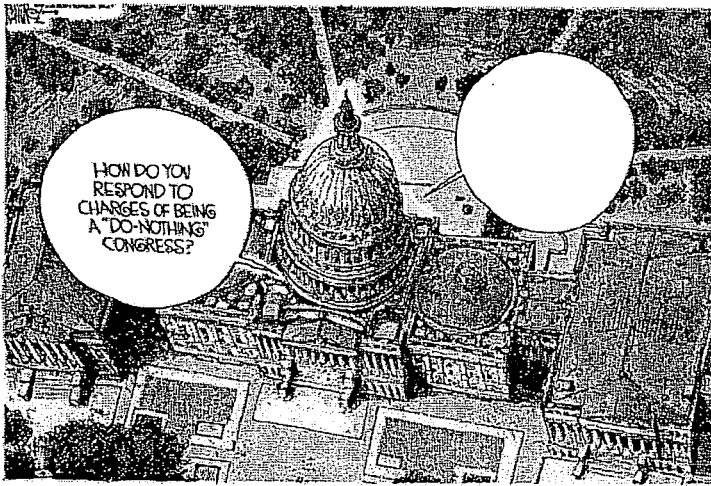
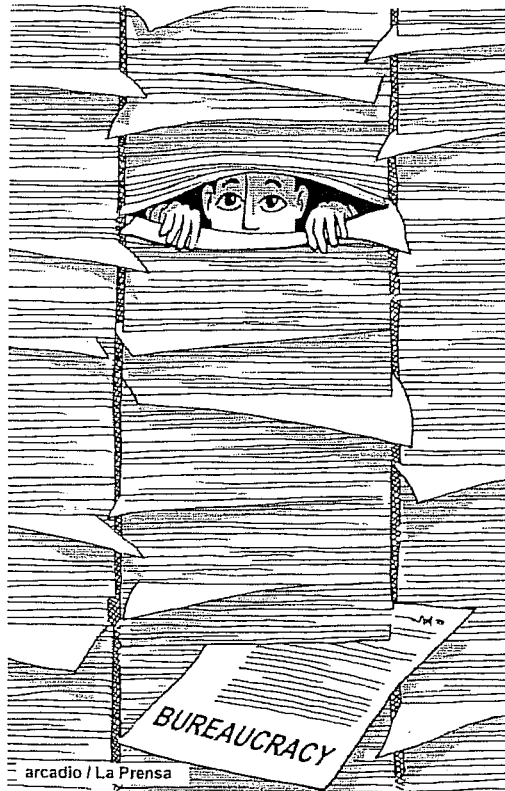
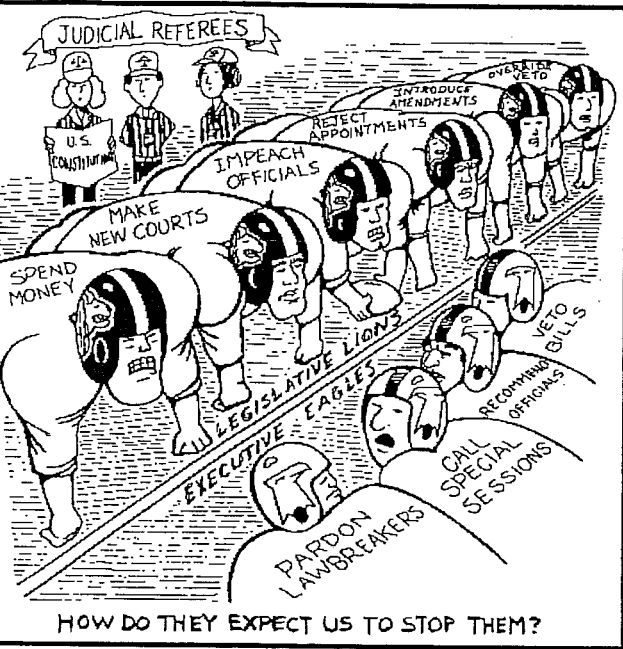

UNIT IV: INSTITUTIONS OF THE FEDERAL GOVERNMENT

Y Y Y

Congress, Presidency, Bureaucracy, and the Federal Courts



history of this branch of the English Constitution, anterior to the date of Magna Charta, is too obscure to yield instruction. The very existence of it has been made a question among political antiquaries. The earliest records of subsequent date prove that parliaments were to *sit* only every year; not that they were to be *elected* every year. And even these annual sessions were left so much at the discretion of the monarch, that, under various pretexts, very long and dangerous intermissions were often contrived by royal ambition. To remedy this grievance, it was provided by a statute in the reign of Charles II. that the intermissions should not be protracted beyond a period of three years. On the accession of William III., when a revolution took place in the government, the subject was still more seriously resumed, and it was declared to be among the fundamental rights of the people, that parliaments ought to be held *frequently*. By another statute, which passed a few years later in the same reign, the term "frequently," which had alluded to the triennial period settled in the time of Charles II., is reduced to a precise meaning, it being expressly enacted that a new parliament shall be called within three years after the termination of the former. The last change, from three to seven years, is well known to have been introduced pretty early in the present century, under an alarm for the Hanoverian succession. From these facts it appears that the greatest frequency of elections which has been deemed necessary in that kingdom, for binding the representatives to their constituents, does not exceed a triennial return of them. And if we may argue from the degree of liberty retained even under septennial elections, and all the other vicious ingredients in the parliamentary constitution, we cannot doubt that a reduction of the period from seven to three years, with the other necessary reforms, would so far extend the influence of the people over their representatives as to satisfy us that biennial elections, under the federal system, cannot possibly be dangerous to the requisite dependence of the House of Representatives on their constituents.

Elections in Ireland, till of late, were regulated entirely by the discretion of the crown, and were seldom repeated, except on the accession of a new prince, or some other contingent event. The parliament which commenced with George II. was continued throughout his whole reign, a period of about thirty-five years. The only dependence of the representa-

tives on the people consisted in the right of the latter to supply occasional vacancies, by the election of new members, and in the chance of some event which might produce a general new election. The ability also of the Irish parliament to maintain the rights of their constituents, so far as the disposition might exist, was extremely shackled by the control of the crown over the subjects of their deliberation. Of late, these shackles, if I mistake not, have been broken; and octennial parliaments have besides been established. What effect may be produced by this partial reform must be left to further experience. The example of Ireland, from this view of it, can throw but little light on the subject. As far as we can draw any conclusion from it, it must be that if the people of that country have been able under all these disadvantages to retain any liberty whatever, the advantage of biennial elections would secure to them every degree of liberty, which might depend on a due connection between their representatives and themselves.

Let us bring our inquiries nearer home. The example of these States, when British colonies, claims particular attention, at the same time that it is so well known as to require little to be said on it. The principle of representation, in one branch of the legislature at least, was established in all of them. But the periods of election were different. They varied from one to seven years. Have we any reason to infer, from the spirit and conduct of the representatives of the people, prior to the Revolution, that biennial elections would have been dangerous to the public liberties? The spirit which everywhere displayed itself at the commencement of the struggle, and which vanquished the obstacles to independence, is the best of proofs that a sufficient portion of liberty had been everywhere enjoyed to inspire both a sense of its worth and a zeal for its proper enlargement. This remark holds good, as well with regard to the then colonies whose elections were least frequent, as to those whose elections were most frequent. Virginia was the colony which stood first in resisting the parliamentary usurpations of Great Britain; it was the first also in espousing, by public act, the resolution of independence. In Virginia, nevertheless, if I have not been misinformed, elections under the former government were septennial. This particular example is brought into view, not as a proof of any peculiar merit, for the priority in those instances was prob-

ably a
in *sej*
with ;
ble; b
be a v
of the
nial cl

The
ples w
lecting
the fee
of tha
vested
and w
cised b
legisla
maxim
fect th
shorter
versely
may it:
place,
that th
straine
other l
moreo-
eral co
tive bo
compa
that w
branch
ing, if
House
the pe
the po
branch
less po
represe
side, ar

I SHALL
rent ob
end, ty
been r
provert
is not le
are ofte
of them
proof b
reason c
foundec
ridicule

ably accidental; and still less of any advantage in *septennial* elections, for when compared with a greater frequency they are inadmissible; but merely as a proof, and I conceive it to be a very substantial proof, that the liberties of the people can be in no danger from *biennial* elections.

The conclusion resulting from these examples will be not a little strengthened by recollecting three circumstances. The first is, that the federal legislature will possess a part only of that supreme legislative authority which is vested completely in the British Parliament; and which, with a few exceptions, was exercised by the colonial assemblies and the Irish legislature. 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; and, conversely, the smaller the power, the more safely may its duration be protracted. In the second place, it has, on another occasion, been shown that the federal legislature will not only be restrained by its dependence on the people, as other legislative bodies are, but that it will be, moreover, watched and controlled by the several collateral legislatures, which other legislative bodies are not. And in the third place, no comparison can be made between the means that will be possessed by the more permanent branches of the federal government for seducing, if they should be disposed to seduce, the House of Representatives from their duty to the people, and the means of influence over the popular branch possessed by the other branches of the government above cited. With less power, therefore, to abuse, the federal representatives can be less tempted on one side, and will be doubly watched on the other.

PUBLIUS

Number 53

[HAMILTON OR MADISON]

I SHALL here, perhaps, be reminded of a current observation, "that where annual elections end, tyranny begins." If it be true, as has often been remarked, that sayings which become proverbial are generally founded in reason, it is not less true that when once established they are often applied to cases to which the reason of them does not extend. I need not look for a proof beyond the case before us. What is the reason on which this proverbial observation is founded? No man will subject himself to the ridicule of pretending that any natural con-

nection subsists between the sun or the seasons, and the period within which human virtue can bear the temptations of power. Happily for mankind, liberty is not, in this respect, confined to any single point of time; but lies within extremes, which afford sufficient latitude for all the variations which may be required by the various situations and circumstances of civil society. The election of magistrates might be, if it were found expedient, as in some instances it actually has been, daily, weekly, or monthly, as well as annual; and if circumstances may require a deviation from the rule on one side, why not also on the other side? Turning our attention to the periods established among ourselves, for the election of the most numerous branches of the State legislatures, we find them by no means coinciding any more in this instance than in the elections of other civil magistrates. In Connecticut and Rhode Island the periods are half-yearly. In the other States, South Carolina excepted, they are annual. In South Carolina they are biennial—as is proposed in the federal government. Here is a difference, as four to one, between the longest and shortest periods; and yet it would not be easy to show that Connecticut or Rhode Island is better governed, or enjoys a greater share of rational liberty, than South Carolina; or that either the one or the other of these States is distinguished in these respects, and by these causes, from the States whose elections are different from both.

In searching for the grounds of this doctrine, I can discover but one, and that is wholly inapplicable to our case. The important distinction so well understood in America, between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country. Wherever the supreme power of legislation has resided, has been supposed to reside also a full power to change the form of the government. Even in Great Britain, where the principles of political and civil liberty have been most discussed, and where we hear most of the rights of the Constitution, it is maintained that the authority of the Parliament is transcendent and uncontrollable, as well with regard to the Constitution as the ordinary objects of legislative provision. They have accordingly, in several instances, actually changed, by legislative acts some of the most fundamental articles of the government. They

CHAPTER 4

Congress: The First Branch

17

From Congress: *The Electoral Connection*

DAVID R. MAYHEW

Are members of Congress motivated by the desire to make good public policy that will best serve the public and national interest? The political scientist David Mayhew argues the motivation is not so idealistic or complex. Members of Congress simply want to be reelected, and most of their behavior—advertising, credit claiming, and position taking—is designed to make their reelection easier. Further, Mayhew argues that the structure of Congress is ideally suited to facilitate the reelection pursuit. Congressional offices and staff advertise member accomplishments, committees allow for the specialization necessary to claim credit, and the political parties in Congress do not demand loyalty when constituent demands run counter to the party line.

Mayhew's argument is not universally accepted. Many political scientists take his underlying premise as a given: Elected officials are self-interested, and this is manifest in their constant pursuit of reelection. But others disagree with the premise. Motivations, they argue, are far more complex than allowed for by such a simple statement or theory. People often act unselfishly, and members of Congress have been known to vote their consciences even if it means losing an election.

