning. On the one hand, they allow for a more efficient legislative process and give Congress greater expertise on specific issues. Instead of being forced to discuss every issue as a whole body, committees allow Congress to divide into smaller units to screen legislation, managing its workload. It also allows members to specialize in certain areas through longstanding membership on committees. On the other hand, if committees have influence over legislation, and members seek committee assignments that allow them to advance their constituents' interests, then committees can enable special interests to gain greater influence in the legislative process.

The history of committees' rise and fall in Congress shows these advantages and disadvantages in action. During the middle part of the 19th Century, committees became so powerful that Woodrow Wilson famously wrote that "Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work." Committees wrote most legislation, and amendments to their legislation were minimal. Once a bill reached the floor, it would be passed in largely the same form as it was written by a committee.

After the Civil War, however, strong political parties emerged to discipline these committees. Members like the Speaker of the House controlled the legislative process through the power of recognition, the power of appointment, and through controlling the rules committee which was in charge of sending bills to the floor for passage. Committees and their chairs knew that they could not pass legislation if the party leadership opposed it. The emergence of party leadership allowed the majority party to resist the influence of narrow, special interests that might dominate at the committee level.

But the party discipline of the post-Civil War period was short-lived. In the early 20th Century, Progressives succeeded in weakening the Speaker of the House, and imposed new rules that limited party leaders' influence over legislation. In 1910 George Norris led the minority Democrats of the House in a revolt against Speaker Joe Cannon. Soon after the Speaker was stripped of his power to decide membership on House committees, and power became decentralized. As a result, committees once again emerged as the most powerful bodies in Congress. They were so powerful that their chairs gained complete control of the legislative agenda. These committee chairs were called the "barons" of Congress. Unfortunately, they refused to follow the will of Congress as a whole, and followed their own wishes

instead. Congress became out of touch with the people in the middle of the 20th Century as a result of the power and autonomy of these committees.

Today, committees are weaker than they were in the middle of the last century. Both parties limit the tenure of their committee chairs, so that they do not become too powerful and independent of the whole Congress. Members of Congress receive their committee assignments from their parties, and can be removed from committees if they fail to act in the party's interest. Committees are still very powerful, but they are now more accountable to parties than they were fifty years ago. The late-19th Century era of party dominance has not returned, but we are no longer in the era of strong, independent committees either.

This history suggests two lessons for us today. First, the rules regarding how committee members are chosen and what powers committees have to write legislation are highly important to how Congress works. If committee power is unchecked by Congress as a whole, their advantages (efficiency and expertise) and disadvantages (influence of narrow interests) will be increased. If committees are more accountable to Congress as a whole, including their party leaders, Congress will be more inefficient and have less expertise, but narrow interests will be disciplined by the national majority. Many of the problems we see in Congress today are the result of reforms to the committee process.

Second, committees provide Congress with a double-edged sword. They help Congress do its job, but they also threaten to subvert the legislative process, dividing Congress into many subunits, each of which advance a narrow, special interest rather than the common good. If they are not held accountable to the whole Congress, through rules that allow party leaders to influence committees and allow members to amend legislation after it leaves committees, they can threaten the very purpose of Congress: to make laws that reflect the sense of the majority rather than the interests of the powerful.

*Joseph Postell is Associate Professor of Political Science at the University of Colorado-Colorado Springs. He is the author of Bureaucracy in America: The Administrative State's Challenge to Constitutional Government. He is also the editor of Rediscovering Political Economy and Toward an American Conservatism: Constitutional Conservatism during the Progressive Era. Follow him on Twitter @JoePostell.*

*Samuel Postell is a Ph.D. student at the University of Dallas.*

## Constitutional Muster – How Representative Government Happens During Congressional Committee Hearings

## Guest Essayist: Scot Faulkner

Since the Roman Senate, there has always been a need for a smaller group of Members to focus on details before actions are considered by the entire assembly. This is a better use of time, as Members are not equally interested or versed in every topic under consideration.

Committees to support the legislative process in America's colonies started in the House of Burgesses in Williamsburg, Virginia in 1642.

The drafting of America's Declaration of Independence was the act of a committee.

On May 15, 1776, the Second Continental Congress unanimously passed a resolution calling on all thirteen colonies to form governments representing colonial interests independent of the British Crown. Congress then authorized the drafting of a preamble explaining the reasons for and purposes of this action. On June 11, 1776, Congress appointed a "Committee of Five" to draft this "declaration". John Adams, Benjamin Franklin, Thomas Jefferson, Robert Livingston, and Roger Sherman were appointed.

The work of the "Committee of Five" was presented to the Congress on June 28 and, after spirited debate, was adopted on July 2, 1776. The approved Declaration of Independence was signed on July 4, 1776.

After the Revolutionary War, and the adoption of the U.S. Constitution, newly elected Senators and Representatives quickly formed committees to support their legislative duties.

On April 2, 1789, the first House committee was established to "prepare and report" on rules and procedures.

On April 7, 1789, the first Senate committee was formed to establish rules of procedure. By 1816, the Senate had eleven standing committees, many of which operate to this day.

The formation of the House committee on Ways and Means, on July 24, 1789, marked Congress' implementation of its most important relationship with the Executive Branch.

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.– U.S. Constitution; Article 1; Section 9

The "Consequences of Appropriations" is how representative government holds the Executive Branch in check. In the earliest days of the United States, unelected functionaries, allowing their positions to political patronage, had to be held accountable to Americans. Only through elected Senators and Representatives in "oversight" hearings could these public officials be reminded that their loyalty was to the law and Americans citizens, not just to the President.

Congressional Hearings are conducted to put actions and information on the public record.

Senators and Representatives use hearings to expand from focusing on legislative details to exposing and communicating facts.

Ideally, a Congressional hearing is well-scripted theater. Executive Branch officials work with Committee staff to prepare for publicly sharing information. When the hearing convenes, everyone knows their role. Witness testimony, followed by questions and answers, clarify intent

of laws, explain programmatic and policy matters, and explore solutions. The outcome is action that supports passage of legislation or funding for government operations.

Majority and minority members of the Committee have equal time to speak and pose questions to witnesses. Depending on the issue, non-government experts, and at times, average citizens, may be witnesses, sharing their insights and experiences to illuminate the impacts of a given issue.

As government expanded, Congress needed help with its oversight. In 1921, the Government Accounting Office (GAO) was formed. It was later renamed the Government Accountability Office, using the same acronym – GAO.

The GAO's accounting and management experts review how Americans' tax dollars are spent, or misspent. Every year hundreds of investigative reports, filled with hundreds of recommendations are sent to the Congress. These reports support oversight hearings where Congressional committees hold public officials accountable and launch legislative efforts to curb abuse and facilitate efficiency.

That is how it is supposed to have worked.

Unfortunately, most Senate and House members find government oversight "boring". Unless there is a headline-grabbing scandal, few news outlets cover improper payments, operational duplication, or mismanagement leading to wasteful spending.

This is unfortunate. In 2017, implementing just 52% of the 724 GAO management recommendations saved taxpayers $178 billion. During the final years of the Obama Administration, only 29% of the GAO's recommendations were implemented.

Annually, the GAO, and the 73 independent Inspectors General within the Executive Branch, publish over 8,000 reports identifying approximately $650 billion in waste.

In the past, Appropriations Committees met to build the case for spending public funds. Administration witnesses made their case for spending. Appropriation Committee Members made their alternative case, opposing or supporting what the Administration witnesses proposed. Oversight reports and hearings guided spending and reforms.

What should occur is a dialogue designed to align Congressional intent, and Executive Branch actions. Representative government is fundamental to validating public spending.

What should emerge is legislation filled with spending numbers. Supporting these numbers should be a narrative, in the public hearing record and committee reports, building a compelling case for how and why public finds are being spent, or not spent.

None of this happens anymore. Few, if any Appropriation bills pass. Concurrent Resolutions or Omnibus spending bills are generated at the last moment to meet spending deadlines. Political expediency, not representative government, drives the legislation.

In 2015, there were 128 House Appropriation hearings prior to marking-up legislation. In 2016, there were only 88. The House listened to 253 Administration witnesses, but only seven of the 73 Inspector Generals. No one from the Government Accountability Office (GAO) was involved. No one from private oversight groups, documenting government waste and abuse, were heard.

It gets worse. In the 1980s and 1990s, Appropriation hearings lasted three or more hours. Hearings in 2016 averaged 77 minutes. When you factor in the opening remarks from the Chair and Ranking Member and the opening statement of the main witness, less than 25 minutes were devoted to questioning witnesses at each hearing. Very few Members attend or participate.

House Committees broadcast their hearings online and archive them as podcasts. None of the 47 Senate Appropriation hearings were broadcast or archived. The public only knows that three Inspector Generals appeared, and there was no one from the GAO or government watchdog groups. The public remains uninformed as to what 121 Senate witnesses had to say beyond the text of their prepared remarks. Senators' questions are also a mystery.

Congressional hearings, the embodiment of representative government, are deteriorating. This undermines the carefully crafted balancing of powers in the U.S. Constitution.

Representative government means its elected officials must do their duty. Even "boring" management oversight is important, especially to taxpayers concerned about how their hard-earned money is spent.

*Scot Faulkner advises corporations and governments on how to save billions of dollars by achieving dramatic and sustainable cost reductions while improving operational and service excellence. He was the Chief Administrative Officer of the U.S. House of Representatives. He started his Congressional career as an intern for Rep. Don Young (R-AK), then served on the legislative staffs of Rep. Arlan Stangeland (R-MN) and Rep. John Ashbrook (R-OH). Faulkner later served on the White House Staff and as an Executive Branch Appointee.*

## From Committee to Floor Vote: Role of the American People in the Congressional Committee Process

## Guest Essayist: Amanda Hughes

The committee process in Congress can play a significant role in revealing true intentions of legislation so that voters, including United States House of Representatives and Senate Members, know just what each bill is about exactly, and receive opportunities especially to work out any unintended consequences before a bill gets to the House or Senate Floor for a vote.

Various committees exist in both the House and Senate on issues from Agriculture, to Homeland Security, to Small Business to Ways and Means, and more. Some committees are standing or permanent, and others are temporary such as conferences committees designed to work out differences between bill versions in the House and Senate. All can make a difference in

maintaining accountability, efficiency, transparency, and integrity in America's representative government.

Many pieces of filed legislation sent to a committee never make it out of committee for scheduling on the House or Senate Floor for a vote. When this happens, it is considered that a bill "dies in committee" because it simply gets left there and never pushed along the committee process to the point of being reported on and let out of committee to get a Floor vote for passage.

Typically, many of the problems a bill has in committee get worked out *in* committee before going to the Floor, but not always. Moreover, depending where the bill originates, or which chamber files the bill rather, new questions could arise altogether.

Committees are helpful in that Congress may send potential laws to them for review by the American people. Committees operate as places of explanation, and amendments may be offered to address issues that arise when witnesses come to testify in favor of or against a piece of filed legislation. Some bills sent to a committee might not receive a hearing for certain action. However, when they do, it is an opportunity for voters to learn more and engage more in the legislative process. This is especially true for controversial issues.

When people come to testify regarding legislation in a congressional committee hearing, they attend with prepared remarks, and from various backgrounds and points of view. Members who wish to vote for or against a bill that is in committee respond to constituent concerns regarding the bill. Those Members may have some constituents in favor of or against the bill come and testify by presenting their personal views during the committee hearing.

There may also be present expert witnesses who talk about parts of the legislation and what certain points mean and what could occur should the measure pass. Expert witnesses are not in attendance necessarily to agree or disagree on a bill, but to talk about specific points that will affect people, if the bill were made law.

People providing testimonies are similar to those who testify in court. They come to a set committee hearing, and are "heard" by House or Senate Members, and other constituents, voters. As testimony is provided through time allotments per person, decisions are made as to whether amendments should be made to the bill while it is in committee.

It seems that bills should be able to get figured out during the committee process, but this does not always happen. Bills may get to the House or Senate Floor and still need amendments. It is possible to offer amendments throughout the legislative process which is helpful as something could be missed during committee.

Sometimes it is best to get to a certain point in committee and then Members working to pass the bill, get it out of committee to the Floor for a vote, as is. However, those in support must take care that the bill is checked for concerns that might cause results that were not anticipated. This means Members and their staffs need "run their traps" by working with their constituents – voters, on bills through the committee process, and other means of clear communication, to be sure everything is clarified and understood as to what the bill does and does not do.

This is where the checks and balances of America's constitutional governing systems are especially important. It is also why the legislative process should not be super easy to navigate. If the process is rushed through, the cost is too high in time, tax dollars, and efforts to repeal later down the line.