[1.] The organization of Congress meets remarkably well the electoral needs of its members. To put it another way, if a group of planners sat down and tried to design a pair of American national assemblies with the goal of serving members' electoral needs year in and year out, they would be hard pressed to improve on what exists. * * * [2.] Satisfaction of electoral needs requires remarkably little zero-sum conflict among members. That is, one member's gain is not another member's loss; to a remarkable degree members can successfully engage in electorally useful activities without denying other members the opportunity successfully

to engage in them. In regard to credit claiming, this second point requires elaboration further on. Its application to advertising is perhaps obvious. The members all have different markets, so that what any one member does is not an inconvenience to any other. There are exceptions here—House members are sometimes thrown into districts together, senators have to watch the advertising of ambitious House members within their states, and senators from the same state have to keep up with each other—but the case generally holds. With position taking the point is also reasonably clear. As long as congressmen do not attack each other—and they rarely do—any member can champion the most extraordinary causes without inconveniencing any of his colleagues.

* * *

A scrutiny of the basic structural units of Congress will yield evidence to support both these * * * points. First, there are the 535 Capitol Hill offices, the small personal empires of the members. * * * The Hill office is a vitally important political unit, part campaign management firm and part political machine. The availability of its staff members for election work in and out of season gives it some of the properties of the former; its casework capabilities, some of the properties of the latter. And there is the franking privilege for use on office emanations. * * * A final comment on congressional offices is perhaps the most important one: office resources are given to all members regardless of party, seniority, or any other qualification. They come with the job.

Second among the structural units are the *committees*. * * * Committee membership can be electorally useful in a number of different ways. Some committees supply good platforms for position taking. The best example over the years is probably the House Un-American Activities Committee (now the Internal Security Committee), whose members have displayed hardly a trace of an interest in legislation. [Theodore] Lowi has a chart showing numbers of days devoted to HUAC public hearings in Congresses from the Eightieth through the Eighty-ninth. It can be read as a supply chart, showing biennial volume of position taking on subversion and related matters; by inference it can also be read as a measure of popular demand (the peak years were 1949–56). Senator Joseph McCarthy used the Senate Government Operations Committee as his investigative base in the Eighty-third Congress; later on in the 1960s Senators Abraham Ribicoff (D., Conn.) and William Proxmire (D., Wis.) used subcommittees of this same unit in catching public attention respectively on auto safety and defense waste. With membership on the Senate Foreign Relations Committee goes a license to make speeches on foreign policy. Some committees perhaps deserve to be designated "cause committees"; membership on them can confer an ostentatious identification with salient public causes. An example is the House Education and Labor Committee, whose members, in Fenno's analysis, have

two "strategic premises": "to prosecute policy partisanship" and "to pursue one's individual policy preferences regardless of party." Committee members do a good deal of churning about on education, poverty, and similar matters. In recent years Education and Labor has attracted media-conscious members such as Shirley Chisholm (D., N.Y.), Herman Badillo (D., N.Y.), and Louise Day Hicks (D., Mass.).

Some committees traffic in particularized benefits.

* * *

Specifically, in giving out particularized benefits where the costs are diffuse (falling on taxpayer or consumer) and where in the long run to reward one congressman is not obviously to deprive others, the members follow a policy of universalism. That is, every member, regardless of party or seniority, has a right to his share of benefits. There is evidence of universalism in the distribution of projects on House Public Works, projects on House Interior, projects on Senate Interior, project money on House Appropriations, project money on Senate Appropriations, tax benefits on House Ways and Means, tax benefits on Senate Finance, and (by inference from the reported data) urban renewal projects on House Banking and Currency. The House Interior Committee, in Fenno's account, "takes as its major decision rule a determination to process and pass *all* requests and to do so in such a way as to maximize the chances of passage in the House. Succinctly, then, Interior's major strategic premise is: *to secure House passage of all constituency-supported, Member-sponsored bills.*"

* * *

Particularism also has its position-taking side. On occasion members capture public attention by denouncing the allocation process itself; thus in 1972 a number of liberals held up some Ways and Means "members' bills" on the House floor. But such efforts have little or no effect. Senator Douglas used to offer floor amendments to excise projects from public works appropriations bills, but he had a hard time even getting the Senate to vote on them.

Finally, and very importantly, the committee system aids congressmen simply by allowing a division of labor among members. The parceling out of legislation among small groups of congressmen by subject area has two effects. First, it creates small voting bodies in which membership may be valuable. An attentive interest group will prize more highly the favorable issue positions of members of committees pondering its fortunes than the favorable positions of the general run of congressmen. Second, it creates specialized small-group settings in which individual congressmen can make things happen and be perceived to make things happen. "I put that bill through committee." "That was my amendment." "I talked them around on that." This is the language of credit

claiming. It comes easily in the committee setting and also when "expert" committee members handle bills on the floor. To attentive audiences it can be believable. Some political actors follow committee activities closely and mobilize electoral resources to support deserving members.

* * *

The other basic structural units in Congress are the *parties*. The case here will be that the parties, like the offices and committees, are tailored to suit members' electoral needs. They are more useful for what they are not than for what they are.

* * *

What is important to each congressman, and vitally so, is that he be free to take positions that serve his advantage. There is no member of either house who would not be politically injured—or at least who would not think he would be injured—by being made to toe a party line on all policies (unless of course he could determine the line). There is no congressional bloc whose members have identical position needs across all issues. Thus on the school bussing issue in the Ninety-second Congress, it was vital to Detroit white liberal Democratic House members that they be free to vote one way and to Detroit black liberal Democrats that they be free to vote the other. In regard to these member needs the best service a party can supply to its congressmen is a negative one; it can leave them alone. And this in general is what the congressional parties do. Party leaders are chosen not to be program salesmen or vote mobilizers, but to be brokers, favor-doers, agenda-setters, and protectors of established institutional routines. Party "pressure" to vote one way or another is minimal. Party "whipping" hardly deserves the name. Leaders in both houses have a habit of counseling members to "vote their constituencies."

DISCUSSION QUESTIONS

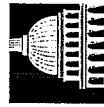
1. If members are motivated by the desire to be reelected, is this such a bad thing? Why or why not?
2. Does the constant quest for reelection have a positive or negative impact on representation? Explain. (The answer to this question obviously depends on your conception of representation.)
3. How could the institutions of Congress (members' offices, committees, and parties) be changed so that the collective needs of the institution would take precedence over the needs of individual members?

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.

I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of society? I answer: the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it.

If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty.

Such will be the relation between the House of Representatives and their constituents. Duty, gratitude, interest, ambition itself, are the cords by which they will be bound to fidelity and sympathy with the great mass of the people. It is possible that these may all be insufficient to control the caprice and wickedness of men. But are they not all that government will admit, and that human prudence can devise? Are they not the genuine and the characteristic means by which republican government provides for the liberty and happiness of the people? . . . ■



American Politics Today

Most American government students must learn the basics of how a bill becomes a law in the United States Congress. First, the bill must be introduced in both the House and Senate. Then the bill is referred to the relevant committee in each house, which holds hearings and makes whatever changes it deems necessary. Then the bill is sent back to the full House and Senate, which conduct floor debates and consider formal amendments. If the bill clears both houses, it may be sent to a conference committee to work out minor differences, before being sent back to the House and Senate for final approval. Finally, the bill is sent to the president for signature or veto.

For better or worse, as the political scientist Barbara Sinclair explains, this traditional model is rarely followed in the modern Congress. Bills are frequently sent to more than one committee; multiple bills are often combined into large, "omnibus" legislation covering a wide range of subjects; and bills are often rewritten at every stage in the process after informal negotiations among congressional leaders and between Congress and

the White House. This "new legislative process," as Sinclair describes it, is partly a consequence of divided government (in which Congress and the White House are controlled by different political parties). The new legislative process was also made possible by the strengthening of the congressional leadership in the 1980s and 1990s and, in turn, has helped to make the leadership even more powerful.

Questions

1. What are some of the characteristics of the "new legislative process," according to Sinclair? How does the new legislative process differ from the traditional legislative process?
2. What are the implications of the new legislative process for the role of individual legislators? For committee and subcommittee government? For the relationship between Congress and the White House? For representative government in the United States?
3. How do the House and Senate differ in terms of the "new legislative process"? What accounts for these differences between the two houses of Congress?

9.3 Party Leaders and the New Legislative Process (1997)

Barbara Sinclair

As 1995 drew to a close, President Bill Clinton, Speaker of the House Newt Gingrich, and Senate Majority Leader Bob Dole sat face-to-face attempting to negotiate a comprehensive budget agreement, a task that entailed making a host of major changes in policy. That this mode of policy making did not strike Americans as particularly out of the ordinary indicates just how much the legislative process has changed in recent years. Although it received less media attention, the legislative process on the budget bill in the months before the summit talks was also far from what would have been considered normal only a few years ago. In both chambers a large number of committees had a hand in drafting the legislation, and the resulting bill was an enormous omnibus measure. In the House, floor procedure was tailored especially to the specific problems this bill raised, and in both chambers majority party leaders were intensely involved throughout the process.

As this example suggests, the how-a-bill-becomes-a-law diagram that is a staple of American government textbooks in reality describes the legislative process on fewer and fewer of the major measures Congress considers. Rather than being sent to one committee in each chamber, a measure may be considered by several

Barbara Sinclair, "Party Leaders and the New Legislative Process," in Lawrence C. Dodd and Bruce I. Oppenheimer, eds., *Congress Reconsidered*, Sixth Edition, (Washington, DC: CQ Press, 1997), pp. 229, 232, 234–236, 240–244. Reprinted by permission of the Congressional Quarterly.

committees, and some measures bypass committees altogether. In addition, after a bill has been reported, but before it reaches the floor, substantive changes are often worked out via informal processes. Omnibus measures of great scope are a regular part of the legislative scene, and formal executive-congressional summits to work out deals on legislation are no longer considered extraordinary. On the House floor, most major legislation is considered under complex and usually restrictive rules, often tailored to deal with problems specific to that bill. In the Senate, bills are regularly subject to large numbers of not necessarily germane floor amendments, and filibuster threats are an everyday fact of life, affecting all aspects of the legislative process and making cloture votes a routine part of the process.

• • •

Omnibus Legislation, the Budget Process, and Summits

Omnibus legislation—bills with great substantive scope often involving, directly or indirectly, many committees—is now a regular part of the congressional agenda. Such measures increased as a proportion of the congressional agenda of major legislation from zero in the 91st Congress (1969–1970) to 8 percent in the 94th (1975–1976)—all budget resolutions—to 20 percent in the 97th (1981–1982) and 100th (1987–1988). In the Congresses of the 1990s, omnibus measures made up about 11 percent of major measures.

Some omnibus measures are the result of the 1974 budget act. The act requires an annual budget resolution and, in the 1980s and 1990s, the budget resolution often called for a reconciliation bill. Beyond that, the decision to package legislation into an omnibus measure is discretionary, and it is principally the majority party leadership that decides. Measures may be packaged into an omnibus bill for several reasons: to pass unpalatable but necessary legislation; to force the president to accept legislative provisions that, were they sent to him in freestanding form, he would veto; or to raise the visibility of popular legislation and garner partisan credit. During the Reagan and Bush administrations, for example, House Democratic leaders packaged legislation on issues such as trade and drugs into high-profile omnibus measures to compete with the White House for media attention and public credit and to protect favored provisions from a veto. During the 103d Congress, congressional leaders did not need to pressure President Clinton into signing their legislation, but the usefulness of omnibus measures for enacting tough bills or for raising the visibility of popular measures led to their continued use. A number of modest provisions were packaged into a big anticrime bill, and omnibus budget measures were used to pass Clinton's economic program.

• • •

New Processes and Procedures as Leadership Tools in the House

Traditionally, the legislative process would begin with the referral of a bill to a single committee, which would be largely responsible for its fate. In 1995 the Republicans' bill to abolish the Commerce Department was referred to eleven House committees. Although the number of committees was unusual, the fact that more than one committee was involved was not. In the contemporary House about one

85

bill in five is referred to more than one committee. Major legislation is even more likely to be sent to several committees; between 1987 and 1995, about a third was.

Multiple referral of legislation was not possible before 1975, when the House passed a rule providing for it. The new rule came about for two reasons: the House's inability to realign outdated committee jurisdictions and reform-minded members' desire to increase opportunities for broad participation in the legislative process. The rule was amended in 1977 to give the Speaker the power to set deadlines for committees to report legislation. As revised in 1995, the rule directs the Speaker to designate a lead committee with the most responsibility for the legislation; once that committee has reported, the other committees are required to report under fairly strict deadlines.

For the Speaker, the frequency with which major legislation is multiply referred presents opportunities, but also problems. One problem is that when legislation is referred to several committees, the number of people who must come to agreement is multiplied, complicating and slowing down the legislative process. Often, multiple referral forces the Speaker to be the jurisdictional and substantive mediator, a role that brings with it influence as well as headaches. On contentious legislation, the leaders of the several committees involved may not be able to work out their differences without help. If the party leaders have to get involved, they gain influence over the substance of the legislation. Furthermore, when several committees work on the same piece of legislation, the committee process is more open to influence by party leaders; no one committee can consider such a bill its private business. Multiple referral also gives the Speaker the opportunity to set time limits for the reporting out of legislation. During the first one hundred days of the 104th Congress, when the new Republican majority was attempting to bring all the items in the Contract with America to the floor, that power gave added weight to Speaker Gingrich's stringent informal deadlines.

Although legislation is routinely considered by more than one committee, sometimes bills bypass committee consideration altogether. Skipping committee review was a rare occurrence before the 1980s; for example, in 1969 and 1970 and in 1975 and 1976, committees were bypassed on only 2 percent of the major legislation. By the late 1980s, however, almost 20 percent of major measures were never considered by a committee in the House. The frequency dropped to 6 percent in the 103d Congress; it then rose to 11 percent in 1995, but, as we shall see, that relatively low rate is somewhat misleading.

• • •

This method of passing legislation is a radical change from the way things used to be done. In the prereform House, autonomous committees crafted legislation behind closed doors and usually passed it unchanged on the floor with little help from the party leadership. As a matter of fact, party leadership intrusion into the legislative process on matters of substance was considered illegitimate. As House members became less willing to defer to committees and more willing to question committee bills on the floor, as multiple referral destroyed committees' monopoly over legislation in their area of jurisdiction, and as the political climate became harsher and the political stakes higher, committees became less capable of crafting legislation that could pass the chamber without help. In responding to their

members' demands for assistance, majority party leaders were drawn more deeply into the substantive aspects of the legislative process and, in effect, changed how the process works. Now party leaders often involve themselves well before legislation is reported from committee.

Moreover, party leaders frequently take a role in working out substantive adjustments to legislation *after* it has been reported from committee. In the pre-reform 91st Congress, no major legislation was subject to such postcommittee adjustments; in the 94th, 4 percent was—all budget resolutions. In the early 1980s, the frequency jumped to almost one major measure in four and, in the late 1980s and early 1990s, averaged a little more than one in three. In 1995 almost half of major measures underwent some sort of postcommittee adjustment.

• • •

The Triumph of Individualism and the New Legislative Process in the Senate

The contemporary legislative process in the Senate is shaped by senators' rampant individualism and their leaders' attempts to do their jobs within that context. Senators now routinely exploit the enormous prerogatives Senate rules give the individual to further their own agendas.

In an institutional setting where every member is able—and often willing—to impede the legislative process, leaders must accommodate individual members to legislate successfully. The increase in postcommittee adjustments to legislation in the Senate reflects this accommodation. Rare in the 1970s even on major legislation—only 2 percent of major measures underwent postcommittee adjustments in the 91st and 94th Congresses—the frequency jumped to about 20 percent in the 1980s and then to more than 33 percent in the early 1990s. In 1995 more than 60 percent of major legislation was subject to postcommittee adjustments. Although the negotiations that produce these modifications are sometimes undertaken by committee leaders or other interested senators, the party leaders often become involved.

Senate individualism is most evident on the floor. Senators can use their power to offer as many amendments as they choose to almost any bill, not only to further their policy preferences but also to bring up issues leaders might like to keep off the floor, to make political points, and to force their political opponents in the chamber to cast tough votes. Senators regularly use their amending prerogatives for all these purposes. Because, in most cases, amendments need not be germane, Barbara Boxer, D-Calif., was able to force onto the floor the issue of holding open hearings on the sexual harassment charges against Bob Packwood, R-Ore., even though Majority Leader Dole wanted to keep it off. Boxer offered it as an amendment to a defense authorization bill. For years, Jesse Helms, R-N.C., has been bringing up and forcing votes on amendments on hot button issues such as abortion, pornography, homosexuality, and school prayer. He often does not expect to win, but to provide ammunition for the electoral opponents of senators who disagree with him.

• • •

Given senators' willingness to exploit their right of extended debate, the majority leader, in scheduling legislation and often in crafting it, has little choice but to be responsive to small groups of members or even to individuals. On legislation of secondary importance, before a recess, or late in the session, one senator's objection will suffice to keep a bill off the floor. When a great deal of legislation is awaiting floor consideration, the majority leader cannot afford the time for a filibuster, so even an ambiguous threat to filibuster serves as a veto. This reality has become semi-institutionalized in the practice of holds. Any senator can inform the leader that he or she wishes to place a hold on a measure—a bill, a presidential nomination, or a treaty. Leaders assert that use of this device only guarantees that the senator will be informed before the measure is scheduled for floor consideration; however, if the hold represents a veiled threat to filibuster the measure and if other matters are more pressing, it often constitutes a *de facto* veto.

The mere threat to filibuster is often sufficient to extract concessions from the supporters of a measure. A number of the Contract with America items that sped through the House were held up in the Senate until their supporters made significant compromises—for example, a bill to impose a moratorium on all new regulations was transformed, under a filibuster threat, into a measure giving Congress forty-five days to review new regulations. In the 103d Congress a number of Clinton's priorities also ran into troubles in the Senate, not because they lacked the support of a majority but because the sixty votes to cut off debate could not be amassed. Supporters had to make concessions on national service legislation and the voter registration bill (motor voter), for example, to overcome a filibuster or a filibuster threat.

Sometimes a large minority defeats outright legislation supported by a majority. Clinton's stimulus package succumbed to this fate in 1993. Senate Majority Leader George Mitchell, D-Maine, attempted to invoke cloture a number of times, but, even though majorities supported cutting off debate, he was not able to put together the necessary sixty votes. In 1995 Senate Democrats forced Majority Leader Dole to abandon his own bill overhauling federal regulatory procedures; he mustered a majority on several cloture votes but fell short of the sixty needed. In the 103d Congress, of nineteen major measures that failed to become law, twelve were killed by the Senate alone; eight of those ran into filibuster-related problems.

The majority leader's leverage depends not on procedural powers, of which he has few, but on his central position in the chamber; on really difficult and contentious issues, he has a better chance than anyone else in the chamber of negotiating a deal that can get the necessary votes. Consequently his leverage is dependent on senators wanting legislation, but if a substantial minority prefers no legislation to a deal, he has little recourse.

New Legislative Processes: An Assessment

By the end of the first hundred days of the 104th Congress, the House had voted on every measure in the Contract with America, as Republicans had promised, and had passed all but the term limits constitutional amendment, which required a two-thirds vote. In the Senate only five measures—some parts of the preface and of two of the ten planks of the contract—had reached the floor, and only four,

mostly relatively uncontroversial measures, had passed. By the end of 1995 just five contract items had become law.

The contract items fared differently in the House and Senate in part because the distribution of preferences differed in the two chambers: moderates made up a larger proportion of the Senate Republican membership than of the House Republican membership, and Senate Republicans had not endorsed the contract. Even more important, however, are the differences in chamber rules and in the tools leaders have available. In the House many of the modifications and innovations in the legislative process allow the party leadership to tailor the process to the problems a particular measure raises and use them to get the measure passed. In the Senate changes in the legislative process have created more problems than opportunities for the majority party leadership.

A brief examination of the legislative process on welfare reform, one of the major contract items, illustrates the differences. In the House three committees—Ways and Means, Education and Economic Opportunity, and Agriculture—reported their provisions by early March. Under strict instructions from the party leadership, Republican committee chairs had pushed the measures through their committees with limited debate and on largely party line votes. The leadership then combined the provisions from the three committees, making alterations where they seemed advisable. The bill was brought to the floor under a tight rule barring votes on several amendments that would have split Republicans. Pro-life Republicans, who feared that provisions cutting off benefits to teenage unwed mothers would encourage abortions, were denied a chance to offer amendments deleting such provisions. The rule was narrowly approved, and the bill passed on a 234-199 party line vote.

The Senate Finance Committee did not report a bill until May 26. Problems within the majority party quickly became apparent: Republicans from the South and Southwest, who represent fast-growing states that offer relatively low welfare benefits, objected to funding formulas based on past welfare expenditures; some conservative senators decried the dropping of House provisions barring unwed teenage mothers from receiving welfare; and Republican moderates believed the legislation did not provide enough money for child care and would allow states to cut their own welfare spending too much.

Because of the saliency and hot-button character of the issue, no one, including most Democrats, wanted to vote against a welfare reform bill, and, had the Republican leadership been able to force an up-or-down vote, the committee bill might well have passed. But because Dole had no way of protecting the legislation from a filibuster or a barrage of amendments on the floor, he had to deal. He, along with Finance Committee Chairman Packwood, took on the task of rewriting the bill. In early August, after several months of negotiations, Dole unveiled a revised bill aimed at satisfying the various factions. The new proposal was a modified version of the Finance Committee bill and incorporated in revised form three other pieces of legislation—the food stamps overhaul from the Agriculture Committee and the child care and job training bills approved by the Labor and Human Resources Committee. Adding these provisions provided a greater scope for compromise.

Floor debate began August 7, and it soon became evident that problems still existed and the bill would not pass before the scheduled recess. Republicans blamed

the Democrats, charging that they intended to offer fifty amendments. In fact, the GOP was still split. On September 6, after the recess, Dole brought the bill back to the floor, but he still lacked a secure winning coalition and continued to make changes to placate various groups of Republicans. He began talking with Democrats and moderate Republicans, and on September 15 a compromise was reached; among other provisions, it added substantial funds for child care. On September 19 Dole offered for himself and the minority leader the Dole-Daschle amendment, which incorporated the compromise, and it passed, 87-12, with mostly headline conservative Republicans opposed. Acceptance of the amendment moderated the Senate welfare bill, which was already more moderate than the House bill. The Senate passed the bill as amended 87 to 12, with only one Republican voting in opposition.

In the House, then, the new legislative process has on balance provided the majority party leadership with effective tools for facilitating the passage of legislation. Backed by a reasonably cohesive majority party, House leaders can engineer passage of legislation quickly and in a form consonant with the preferences of the members of the majority party. In the Senate, as in the House, the party leadership has become more central to the legislative process, but, unlike the Speaker, the Senate majority leader has gained few new tools for dealing with a more unruly membership. The need to accommodate most senators and to build supermajority coalitions to pass legislation in the Senate almost always means the process is slower and often results in more broadly based (or weakening) compromises. Sometimes, it results in no legislation at all. In the contemporary Congress, the legislative process in the two chambers is more distinct in form and in results than ever before. ■



The Comparative Context

In sharp contrast to the United States, most modern democracies operate under *parliamentary* systems of government. In a parliamentary system, the legislative and executive branches are fused, not separated, and the leader of the legislative branch (usually known as the prime minister) also functions as chief executive. Moreover, in such systems the two branches are typically controlled by a single political party, or coalition of parties, and party leaders can expect, and enforce, loyalty from their troops.

The American system of government, of course, is different in all respects. Congress and the White House are independent by constitutional design and, in modern times, are often controlled by different political parties. Congressional leaders, though stronger than they were twenty-five years ago, still cannot compel or count on the unwavering loyalty of their rank-and-file members.

Throughout American history, many political leaders and political scientists have argued that the American system is inferior to the parliamentary system and that the United States should move, more or less radically, in the parliamentary direction. In particular, these would-be reformers argue, a parliamentary system allows the government to act

A CONTRACT WITH AMERICA

1994

----- Newt Gingrich -----

On September 27, 1994, more than 300 Republican congressional candidates met on the steps of the U.S. Capitol to sign the Contract with America, a pledge to enact ten specific bills within the first hundred days of the 104th Congress. The Contract with America gained the support of a large number of American voters: every Republican incumbent won reelection, while many Democratic incumbents lost, earning the Republicans a majority of seats in both the House and Senate. In a speech before Congress made on September 22, House Minority Whip Newt Gingrich of Georgia first introduced the Contract with America.

THINK THROUGH HISTORY: Analyzing Motives

Does Gingrich mention specific solutions to the problems he names? Why or why not?

Mr. Speaker, I think at the beginning I want to talk tonight about the Capitol steps contract and cynicism in Washington, D.C....