*Amanda Hughes serves as Outreach Director, and 90 Day Study Director, for Constituting America. She is the author of Who Wants to Be Free? Make Sure You Do, and a story contributor for the anthologies Loving Moments(2017), and Moments with Billy Graham(forthcoming).*

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## Will They Agree? When Legislation Must Go to a Conference Committee After the House and Senate

## Guest Essayist: Amanda Hughes

It would seem Congress should simply agree to disagree. However, the United States House of Representatives and Senate must work out their differences in order to get a bill passed and finally sent to the President to sign into law. This is where a conference committee can help the process of getting legislative conflicts cleared up so the making of a new law may occur.

Before the President may receive a bill to sign into law or veto, the bill must first pass in both houses of Congress. If a bill does not pass in exactly the same way in the House and Senate, a conference committee may be requested, made up of Members from both chambers, to come together and work out any differences. Prior to convening a conference committee, amendments may first be offered to try and resolve differences. Either way, the goal is to arrive at a final bill approved by both the House of Representatives and Senate.

Should a bill require a conference committee, the committee must address only the differences between the two chambers. One chamber, or body, say the House, may try to make the process easy by passing a bill as the House would like it, and then send the passed bill to the other body, the Senate. The bill would need to pass in the Senate without amendments.

Another method, for example, to make things simpler, is for the House to take up a bill on the same subject that was passed in the Senate and work out any differences through the House so that passage in the House results in the same bill passed by the Senate. If passage without resolving differences is not possible, however, the bill may be sent to conference. Either chamber may request a conference committee at any point while amendments are in process. Each chamber must formally state its disagreements before a conference committee is designated. Only so many opportunities for amendments are allowed as exchanges of amendments are limited and there are requirements for finalizing parts of the process to resolve policy problems. If policy differences cannot be resolved between the chambers even in conference, the bill dies.

What then is all the fuss about needing identical bills in both chambers, making statements about disagreements, then possibly needing a special committee to work out differences? It is to be sure the warnings of America's Founders are heeded to keep checks and balances upheld with separation of powers.

While the conference committee process might be tedious, to say the least, it needs to be somewhat cumbersome in order to work out unforeseen problems a bill might cause if rushed through. At times, emergency legislation is necessary to complete faster. Otherwise, the most helpful legislative process to voters is unhurried and wisely examines potential laws moving through Congress without any of them speeding by, missing pitfalls.

America's Founders were concerned that laws may be pushed through Congress without careful review, or too long and difficult to understand. As James Madison noted in Federalist 62, legislation too long to benefit those it was intended to serve:

> It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood;

In that case, Madison presents a strong case for working out differences through, for example, special discussions set aside to ensure a bill gets the scrutiny it should receive. Legislation should serve to maintain the freedoms of Americans and not entangle them in laws they do not even know they are breaking because there is no way to understand them and they come across convoluted.

> When legislature is corrupted, the people are undone. – John Adams

The slow and often tiresome processes of Congress come from a long history that America's Founders seriously considered when designing a new system of government for the new country, and its Constitution as they realized firsthand how difficult it was to escape unchecked power. A weary, exasperated John Adams wrote in a letter to his wife Abigail in 1777 during the American Revolutionary War that highlights the importance of weighing decisions with careful deliberation, resolve and eyes on the future:

> Posterity! You will never know, how much it cost the present Generation, to preserve your Freedom! I hope you will make a good Use of it. If you do not, I shall repent in Heaven, that I ever took half the Pains to preserve it.

The Constitution Framers did carefully consider how to maintain a governing system that could stand the test of time. They set the new government up for success by dividing it into three branches, and having a House and Senate to check on each other further aided in ensuring no one system within America's government would gain too much power:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives. – Article I, Section 1, United States Constitution

Their idea ensured government power in the legislative process would remain in the hands of the people through representation and leadership, rather than tyranny by those sitting in government positions.

*Amanda Hughes serves as Outreach Director, and 90 Day Study Director, for Constituting America. She is the author of Who Wants to Be Free? Make Sure You Do, and a story contributor for the anthologies Loving Moments(2017), and Moments with Billy Graham(forthcoming).*

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## Sign or Not Sign Into Law – Getting a Bill From Congress to the President's Desk: How Easy Should It Be?

## Guest Essayist: Gary R. Porter

Short answer: It should be easy, but it's not.

Article 1, Section 5, Clause 2 of the Constitution states: **"**Each House may determine the Rules of its Proceedings…." Because of this clause, we have different procedures in each house of Congress which determine how a bill will be handled in that chamber. Both the rules of the House and those of the Senate are a matter of public record and may be downloaded from the respective chamber's website. There are both unique and common elements of the rules. For instance, House Rule XII uniquely requires that every bill contain a paragraph describing the claimed constitutional authority for the action the bill proposes. One would think this provision would deter a Congressman or Congresswoman from exceeding the limited and enumerated powers which the Constitution provides to the legislative branch, but one would be wrong.

When Rep. Dennis Kucinich (D-OH) proposed a bill that would create a "Department of Peace," he famously cited the Preamble's goal of "ensur[ing] Domestic Tranquility" as his authority. Unfortunately for Rep. Kucinich, the Constitution's Preamble does not grant power to any branch of government; the government has no explicit power to ensure "domestic tranquility," it remains only a goal of the overall document. To be sure, there are other powers explicitly granted to the Congress, such as the power to call forth the militia to "suppress Insurrections" that would serve this end, but, sadly, domestic tranquility will have to be achieved without Rep. Kucinich's Department of Peace. Representative Bill Pascrell (D-NJ) cited the Constitution's Commerce Clause as the authority for his H.R. 1127, a bill "to encourage and ensure the use of safe football helmets." What Pascrell's proposal had to do with interstate commerce was left unsaid.

The authors of House Rule XII had noble intent, but they presumed the people would elect Representatives who would take the rule seriously.

Over in the Senate we find the infamous "Filibuster Rule," which requires the agreement of "3/5 of the Senators" (normally 60) before debate on a bill can be ended. When neither of the two major parties enjoys a 60+ majority, the "Cloture Rule," as it is also called, provides a convenient partisan blocking mechanism. This rule was amended recently to expedite certain presidential nominations that were being stonewalled by one party.

Aside these and a few other differences, the basic process for getting a bill to the President's desk for signature is essentially the same. Some Congressmen place simplified descriptions of the process on their websites. In brief, the bill is proposed by an individual member after he or she has either drafted it or had it provided by a constituent or lobbying group. The bill is

normally then sent to a Committee for consideration in the Chamber in which it was first introduced. Depending on the bill's complexity, it may be further referred to one or more subcommittees. It is a poorly kept "secret" that bills lacking widespread popularity are sent to sub-committees to "die," never to be put to a committee vote, let alone a floor vote. For instance, of the thousands of constitutional amendments proposed over the years few ever made it to a floor vote and only 33 were ever sent to the states for ratification.

The committee may modify the bill's wording after public hearings to improve its chance of surviving a floor vote and then they must pass it with a majority vote of the committee. The bill is then sent to the majority leader of the originating chamber to be put on the chamber's calendar for a vote of the entire chamber. Here is another weakness in the process; the Speaker of the House and Senate Majority leader enjoy great power over what goes on their chamber's calendar. Both bills originating in their chamber or coming from the other chamber after a successful vote may languish for a very long time before appearing on the calendar; or they may never appear on the calendar. There are periodic complaints over this practice.

Presuming a bill passes with a majority vote of each chamber, and any differences between the two versions of the bill have been resolved in a Conference Committee, the bill is sent to the President.

But here we must pause for a history lesson.

In 1776, Thomas Jefferson complained in his famous declaration that King George III had *"refused his Assent to Laws, the most wholesome and necessary for the public good."* Laws duly passed by the colonial legislatures and sent to the King often never received his signature and thus were never put into effect. Some of these bills were no doubt "wholesome and necessary." The Framers of 1787 sought to solve this problem. They set out to ensure the "people's voice," as reflected in the actions of their representatives, would never be muted.

Our constitution therefore does not require the President give his "assent" to a bill, at least not explicitly, before it becomes a law. Many Americans erroneously believe the President must sign a bill before it becomes a law. Not so. He may sign it if he agrees with its purpose, or he may veto the bill. He may also let it become law without his signature. This will occur automatically 10 days after the bill has been presented to him (not counting Sundays, when the President was expected to be in church). One caveat, if a bill is presented to the President and he does not have a full 10 days to consider it before Congress adjourns, it does not become law, but suffers what is called a "pocket veto."

One final note: According to Article 2, Section 2, the President is required to *"take Care that the Laws be faithfully executed;"* i.e., he must carry out the "will of the people" as expressed in the new law passed by Congress, every part of it. But what happens if the President objects to one teeny-weeny provision in a 2000+ page bill. Must he veto the bill in its entirety over this minor flaw? Perhaps he feels the provision exceeds the power of Congress or infringes upon executive privilege. Enter: Signing Statements.

Signing Statements date back to 5th President James Monroe. Although originally used as ways to express great satisfaction in signing a particular piece of legislation, today they provide the President the opportunity to express reservations over certain provisions of a bill without having to veto the entire thing. Deputy Assistant Attorney General and future Supreme Court Justice Samuel A. Alito raised quite a stir when he published an 1986 memo entitled: *"Using Presidential Signing Statement[s] to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law"* in which he stated bluntly that Presidential Signing Statements could be used to "increase the power of the Executive to shape the law."

"Getting a bill from introduction in Congress to the President's desk" is clearly not as easy as it could be or should be. We have the rules of Congress to blame for that; and as long as the Constitution gives Congress the complete power to compose their rules as they see fit, there is little hope for change any time soon. If the American people want streamlined procedures for passing legislation, they must demand it of Congress. Concerted demands will be heard. But do the American people ever act in concert? Not often. The only remedy which remains is to amend the Constitution in such a way that an expedited legislative procedure results. Congress, once again, is unlikely to ever propose an amendment which reduces in any way their power over legislation; thus it devolves to the people, through an Article V convention, to propose an amendment which would enact such a change.

If you want an easy process for getting legislation to the President's desk, there is work to do.

*Gary Porter is Executive Director of the Constitution Leadership Initiative (CLI), a project to promote a better understanding of the U.S. Constitution by the American people. CLI provides seminars on the Constitution, including one for young people utilizing "Our Constitution Rocks" as the text. Gary presents talks on various Constitutional topics, writes a weekly essay: Constitutional Corner which is published on multiple websites, and hosts a weekly radio show: "We the People, the Constitution Matters" on WFYL AM1140. Gary has also begun performing reenactments of James Madison and speaking with public and private school students about Madison's role in the creation of the Bill of Rights and Constitution. Gary can be reached at gary@constitutionleadership.org, on Facebook or Twitter (@constitutionled).*

## Genius Design: How an American Bill Becomes Law

## Guest Essayist: Amanda Hughes

With U.S. House elections every two years, and some portion of the U.S. Senate up for re-election every two years as well, the legislative branch is the branch closest to "We The People." Because of the number of U.S. House Members and U.S. Senators, it is far easier for us to have access to Members of Congress than it is to the President or Members of the judicial branch. Therefore, as citizens, it is important we understand the process of how a bill becomes a law, and the powers granted to Congress by the U.S. Constitution.

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives. – Article I, Section 1, United States Constitution

Bills may originate in the United States House of Representatives or Senate, of Congress, except revenue legislation must originate in the House. There are different types of bills, public and private. Measures such as resolutions, depending on the type, are used to continue appropriations or emergency legislation, for example.

Upon introduction in the House or Senate, bills are referred to Committees. Bills may receive committee consideration with hearings, amendments, and if "passed" out of committee may be scheduled for further consideration, with possible further amendments on the House or Senate Floor, by vote. A bill must pass both the House and Senate in the same form before it is allowed to go to the President for possible final approval to become law.

Anyone may ***draft*** a bill, or measure. A bill may also be referred to as "legislation" though legislation tends to be used interchangeably as a bill or law. The drafter could be a legislative aide who works with a Member of Congress, an attorney, or someone else. The President of the United States may even send an idea for a bill to Congress. However, the only ones who may ***introduce*** a bill for consideration *in* Congress are Members *of* Congress. They are the only ones who may "author" a bill even if someone else writes the language of the bill. A bill's author is also the sponsor of the bill who will guide it through the legislative process. Other Members may "sign on" to the bill in support of its passage, and those Members are considered co-authors or co-sponsors.

While it's important to understand the legislative process, it's vital to understand our country's history, and the circumstances that brought about this genius design, that originates, first and foremost with "We The People."