Next Tuesday, September 27, we will have over 300 candidates for Congress from all over America coming to the Capitol steps to pledge a checklist and a contract. We have a basic document that says, "A campaign promise is one thing, a signed contract is quite another." Then what it outlines, in what will later on be a full page ad in TV Guide, is a basic set of commitments for the opening day, our checklist, and then a contract to bring 10 bills to the House floor and get them to a final passage vote in the first 100 days.

Mr. Speaker, I think what I am sad about about the things the White House has done so far to try to attack the contract, and the tone in some of the press coverage and the 1-minute speeches here by the Democrats today, is that I think they miss the whole point of what we are doing. There is not a word in this ad that talks about the Democrats. There is not a word in this ad that talks about the Clinton administration.

What this ad does is, it talks in a positive way about what Republicans would do to solve real problems. I'm going to read the ad, and then I'm going to explain the background of why we are doing this, and how we got to this.

The ad starts, as I said a minute ago, with a cover which says: "A campaign promise is one thing, a signed contract is quite another." That is why Republican House candidates have pledged in writing to vote on these 10

common-sense reforms.

Then it says:

One, balanced budget amendment and line-item veto. It is time to force the government to live within its means and to restore accountability to the budget in Washington.

Two, stop violent criminals. Let us get tough with an effective, believable, and timely death penalty for violent offenders. Let us also reduce crime by building more prisons, making sentences longer, and putting more police on the streets.

Three, welfare reform. The government should encourage people to work, not to have children out of wedlock.

Four, protect our kids. We must strengthen families by giving parents greater control over education, enforcing child support payments, and getting tough on child pornography.

Five, tax cuts for families. Let us make it easier to achieve the American dream, save money, buy a home, and send the kids to college.

Six, strong national defense. We need to ensure a strong national defense by restoring the essential parts of our national security funding.

Seven, raise the senior citizens' earning limit. We can put an end to government age discrimination that discourages seniors from working if they choose.

Eight, roll back government regulations. Let us slash regulations that strangle small business and let us make it easier for people to invest in order to create jobs and increase wages.

Nine, commonsense legal reform. We can finally stop excessive legal claims, frivolous lawsuits, and overzealous lawyers.

Ten, congressional term limits. Let us replace career politicians with citizen legislators. After all, politics should not be a lifetime job.

My point is, here are three reforms for the opening day that are our checklist of what we will do. Here are 10 specific bills that we are committed to bring to a vote in the first 100 days.

There is not a negative word here about the Democratic Party. There is not a negative word here about President Clinton and his administration. It is an effort on our part to be positive.

You might say, why are we being positive about this? I think that there are two very profound reasons why it would be good to have a positive campaign in October 1994, rather than a negative campaign.

(101)

The first reason is that people are so frustrated, people are so hostile, people are so angry, that you do not need to go out and get them madder. You don't have to go out and beat up on President Clinton or beat up on the Congress. People get it. They are already fed up.

What people want to know, I think, is what are you going to do differently? Our challenge to the Democrats is if they do not like our 10 bills, what are theirs? If they do not like our three reforms, what are theirs? Let us have a debate between ideas, but let us not have the kind of negative smear tactics that have driven the country, I think, to distraction, and have broken down any willingness to have a decent political debate.

We are prepared to debate on the issues: Is it a good idea to have a balanced budget amendment, a line-item veto, or not? Is it a good idea to have an effective, believable, and timely death penalty for violent offenders, or not? Should we encourage work and family in the welfare system, or not?

These are real policy proposals. We are going to have next Tuesday a whole set of bills. All 10 bills are already going to be written and available.

There is a second reason. I would argue, why it would be good to actually try to have a debate in October on the issues. I think this country is in trouble. The underlying core pattern of where America is at is real trouble.

If you do not believe me, watch any major city local television news, including Washington, for 2 nights. The child abuse, the rape, the murders, the cocaine dealing, the problems of American life are unbelievable. I am a history teacher, and I tell every audience that as a matter of history, not politics, as a matter of history, it is impossible to maintain American civilization with 12-year-olds having babies, 15-year-olds killing each other, 17-year-olds dying of AIDS, and 18-year-olds getting diplomas they cannot read. I don't think that is debatable. I think it is clear.

Yet, every single thing I just described is happening within a mile of your national Capitol. It is happening in every major city in the country. It is happening in West Virginia. It is happening on most Indian reservations. It is an objective fact, if you are going to be honest about it, that we are in the middle of the largest moral and societal crisis we have had maybe in the country's history.

The result has been a breakdown in trust in government. I think there are very deep reasons we are in trouble. I do not think what we are going to do in the first 100 days by itself is going to get us out of trouble. I think even if we pass all 10 of these bills...all they would be is the beginning. The purpose of next Tuesday, with all the Republican candidates on the Capitol steps, is to outline the beginning. It is the first 100 days.

Source: "The Capitol Steps Contract and Cynicism in Washington, DC" by Newt Gingrich in the *Congressional Record*, September 22, 1994, vol. 140

102

Newt's Fiercest Fight

Jason DeParle

In 1994 Newt Gingrich made history by leading the Republican Party effort to take control of the House of Representatives. Campaigning with the 10-plank "Contract with America," which promised to take action on a highly conservative agenda within the first Hundred Days of the 104th Congress, Gingrich captured the political imagination of the voters. But it was his control over the campaign funds raised by the political action committee of the Republican Party known as GOPAC that also enabled him to win the loyalty of the new Republican members of Congress.

The problem for Gingrich, as with any successful revolutionary, is whether the skills required to win the revolution transfer to the skills required to govern. The pent-up demands present in a party that had not controlled the House for nearly 40 years were almost overwhelming. Whereas the highly partisan and conservative freshman members of Congress wanted to put forward their agenda as quickly as possible, Gingrich was faced with questions about how much to compromise with President Bill Clinton, who was seeking to make himself appear more conservative in order to win reelection in the 1996 Presidential election.

This article, written in January 1996, portrays Gingrich's conflicting image of the visionary, and sometimes dictatorial, revolutionary leader who seeks to keep his followers and the president's political efforts from pulling apart his revolutionary effort, and himself. In late 1995, Gingrich had miscalculated, by allowing Clinton to gain the high political ground in the budget balancing debate by forcing Congress to shut down the government when the two sides could not agree on a budget. Whereas Clinton argued that Congress did not want to spend money on needy areas, the Republicans argued that the president had not held to the deal agreed on in these negotiations. (This pent-up anger resurfaced three years later when many of these same members of Congress voted to impeach the president, saying that because he had lied to them before, they were certain that he had lied in this affair too.)

Another fight that was brewing was the effort to reform welfare and send the issue back to the states (as described in Selection 1.5). Both Gingrich and his followers and President Clinton sought to take credit for reform while escaping blame for eliminating the financial safety net for tens of thousands of people.

Eventually, Gingrich was outflanked by the president, as Clinton took credit for "reforming" welfare while blaming the Republicans for threatening to put the children of poor people into orphanages. This portrait of a Speaker trying to lead Congress in the face of recalcitrant and independent members, and with the ever-present media scrutinizing every move, is very different from the days of

Speakers such as Sam Rayburn and Joe Cannon, who could force their will on members through House rules and by their iron control of committee assignments. Few people wanted this position more than Gingrich, and fewer still were better prepared for it. However, the problems he faced serve as a reminder of the difficulty of serving there now.

BILL ARCHER Republican Chairman of the House Ways and Means Committee.

JOHN BOEHNER Republican Congressman from Ohio and defeated party Conference Chairman (to J.C. Watts of Oklahoma).

JENNIFER DUNN Republican Congresswoman from Washington and defeated Majority Leader candidate (against Dick Armey) in 1999.

THOMAS FOLEY Former Democratic Congressman from Washington State and former Speaker of the House.

RICHARD GEPHARDT Democratic Minority Leader and likely Speaker if the Democrats retake control of the House.

DAVID HOBSON Republican Congressman from Ohio.

JOHN KASICH Republican Congressman from Ohio and Chairman of the Budget Committee.

WILLIAM KRISTOL Conservative editor of the *Weekly Standard* and commentator on "This Week with Sam Donaldson and Cokie Roberts."

ROBERT LIVINGSTON Republican former chairman of the Appropriations Committee and resigned Speaker of the House.

MARK NEUMANN Former Republican Congressman from Wisconsin and failed challenger to Senator Mark Feingold in 1998.

ROGER WICKER Republican Congressman from Mississippi and president of the freshman class in the 104th Congress.

reductions and its profound reordering of Government authority—was their reason for being in Washington.

But Republican moderates, perhaps two dozen in the House and more in the Senate, wanted a full resumption of Government services—and not just through the winter but for an entire year. Moreover, they hinted at joining the Democrats to get it. The conflicts were threatening to derail Gingrich's self-styled "revolution" and diminish him as its paramount leader.

Gingrich had absorbed the complaints the previous day in small gatherings and then in a sour, disorderly caucus that spilled two and a half hours into the evening. Now he was back with a revised plan, a partial reopening, but only through late January. And he offered it on defiant take-it-or-leave-it terms.

"I realize that many of you believe you have a better approach, and that if you were Speaker, you'd do it differently," Gingrich told the caucus. "But if you don't like the job I'm doing," he continued, "run against me." And what's more, if "you don't like the job *we're* doing"—meaning the entire House leadership, symbolically seated behind him—"run against us."

In the meantime, Gingrich cautioned, remember that any successful plan has to pass not only the House but the Senate, where Republicans are less dominant. "We've checked the Constitution," he added sardonically. "And for the rest of the session there's going to be a Senate. We've checked! It's going to be there."

Over the past year the House Republicans had seen their volatile Speaker in emotional states that ranged from beer-guzzling exaltation to teary gratefulness to somber defeat. But they had never seen this. Gingrich said "there won't be any discipline" directed at those who oppose him, but by saying so he hinted otherwise. He warned that those who dissent on this vote should never complain about others who abandon "the team." He planned to "keep a list." Then, with the pointedness of his first outburst, Gingrich stalked out of the room.

The meeting was over. And so, for now, were the threats to his authority. The freshman class president, Roger Wicker of Mississippi, was leading a standing ovation. A few hours later the Gingrich plan was approved by the House. The Speaker was still in control of his grand conservative scheme. "He's held them together pretty well, on a course that I have often disagreed with," President Clinton said a week later, speaking of Gingrich and the freshmen. "You must give him credit for that."

It has been a remarkable development, this transformation of Newton Leroy Gingrich from a back-bench troublemaker to a legislative leader, maybe even one of historic consequence. In a single year Gingrich has driven the President to present four successive budgets, each with deeper cuts and a different political identity. Clinton's first plan envisioned annual deficits of \$200 billion and more, as far as the eye could see. His latest, at least theoretically, reaches balance by the year 2002. "Let me say, we have come a long way," Clinton also said, referring to himself and the Republican Congress. "We have come very close together, I believe."

But is that a boast? Or a confession? The significance of Clinton's journey lies not just in the math but also in the shift of underlying aspirations. Where fiscal discipline has won, his activist agenda has lost. Gone is the talk of greater public investment; gone is the talk of universal health care. Now the President fights a rear-guard action simply to preserve victories won a generation ago, like the

With the government still closed after 21 days, the Speaker was ready to speak. "Hobson!" he bellowed. "Either sit down and shut up or leave the room!" Normally at a caucus of the 236 House Republicans, official business competes with a buzz of background conversation. But on this morning in early January, as he stood in the high-ceilinged caucus room of the Cannon Building, across from the Capitol, Newt Gingrich wanted quiet. He had said so once, politely. Now he had a 59-year-old Congressman, David L. Hobson, hurrying to his seat.

"I won't be taking questions," Gingrich continued, addressing the suddenly silent room. He had heard plenty the previous day, when he first told other House Republicans of his plan to reopen the Government. With his party bearing the brunt of the public's pique, Gingrich wanted services restored, at least partly, until the middle of March. But the caucus was on the verge of rebellion.

Many of the firebrand freshmen who had been his source of strength were now complaining that Gingrich was giving away too much. Without the pressures of a Government shutdown, they argued, President Clinton would have no incentive to sign their balanced budget plan. And that—with its mix of tax cuts and spending

Medicaid entitlement for the poor. He came to office promising welfare families new opportunities to work or be trained for work. By the fall, his own proposal, like the Republicans', agreed to strip poor children of the right to Federal aid they have held for 60 years.

There's only one way of explaining the change—Gingrich. He is pilloried in the press. He plunges in the polls. But he dominates the capital's agenda as few legislators have before him. It has been no easy feat. In capping his unlikely rise to Speaker, Gingrich has had to lead the thinnest House majority in 40 years, and one with scores of potential fissures. He would have to bring together all-or-nothing freshmen and moderate veterans, Western deregulators and Eastern environmentalists, pro-life forces and their pro-choice enemies, the family-values right and the libertarian right. In starting the 104th Congress with a margin of only 12 members, and a Democratic minority that despised him, Gingrich went into each vote with the potential for deadly defections.

Yet inside the Capitol he won—again, again and again. On the nightly news, Gingrich still appeared in his familiar guise, as a bombastic bomb thrower with a series of charges against him pending before the ethics committee. But inside the House, Gingrich mastered a succession of more challenging roles. He played New Age therapist and old-school dealmaker. He was a diplomat, a policy wonk and a back-room boss. By the end of the year he had pushed his sweeping agenda through not only the House but the swamps of the Senate as well. He had defied the conventional wisdom about entitlements, special interest groups and legislative gridlock.

The question now is whether he can secure the one prize that eludes him: Clinton's signature on a balanced budget. Left alone, Gingrich and Clinton might be tempted to split the narrowing differences between them. For that reason they will not be left alone. Instead, they are closely flanked by their respective ideological stewards. For Gingrich, that ultimately means the freshmen. With 74 members, they constitute nearly a third of the Republican caucus, and are distinctive not just for their numbers but for their rawness. Only half have ever held elective office; three-quarters came to Washington with no legislative experience. They will not easily swallow the word "compromise" even if it comes from their own leader's lips. While the freshman fervor has brought Gingrich tantalizingly close, it may also prevent a final deal.

During the run up to the State of the Union, Gingrich refused even to return to the table. Mindful of the hard-liners whose support he had only narrowly maintained, he demanded that Clinton first make further public capitulations on Medicare and taxes. By the curious calculus that had taken hold, it was Clinton now demanding a deal. If he could get one (without completely alienating his liberal base), he would rob the Republicans of the charge they would fling against him all fall: fiscal irresponsibility.

"I heard the Republican Congress say over and over again, 'We have to balance the budget, we have to balance the budget—why won't the President agree to balance the budget in seven years?'" Clinton said. If the Speaker would only break free of the zealots and come to the White House, "we could do this in 15 minutes."

Master of the moment or captive of his movement—which will Gingrich prove to be? In an hourlong talk at the end of the year, Gingrich, seeming bled of his usual

animation, tried to put his best face on the rumblings of discontent. "The troops did not rebel on me," he said. "Some days you have 236 people in leadership." In occasional conversations over the past five months, and in his public appearances, he has presented a bewildering array of personas. He could be wickedly funny, as he was in October at Liberty University when he lampooned liberalism with a script that could work on "Saturday Night Live." The founders guaranteed the pursuit of happiness, he said, not "happiness quotients, happiness set-asides, the Federal Department of Happiness."

He could be intellectually seductive, displaying a more subtle understanding of government than his public demagoguery implied. He could be mischievous, confiding during the first Government shutdown, in November, that he was opening the House gym, even while closing passport offices and the Grand Canyon. ("You don't want these guys here if they don't have the gym open. They will eat each other alive.")

He could also be pompous and self-promoting, and often was, describing his efforts to balance the budget as "truly one of the most amazing political decisions in modern America." At times he would erupt like a geyser of bile, denouncing his detractors as "grotesque," "liars," "vicious" and "corrupt."

It is this unique blend of statecraft and snake oil that makes Gingrich so compelling to watch. And so confusing. He is endlessly asking the President to behave like an "adult" while wallowing in his own adolescent fits. The voters seem baffled as well, drawn to his vision of a caring conservatism yet spooked by the gibbness of his orphanage talk. They embrace his goal of a balanced budget even while last month driving his approval ratings to a record-low of 29 percent. "I'm not a natural leader," Gingrich said. "I'm a natural intellectual gadfly."

Or so he would have us think. But though he strides about in neckties decorated with rare-book motifs, his professional postings are grist for parody. ("These are the best of times and the worst of times, as Charles Dickens wrote"—so begins his million-dollar manifesto, "To Renew America.") Gingrich lacks the nuance needed to be more than a second-class scholar, but he has the drive and the strategic vision of a first-rate politician. His brilliance is not as a thinker but as a doer, a toppler of established regimes.

Shortly after the 1994 elections, William Kristol, then a leading conservative strategist, wrote a memo warning Republicans against unrealistic expectations. Despite the party's decisive success at the polls, he wrote, agendas still get set in the White House. Gingrich sent back a short note, citing a freshman Speaker who plunged the nation into war: Henry Clay, 1812. Gingrich is fighting the domestic policy equivalent, with a Democratic enemy ahead and fervent—or will it be too fervent?—allies at his side.

The speaker's budget generals were still heady with their new, improbable power in January 1995 when Gingrich summoned them to a small dinner in his Capitol suite. He predicted that it would prove among the year's most important meetings. For ages Republicans had talked about balancing the budget. Then they had swelled their ranks with freshmen pledging to do the same. Now scanning the room, Gingrich said that only these few committee chairmen, each chosen by him, could make it happen. He wanted a report on the struggle ahead.

125

John Kasich, the animated chairman of the Budget Committee, spoke frankly about the difficulties of financing a tax cut. Bill Archer offered the Ways and Means forecast of future revenues. Robert Livingston issued a note of caution. The hundreds of programs now under his purview at the Appropriations Committee had strong constituents; cutting them wasn't "going to be peaches and cream." Gingrich said little as the presentations unfolded, but Livingston's remarks were his cue.

"Bob, that's all fine, but I have one question for you," he said, pausing for effect. "Are you up to it?" Emphatically so, Livingston said, and so did everyone else present as Gingrich solicited their pledges. Gingrich concluded by hailing the Wilderness Campaign, in which Ulysses S. Grant held his ground with the words the Speaker keeps framed on his mantle: "I propose to fight it out on this line if it takes all summer."

The historical allusions, the brotherly bonds, the call to glory with the tinge of threat—these are signatures of the Gingrich style, and he used them to lay the groundwork for the year's central event: the drive to balance the budget. Reflecting on the moment a year later, Gingrich explained that he had, called the meeting so his chairmen "would have a team approach," rather than retiring to the "independent fiefdoms" that had plagued Democratic Houses.

But for all the professions of blood loyalty, the budget generals were still talking budget generalities. The decision actually to write a balanced budget was not reached until weeks later. And it came like most of the year's major developments—with a shove from Gingrich. In February, the Senate narrowly defeated a constitutional amendment that would have required a balanced budget in seven years. The freshmen had felt so strongly that they marched on the Senate to urge the amendment's passage. Knowing he would have their support, Gingrich stood up at a news conference and announced that he would put together a seven-year plan anyway.

Kasich flew into a leadership meeting and bounced off the walls. "Where is it written in stone," he asked, that the House would produce a seven-year plan? With the boisterous leaders gathered in the room, Gingrich put it to a vote: who wants to write it in stone? Every arm flew up but Kasich's. (Gingrich later honored the moment by handing Kasich an inscribed stone.) It was a characteristic Gingrich step—for weeks he had cultivated the consensus, then he forced it to congeal. "It's an old F.D.R.—Reagan technique," he later remarked. "If you plant it out there hard enough, the rest of the guys decide it must be real."

Throughout the spring Gingrich would compare his budget moves to the invention of Higgins boats, the landing craft that made D-Day possible. A few years after the design took shape in an eccentric shipbuilder's mind, 20,000 boats floated into action. In devising his own mathematical formula—zero in seven—Gingrich had proved every bit as inventive as Andrew Higgins. He had managed to reduce hundreds of political questions to a single compelling symbol, easily explained to the public. Its appeal, Gingrich said, is "mythic."

It's also completely arbitrary. Though Gingrich has manufactured various rationalizations, there's not an economist in the country who could seriously argue for seven years, as opposed to six or eight or nine. Privately, Republican budget aides are more frank: seven years is merely an accident of a 1993 plan to reach balance

by century's end. Yet vital decisions on virtually every Government function—and perhaps the shape of the '96 Presidential campaign—would be framed by this magic number.

For Gingrich, the appeal was not only fiscal but political: it gave him cover to raid the programmatic redoubts of liberalism, which he had conspired against for decades. "It changes the whole game," he said last month. "You cannot sustain the old welfare state inside a balanced budget."

Wary at first, Robert Dole, the Senate majority leader and Republican Presidential front runner, put forward his own seven-year plan. Invisible for months, President Clinton gradually beamed himself back into view with the assurance that he was a zero-in-seven man too. Late in the spring he abandoned his deficit-laden proposal for one that would reach balance in 10 years. By December he had a seven-year plan. A month later he was back with a seven-year plan that used more stringent Congressional economic assumptions.

Campaigning in Nashville a few weeks ago, Clinton sounded incredulous that anyone would have it any other way. "To put off balancing the budget because we have some disagreements," he said, "that's wrong!"

While Gingrich has wielded extraordinary influence, he grabbed the Speaker's gavel as no ordinary boss. He had delivered House Republicans from four decades of exile, and as the Democratic leader, Richard Gephardt, has observed, "When you've been in the desert for 40 years your instinct is to help Moses." As candidates, the freshmen had trained on his tapes and run on his Contract With America, and most regarded him with awe. Sonny Bono, the pop star turned Palm Springs Mayor turned freshman legislator, appeared in November for what was billed as a Gingrich roast. "But I can't roast Newt," Bono told the crowd in Marietta, Ga. Instead, he recalled the "magic" of his first encounter with Gingrich. "Everything he felt and everything he said and everything he believed, I believed."

Roger Wicker is no less admiring as he ponders the subject of Gingrich. He is driving from Tupelo to Jackson during the recent Congressional recess, a trip he used to make every week as a Mississippi state senator. "Since 1987, I have listened, driving up and down this Natchez Trace, to every single Gopac tape—with-out exception," he says. (Gopac, of course, was Gingrich's political action committee. The Federal Election Commission is now suing the organization, charging that it violated campaign laws.) The audiotapes were Gingrich's connection to countless local politicians, many of whom, like Wicker, he had scarcely met.

When Wicker decided to run for Congress, the Gingrich tapes not only offered the broad themes, they even told him how to color-code brochures for effective literature drops. "I wish—I wish I could get you this tape," Wicker suddenly exclaims, recalling how moved he had been while listening to Gingrich talk about freedom reaching the East bloc. Though he is president of a class that sometimes seems cultish in its passions, Wicker has a mildly independent streak. He once defied the Mississippi Governor, Kirk Fordice, by helping Democrats override the Republican veto of a sales-tax increase. But he does not sound modulated when he talks about his Speaker. "Newt Gingrich is a genius. Have I told you I think Newt Gingrich is the Winston Churchill of our age?"

But Gingrich understood that adulation could be an uncertain ally. Though he had taught the freshmen many things, discipline was not among them. Even before their swearing-in, the freshmen were overturning apple carts. They helped abolish "legislative service organizations," the taxpayer-financed caucuses that more experienced lawmakers had relied on. They ended the commemorative resolutions that wasted staff time and money—no more National Dairy Goat Awareness Week. These were marginal causes but indicative of larger rebellions to come. When Gingrich moved to put term limits on chairmen, the freshmen put one (of eight years) on him as well. "Term limits for the Speaker—that was a freshman initiative," Wicker says. "There was a determination within the class not to be like some of the other so-called reform classes"—that is, co-opted by the leadership.

Knowing that his charismatic authority would always have its limits, Gingrich sought the more durable handles of institutional control. His predecessor, Thomas Foley, had inherited a House where power had been flowing away from the Speaker for nearly 80 years—first to autocratic committee chairmen, and then, in an attempt at democratization, to subcommittee heads who themselves soon proved adept at empire building. With bold strokes, Gingrich felled the tradition of committee autonomy and restored power to the place it had resided a century ago during the notorious reigns of Thomas Brackett Reed and Joe Cannon: the Speaker's office.

Discarding the sacred institution of seniority, Gingrich put his allies in charge of the key committees: Livingston at Appropriations, Thomas Bliley at Commerce and Henry Hyde at Judiciary. Then he limited their ability to amass independent power by packing their committees with his own shock troops. As the political scientist Walter J. Oleszek has noted, freshmen were at the front of the line, winning 9 of 10 open seats on Commerce, 7 of 11 on Appropriations and 3 of 10 on Ways and Means. Backed by the freshmen, Gingrich not only put term limits on chairmen but also abolished their right to cast proxy votes, further weakening their status.