After the proceedings of the Constitutional Convention of 1787 people waited outside Independence Hall to receive the verdict about what their new system of government would be. A woman saw Benjamin Franklin and asked, "*Well, Doctor, what have we got, a republic or a monarchy?*" With no hesitation whatsoever, Franklin responded, "*A republic, ma'am, if you can keep it*."

> The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence. – Article IV, Section 4, Clause 1, United States Constitution

*If* you can keep it, Franklin said. Corruption of a constitutional, representative government that runs on the rule of law is easy. Preserving it is hard. Preserving a system the American people say they want to keep, including leadership by representation, is the foremost resolve each Member of Congress must have, each time they file a new bill.

But that is what the process is for. The legislative process vets potential laws as bills so that the process has ample opportunities to air appropriateness or pitfalls well before each measure gets to a vote. Much must happen before any bill gets to the point of a vote. The legislative process is intended to eliminate poor decisions the entire country will regret.

Legislation gets drafted on many different topics for all kinds of reasons. Some pieces are passed to edit or repeal certain laws as needed. Others are major initiatives that make the news and are controversial.

Upwards of 5,000 bills get filed in a legislative session of Congress, and around 500 may pass. And for good reason. The process weeds out. Unfortunately, though, bills do languish in committee without further consideration that are actually better ideas for the country than others that make it through the process.

This is why lawmakers, which is what Members of Congress are, need to understand the United States Constitution to consider whether bills they are filing are constitutional ***before*** filing. It is important that they learn America's history and founding, and how America's founding documents such as the Declaration of Independence, Constitution, and Bill of Rights, make America succeed as exceptional. It is important that lawmakers understand that America's Constitution is the law of the land, and that the Preamble to the Constitution is only an introduction, not a precedent of law in which they may cite a constitutional purpose for filing a certain bill. Learning America's history and founding matters so that lawmakers understand checks and balances, the balance of power that prevents the resting of too much power in one part of government. America's elected leaders too often forget this. It is our duty, as "We The People," to be educated ourselves, and remind them.

*Amanda Hughes serves as Outreach Director, and 90 Day Study Director, for Constituting America. She is the author of Who Wants to Be Free? Make Sure You Do, and a story contributor for the anthologies Loving Moments(2017), and Moments with Billy Graham(forthcoming).*

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## Happy Independence Day!
## Read the Declaration of Independence With Your Family and Friends!

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The Declaration of Independence: A Transcription

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IN CONGRESS, July 4, 1776.

**The unanimous Declaration of the thirteen united States of America,**

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.–That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, –That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.–Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

> He has refused his Assent to Laws, the most wholesome and necessary for the public good.
> He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.
> He has refused to pass other Laws for the accommodation of large districts of people,

unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.
He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.
He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.
He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.
He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.
He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.
He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.
He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.
He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.
He has affected to render the Military independent of and superior to the Civil power.
He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:
For Quartering large bodies of armed troops among us:
For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:
For cutting off our Trade with all parts of the world:
For imposing Taxes on us without our Consent:
For depriving us in many cases, of the benefits of Trial by Jury:
For transporting us beyond Seas to be tried for pretended offences
For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:
For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:
For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.
He has abdicated Government here, by declaring us out of his Protection and waging War against us.
He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.
He is at this time transporting large Armies of foreign Mercenaries to compleat the works

> of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.
> He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.
> He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

*The 56 signatures on the Declaration appear in the positions indicated:*

Column 1
**Georgia:**
Button Gwinnett
Lyman Hall
George Walton

Column 2
**North Carolina:**
William Hooper
Joseph Hewes

John Penn
**South Carolina:**
Edward Rutledge
Thomas Heyward, Jr.
Thomas Lynch, Jr.
Arthur Middleton

Column 3
**Massachusetts:**
John Hancock
**Maryland:**
Samuel Chase
William Paca
Thomas Stone
Charles Carroll of Carrollton
**Virginia:**
George Wythe
Richard Henry Lee
Thomas Jefferson
Benjamin Harrison
Thomas Nelson, Jr.
Francis Lightfoot Lee
Carter Braxton

Column 4
**Pennsylvania:**
Robert Morris
Benjamin Rush
Benjamin Franklin
John Morton
George Clymer
James Smith
George Taylor
James Wilson
George Ross
**Delaware:**
Caesar Rodney
George Read
Thomas McKean

Column 5
**New York:**
William Floyd
Philip Livingston
Francis Lewis
Lewis Morris

**New Jersey:**
Richard Stockton
John Witherspoon
Francis Hopkinson
John Hart
Abraham Clark

Column 6
**New Hampshire:**
Josiah Bartlett
William Whipple
**Massachusetts:**
Samuel Adams
John Adams
Robert Treat Paine
Elbridge Gerry
**Rhode Island:**
Stephen Hopkins
William Ellery
**Connecticut:**
Roger Sherman
Samuel Huntington
William Williams
Oliver Wolcott
**New Hampshire:**
Matthew Thornton

## GRIDLOCK IN CONGRESS

## Gridlock: Why Congress Is so Contentious and the Effects on Passage of Good Laws

## Guest Essayist: Richard E. Wagner

### Congressional Gridlock

Probably every resident of a large city has experienced gridlocked traffic. The traffic lights in front of you are green. Yet you can't move because your path is blocked by cars stuck in the intersection because their path is blocked by a red light. By the time those cars have cleared the intersection, your light has turned red, so you sit there caught in gridlock.

Traffic gridlock is real and most of us have experienced, some of us regularly. The term gridlock has also been applied to Congress, and with increasing regularity over the past few decades. Some imaginative observers have even developed measures of gridlock. One measure with some

intuitive plausibility is a ratio between the pieces of legislation enacted and the pieces that were introduced. Gridlock thus becomes synonymous with unfinished business or unenacted legislation.

When faced with gridlock, whether of traffic or of legislation, the normal human response is to decry the gridlock and to seek to overcome it. Just how this might be done depends on one's political agenda, about which many possibilities exist. One agenda might try to reduce gridlock by pricing the use of roads during periods of peak congestion, which would reduce the volume of traffic. A quite different agenda might try to create subsidized systems of mass transit, which would increase budgetary requirements. Regardless of one's agenda, one notable thing about gridlocked traffic is that all drivers agree that sitting in traffic is a waste of time and that they would prefer to arrive more quickly at their destinations.

This situation does not pertain to Congressional gridlock. Without doubt, there are people who would like to see legislation flow more quickly through Congress. Equally without doubt, however, there are also people who would like to see the flow of legislation slow down, and even stop in some cases. How one appraises and reacts to gridlock depends to some significant extent on what one thinks is the proper scope of government in society.

In this respect, the American Constitution established a system of divided and separated governmental powers that created obstacles to the enactment of legislation. Gridlock was built into our constitutional system. That built-in gridlock has been intensified by the Progressivist transformation of the federal government that has been underway over the past century or so.

Through this transformation, the federal government has shifted increasingly from producing real goods and services to transferring income among people. When the federal government was especially heavily devoted to doing such things as providing military services, keeping rivers and harbors navigable, and providing interstate highways, we faced a situation where most people thought those services were reasonable things for the federal government to do even if there were disagreements over budgetary details. Within this setting, there was much scope for compromise among members of Congress, which facilitated enacting budgets in timely fashion.

Rarely are budgets enacted in timely fashion these days. The last time Congress did so was 1996. Since then, continuing resolutions along with occasional shutdowns have become the standard mode of operation. Even worse, Congress has now placed over two-thirds of the budget on automatic pilot. Congress has thus reduced the items with which it must deal, and yet performs ever more poorly with respect to that reduced menu of items.

Through the progressivist transformation, the federal government has become increasingly dominated by programs to redistribute income and wealth. This shift in the pattern of governmental activity shrinks the scope for compromise, increasing gridlock in the process. As the federal government has moved away from supplying real goods and services that most people probably value to some degree and toward taxing some people for the benefit of others, gridlock is the natural product of the clash between those who are forced to pay and those who would benefit. And do not forget in this respect that approximately half the population is free of liability

under the personal income tax, making government costless to the extent it is financed by the personal income tax.

To be sure, we should always expect some gridlock inside political processes, as was recognized at the time of the American Constitutional founding. Our present political system, however, seems to have created a significant cleavage between those who would like to be left alone by the federal government to pursue their peaceful dreams and projects and those who seek to receive support at someone else's expense.

Yet we must recognize that governments can't create wealth. All they can do is take and redistribute wealth that other people have created. This property of government was recognized at the time of our Constitutional founding, and we need to recapture that founding wisdom. This does not entail streamlining government to reduce gridlock, but rather requires restoring our Constitutional system of free enterprise and limited government.

*Richard E. Wagner is Holbert Harris Professor of Economics at George Mason University.*

## Partisanship and Violence in Congress: The Caning of Senator and Abolitionist, Charles Sumner (1811-1874) (R-MA)

## Guest Essayist: George Landrith

### Partisanship and Violence in Congress — Not All Partisanship Is Bad, but Some Partisanship Is Catastrophic

Washington is a city that has long been known for partisanship. Even as respected and honored as he was, George Washington was viciously and unjustly attacked by partisans.

Thomas Paine who helped build support for America's independence by writing the historic political pamphlet "Common Sense," accused Washington of corruption and wrote that "the world will be puzzled to decide whether you are an apostate or an impostor; whether you have abandoned good principles, or whether you ever had any."[1]

Partisans for Thomas Jefferson and John Adams viciously attacked each other with such labels as: atheist, tyrant, coward, fool, hypocrite, and weakling. Jefferson's allies accused Adams of having a "hideous hermaphroditical character, which has neither the force and firmness of a man, nor the gentleness and sensibility of a woman."[2] Adam's partisans called Jefferson "a mean-spirited, low-lived fellow, the son of a half-breed Indian squaw, sired by a Virginia mulatto father."[3]

Partisans are strong supporters of a political party or cause. There is nothing wrong with being a partisan as long as it is healthy partisanship and the cause is within the bounds of the Constitution. But Partisanship becomes unhealthy when support for the cause becomes disconnected from fact, reason, constitutional limits, or basic right and wrong.

In 1856, regional tensions between North and South were intensifying, and the U.S. Senate Chamber became a cage fight arena of sorts. On May 19, 1856, Senator Charles Sumner of Massachusetts, a deeply committed abolitionist, gave a fiery speech in which he lambasted his opponents and specifically attacked his colleague Senator Andrew P. Butler of South Carolina. That may have been uncivil. But three days after that speech, on May 22, 1856, Senator Sumner was on the Senate floor affixing the franking stamp to copies of his speech which he intended to mail to supporters. Unknown to Sumner, Senator Butler's cousin, Congressman Preston Brooks, entered the Senate Chamber and clubbed Senator Sumner into unconsciousness with a cane. Witnesses said that Sumner never saw it coming and the beating was so severe, that it took him years to fully recover.

That is a classic example of toxic congressional partisanship. But it wasn't uncharacteristic of the time. In the decade leading up to the Civil War, Congress was plagued by toxic partisanship. During that time, Members of Congress often carried firearms in the chambers, made death threats against each other, engaged in fistfights and even group brawls.

Sadly, unhealthy, corrosive partisanship is nothing new. But acknowledging that bitter hyper-partisanship has been around a long time, is not an attempt to justify or normalize it. Obviously, civility should be our standard. We can engage in robust debate. But threats and violence have no place in a constitutional republic.

In the last few decades, it seems that partisanship has grown more heated and occasionally even veers into toxic partisanship. We have seen more and more veiled threats and in some cases actual violence motivated by partisanship.

The mass shooting of GOP Members of Congress in June 2017 by an angry, and likely, mentally ill Democrat campaign volunteer on Senator Bernie Sanders' presidential campaign is one of the most recent and most egregious examples of toxic partisanship gone way too far.

A more subtle version of hyper partisanship is now in vogue. Calling upon supporters to "confront" political opponents wherever they may be, is clearly an attempt to put them in fear for their safety — without actually crossing the red line of doing them physical harm. But it is nonetheless an attempt to threaten the opposition and bully them into submission. This cannot be tolerated in a free society.

When partisanship displays itself as robust disagreements and debates about important public policy and political issues that fall within the limited powers given to government, partisanship is not a bad thing. We need a robust debate. It isn't necessary for everyone to agree on everything. But when partisanship becomes threats of violence or worse still, actual violence, it is a sign that something is deeply wrong.

The truth is politics is a surrogate for violence and war. In a less civilized society, those who can enforce their will upon the rest of the populace become the rulers. In establishing a constitutional republic, the Founders were attempting to set aside that age old "rule by force" model of government. Instead, they created a system where the voice of the people ruled — without enforcing their will through threats and violence.

The Constitution was a compact that we would accept election results, and if we were unhappy with those results, we would redouble our efforts to win the next election. In that social compact, we agreed not to subvert the system and revert to the "rule by force" model of governance.

But an integral part of that compact was also designed to reduce the friction points, and maximize personal freedom in an ordered society. Thus, we also agreed in that compact that certain issues were off the table — certain issues would not be subject to a vote and our individual rights could not be endangered by an overzealous majority. For example, our Constitution gives the federal government a short and specific list of limited powers. So the majority wins on that short list of powers, but it doesn't win on everything that it wants. Some things are beyond the government's or the majority's power.

Additionally, most of the Bill of Rights limits the power of the government and the majority. No matter how many Americans dislike your political opinions, you are free to speak and write them. No matter how small a minority your faith may be, you can freely exercise your religious beliefs. No matter what the majority or government may say, you have the right to own firearms to protect yourself and keep a check on government. No matter how unpopular you may be, you may not be denied due process or a fair trial. No matter how much the government may want your property, it may not take it for public use without just compensation. These are only some of the limits on the power of government built into our constitutional system.

The majority's power and the government's power was limited on purpose — not by accident or oversight. Many things were simply off limits and not subject to a majority vote. By doing this, the Founders hoped to avoid the problems so often associated with democracies — that too often they became an exercise of three wolves out-voting two sheep about what is for dinner.

The Founders believed that a significantly limited government would reduce the surface area for political friction that could rub raw and blister our civil society. Simply stated, they did not want the majority to be able to impose its will on every conceivable issue.

As government has grown in the powers it asserts and the control it claims of its citizens' rights, the chances for serious conflict dramatically increase. This is one of the many reasons, why we should cling to the Founders vision of a constitutional republic with limited powers. One of the dangers of an ever expanding government is that it leads to more friction points and more conflict as government imposes it will on an unwilling minority on an ever growing list of issues that were once off-limits for government.

As Americans, we should be civil and eschew threats and violence. We should argue for our beliefs with vigor, but we should not attempt to use the power of numbers to impose our will by force when the Constitution does not give us that power.

Every bit as important — Americans should respect the concept of limited constitutional powers. That means the majority is limited in what victories it can claim. Without limits on government, an over-zealous majority will eventually so trample the minority, that they will begin to feel that their only option is revolution. Those seeking to impose their will on the minority, should keep in mind that the social compact is designed to give the majority its way only on those matters that

are properly within the government's power. But it is also designed to protect the minority from an over-zealous majority that believes its views are correct and should be imposed on all.

On a practical level, if we are smart and responsible, we will support government that circumspectly exercises only those powers that it was actually given in the Constitution. This is one more way that the Founders hoped to avoid toxic and hyper-partisanship. Then with that foundation, we can freely discuss, debate, and argue actively for our views on what public policy should be. That would be healthy partisanship. We need more of that in Congress and in the populace.

*George Landrith is the President of Frontiers of Freedom.*

[1] https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/press-attacks/#note11
[2] http://thegarrisoncenter.org/archives/5122
[3] http://thegarrisoncenter.org/archives/5122

## Revolt of 1910 Against House Speaker Joseph Cannon (1836-1926) (R-IL)

## Guest Essayists: Joseph Postell and Samuel Postell

Every fourth of July American citizens recognize the signing of the Declaration of Independence and the revolution that gave birth to our country, but very few remember the revolution that occurred in Congress about one hundred years after the revolutionary war. That revolution has had profound effects on how Congress works today.

This revolt occurred in 1910 and was a revolt against the Speaker of the House. It featured Joseph Cannon, a powerful and formidable speaker who used his power to the hilt in order to ensure that the will of his party was carried out through the representative body of the nation. The revolt against the Speaker is not only a unique story in our nation's history, but one that modified the orders of the House and the powers of its Speaker.

Prior to this revolt Speakers of the House had three important powers that allowed them to fulfill the will of their party. They had the power of committee appointment, the power of recognition, and they were the chair of the "rules committee." These powers in tandem allowed the Speaker to dictate the bills that would reach the floor, recognize who would speak on the given bill, and also determine the rules that governed the deliberation upon the bills. Speakers would typically use these powers on behalf of their party, to ensure that the majority party was able to pass the agenda that voters sent them to Congress to enact.

In 1910, however, the Republican Party, of which Cannon was the leader in the House, was divided between conservatives and progressives. Cannon, a conservative, was consistently suppressing the influence of the progressives in his own party. Progressive politicians, who deeply distrusted parties in general, began to resent the power vested in the Speaker which was being used to thwart them. They believed that political parties rendered government corrupt and

irresponsible; that the laws that actually governed the nation were not a product of the people, but rather of a select group of interested individuals who used their personal influence to control the government.

It was a progressive Republican, George Norris of Nebraska, who worked to weaken party power at the Congressional level. After serving in Congress for many years, the opportune time finally arose. On Saint Patrick's Day, 1910, while many of the Republican representatives were out celebrating, Norris introduced a resolution to strip Speaker Cannon of his power over the Rules Committee, which had the power to send bills to the floor of the House for debate, vote, and passage. He noticed that many of Cannon's loyal partisans were out celebrating and thus unable to swing the vote in defense of their party leader.

There was a problem: Cannon had the power to determine whether Norris could introduce his resolution in the first place. Norris claimed that his resolution was privileged by the Constitution and therefore had priority over all other business. This would mean that even the Speaker could not prevent the House from proceeding with the resolution. Cannon had to determine whether the Norris resolution was privileged, but he knew that the entire House would vote either to uphold or to overturn his ruling. Stalling, he allowed members of the House to debate whether the resolution was privileged, and the debacle lasted the entire night. Shortly after midnight the sergeant at arms was ordered to take absent members into custody and bring them back to the House to produce a quorum.

The debate, which began in the middle of the afternoon on March 17th, ended with no decision at 2 P.M. on March 18th. The following day Cannon ruled that the resolution was not privileged, and therefore could not be heard. Norris and his allies were prepared for this and they appealed to the entire House. Cannon was overruled in a vote of 182 to 163, and Norris' resolutions passed by a margin of 191 to 156.

From that point on, the Speaker of the House would never again have the powers that enabled him to represent the will of his party and push his party's agenda through the House of Representatives. Committee chairs became "barons" of the House, no longer subject to the control of Speakers and the majorities they represented. This committee chair-dominated system lasted for decades, until recently, when the Speaker regained some of his influence, including the power to appoint the members of the Rules Committee. Still, even today, Speakers are much weaker than they were in Cannon's day. Back then, they were called "czars." Today, they have the ability to determine the agenda, but not the power to influence members of the House to vote for it.

*Joseph Postell is Associate Professor of Political Science at the University of Colorado-Colorado Springs. During the 2017-18 academic year he is a visiting fellow in the B. Kenneth Simon Center for Principles and Politics at The Heritage Foundation. Postell is the author of Bureaucracy in America: The Administrative State's Challenge to Constitutional Government. He is also the editor of Rediscovering Political Economy and Toward an American Conservatism: Constitutional Conservatism during the Progressive Era. Follow him on Twitter @JoePostell.*

*Samuel Postell is a Ph.D. student at the University of Dallas.*

## Filibuster: History, Purpose as Used by the Senate and Effects on the Legislative Process

## Guest Essayist: The Honorable Frank M. Reilly

U.S. Senate Rule XXII, which requires a three-fifths supermajority vote of the body (60 votes) to end debate on a measure, has been on President Donald Trump's mind lately as some of his key legislation has hit a brick wall in the senate.[1] The rule effectively empowers the minority political power because it takes a supermajority to pass legislation, and up until recently, to confirm a president's nomination of a Supreme Court justice. But the rule, which allows for a parliamentary procedure called a filibuster, has not always been on the books, and is not mentioned in the U.S. Constitution.

The Great Compromise of 1787 reached during the Constitution's framing made the Senate the prime legislative body to represent the states,[2] thus the Constitution provides that each state has two senators, regardless of the state's population.[3] With this fact in mind, consider that any percentage of the Senate does not equate to a similar percentage of the nation's population being represented.

The Constitution provides that the House and Senate "may determine the Rules of its Proceedings… ."[4] The Constitution's framers specified five instances in which the Senate must have a supermajority vote: expelling members,[5]ratifying treaties,[6] convicting federal officials following impeachments,[7]overriding presidential vetoes,[8] and proposing constitutional amendments.[9] Both James Madison and Alexander Hamilton argued against supermajority votes in *The Federalist*.[10]

While some have argued that the supermajority vote that the Senate rules require to end debate is unconstitutional,[11] it has remained in place in various forms since 1806. However, the rule's continued survival is more likely to be subject to political decisions within the U.S. Senate rather than the involvement of the U.S. Supreme Court in an internal Senate matter.[12]

Aaron Burr, who killed Alexander Hamilton in their famous duel, is credited with changing Rule XXII and empowering the political minority — that Hamilton feared — at the expense of the majority. In 1805, Burr, who by virtue of Article I, Section 3 of the Constitution, also served as President of the Senate, urged the Senate to simplify its rules to end the "Move the Previous Question" rule, arguing it was redundant to the original "question" or motion made, and in 1806, the Senate ended the rule.[13] The change to Senate Rule XXII, which was apparently made to simplify the rules, allowed for a filibuster, which is the act of speaking continuously on a motion so that a vote cannot occur. The word "filibuster" is a variation of the Spanish word for pirate, which is indicative of the parliamentary move that stops a vote from occurring. But even though the rule change occurred in 1806, no senator threatened a filibuster until 1837, and it not used until 1841.[14]

In 1917, under pressure by President Woodrow Wilson who was seeking legislation to arm merchant ships and was being blocked by the Republican minority, the Senate added a rule to allow for the "cloture of debate," meaning to end a filibuster. Cloture is the French word for fence. The amended Rule XXII required a two-thirds vote to end debate.[15] From 1917 until 1963, cloture was rare, and was invoked only five times to end debate.[16] The Senate later amended the rule to lower the number from two-thirds of the senators present and voting to three-fifths of all of the senators, which increased ability to end debate, but which also maintained a supermajority requirement. Senators' use of filibusters significantly increased over time to the point that almost all major legislation must now garner 60 votes to pass.

Through the years, both parties used filibuster threats to stop presidential appointees. Republicans threatened, during the President George W. Bush administration, to use what some called the "nuclear option" to modify Senate rules to eliminate filibusters of presidential appointees.[17] They backed down after raucous protests from the Democrats, and after a group of moderate senators from both parties, who dubbed themselves the "Gang of 14" reached an agreement in 2005 to allow the votes on some of President Bush's judicial nominees in exchange for a retreat on moving forward with doing away with the supermajority requirement.

The agreement was short lived, in that when the Democratic Party gained control of the Senate, the Democrats used the "nuclear option" to end the filibuster rule for all presidential nominations except Supreme Court justices.[18] In the summer of 2016, when then-Senate Majority Leader Harry Reid (D-NV) assumed Senator Hillary Clinton (D-NY) would defeat Donald Trump in the November presidential election and that the Democrats would win control of the U.S. Senate, he said that the Democrats were prepared to eliminate the filibuster rule, saying "[i]t is going to happen.".[19] The Democrats lost the presidential election, and the Republicans maintained control of the Senate, and the supermajority cloture rule for legislation has remained intact, but was modified to a simple majority for Supreme Court justices.[20]

In January 2017, President Donald Trump nominated Judge Neil Gorsuch to fill the vacancy on the Supreme Court resulting from Justice Antonin Scalia's death.[21] When the Senate Democratic Party leadership announced they would filibuster Gorsuch's nomination, the Republicans changed the cloture rule for U.S. Supreme Court nominees, requiring a simple majority of votes to confirm Gorsuch's nomination. The Senate confirmed Gorsuch with a 54-45 vote. While Senator Harry Reid promised that the Democrats would end the supermajority cloture rule for Supreme Court justices and legislation, the Republicans ended the rule for Supreme Court justices.[22]

While filibusters are essentially dead as far as presidential nominees are concerned, they remain very much alive for votes on legislation. Filibusters can be used as a shield to try to stop legislation that a senator dislikes, or a sword to spur action on some other measure. For example, Senator John McCain (R-AZ) and senate democrats repeatedly filibustered to force a Republican senate to vote on campaign finance reform, and Senators Hillary Clinton (D-NY) and Patty Murray (D-WA) held up President George W. Bush's executive branch nominations to successfully pressure President Bush's Food and Drug Administration to allow so-called "Plan B" emergency contraceptives to be sold without a prescription.[23]

The U.S. Senate's 2018 partisan split of 51 Republicans and 49 Democrats means that any Republican sponsored measure must receive at least 9 votes from the Democrats to pass, and even more votes, if some of the Republicans do not vote or do not support the measure. Whenever any political party holds a majority, but less than the 60 vote majority, that party will have to seek votes from the other party. In other words, 41 members of the Senate can stymie legislation.