At times Gingrich simply ordered committees to rewrite their bills. He demanded that Commerce make its telecommunications law more favorable to the Baby Bells; he ordered Ways and Means to back off from an assault on ethanol. On other occasions Gingrich simply circumvented committees, putting together Speaker's task forces to draw up legislative proposals. When the Democrats complained that Hyde was pushing the Contract With America through his committee too fast, he flatly advertised his subordinate status. "I'm really a subchairman," he said, words his predecessors would never have uttered.

Among the places the changes were apparent was in the Appropriations Committee, where both Gingrich and his freshmen asserted unusual control. Gingrich began the year demanding loyalty letters from the 13 subcommittee chairmen, whose previous authority had been so august they were known as "cardinals." By the summer, young members were larding Livingston's spending bills with legislative riders, most famously one by Ernest Jim Istook, a sophomore, and David McIntosh, a freshman, to restrict lobbying by groups that receive Federal funds. Livingston was so miffed he called Gingrich from the hearing, waking him up in a California hotel room. Gingrich listened sympathetically but refused to call the freshmen off.

In October, Livingston tried to banish Mark Neumann to the subcommittee equivalent of Siberia after the freshman thumbed his nose at him on an important vote. As word spread, a delegation of freshmen arrived in Gingrich's office, demanding and receiving redress. (Neumann wound up with a prized seat on the Budget Committee.) "The thing that upset the freshmen was the idea that a reform-minded class could be housebroken," says Wicker, who was in the middle of the negotiations.

Gingrich says the reductions in committee authority were needed to get the House working again. "You had independent, isolated fiefdoms that weren't part of the larger system," he says. It wasn't "just anti-democratic, it was also anti-productive, anti-competent." There's no doubt that the old system was broken—or that his solution further consolidated his power. With the committees vanquished, the ultimate policy-making apparatus became something called "S.A.G.," the Speaker's Advisory Group, whose seven members were selected by Gingrich himself.

Gingrich proved equally deft at harnessing power off the Hill. He had never been shy about soliciting campaign contributions. Before the 1994 elections, Gingrich warned recalcitrant donors that they could face "the two coldest years in Washington" if they did not come around, according to an account in *The Washington Post*. Once in power his lieutenants followed through with a bluntness notable even by Washington standards. Contributors to the campaign of a defeated Washington Democrat received solicitation letters from the House whip, Tom DeLay, offering "the opportunity to work toward a positive future relationship." Political action committees found themselves rated in DeLay's ledger—"friendly," "neutral" or "unfriendly." The cash piled up to record highs.

So, it seems, did the access of the friendliest donors. Before the new majority had even been sworn in, an extraordinary array of business lobbyists had convened in DeLay's office to push Project Relief, a moratorium on Federal regulations. With DeLay's backing, they got it (though the measure failed to pass the Senate). In rewriting employee safety regulations and clean-water standards, the lobbyists worked so closely with House aides that the distinction sometimes blurred; on at least one occasion the corporate representative even sat at the committee dais. Meanwhile, the lobbying bill that Gingrich had promised languished until late in the year, when it was pried loose with the help of freshman reformers.

In sum, Gingrich had assembled an extraordinary political machine, and it handed him a string of successes. He passed 31 bills in the first 93 days, covering 9 of the 10 proposals outlined in the Contract With America. (Only term limits went down to defeat.) To be sure, many of the bills were minor in scope, like a paper-work-reduction act. And only three have actually become law. But the Contract victories gave Gingrich what he most wanted—the sense of inexorable momentum. Given the coming budget fight, he knew he would need it. . . .

The stories of Gingrich as resident House therapist are legion. Some freshmen demanded a quick execution for the National Endowment for the Arts; the moderates wanted a period of transition to private financing. Gingrich brokered a compromise by asking each to recite the concern of the other. He used a similar approach when drafting the Contract provisions on welfare. One side wanted to abolish aid for young mothers; another wanted to make them work for it. "It's

almost like he would advise both sides," says one of the combatants. "But he'd say, 'Be fair, keep the conversation going.' You go out of the room 90 percent inspired to do it, and 10 percent afraid not to."

The stories point to Gingrich's skills, but also to his elasticity. Do we strip poor children of Federal aid or do we not? Gingrich replies, in effect: whichever approach will win more votes. It wasn't until the freshmen balked at reopening the Government that others caught on to what the caucus had long known: its most publicly ideological leader was the most privately pragmatic.

Thus, at crucial moments in the past year it fell to Gingrich to rein in the revolution he had wrought. House conservatives were adamant about turning food stamps into a block grant. *End Federal control! Send it to the states! The Governors are with us—no one can stop us now!* But Gingrich was not convinced he could get moderates on board. He settled the issue with a lecture on the Battle of Arnhem, where the British lost a paratroop division by driving too far into Nazi-held territory in the Netherlands. Block-granting food stamps, he said, would place Republicans on their own "bridge too far." The changes to welfare they had already proposed were going to create enough battles. The prescience of his analysis became clear a few weeks later when the welfare bill got hung up on other food-policy issues. "He even directed it at me," says Dick Arney, the House majority leader. "Because we had had such incredible success, I was a little slower to pick up on the point."

If Gingrich does get caught on a bridge too far, it's likely to bear the name Medicare. In seeking to reduce spending for the sacrosanct program by \$270 billion, he ignored the advice of party leaders, who urged him to wait until after the 1996 elections. The program is too popular with the elderly, warned Haley Barbour, the Republican chairman, and the elderly pay attention and vote. "Medicare was the only thing we touched this year that could kill us," Gingrich said. "I've thought about it every day."

Gingrich insists that his motive is simply "to save" Medicare from future fiscal distress. To be sure, its costs were unconstrained and the Administration had dropped its fight to restrain them. But Boehner, the conference chairman, is more forthcoming. Without the Medicare savings, it would be impossible to balance the budget and preserve the substantial tax cut that serves as the coalition's glue. "If we're going to successfully balance the budget, we've got to deal with Medicare," Boehner said. "Now nobody disagreed with that."

In pushing his Medicare plan through Congress, Gingrich drew on his full array of formidable powers. One moment he turned policy wonk, mastering the arcana of health policy; the next he was in his spinmeister mode—denouncing reporters who referred to reductions in growth rates as "cuts." He understood that the Clinton health plan had died in committee, with detail after detail picked apart. Gingrich designed his with a task force of his choosing, presenting it to the full committee as a fait accompli.

As the plan took shape the oddest noise in Washington was the sound of silence. Though the Government was planning to restrain its health spending by hundreds of billions of dollars, the interest groups did not publicly object. Behind the scenes, Gingrich was playing a textbook game of carrots and sticks. While each

major player had something to lose, each also had something to gain. Doctors would get smaller increases in fees, but Gingrich offered them the chance to compete with insurance companies. The insurance companies did not want the competition, but Gingrich gave them new products to sell in a more open Medicare market. On and on it went, deftly calculated.

Gingrich cites the months he spent with health care executives as the supreme example of his willingness "to listen." But the corollary was, "No public dissent," as Gingrich made apparent from the start. Months before the final details were clear, the American Hospital Association was ringing the usual Washington alarms with ads that accused individual members of conspiring to "devastate Medicare." The group found itself shut out of meetings and publicly denounced, its members chased after in letters. Everyone in town got the message. "We knew exactly what we had to do," Boehner said, popping a fist into his hand. "We had to *smack 'em*."

But there would be none of that talk in public. Policy types debated whether health programs could sustain a cut—er, make that a "reduction in the rate of growth"—that would reach nearly half a trillion dollars. (That's \$270 billion in Medicare savings, plus \$180 billion in Medicaid, though Gingrich has since retreated on both numbers.)

But to a member, the Republicans stayed in line with a carefully formulated message. Boehner says: "We tested it and found out that if you talked about balancing the budget and Medicare in the same sentence, you were asking for trouble. Big trouble." Gingrich said, "We learned that if you talked about 'preserving' and 'protecting' Medicare, it worked."

It is a Friday night in a disheveled Virginia office suite across the Potomac. The fluorescent lights paint the air a pale green, and all is silent except for Newt Gingrich, who is railing against the welfare state. "By creating a culture of poverty, we have destroyed the very people we are claiming to help," he says, glowing larger than life on the oversize television in the office of Frank Luntz, the pollster. "Caring for people is not synonymous with *care-taking* for people."

Colored lines crawl across Gingrich's face—blue for Democrats, yellow for Republicans and red for independents, who have registered their approval or disapproval in a focus group, using an electronic dial. Luntz leans forward in anticipation. "Here it comes—bang!" he says. And "bang" is right: all three squiggles leap in appreciation of the Gingrich line. Gingrich's aides have heard the line so often they have turned it into a joke. "I care for you, but I don't *take care* of you," they tease.

Gingrich's scientifically honed oratory has been central to one of his signal achievements: legitimizing the assault on the antipoverty budget. While Gingrich fought his Medicare battle clause by clause, he attacked welfare from the air, with sound bites that turned traditional arguments on their heads. Ronald Reagan attacked poor people for abusing the programs; Gingrich attacks the programs for abusing the poor. Asked about the tactic, Gingrich smiles and replies, "You cracked the code."

The Gingrich approach not only bathes him in the soft light of compassion, it also creates a logical momentum for deeper and deeper cuts. *The less we spend, the more we care!* The leader of the Democratic opposition to the cuts, Senator Daniel

Patrick Moynihan, decries the strategy as an "Orwellian perversion" but ruefully acknowledges its success. "You'll hear it in our Democratic caucus," he says. "We are liberating you, breaking your chains!"

Of course, Gingrich's attempts to recast this debate are as old as his Congressional career. The very name of his original caucus, the Conservative Opportunity Society, was a semantic counterpoise to the three words Gingrich strove to discredit: Liberal Welfare State. As with Medicare, Gingrich's welfare plan awaits the signature of a suddenly resolute Clinton. But even Gingrich seems surprised at how fast and how far he has come. "I thought we'd be in more trouble on hurting the poor," he says. "More like '81-'82 with Reagan."

In fashioning his bill, Gingrich certainly reached beyond the usual circle of experts. One of the odder episodes involved a management consultant named Morris Shechtman, who contributed the "caring-caretaking" phrase. Shortly after the 1994 elections, Gingrich's staff tracked him down in Ecuador and asked him to conduct a daylong seminar. "The point I make in my lecture is that the people who are really crippling Americans in large numbers are the old do-gooders," Shechtman says. He called on welfare recipients to join those who "grieve the unbundling of caretaking" and develop better "change-management skills."

The oddity of it all was classic. After all, in December 1994, Gingrich was about the busiest man on earth. "And here we take a day off to bring in an industrial psychiatrist," Gingrich says. "Totally aberrational from what you thought of as traditional American politics."

The pollsters may have been less aberrational, but they were every bit as helpful. When Gingrich's poverty plans first encountered flak—in March, over proposed changes to the school-lunch program—members needed to be reassured that they weren't coming off as stingy or mean. The leadership sent pollsters from the Wirthlin Group to Cleveland for further "pulse line" research. Richard Wirthlin, Reagan's former pollster, appeared before the caucus a few days later for a talk on how to talk poverty. In an accompanying memo, Wirthlin urged members to continue to "redefine compassion," and he listed 13 "power phrases" that would help. "When Rep. Dunn"—Jennifer Dunn of Washington—"uses the word 'hope,' her score moves up (+20)," Wirthlin wrote.

At the same time, Luntz was testing a Gingrich speech, and he compiled a highlights tape of similar winning phrases. He showed it to House members and distributed a transcript, though much of the talk had already been drummed into the freshmen through the Gopac tapes. Seeing the video, the members "wanted to use the same language," Luntz says. "It's almost like a child wanting to replicate what his or her parents do. I showed perhaps 180 members, and now there are 180 Newt clones."

Hyperbole notwithstanding, the Gingrich oratory took root in the least expected quarters. Perhaps no convert was as unlikely as Christopher Shays, a former Peace Corps volunteer and a main co-sponsor of Clinton's national service bill. As recently as 1990, Shays says, "I had such a strong dislike" for Gingrich that "I would have rejoiced if he'd been defeated."