President Trump's repeated pleas to the Republican-led Senate to end the supermajority cloture rule that allows Democrats to filibuster his legislative proposals may eventually be heeded by the Senate Republicans. With former Senate Democratic Leader Harry Reid's promise that the Democrats would do the same thing if and when they regain control of the Senate, it is likely that one political party or the other will end the rule if that party's control remains less than three-fifths of the Senate.

*Frank M. Reilly teaches constitutional law, election law, and other political science courses at Texas Tech University. He is also a lawyer in private practice in Horseshoe Bay, Texas, and serves as a municipal judge for two Texas cities. Follow him on Twitter @FrankReilly or on Facebook at JudgeFrankReilly.*

[1] *See e.g.*, President Donald Trump's Twitter posts on June 30, 2018, June 21, 2018, July 29, 2017, and September 15, 2017. <https://twitter.com/realDonaldTrump>.
[2] The 17th Amendment, ratified by the states in 1913, changed the compromise by switching the means by which senators are chosen, from the original appointment by each state legislature to direct election by voters.
[3] U.S. Const., art. I, sec. 3.
[4] Art. 1, Sec. 5, U.S. Constitution.
[5] *Id.*
[6] *Id.*, Sec. 2.
[7] *Id.*, Sec. 3.
[8] *Id.*, Sec. 7.
[9] *Id.*, Art. 5.
[10] *See Federalist 58* (""a minority can demand unreasonable things"") with James Madison writing, and *Federalist 22* ("[i]f a pertinacious minority can control the opinion of a majority [the result will be]tedious delays; continual negotiation and intrigue; contemptible compromises of the public good"), with Alexander Hamilton writing.
[11] *See e.g.*, Chafetz, Josh and Gerhardt, Michael J., "Is the Filibuster Constitutional?" (2010). Cornell Law Faculty Publications. <https://scholarship.law.cornell.edu/facpub/160>
[12] *See NLRB v. Noel Canning*, 573 U.S. ___, 134 S. Ct. 2550 (2014) ("for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business"); and *Raines v. Byrd*, 521 U.S. 811 (1997) (individual members of Congress do not have standing to sue unless they can prove a particular injury separate and apart from that of the legislative body). *See also Page v. Shelby*, 995 F. Supp. 23 (D.C. 1998) (holding voter lacked standing to challenge the constitutionality of Rule XXII).
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## How the Democratic and Republican Parties Have Changed Throughout United States History and the Effects on Congress

## Guest Essayist: Tony Williams

Americans are deeply polarized in this country but often incorrectly attribute it to growing partisanship and the strength of political parties. In fact, the opposite is true. Some scholars have argued that the growing polarization in Congress and in politics more generally is a symptom of a declining two-party system and identification of Americans with one of the two major parties.

Political parties have experienced a long-term decline in our political system and society over the past forty or fifty years. During the middle of the twentieth century, political parties were strong and played an important role in representing broad swaths of the American population, the majority of whom registered and identified with one of the major parties even if they did not always agree with every position.

However, Americans have increasingly identified themselves as independents and not beholden to one party or the other. The phrase that people use in conversation that they vote for the candidate rather than the party is revealing and indicative of a very important sea change in American politics. Moreover, primaries have replaced the proverbial smoke-filled rooms with party bosses who exercised a great deal of power. Special interests often control a great deal

more money than do party organizations who are unable to control party members the way they did formerly that encouraged party loyalty.

Therefore, the lens through which we view politics today is really often clouded by liberal and conservative ideologies and our uncompromising allegiance to them rather than Republican and Democratic lenses. The unfortunate result for our political system is gridlock and an inability to compromise to accomplish reasonable laws and policies that are supported by most Americans rather than just one side. Perhaps even more unfortunate has been the inability of Americans to speak to each other constructively, if at all, about politics without name-calling, labeling, or abiding by a modicum of civility, particularly on social media.

The result of weak political parties for Congress and weak partisan leadership has been quite significant. Congress has become more decentralized as the power of the old committee chairs has been greatly weakened. Representatives are often beholden to their own districts or special interests and lobbyists more than their political party. How many people would seriously argue that Speakers of the House John Boehner or Paul Ryan could control the members of their own party? They were party leaders who struggled to contain the more ideologically-driven members of their party as much as they contended against the rival party within Congress and in the White House.

The ironic solution for gridlock in Congress and an inability to compromise for the common good may be the strengthening of political parties rather than decreasing their influence. However, with the rise of television, the internet, YouTube, and Twitter over the past fifty years and structural changes that challenged the organization and strength of parties (not to mention increasing distrust in party institutions), it does not seem that parties will recover and that our ideological polarization may continue and even increase.

*Tony Williams is a Constituting America Fellow and a Senior Teaching Fellow at the Bill of Rights Institute. He is the author of six books including the newly-published Hamilton: An American Biography.*

# CONTEMPORARY ISSUES

## Congress and the Rise of the Progressive Administrative State

## Guest Essayist: Marc Clauson

No one would argue that in the last hundred years or so, legislation on all sorts of matters by Congress has increased tremendously. The question for this essay is why? The answer has to do with an ideological change in American political thought and the practical outworkings of it in Congress and the agencies created by Congress and controlled by the president. The ideological shift was to Progressivism or modern liberalism. The practical outworking is the so-named "administrative state," otherwise known as bureaucracy, or rather large bureaucratic organizations designed to implement legislation. First however, definitions are in order.

The term “administrative state” refers, in the words of one scholar, to “our contemporary situation, in which the authority to make public policy is unlimited, centralized, and delegated to unelected bureaucrats.”[1] It encompasses three related elements: (1) the propensity of Congress and agencies to promulgate much more frequent legislation and to issue expansive regulations respectively; (2) the idea that bureaucratic agencies ought to be populated by experts who are unbiased and public-minded; and (3) the massive growth of the size and power of those agencies since the New Deal era.

Progressivism is generally a uniquely American ideological term that is more or less equivalent to modern liberalism and similar to the European social democracy.[2] It is associated with the period from roughly 1880 to 1925 and is defined as “a total rejection in theory, and a partial rejection in practice, of the principles and policies on which America had been founded and on the basis of which the Civil War had been fought and won only a few years earlier.” Another definition: “Progressivism was the reform movement that ran from the late 19th century through the first decades of the 20th century, during which leading intellectuals and social reformers in the United States sought to address the economic, political, and cultural questions that had arisen in the context of the rapid changes brought with the Industrial Revolution and the growth of modern capitalism in America. The Progressives believed that these changes marked the end of the old order and required the creation of a new order appropriate for the new industrial age.”[3]

Progressivism was more or less equivalent to modern liberalism, the term used in Europe, particularly the United Kingdom in the 1880s and onward. In addition, it was inspired to an extent by socialism in certain of its aspects. The Industrial Revolution seems to have been the main force in the origin of the movement, but the other side of that same coin was a skepticism of capitalism. It is easy to see how Progressivism would challenge the constitutional principles of the American Constitution.

But the other element of the movement included a new-found appreciation for big government, and, particularly governmental services provided through a centralized bureaucratic organizational form employing experts who were considered both efficient and non-political. This public administration aspect was especially advocated by Woodrow Wilson. Wilson argued first that “Government does now whatever experience permits or the times demand.”[4] The best means or state action was the most efficient and the most efficient was a bureaucratic and centralized government that could then bypass the inefficiencies of the separation of powers and a deliberative Congress. The single chief executive then was the ideal for Wilson.[5] At the same time, administration was separated from politics in the Progressive vision.[6] This “administrative state” is described: “[T]o varying degrees, the fathers of progressive liberalism envisioned a delegation of rulemaking, or regulatory, power from congressional lawmakers to an enlarged national administrative apparatus, which would be much more capable of managing the intricacies of a modern, complex economy because of its expertise and its ability to specialize. And because of the complexities involved with regulating a modern economy, it would be much more efficient for a single agency, with its expertise, to be made responsible within its area of competence for setting specific policies, investigating violations of those policies, and adjudicating disputes.”[7]

The Progressive Era as a movement ended around 1925, but its ideas persisted and the ideology gained adherents both among academics and politicians and government officials. As a body, Congress came to be more swayed by Progressive ideas once it was made up of a Democratic majority during the presidency of Franklin Roosevelt. In fact, it attempted to pass much legislation that had a Progressive cast. However until around 1937, the Supreme Court consistently struck down many Congressional efforts. But after the court-packing scheme, the Court began to uphold legislation on a regular basis, and this expansion has never abated. In the meantime, Congress itself moved increasingly toward increasing intervention in social and economic issues. So while one may place some blame on the Court, an equal blame falls on Congress itself. It has delegated power to non-elected and unaccountable agencies while at the same time passing incredibly lengthy and complex legislation, thus justifying (it argues) such delegation. The Court has of course come to allow delegation as it has eviscerated the non-delegation doctrine, an outcome the fathers of Progressivism embraced.[8] At present, Congress routinely passes very large pieces of legislation and simply delegates rule-making power to the agencies, as the Progressives envisioned.

In summary, the Progressive movement provided the intellectual stimulus for the expansion of the administrative state. But Congress over time was increasingly willing to put into practice the ideas of that movement, both procedurally (by creating large, centralized and unaccountable agencies and delegating extensive power to them) and issuing the kind of legislation (in terms of its content) that can only be characterized as interventionist in markets and private activities. One possible solution, apart from the courts, is the Article I Project, seeking to urge Congress to take back its law making power and eliminate or reduce delegation. How well this movement fares is still an open question.

*Marc A. Clauson is Professor of History, Law and Political Economy and Professor in Honors at Cedarville University. Marc holds a PhD from the University of the Orange Free State, SA, Intellectual History and Polity); JD (West Virginia University College of Law, Jurisprudence); MA, ThM (Liberty University, New Testament Studies and Church History); MA (Marshall University, Political Science); BS (Marshall University, Physics); and PhD work (West Virginia University, Economic Theory).*

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## Direction of Power, Congress, and the Rise of the Progressive Administrative State

## Guest Essayist: Patrick M. Garry

The progressive administrative state now seems entrenched in contemporary American political governance. While progressivism first arose on the political scene in the late nineteenth century, and the administrative state came into being with the sudden increase in centralized government during the 1930s, the two came together only later in the twentieth century to form what is now known as the progressive administrative state.

The term *administrative state* refers to the reach and power of the vast web of administrative agencies that populate the executive branch of the U.S. government. Administrative agencies, directed by the executive branch and run by unelected bureaucrats, possess the power to issue legally binding rules and adjudicatory orders. The heads of agencies may be appointed by the President, and through these heads the agency may be influenced by the President or by Congress, but otherwise the agencies have no elected officials and sometimes little political accountability. The rules issued by the wide array of federal executive agencies far outnumber the laws democratically enacted by Congress.

The term *progressive* refers to a political philosophy that favors an ever larger federal government that will assume ever more authority over social and individual life. Progressives believe that modern life is so complex that it necessitates a pervasive central government run by elites who can direct society with enlightened expertise. Progressivism mistrusts traditional cultural values and non-governmental social institutions, such as religion and local communities and civic voluntary organization, and believes that the private sector is the source of injustice. Thus, a strong central government is needed as an antidote or override to those other institutions.

Since the 1960s, progressivism has also referred to a set of substantive ideological beliefs characterizing a leftist political agenda. Thus, the progressive administrative state has used the power of big government to push progressive political goals.

The progressive administrative state has its historical roots in the New Deal agenda of the 1930s. Progressives believed that only an unrestrained federal executive branch could remedy

all the effects of the Great Depression, as well as engineer society so that such a calamity would never again occur. The progressive mindset saw limited government, the private-sector economy, and the complex web of social and cultural institutions that characterized America since its colonial beginnings as means of oppression. To progressives, individual liberty gave way to the power of big government to engineer society for individuals who do not have the expertise to adequately govern themselves. Government freedom trumped the freedom of the individual.

The New Deal agenda, powered by progressive ideas, brought about a dramatic expansion of the federal government. This expansion occurred through an increase in the size and reach of the administrative state, accompanied by the birth of many new federal agencies. But underlying all this expansion was Congress, since only through congressional laws creating, empowering and funding administrative agencies could such an expansion occur. In rulings that have endured to the present, the New Deal era Supreme Court held that Congress could delegate unlimited power to the administrative state.

Following the New Deal, the administrative state witnessed another significant expansion during the 1960s and 1970s, with the Great Society programs being administered by new and enlarged agencies. During one of the most liberal periods in American political history, Congress enabled the federal executive branch, through its administrative agencies, to pursue a progressive agenda that steadily enlarged the sphere of the national government, while shrinking the social space left to all other non-governmental institutions. A somewhat similar expansion occurred decades later, during the presidency of Barack Obama.

Although Congress plays an essential role in fueling the administrative state, primarily through its funding of the executive branch, for the most part the personnel and operations of the progressive administrative state have remained insulated from Congressional oversight. This is shown by the fact that even when Congress is controlled by a party populated by members who advocate a less expansive, more accountable federal bureaucracy, Congress has been unable to decrease the size or reach of the administrative state. The administrative state has become so intertwined in national life, so involved in so many aspects of social life, that any attempted cutback runs the risk of shutting down the government altogether.

Various scandals and controversies in recent years have shown how politically-biased the progressive administrative state has become. The Internal Revenue Service, for instance, used its vast power to target conservative organizations that might be opposed to the progressive administrative state. The Consumer Financial Protection Board's acting head refused to recognize or yield to the agency head appointed by President Trump. The Veterans Administration actively covered up its failures to provide timely and adequate care to veterans, all the while doling out large pay increases to agency officials.

The progressive administrative state has undermined vital non-governmental social and cultural institutions. The Great Society programs of the 1960s and 1970s, for instance, eroded the family and neighborhood. Federal land and environmental agencies have eroded the power of local government. And more recently, the agencies implementing the Affordable Care Act directly attacked religion by forcing religious organizations to act against long-held beliefs. But as all

these different aspects of society are undermined, the progressive administrative state grows ever more powerful and becomes the only institution on which individuals can rely for support.

*Patrick Garry is professor of law at the University of South Dakota and is the author of Limited Government and the Bill of Rights and The False Promise of Big Government: How Washington Helps the Rich and Hurts the Poor.*

## Role of Congress as Representative Government and the Rise of the Progressive Administrative State

## Guest Essayists: Joseph Postell and Samuel Postell

As the two previous essays have explained, we are increasingly governed not by our elected officials in Congress, but rather by an administrative state which makes most of the national government's policies. How has this affected the way Congress functions, and how it represents the people? The administrative state has fundamentally changed the way Congress works, and this change has taken place over two distinct eras.

Throughout most of the twentieth century, while the administrative state was being constructed and expanded, Congress decentralized its power to committees. These committees specialized in the subjects that the bureaucracy was created to regulate: agricultural production, workplace safety, consumer product safety, aviation policy, financial regulation, environmental protection, and so forth. By decentralizing its own power into these specialized committees, Congress created a system that enabled it to supervise and oversee the work of the administrative state.

Congress was able to remain in control of the administrative state, in spite of the fact that the bureaucracy was ostensibly controlled and supervised by the executive branch. Congress remained in charge due to two powers: the power to empower agencies by authorizing them to make policy, and the power to appropriate money to agencies. Agencies needed Congress to give them power and funding. This meant that when members of Congress – typically those on the relevant committee – demanded agencies to make certain decisions, the bureaucrats were happy to oblige.

Congress's structure, throughout the twentieth century, in other words, was perfectly designed to supervise the administrative state it created. But it was no longer representing the people in the making of law. Instead, individual members had power, due to their committee assignments, to please their own constituents rather than deliberating with their colleagues on the bills that would promote the good of the country.

During this period, both parties in Congress largely supported the increasing role of the administrative state in making policy. Members of Congress, regardless of their party affiliation, enjoyed the benefits that they derived from the administrative state. Political ideology mattered a lot less than whether a member could bring home benefits to his or her constituents, and members were happy to play this role regardless of their partisan affiliation. Congress could pass vague bills that promised to accomplish huge goals such as cleaning the air and improving

automobile safety, but the costs would be imposed by the agencies that implemented the regulations necessary to attain those goals.

This is surely one reason why, throughout the twentieth century, the nation witnessed a steady increase in reelection rates to Congress, the rise of career members of Congress, and a decrease in voters' sense that the government reflects their wishes.

Things have changed in important ways since the last century, however. Instead of both parties in Congress agreeing on the legitimacy of the administrative state, and using it to promote the narrow interests of their constituents, one party has begun to question the legitimacy of the modern administrative state completely. As the Republican Party became more consistently conservative, culminating in the 1994 and 2010 midterm elections, partisan politics has reemerged in Congress. Newt Gingrich, the Speaker of the House after 1994, took some powers away from committees and centralized some power in the Speaker's hands, allowing the party leaders in Congress to bring partisan politics, and the fight over the size of the national government, back into Congress.

In this second phase of the relationship between Congress and the administrative state, Congress is no longer content to oversee the exercise of administrative power. Instead, one party in Congress seeks to constrain this administrative state, while the other defends it. This has made Congress more polarized and more gridlocked, but it has also caused Congress to become weaker. Congress was still an "impetuous vortex" in the twentieth century, just as James Madison had predicted it would be. It ostensibly delegated power to the bureaucracy, but it controlled the bureaucracy behind the scenes. Today, on the other hand, Congress has become so deeply divided that its members no longer act institutionally, defending and expanding congressional control of the administrative state. Instead, they fight over the legitimacy of the modern state itself.

Paradoxically, the administrative state did not gain its powers at the expense of Congress. Rather, Congress gained the most when it delegated lawmaking power to the bureaucracy, because members could claim credit for fixing problems but avoid the responsibility for the modern state's costs. As Congress has become increasingly polarized and gridlocked, it neither oversees the administrative state systematically, nor has it regained the original responsibility for making laws that our Constitution's Founders envisioned it should have. It is increasingly relegated to the periphery of American politics, eclipsed by the President, by the Supreme Court, and the bureaucracy. Far from the republic's crown jewel, Congress sadly has become the country's most despised political institution. It no longer resembles the representative, lawmaking body that the Founders intended it to be.

*Joseph Postell is Associate Professor of Political Science at the University of Colorado-Colorado Springs. He is the author of Bureaucracy in America: The Administrative State's Challenge to Constitutional Government. He is also the editor of Rediscovering Political Economy and Toward an American Conservatism: Constitutional Conservatism during the Progressive Era. Follow him on Twitter @JoePostell.*

*Samuel Postell is a Ph.D. student at the University of Dallas.*

## Lobbying: Influence of Lobbyists on Congress

## Guest Essayist: Amanda Hughes

> ...and to petition the Government for a redress of grievances. – First Amendment to the United States Constitution

Some get caught up in illegal activity. Others are honest in their attempts to represent client concerns. Who are they? Lobbyists. Political lobbying has existed as long as voters and elected leaders have. The meaning of "lobby" is the only newer thing about it. The term lobbying was found in newspapers in 1820, lobbyism in 1824, and lobbyist in 1846 as the first uses of lobby in print. Around 1810, political use of lobby was known in the northeast legislatures. Some speak of Ulysses S. Grant having coined the term in the 1860s when people would wait for him in the Willard Hotel lobby to talk, or as possibly beginning outside of British Houses of Parliament.

Yet, lobby comes from an earlier usage of the German word "louba" meaning hall or roof. In the 18th century, people would come to British theaters and became known as lobby loungers. They would come not to watch a play, but gather outside of box seat areas to visit with prominent people. Such occurrences became known in America as well.

A more commonly heard use of lobbying connected to political use relates to people congregating outside of the House Chamber waiting to catch a lawmaker's attention and was known as such since the beginning of the United States Congress. Spectators, vendors, and ambassadors would fill the area which created noise for the Chamber where acoustics and ventilation were already poor.

At the time, there were no offices or other areas for constituents to meet with their Representatives, making the lobby area a best place for visits. It became the Old Hall where the House of Representatives met, and is now Statuary Hall in the United States Capitol, before the 1857 opening of the new House Chamber which included an area that was called the Speaker's Lobby. There, people would wait to see the Speaker who officed behind the Speaker's chair, and representatives would talk, relax yet maintain an ability to keep up with proceedings on the Floor, and meet with constituents and people who were gaining notice as professional lobbyists. The area became a popular place to meet until 1908 when the first offices opened for Representatives to meet with visitors. The new House Chamber could now accommodate Representatives for a growing America adding more and more states to the Union.

To "lobby" has been termed from various sources as one who comes to visit, to connect with others. Politically, to lobby is to seek the ear of an elected official to influence votes on legislation. This description makes any constituent who writes, visits, or calls his or her congressman, a "lobbyist." And as guaranteed by the First Amendment to the United States Constitution, any American citizen may petition the government without fear of punishment or retaliation. What is it, then, that makes people cringe at the word, lobbyist?

Unfortunately, it has been all too easy for businesses and organizations to hire professional lobbyists who could work around legal ways to influence lawmakers. These lobbyists could

essentially bring laws to pass with great impact and fund candidates running for office. This is why people who meet requirements for being lobbyists are required to register as lobbyists based on the amount of time they spend representing clients in front of lawmakers. Under the Lobbying Disclosure Act, they are required to report what they do and money they spend on their efforts. Many bring gifts to legislators and they are required to report what they spend on those gifts which is a limited amount by law.

This does not mean that all lobbyists are dishonest or lobbying is bad. Lobbying can be a helpful tool to reach legislative goals that individuals want to reach as groups. Each individual voter wants to be heard. This includes voters who are part of organizations and businesses. Such voters may be part of groups with similar interests and can bring a large voice to bear on Members of Congress.

This is also why it is important for each individual voter, whether part of an organization or business that lobbies or not, to remain engaged in the political process, America's Founders set in place, in some way and especially at the ballot box.

> If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be. If we are to guard against ignorance and remain free, it is the responsibility of every American to be informed. – Thomas Jefferson

It can seem that the Legislative Branch of American government is at such a large-scale that individual involvement is of little or no consequence. Yet, Members of Congress want to hear from constituents and they will tell constituents that letters, visits and phone calls do make a difference. Representatives who run to serve in elected, public office are people who vote too. They had to spend time listening to individuals with concerns and who encouraged them to run for office.

Representatives wish to follow through with promises made and the reasons they felt compelled to run for an elected seat. However, accountability is continually needed on all fronts – by those elected and those who voted them in. As long as America has representative government with no king, it means "We the People" people are in charge. It is important to remember that each American citizen holds the greatest opportunity to influence and voice concerns to leaders elected not to obtain power, but to serve.

*Amanda Hughes serves as Outreach Director, and 90 Day Study Director, for Constituting America. She is the author of Who Wants to Be Free? Make Sure You Do, and a story contributor for the anthologies Loving Moments(2017), and Moments with Billy Graham(forthcoming).*

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## Technology: Impact on and by Congress From Ink and Quill to Electronic Voting, Internet and Televised Floor Proceedings

## Guest Essayist: Scot Faulkner

There are three ways Congress lives up to its mandate from the Founding Fathers – documenting their actions, recording their votes, and communicating with their constituents. Each method has changed as technology evolved. Each technological advance has expanded the availability of official records, and opened more avenues for communication and accountability.

America's Founding Fathers understood the importance of communication and accountability between citizens and their elected representatives.

Even before the U.S. Constitution, the Continental Congress approved provisions for communicating with citizens, and assuring citizen accountability through knowledge of the actions of their elected representatives.

**Articles of Confederation**

> …and shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the Journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states.

James Wilson, a member of the Committee on Detail which compiled the provisions of the draft U.S. Constitution, was a follower of the great British parliamentary scholar Sir William Blackstone. He quoted Blackstone's Oxford 1756 lectures, which underscored the importance of a public record for holding officials accountable, *"In the House of Commons, the conduct of*

*every member is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection."*

The U.S. Constitution mandates open communication and documentation.

**Article 1, Section 5, Clause 3**

> Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

During its ratification, the importance of citizens interacting with their elected representatives was institutionalized in the Bill of Rights.

**Amendment 1**

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Alexander Hamilton and James Madison made communication between citizens and their elected representatives fundamental to the integrity of representative Democracy.

**Federalist No. 56**

> February 19, 1788
>
> It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents.

Every day the Congress approves the "Journal" of the previous session. This is the official outline of actions taken during the previous meeting of each Chamber, like a set of minutes. It is codified in **Section 49** of Thomas Jefferson's 1812 Parliamentary Manual that governs Congressional operations.

Staff of the House Clerk's Office, and the Secretary of the Senate physically write, and now type, every word said during Congressional sessions. These are transcribed and printed in the Congressional Record. Printed daily editions of the Congressional Record were distributed to Legislative Offices. A very limited number of copies were also available through those offices to the public.