It was a Gingrich speech that changed his mind—this one delivered in 1991, at a hotel in Trumbull, Conn. Shays calls it the first time he heard Gingrich decry "12-

year-olds having babies and 15-year-olds selling drugs and 18-year-olds who can't read their diplomas." He drove home in a state of shock. "Oh, my gosh," he told his wife. "I agree with the guy."

While many House Republicans might seem to be targets for Gingrich's glib talk, one wouldn't expect to find Shays among them. But that is the beauty of Gingrich's approach: by relentlessly attacking what he's against—"12-year-olds having babies and 15-year-olds selling drugs"—he does not have to state, never mind defend, what he is actually for. As the welfare bill headed to the floor, leadership aides armed every member with a list of horrifying anecdotes, including the case of a 4-month-old boy "who bled to death when bitten more than 100 times by the family's pet rat." Let the Democrats defend that!

Though no one seemed to notice, Gingrich's own plan rapidly changed to fit the financial and political needs of the moment. The bill he endorsed in 1993 would have cost an additional \$20 billion to put welfare mothers to work. The one he got passed last year sliced \$12 billion from welfare over seven years and nearly \$90 billion from other antipoverty programs. It allows states to cut off families whether the parents are willing to work or not. What accounts for the sweeping change? "This is a bolder bill," Gingrich says. "I don't know the details."

Shays does know the details, and he admits that "there's a part of me that wonders if it's as well thought out as I'd like it to be." But, he adds, "I'll take almost any alternative over what we've got now." And on the day the measure passed the House, Shays was standing at Gingrich's side, paying homage with the familiar phrases. "What I had to wrestle with was, in my heart I thought I was a caring person," he said. "But I realized I was a caretaking person. And today, what we have shown is that we are a caring country." And then the unlikely convert concluded with the least likely words: "Newt Gingrich is my hero."

The elderly woman at a Tupelo bank does not share that view this January morning as her Congressman enters the lobby. Spying Roger Wicker, she chides him for the Government closing that could delay her husband's monthly military pension check. She has been leaving that message at his office.

"I got a letter thanking me for my kind words, and I thought maybe you didn't get my message," she says. "I wouldn't call them kind words." Nor did the aide who took the call, and wrote in the file: "She'll never vote for RW again. 'Cut your own pay instead of poor people.'"

But before Wicker leaves the lobby he is approached once more, this time by a young man in jeans holding a bag of change from the convenience store where he works as a manager. "Wanna let you know how much we appreciate you fightin' for us on the budget," he says. "If that's what it takes, shut it all down. We don't need to be spending our children's money."

There, in two minutes, is the crux of the budget battle: "hands off" versus "right on." The oddity of it is that each of the protagonists, Gingrich and Clinton, thinks the public is on his side. And each has a plausible case. There's no doubt, as Gingrich understands, that the public wants the budget balanced—in theory. There's also no doubt that people don't want their own programs gored, least of all the elderly and their interest groups.

But that is merely the ancient impasse; what's remarkable about Gingrich is how close he has come to breaking it. As Gingrich mulls over whether to balk or to talk, he faces twin dangers. One is that he will lose his caucus. The other is that he will lose the country. For all his genius in plumbing the public mood, Gingrich may have misread Americans' feeling about the Government they love to hate.

Throughout the fall he baited conservative audiences with a twist on the old lefty chant: what if we closed the Government and no one noticed? At Liberty University in October, Gingrich offered a forecast of the showdown to come. If the Democrats don't go along, he swaggered, then "fine, they won't have any money to run the parts of the Government they like, and we'll see what happens." What happened was that the public got mad, Gingrich's popularity plunged and Clinton's suddenly hit a 22-month high.

Needing a tactical retreat, Gingrich had to pull out all the stops to bring his caucus—which is to say, his freshmen—with him. As he stood before his troops, Gingrich argued that the shutdown had been "a failed strategy." But a substantial group of freshmen disagreed. And Clinton isn't the only one wondering if "the tail will keep wagging the dog over there."

Though some freshmen applauded early this month when Gingrich threw down the gauntlet and stalked out of the room, others seethed. Many stayed and expressed outrage at the Speaker's unveiled threats. When they caucused among themselves at noon, a number were still talking of opposing him in the afternoon vote to reopen the Government. After all, Gingrich himself had warned them a year ago that when the going got tough, their poll numbers would drop. (He even brought in Michigan's Governor, John Engler, to describe how his own approval rating had bottomed out below 20 percent after he pushed through deep budget cuts. He later rebounded to win a second term.) Now Gingrich was counseling retreat. Seeing the vote in peril, Wicker abandoned the class president's gavel for the first time in a year and argued the Speaker's cause.

"If a rump group of dissidents had managed to derail" the plan, he said, Gingrich "would have been severely wounded." In the end, 12 freshmen (and 3 other Republicans) voted against him—a minority, but not a negligible one.

It turns out that Gingrich did keep "a list." In the past few weeks, he canceled every scheduled fund-raising event for a freshman voting against him. "An outrageous step," says David McIntosh, a freshman liaison to the leadership. "He has to stop this crybaby attitude with people who don't agree with him." That's not the sound of freshman deference.

Asked a few weeks after the vote where Gingrich stood with the freshmen, Wicker said, "Fine." But he added, laughing, "I guess the majority of freshmen would prefer that the leadership had dug in several billion ago." Message to Newt: You'd better dig in.

Sitting in his office one evening at the end of the year, Gingrich explains that he had spent his Christmas holiday "reading volume two of Churchill's wartime correspondence, just to reimmerse myself in someone who was a great leader at a moment of enormous stress." Gingrich reads history the way others might read plumbing manuals, hungry for how-to tips, and while he does not explicitly elevate himself to Churchill's ranks, the suggestion seems to hang in the air.

At the time, Gingrich won't even contemplate a new year in which Clinton doesn't sign a Congressional budget. "I won't, I won't—no, we will get a budget." But that's before the talks break off, the freshmen grow bold and the Speaker becomes publicly pessimistic.

Would the freshmen prove an impediment in the end?

Gingrich grows snappish and says he has been defying predictions of crackups all year. "Let me tell you what I said to the President this summer, and the reason I spent Christmas weekend reading Churchill's wartime papers," he says. "There's no freshman more committed to getting to a balanced budget than I am."

"It would be like saying to Churchill in '40, 'We think there's somebody in Parliament more committed to victory than you.'"

Discussion Questions

1. What are the personal and professional qualifications that make it possible for a person to successfully govern the House as Speaker?
2. What will be the long-term impact of Newt Gingrich on the history of Congress and the United States?
3. Should members of Congress operate as a team for their party, or do they have more of an obligation to operate independently, following their own consciences and the desires of their constituencies?
4. What will be the long-term impact of the 1994 Republican class in Congress? Does that party have a chance to maintain control of the body in 2000, and what must they do to accomplish this goal?

THE DEBATE: PORK-BARREL POLITICS

Each article in this chapter highlights the importance that legislators place on serving their constituents. Yet, as Stark argues, the strategy might work for re-election, but it may undermine the capacity of Congress to deal effectively with national problems and priorities. The debate over pork-barrel politics captures this institutional tension, and illustrates the difficulties of defining "national" interests rather than parochial, or local, interests.

The emergency spending bill that was passed early in 1999 is a classic example of "pork-barrel politics": localized benefits that are tacked onto larger "must pass" bills (in this most recent case, the larger bill provided money for the war in Kosovo and disaster relief for flood and hurricane victims). Sean Paige and Jonathan Cohn view pork-barrel politics from different perspectives. For Paige, the \$520 billion spending bill passed in late 1998 tossed aside the "hard-won gains" of budget balancing achieved in 1997 and was "larded . . . with heapings of pork-barrel projects." Paige recognizes the difficulties of practicing fiscal discipline when all members of Congress want and need to provide something for their home districts. Nevertheless, he criticizes the practice of attaching last-minute pork-barrel riders to the budget, something done even by members who built their careers on deficit reduction. According to Paige, the national interest in a balanced budget should take priority over parochial projects.

Where Paige sees waste and abuse of the nation's resources, however, Cohn views pork as the "glue" of legislating. If it takes a little pork for the home district or state to get important legislation through Congress, so be it. Cohn also questions the motives of budget reform groups that call for greater fiscal discipline in Congress; in his view, most of these groups are not truly concerned over waste, but are simply against government spending in general. The policies they identify as pork, he argues, can have important national implications: military readiness, road improvements for an Olympic host city, or the development of new agricultural and food products. In other words, national interests can be served by allowing local interests to take a dip into the pork barrel. Finally, Cohn argues that pork, even according to the critics' own definition, constitutes less than 1 percent of the overall federal budget.



White House that went badly for Republicans—found himself fending off a rear-guard action from the right, of all places, and had to put the ingrates (he called them "petty dictators" and the "perfectionist caucus") in their place. "It is easy to get up and say, 'Vote No!' Then what would you do?" shrugged a world-wizened Gingrich. "Those of us who have grown up and matured . . . understand that we have to work together on the big issues."

Even the old sausage-maker himself, Democratic Sen. Robert Byrd of West Virginia, was shocked at what he saw. Renowned for his own cagey use of the budget process to bring billions of dollars in pork back to the Mountain State (and perhaps a bit peeved at finding himself excluded from all the behind-the-scenes horse trading), Byrd condemned the bill as a "gargantuan monstrosity"—a "Frankenstein monster patched together from old legislative body parts that don't quite fit."

Members of both parties chafed at having to vote on legislation crafted in such haste that few actually knew what was inside the 40-pound, 16-inch, 4,000-page end product (except, of course, for that quick peek at page 2,216, Part B, subsection 3[a], just to be sure that a wastewater-treatment facility and \$4 million grant for the alma mater made it in). But by now a bit more is known about how this particular sausage was made and what ingredients went into it. The measure included funding for eight unfinished spending bills, a \$21 billion emergency-spending measure and a cornucopia of legislative riders ranging from the substantial (one resulted in a major reorganization of the State Department) to the trivial (another extended duck-hunting season in Mississippi for 11 days) to the ludicrous (still another bans nude sunbathing at a beach near Cape Canaveral, Fla.).

Fiscal conservatives, led by House Budget Committee Chairman John Kasich of Ohio, had entertained the notion of dusting off the old budget battle ax. But perennial targets for their imagined whacks, such as the National Endowment for the Arts and the Tennessee Valley Authority, sailed through unscathed. Moreover, even some old budget bogeymen—such as the wool, mohair and sugar subsidies—came roaring back from the brink of extinction.

If and when disputes arose between Democrats and Republicans, they invariably hinged not on where the ax might fall but on whom would be supping upon the larger ladle of gravy.

Clinton and the Democrats got \$1.2 billion to begin hiring 30,000 of 100,000 new teachers (meaning much more money will be needed in the future); an \$18 billion bailout for the International Monetary Fund; \$1.7 billion in new home-health-care money for Medicare (reversing changes to the program made in 1996); and more than most Republicans wanted in farm aid (which even Senate Agriculture Committee Chairman Richard Lugar of Indiana said would "undermine" recent efforts to wean farmers off federal aid). Democrats also prevailed on a measure expanding coverage of the federal-employee health-insurance plan to include

"Rolling Out the Pork Barrel"

SEAN PAIGE

The fall of 1997 was a triumphant time for deficit hawks in Congress: Step by laborious step they finally had maneuvered President Clinton into signing the first balanced-budget bill in two decades, a long-sought political grail. Yet only a year later, as Congress rushed to cram a year's worth of budget writing into the waning weeks before the midterm elections, the hard-won gains of 1997 vanished like a mirage and the madness of budget seasons past made a triumphant return.

"There's a lot of little things tucked away there that I wish weren't," the president said, talking not about the latest batch of White House interns but rather the \$520 billion omnibus spending bill he was signing into law. "But on balance, it honors our values and strengthens our country and looks to the future."

Critics, however, say the values it honors most are political expediency, fiscal opportunism and the scruples of the horse trader—while the only future to which its political authors looked was their own.

All but a few members of Congress claimed to hate the damned thing. However, a majority in both chambers held their noses and voted for it, larded as it was with heapings of pork-barrel projects, the distribution of which remains a staple of the incumbency-protection racket, and some breathtaking acts of budget wizardry. The more than \$21 billion in spending that exceeded budget caps set only a year earlier was declared "emergency" spending, as members continued to exploit a loophole that threatens to make the U.S. Treasury a federal disaster area. And some \$9.1 billion in additional spending was "forward funded"—which means that Congress will spend it now and figure out how to pay for it later.