This changed in January 1995, when the Library of Congress made digital copies of the Congressional Record available on its website. Continuous improvements now allow for user friendly search of the Record and all legislation, by anyone on the web, anytime, anywhere.

The Congressional Record remains the official transcript of proceedings. Since March 19, 1979 in the House and June 2, 1986 in the Senate, the Cable-Satellite Public Affairs Network (C-SPAN), a nonprofit private entity, provides live coverage of each Chamber. The cameras are owned and maintained by the Architect of the Capitol, while their operations and broadcasts are operated by staffs of the Chief Administrative Officer in the House and the Secretary of the Senate. C-SPAN receives the signal and airs it on its various cable television channels.

Live television fundamentally expanded the Congressional audience. Instead of the small public viewing galleries, anyone can now watch what happens instead of reading about it. Archived videos of each session can be accessed 24-7 on C-SPAN's website.

Starting in 2007, every public hearing in the House is broadcast live, and archived as podcasts on each Committee's website. The Senate only provides the traditional list of witnesses and publishes opening statements.

For over 184 years Congress used voice voting. The process of calling each Member's name remains the Senate's format. The House started using an electronic voting system on January 23, 1973. This reduced voting time from 45 minutes or more to 15 minutes. Clustering votes on noncontroversial bills, under "Suspension of the Rules", can reduce vote times to five minutes. This saves as much as 400 hours a year in vote and "quorum call" time and provides immediate documentation of how each Member votes.

Every day, citizens learn about the actions of the Legislative Branch through a free and vibrant news media and through direct communication with their elected representatives. Credentialing and supporting journalists covering Congress began in 1838. Today, the media galleries, operated by the House CAO and Secretary of the Senate, but managed by the media themselves, credentials over 6,000 correspondents from around the world.

Up until 1995, Members responded to their constituents' requests and comments using paper, just like public officials had done for centuries. Handwriting gave way to typewriters, which evolved into word processors.

That all changed in 1995. Dramatic operational savings, achieved from strategic reforms in the House, gave Speaker Newt Gingrich the ability to invest in the CyberCongress. Former executives from IBM and other technology companies were recruited by the Chief Administrative Officer. They designed and implemented the most dramatic technology revolution in Congressional history. This giant leap took House communications from the 18th Century into the 21st in one giant leap.

The epic leap changed the layout of Capitol Hill and the culture of Congress forever.

- Five miles of fiber optics and thirty miles of T-1 lines, with all servers and switches installed through the Capitol Building and all five House office buildings and annexes.
- A Pentium computer in each Member, committee, and leadership office. This allowed for paperless transactions from "Dear Colleague" letters, to Whip operations, to financial record keeping, purchasing, and work orders.

- Uniform service contracts, equipment, training, and support to immediately make the entire system immediately operational.
- Moving all operational documents and databases onto a compatible digital database.
- A distributed architecture of secure servers, with sufficient firewalls to allow for Internet access, LAN, and intranet operations even to district offices, without fear of hacking or other security breaches.
- A unified email system.
- Enough server power and memory to support a 310 percent increase in electronic-based communications in the House in the first year, and doubling each year for ten years.
- A decision support center allowing for virtual caucuses, virtual committee meetings, and strategic planning meetings accessing distant users.
- Placing all Member support services online. This included all financial data, human resource data, and personal property inventory data being available electronically. It also allowed for desktop procurement and other forms of electronic commerce.

The CyberCongress took only ten months to be fully operational and came in under budget.

Today, Members and their staffs handle all constituent communication and case work over the web. Members have also become very savvy regarding social media. Facebook, Twitter, Instagram, and countless Apps, generate virtual and real engagement on a vast scale. Survey Monkey, Periscope, and other videos Apps, have reinvented the concept of town meetings.

Early on, some Members were terrified of Congress embracing the Information Age. "I don't want to be talking to my constituents all the time, I want to get real work done" groused one senior Member.

Thankfully, even the doubters have now realized that representative democracy must move with the times.

*Scot Faulkner advises corporations and governments on how to save billions of dollars by achieving dramatic and sustainable cost reductions while improving operational and service excellence. He was the Chief Administrative Officer of the U.S. House of Representatives. He started his Congressional career as an intern for Rep. Don Young (R-AK), then served on the legislative staffs of Rep. Arlan Stangeland (R-MN) and Rep. John Ashbrook (R-OH). Faulkner later served on the White House Staff and as an Executive Branch Appointee.*

## Press: How Media Coverage Affects the Legislative Process

## Guest Essayist: Amanda Hughes

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, ***or of the press***; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. – First Amendment to the United States Constitution

Fake news? Real news? Newswriting has no end. What matters most among abundant sources of information, however, is an ability to maintain freedom of speech including that of the press. Certainly, without integrity in journalism news is not news and only amounts to opinion. Yet, above that, the United States Constitution includes the law that Congress is not allowed to abridge (prevent, suppress, gag) the press. To do so invites tyranny.

Known as the Fourth Estate, an independent institution that keeps an eye on government, Edmund Burke, a British statesman, is said to have observed the vital role of the press in effective, accountable, representative governing:

> there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all.

For reasons such as Burke noted, much effort is invested in preserving freedom of speech and of the press as the Founders intended in the United States Constitution. So the American people may observe laws being made and participate in the legislative process, Congress and the press use opportunities availed by latest innovations such as modern technology to help connect Americans to the workings which make up that process.

However, even with best efforts to report on events from local to worldwide, it is no small task to ensure stories are accurate especially in today's 24-hour news cycle. Human beings, imperfect and owning personal beliefs, provide no lack of doubt to go around regarding trustworthiness of all who write and disseminate "the news."

This fact is part of what makes the business of journalism difficult, drawing ire on both sides of the political aisle. The work of media production is a business full of competition for readers, viewers, and ratings. It is also important. The press was important enough an institution to get placed specifically in the United States Constitution. Included in the Constitution – the law of the land – a free press matters within the system of checks and balances between the legislative, executive, and judicial branches of American government.

As if it were not challenging enough to serve in elected office, Members of Congress must continually pay attention to what they say and how they say it in public, or in whatever form arises that could put them "on the air." They learn how easy it is to feel that one's words were taken out of context. It is definitely easy to misunderstand the words of others in normal day-to-day communications, and elected leaders especially must be sure to understand their own views in order to convey what they mean clearly when news can move quickly throughout a day. This means Members of Congress must pay attention so they are not quoted in a way they deem unfavorable or untruthful about their stance on issues, or is unfair coverage.

The press plays an important role in making sure news is accurately covered, timely, and what is generally considered newsworthy. Members of Congress, on the other hand, must handle the moving of bills through the legislative process while keeping constituents informed on what is happening. It is challenging to see reports on legislation moving through the process that receive negative coverage for which Members must stop to do damage control. A reason is often within the very process – legislation not yet completely through a step. When news pieces go out that

say what a bill does or does not do, and a controversial question arises as a result of the news, reactions to the bill may bring on a firestorm Members believe they must stop work in order to address and "put out fires."

It is not necessarily bad that this happens as it is an example of the required checks on government the press affords. At the same time, integrity of the press, and trust that journalists are doing their homework by asking questions that offer the best, balanced coverage is a must.

Journalists must make every effort to report the truth about where a bill is in the process, whether amendments are currently being offered, and so on to accurately show what is occurring.

Gaining an appreciation for how Congress and the press work helps shed light on the important role of each. Managing how the press and Congress operate so both function as designed takes an understanding of each other, by each other, and by the American people who consume the news and participate in the legislative process.

*Amanda Hughes serves as Outreach Director, and 90 Day Study Director, for Constituting America. She is the author of Who Wants to Be Free? Make Sure You Do, and a story contributor for the anthologies Loving Moments(2017), and Moments with Billy Graham(forthcoming).*

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## Conclusion: The Old Senate

## Guest Essayist: William Morrisey

If the writers contributing to this year's 90-Day Study have identified a main theme for their essays, it is the difference between the way Congressional representatives understood their Constitutional duties in the first century-and-a-quarter of our Union and the ways Congressmen have come to act since Progressivism came to dominate American opinion. From a lawmaking institution whose members consulted the Constitution and, behind it, the natural rights enunciated in the Declaration of Independence, Congress has become a constituent-service institution which attempts to oversee and negotiate with the bureaucratic apparatus of a massive national state. To be sure, it still debates and enacts laws, but very often leaves the details of those laws to the administrative agencies which enforce them, agencies which collectively amount to a fourth branch of government, and an unelected one at that. Given the re-conception of the Constitution as a 'living' or 'elastic' document, those laws may have only a remote connection to the plain meaning of the (formerly) supreme law of the land.

It has become difficult for us even to conceive of the way Congress once operated, and indeed how American politics and government generally once operated. For this, we need to turn to an eyewitness, and as luck would have it, we have one.

At the age of twenty-four, a future newspaper reporter and editor, recently a schoolteacher in the Erie Canal town of Lockport, New York, met and took the measure of the most distinguished cohort of United States senators in our history as those men attempted to navigate the American Union around the most dangerous regime crisis since the American Revolution itself. Thomas Jefferson had predicted that the presence of slaves in the land of the free was "the rock upon which the old Union would split," and that rock sat just beneath the surface when Oliver Dyer arrived for work at the Senate for the session of 1848-49.

The Mexican War had just concluded, and new territories wrested from Mexico, including California, had been annexed. The plantation oligarchs who controlled the governments of the Southern states had seen that only the acquisition of new territories and ultimately the addition of new states in which slavery was legal, would protect their 'peculiar institution' (and thereby their political power) from the solidly anti-slavery Northern states, which were outpacing the South in population and industrial wealth. With popularly-based House of Representatives firmly in Northern hands, and likely to remain so, the Senate, its membership unaffected by population shifts, stood as the oligarchs' best power base for defending their regimes and even extending their influence in the federal government. As Dyer writes, "It was the fixed policy of the South to keep the free States from outnumbering the slave states."

With the sympathetic James K. Polk in the White House, "the war was forced on for the purpose of acquiring territory into which slavery could be extended." But the bill appropriating funds for fighting the war had a rider attached by Pennsylvania Democratic House member David Wilmot of Pennsylvania, stipulating that no territories acquired from Mexico would allow slavery. This "greatly embittered and exasperated the South," "for it struck at the very life of slavery, inasmuch as to limit slavery was to strangle it." The Wilmot Proviso eventually "was killed in

Congress," but "it survived in the country," and Dyer now knew as he wrote his memoir in 1889, the regime struggle between Southern oligarchic regimes and Northern republican regimes would end only at Appomattox or, more accurately, only with the post-Civil War attempt at 'Reconstruction' or regime change in the South by the triumphant republicans.

As early as the 1830s, genuinely factional political parties had begun to arise in the United States. The Founders had hoped to avoid the formation of such parties, parties organized not merely around various local interests and divergent national policies, but the fundamental issue of what kind of political regime the United States should have. The Founders had hoped that they had settled this matter: The United States was to be a democratic and commercial federal republic. But as the invention of the cotton gin made slaveholding more profitable, Southern plantation owners consolidated oligarchic instead of republican regimes in their states. The struggle between democratically-based republicanism and slaveholder-based oligarchy commenced.

The struggle began within the Democratic Party. Although a slaveholder, Andrew Jackson based his electoral successes in 1828 and 1832 squarely on a popular base; the Democratic Party he established, with the help of his Northern ally, the brilliant political organizer Martin Van Buren, was indeed a *democratic* party. Opposing him, however, was an even greater organizer and far superior political theoretician, South Carolina Senator John C. Calhoun. Explicitly rejecting the moral foundation of American republicanism as enunciated in the Declaration of Independence—the equal, unalienable rights to life, liberty, and the pursuit of happiness held by all human beings as such—Calhoun instead maintained that the laws of nature and of nature's God ordained a racial hierarchy entitling plantation oligarchs to rule African slaves without their consent.

Opposing both Jacksonian mass democracy and Calhounian oligarchy, the Whig Party formed in the 1830s out of the remnants of the old, long-defunct Federalist Party, John Quincy Adams's anti-slavery National Republican Party, and even the short-lived Anti-Masonic Party, which had suspected the secretive Freemasons of conspiring against republicanism. The Whigs wanted to maintain Constitutional safeguards on undiluted majority rule, opposed the extension of slavery into the territories, supported a national banking system as well as interstate railroads and canals, to be funded by protective tariffs which would also defend newly-founded American industries against foreign competition. Whereas the Democrats, still the majority of American voters, found themselves split between Jacksonian republicans and Calhounian oligarchs or 'aristocratic republicans,' the Whig coalition had stayed sufficiently unified to elect William Henry Harrison to the presidency in 1840.

The party system had a function that we today might easily overlook. Today, we are accustomed to seeing the administrative tasks of government performed by university-trained professional administrators. But throughout the nineteenth century there was no such class in the United States; professional bureaucracies were a European phenomenon. Who, then, did the administrative work of government in those days? None other than the political parties. Each newly-elected president would appoint 'his' partisan supporters to the government, from Cabinet officers down to local postmasters. With so many jobs at stake, interest in election ran very high. With the dangerous and impassioned debate over the character of the American regime on one

hand, and the material interest in who would find comfortable work on the other, no one complained of political apathy in the America of that time.

This is where Oliver Dyer's story begins. Son of a shoemaker, Dyer learned a more promising trade, studying shorthand stenography—what its inventor, the Englishman Isaac Pitman, called "Sound-Hand" in a widely-distributed 1837 pamphlet. (You listen to a "sound"—a speaker's voice—then hand-write what he says in an abbreviated code which allows you to keep up with even a fast-talking Congressman). Adding some improvements of his own, Dyer marketed the Pitman System to schools and quickly caught the attention of upstate New York politicians, who arranged for him to serve as a recorder for both the Whig Party's and the anti-slavery Free Soil Party's conventions of 1848.

There young Dyer learned the 'low' side of politics, the politics of party insiders and wire-pullers. He begins his memoir, *Great Senators of the United States of Forty Years Ago*, with an account of how the Albany-based Whig boss—the marvelously-named Thurlow Weed—teamed with his protégé William Seward to manipulate delegates into nominating Mexican War general Zachary Scott over the celebrated Kentucky Senator Henry Clay—adding, in the bargain, another Weed man, Millard Fillmore, to the ticket. For good measure, Weed then extended a tentacle into the Free Soil Party convention (held on his home turf in upstate New York), arranging the nomination of former president Martin Van Buren. With the erstwhile Democrat Van Buren drawing votes away from Democratic Party nominee Lewis Cass (a "dull, phlegmatic, lymphatic, lazy" Michigan senator "without an atom of magnetism in his nature," allied with the Calhoun Democrats), Weed's beneficiary Taylor carried New York and with it the nation. Poor Clay never knew what hit him, but Oliver Dyer did.

Dyer explains "the secret of [Thurlow Weed's] political power" under the old party-based system of American politics. Newspapers at that time were owned and operated by political parties, and Weed controlled the Albany *Evening Journal*. Albany was more important than New York City, not only because it was the state capital but because Manhattan Island was icebound in winter; astonishingly to us today, there were no railroad lines running out of Manhattan, whereas politically-connected Albany had them. Weed wrote a regular column in his newspaper, making strategic mention of his political friends and foes alike as he kept the lines of communications open between himself and New York Whigs. "There was seldom a young man, in any part of the State, who gave promise of becoming a person of influence, that was not kindly and flatteringly mentioned in that column, no matter to what party he belonged. And does any one suppose that young men thus mentioned would not feel friendly to Thurlow Wed, and be ready to do him a personal favor?" Indeed so: "Mr. Weed's kindness, shown at a time when the young man feels the need of a friend, sinks into the depths of his heart and brings forth fruit abundantly." This beneficence toward the young, who "are perpetually coming on" the stage as "the old are constantly passing off," extended not only to his fellow Whigs but to young Democrats, as well. But much more than this, Weed proved a supremely artful political boss, ruling not by command but by influence. After all, he controlled the elected officials who controlled the distribution of jobs. As another young man, Henry Adams, had occasion to observe some years later, Mr. Weed was an entirely unselfish man in one way: he gave but he never took, arranging employment and expecting not mere lucre but only political gratitude in return.

His reportorial credentials and political alliances thus established, it is no wonder that Oliver Dyer found himself on the floor of the United States Senator in December 1848, recording the speeches of John C. Calhoun, Thomas Hart Benton of Missouri, Daniel Webster of Massachusetts, and of Henry Clay himself—the man Abraham Lincoln would call "my beau ideal of a statesman." From well-played 'low' politics to the very high: For the next year Dyer received the best political education of any future journalist of his generation, and maybe of any generation in America. He sketches portraits of all these men, and of several other Senate eminences besides.

He begins with Sam Houston from the newly-admitted state of Texas, "about whose name more romance clustered at that time than encircled the name of any other citizen," formerly the governor of Tennessee at the age of 34, then self-exiled to Cherokee territory where he "liv[ed] in barbaric dignity" for a short time before capturing Mexican general Santa Anna during the Texas War of Independence, rising to the presidency of the Republic of Texas, and then to election as senator in 1845. Houston had been Dyer's hero as a boy in Lockport. "As we children on the Niagara frontier were brought up to hate the British, wild beasts, Indians, and foes of every kind whatsoever, and were taught to believe in the good old-fashioned fire and brimstone hell, and in cognate Scripture tenets, undiluted with any revisionary Sheol or Hades, I suppose that our militant religion had a robustness and an edge which are impossible to the faith of boys brought up on the humanitarianism and the diluted theology of the present day. At any rate, we all prayed fervently to God to avenge Travis, Crockett and Bowie on the Mexicans." So much so, that "Twenty-four boys, of which I was one, formed a company to march down and ravage Mexico; but news of Houston's defeat and capture of Santa Anna at San Jacinto came in time to save that ill-fated republic from the impending invasion." "We were simple people who believe in God, and loved heroes who won battles in accordance with our prayers; and from that time General Sam Houston was set in our hearts alongside Jackson and Washington." Nor did Senator Houston disappoint his admirer. Although his experience with Whig and Free Soil Party politicians "had rather chilled my expectations as to all sorts of heroes," Houston proved "a magnificent barbarian, somewhat tempered by civilization." True, his "wild life" had "unfitted him for civilization," so that he "was not a man to shine in a deliberative assembly," but Dyer found him "a sincere lover of his country," "indomitably patriotic," standing "firm by the Union to the day of his death" in 1863.

An anti-slavery Union man himself, Dyer first found Calhoun "to be a perfect image and embodiment of the devil," with an inner complexion of a dark soul shining through the skin of his face." But upon Calhoun speak, he reconsidered. In debate, Calhoun maintained "his dignified demeanor and exquisite courtesy to the end" under the slashing attacks of Senator Benton, the unbending foe of the Calhounite principle of states' rights and even secession in the defense of slaveholding. As was his wont, Calhoun took the time to explain his political principles to the earnest young Yankee; prudent attentiveness to the young was not monopoly of Mr. Weed. Dyer faithfully recalls Calhoun's argument, which hinged on his claim that each state within the United States is "a sovereign state," inalienably so, with natural rights placed "in the hearts and minds of individual freemen." Dyer does not call the reader's attention to the distinction between "freemen" and the Declaration's "all men," as Senator Calhoun surely did not. "As I became better acquainted with Calhoun, I liked him better. At last, I had a genuine affection for him, and mourned over what seemed to me to have been his political decadence;

and I have mourned over it to this hour." Dyer learned from Calhoun—who had forgiven his bitter rival, Jackson—"to distinguish between a man's principles and his personal character, and there developed in me a disposition to extend to the convictions and conduct of others the same forbearance and charity which every man likes to have accorded to his own conduct and convictions." But this does not cause him to omit quoting a speech Calhoun had made years earlier, in which he averred that although "many in the South once believed that [slavery] was a moral and political evil," "we [now] see it in its true light, and regard it as the most safe and stable basis for free institutions in the world." The regime issue had been joined, with men of outstanding character and ability on both sides.

In Thomas Hart Benton of Missouri, Calhoun had "a bitter and relentless foe," as well as a formidable one. "It would be difficult to find two other contemporary Americans, of equal distinction, so absolutely contrasted in body, mind, principles, tastes and manners as were Benton and Calhoun." "To rub Calhoun's nature"—physically slender, theorizing, gentlemanly—"against Benton's"—physically massive, practical, tough to the point of ruthlessness—"was like rubbing the tender skin of an infant against the corrugated hide of a rhinocerous." Indeed, this "Roman gladiator who somehow had become embedded in the nineteenth century," this "robust and ferocious Christian," had a servant scrape his body daily with "the roughest kind of horsehair brush," callousing his skin and toughening his mind for political combat. ("The Roman gladiators did it, sir"—the word "*sir* being a formidable missile on his tongue." Benton's "egoism was so vast, so towering, so part and parcel of the man, that it was not at all offensive and never excited disgust," being "as proper to him as its apex is to a pyramid." The "old ironclad" loved the things that were his own: his country (hence his hatred of Calhoun, who wouldn't have minded breaking it up) and his family above all. Her mind broken by a stroke, Mrs. Benton once appeared unexpectedly at a reception held in their home for a French prince; Benton took her by the hand, seated her beside him, and carried on the conversation "with that impressive dignity in which it is doubtful if he had an equal." When asked if he would obey protocol and kneel before the Czar, he stood on his republican dignity: "No sir! No sir! An American kneels only to God and woman, sir." Unlike Calhoun, "he was a staunch friend of the poor—of poor blacks, as well as poor whites," and when in the Tennessee legislature he introduced a bill providing jury trials for slaves.

The aristocratic Calhoun and the democratic warrior Benton found their complement in Henry Clay, a man of "good nature" and "inborn democratic republicanism." With his photographic memory for persons, names, and places, Clay made any stranger—"however humble in station"—feel "at once at home with the affable and cordial Kentuckian." In floor debate, Calhoun drew his listeners to him with his high-mindedness; Benton drew them into an ego so capaciously American as to make them want to join with it. Clay "spoke to an audience very much as an ardent lover speaks to his sweetheart when pleading for her hand." As Clay's recorder, Dyer saw that "the more successful a lover's speech is on such an occasion, the less readable it is when it gets into cold print," but Clay carried his fellow senators along with "his hearty and sympathetic spirit of fellowship"—the sort that, he hoped, might pervade his beloved Union. Clay loved commerce, industry, and hard work not out of love of profit but love of country. "Clay was poor—poor notwithstanding his thirty-five years of public service; for he was not one of those statesmen who, on a five-thousand-dollar salary, manage to lay up two hundred fifty thousand dollars per annum."

If his peers were remarkable for their character, Daniel Webster outshone them in intellect. "Webster was somewhat lacking in character"; having won a point in principle, "he would lapse into indifference and suffer the fruits of his victory to be snatched from him by men of inferior intellect." But in intellect he had no equal among the public men of that day—not even Calhoun. "The perfection of common sense," his mind in debate kept together the details of the bill he argued for or against; the rules of the Senate; the character of each senator he engaged; the fundamental principles of the Union. "If it had not been for Webster, Calhoun would have carried everything before him." In his published speeches in defense of natural-rights republicanism "he taught the country what the true nature of its government is," out of the teachings of the Founders. "He logically, powerfully, clearly and popularly demonstrated the baneful character of the disunion and secession heresy," and in so doing set in motion the resolve of those people who finally preserved it.

Dyer among them. After his year in the Senate he studied and practiced law, in Washington, but soon moved to journalism in New York, where he wrote for and edited several major newspapers. Having learned politics, low and high, before he began to write about them, he campaigned courageously against the city's underworld, siding with embattled religious and civic reformers. In 1852 he promoted the career of Sarah Willis, who became the first regularly-featured woman newspaper columnist in America after Dyer hired the divorced mother of two boys, doubling her previous salary. Like his heroes of '48, he wasn't afraid to take risks for the right as he saw it. And like his old benefactor, Mr. Weed, he'd pull a string or two for a young talent.

By 1889, when Dyer published his reminiscences, the Civil War had been won but the political reconstruction of the Southern states along republican lines had in many respects failed. Now allied with poor whites against the freedmen, the oligarchs had recovered much of their power. Northerners had decided to move on, hoping for a gradual amelioration of race relations. Dyer concludes with a benediction for all the great senators "of forty years ago," including Calhoun, despite "his unfortunate political aberration." Dyer couldn't know, and would not live to see the new political aberrations of the century to come, at home and abroad. We who have seen them will also see why Congress again finds itself sharply factionalized: Congress members and many voters sense that the regime issue once more is at stake, as it was in the decades leading to the Civil War. Because Progressivism altered the structure and therefore the character of American government and education, we no longer have senators capable of stating the principles beneath today's conflict. This leaves it for citizens themselves to recover the meaning of the American Constitution as understood by its framers.

*Will Morrisey is William and Patricia LaMothe Professor Emeritus of Politics at Hillsdale College, and is a Constituting America Fellow; his books include Self-Government, The American Theme: Presidents of the Founding and Civil War and The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government.*