Criticism of the bill was rancorous and bipartisan. But even the opposition was divided: One faction hated what it saw as a retreat from fiscal restraint and responsibility; the other was appalled by the opacity of the process, in which a handful of negotiators from the White House and Congress worked out the horse trades behind closed doors. "This is a sham," cried Republican Rep. Jon Christensen of Nebraska. "This Congress ought to be ashamed of itself," scolded Wisconsin Democrat Rep. David Obey.

Retiring Speaker Newt Gingrich, who hasn't been quite the same since the federal-government brownout of 1995, a game of chicken with the

oral contraceptives; restored \$35 million in food and oil shipments to North Korea; and turned back the Republican push for tax relief.

Republicans got \$6.8 billion in increased military spending (some of which is classified), \$1 billion for antimissile defense (although the Pentagon already is spending \$3 billion annually on missile defense, with no deployment in sight) and \$690 million for antidrug efforts (including the purchase of \$40 million gulf-stream jets for law-enforcement agencies reportedly surprised by the windfall and \$90 million for helicopters for Columbia). The GOP also was successful in its push to increase visa quotas for hightech workers and, striking a blow for peduncles everywhere, blocked a Department of Transportation move that would have mandated peanut-free zones on commercial airliners.

The standoff continued on the question of how the year-2000 census will be conducted—whether by actual head count, as Republicans and the Constitution demand, or statistical sampling, as Democrats prefer—with a settlement postponed until after the Supreme Court rules on the case early next year. Other interesting bill provisions, without any known partisan parentage, include: a cut in foreign aid to countries that haven't paid parking tickets in the District of Columbia; a measure allowing the secretary of Agriculture to lend Russia money, which the Russians then can use to buy frozen chickens from Mississippi; \$325 million inserted to buy enriched uranium from Russia; and \$1 billion during the next five years to help the Tennessee Valley Authority refinance its debt.

Some of the \$21.4 billion in "emergency" spending extras included: \$3.35 billion to tackle the Y2K computer problem; \$2.4 billion for anti-terrorism activities; \$6.8 billion to improve military readiness; and \$5.9 billion in additional aid to farmers. Many items among them drew fire from budgetwatchers, including \$100 million for a new visitors center for the U.S. Capitol—an idea entertained for years which received a boost following last summer's fatal shootings there—and \$100 million for a buyout of fishermen working in the Bering Sea, where pollock stocks have plummeted.

Singled out for particular opprobrium, however, was the \$5.9 billion in emergency farm relief. Citizens Against Government Waste President Tom Schatz called it a "bipartisan and cynical attempt to buy the farm vote before this fall's election," pointing to studies showing that actual farm losses because of drought or other disasters were much lower. The group also condemned increased subsidies to sugar, peanuts and mohair producers contained in the Agriculture appropriations bill. Such subsidies, said CAGW, represented "a first step toward dismantling the 1996 farm bill"; which made history by beginning to phase out farm price supports that have been in place since the 1930s.

Of course, more pedestrian and parochial kinds of pork projects also were packed into the bill, a random sampling of which includes: \$37.5

million for a ferry and docking facilities at King Cove, Alaska; \$2 million for the National Center for Cool and Cold Water Aquaculture in West Virginia ("The seafood capital of Appalachia!"); one wag said; \$1 million for peanut quality research in Georgia; \$1.4 million for the Jimmy Carter National Historical Site; a \$200,000 grant to Vermont's Center for Rural Studies; \$1 million to restore a German submarine at a museum in Chicago (the project received \$900,000 last year); \$1.2 million for a project called "Building America"; \$400,000 for another called "Rebuilding America"; and \$67,000 for the New Orleans Jazz Commission.

Christmas came early to the nation's capital this year. The party was a hoot-and-a-half while it lasted, but the inevitable hangover followed as its fuller consequences have become clear.

The 1998 spending spree "has made it almost impossible to stay within the budget caps set in the 1997 [budget] agreement," Senate Budget Committee staff director G. William Hoagland told a gathering just weeks after the bill became law. The committee estimates that when everything is factored in, the extra spending in the omnibus bill will drain \$38.2 billion from any future budget surplus. And as the bills for its "forward-funding" mechanisms come due, deep and painful cuts in next year's discretionary spending will be necessary. And that, Hoagland says, is "unlikely unless we can come up with more user fees or some quick gimmicks in the budget."

But even if such a plan fails and the fiscal restraint that took decades to muster caves in on itself like a black hole, sucking the rest of the republic in after it, one thing will be said of the ludicrous budget battle of 1998: At least the duck hunters of Mississippi are happy.

22

"Roll Out the Barrel: The Case Against the Case Against Pork"

JONATHAN COHN

On most days, the lobby of the U.S. Chamber of Commerce's Washington, D.C., headquarters has a certain rarefied air. But on this Tuesday morning it is thick with the smell of greasy, grilled bacon. The aroma is appropriate, since the breakfast speaker is Republican Representative Bud Shuster of Pennsylvania, chairman of the House Transportation Committee and, his critics say, one of the most shameless promulgators of pork-barrel spending in all of Congress. The odor seems

even more fitting given that the topic of Shuster's address is the Building Efficient Surface Transportation and Equity Act, the six-year, \$217 billion highway-spending package about to pass Congress—and, according to these same critics, the single biggest hunk of pork Washington has seen in a decade.

The critics, of course, are absolutely right. The House version of BESTEA, which hit the floor this week, contains at least \$18 billion in so-called "demonstration" and "high-priority" projects. Those are the congressional euphemisms for pork—public works programs of dubious merit, specific to one congressional district, designed to curry favor with its voters. And Shuster's record for bringing home the bacon is indeed legendary. BESTEA's predecessor, which passed in 1991, included \$287 million for 13 projects in Shuster's central Pennsylvania district. Today, visitors can see these and other shrines to his legislative clout by driving along the newly built Interstate 99, a shimmering stretch of asphalt the state has officially christened the Bud Shuster Highway.

None of this much bothers the suits at the Chamber of Commerce, who savor every line of Shuster's pitch as if it were just so much more fat-soaked sausage from the buffet table. Money for roads—whether in Shuster's district or anybody else's—means more ways to transport goods and more work for construction companies. But, outside the friendly confines of groups like this, a relentless chorus of high-minded watchdog groups and puritanical public officials complains that pork-barrel spending wastes government money. These critics also protest the way pork becomes law in the first place, as last-minute amendments designed to bypass the hearings and debate bills normally require.

To be sure, these arguments are not exactly novel. The very term "pork barrel" is a pre-Civil War term, derived from what was then a readily understandable (but, to modern ears, rather objectionable) analogy between congressmen gobbling up appropriations and slaves grabbing at salt pork distributed from giant barrels. "By the 1870s," William Safire writes in his *Political Dictionary*, "congressmen were regularly referring to 'pork,' and the word became part of the U.S. political lexicon." Criticizing pork, meanwhile, is just as venerable a tradition. Virtually every president from Abraham Lincoln to Ronald Reagan has promised to eliminate pork from the federal budget, and so have most congressmen, much to the satisfaction of muckraking journalists and similarly high-minded voters.

But rarely have the politicians actually meant it, and even more rarely have they succeeded. Until now. Thanks to an endless parade of media exposés on government waste, and a prevailing political consensus in favor of balanced budgets, pork critics have been gaining momentum. In 1994, anti-pork fervor nearly killed President Clinton's crime bill; in 1995, the same sentiment lay behind enactment of the line-item veto, something budget-balancers had sought in vain for more than a decade. A few years ago, a handful of anti-pork legislators took to calling them-

selves "pork-busters." Thanks to their vigilance, says the nonprofit group Citizens Against Government Waste, the amount of pork in the budget declined by about nine percent in 1998.

The influence of pork-busters reached a new peak in 1997, when they helped defeat a preliminary attempt at BESTEA. They probably won't be able to duplicate the feat this year—Shuster has nearly 400 votes behind his new pork-laden bill, which House Budget Chairman John Kasich has called an "abomination." But pork-busters won a major public relations victory last week when four House Republicans turned on Shuster and accused him of trying to buy them off with pet projects. "I told them my vote was not for sale," said Steve Largent of Oklahoma. "Shuster bought just about everyone," David Hobson of Ohio told *The Washington Post*. Three weeks ago, Republican Senator John McCain of Arizona, Capitol Hill's most determined pork-buster, won passage of an amendment that could cut at least some of the bill's pork. President Clinton has since joined the chorus, saying he too deplotes the parochial waste Shuster and his cronies added to the measure.

In the popular telling, episodes like these represent epic struggles of good versus evil—of principled fiscal discipline versus craven political self-interest—with the nation's economic health and public faith in government at stake. But this narrative, related time and again by purveyors of elite wisdom, and then repeated mindlessly by everyday citizens, has it exactly backward. The pork-busters are more anti-government than anti-waste. As for pork-barrel spending, it's good for American citizens and American democracy as well. Instead of criticizing it, we should be celebrating it, in all of its gluttonous glory.

Nearly a week has passed since Shuster made his appearance before the Chamber of Commerce, and now it is the pork-busters' turn to be making headlines. In what has become an annual rite of the budget process, Citizens Against Government Waste is staging a press conference near Capitol Hill to release its compilation of pork in the 1997 federal budget—a 40-page, pink-covered booklet it calls the "Pig Book." (Actually, the pocket-sized, 40-page version is just a summary of the unabridged "Pig Book," which weighs in at a hefty 170 pages, in single-sided, legal-sized computer printouts.)

CAGW has been fighting this fight for more than a decade, and its steady stream of propaganda, reports, and testimony is in no small part responsible for pork-busting's Beltway resonance. Republican Representative Christopher Cox calls CAGW "the premier waste-fighting organization in America"; the 1995-1996 Congress sought CAGW testimony 20 times. The interest in today's press conference—attended by more than 60 reporters and a dozen television crews—is testimony to the group's high esteem among the Washington press corps, although it doesn't hurt that CAGW has also provided the TV crews with a good photo opportunity.

Like many press conferences in this city, this one features several

members of Congress, including McCain and Democratic Senator Russell Feingold. Unlike many press conferences in this city, this one also features a man dressed in a bright pink pig's suit, rubber pig masks free for the media to take, plus a live, charcoal-gray potbellied pig named Porky. For the duration of the event, Porky does little except scarf down some vegetable shreds. But the beast's mere presence gets a few laughs, which is more than can be said for the puns that CAGW's president, Tom Schatz, makes as he rattles off the recipients of this year's "Oinker Awards."

Senator Daniel Inouye of Hawaii secured \$127,000 in funding for research on edible seaweed; for this and other appropriations, Schatz says, Inouye (who is of Japanese ancestry) wins "The Sushi Slush Fund Award." Senator Ted Stevens of Alaska sponsored \$100,000 for a project called Ship Creek, so he gets "The Up Ship's Creek Award." (Stevens is a double winner: for his other pork, totaling some \$477 million since 1991, CAGW also presents him with "The Half Baked Alaska Award.") The Pentagon budget included \$3 million for an observatory in South America: "It's supposed to peer back millions of years in time," Schatz says, his deadpan poker face now giving way to a smarmy, half-cocked smile. "Maybe they're looking for a balanced budget." This dubious-sounding project Schatz dubs "The Black Hole Award." And on. And on.

You might think corncob humor like this would earn CAGW the disdain of the famously cynical Washington press corps. But, when Schatz is done, and the question-and-answer period begins, the reporters display barely any skepticism. Instead, that evening, and during the following days, they will heap gobs of attention on the group. They don't flatter or endorse the organization *per se*, but the coverage shares a common assumption that the group's findings are evidence of political malfeasance. CNN, for example, will use the "Pig Book"'s release as a peg for stories bemoaning the persistence of pork in the federal budget. A story out of Knight Ridder's Washington bureau, which will run in nearly a dozen of the chain's newspapers, basically recapitulates the report. And all this comes on the heels of a front-page *Wall Street Journal* feature—sparked by a similar report from the Tax Foundation—highlighting the profligate pork barreling of the Senate majority leader, Trent Lott of Mississippi. Its headline: "MISSISSIPPI'S SENATORS CONTINUE A TRADITION: GETTING FEDERAL MONEY."

This is typical. Normally jaded Washingtonians, journalists especially, tend to view pork-busters not as ideologues but as politically disinterested watchdogs. Television producers, in particular, regularly summon CAGW experts to validate stories for such waste-focused segments as NBC's "The Fleecing of America" and ABC's "Your Money, Your Choice." While this image has a basis in reality—CAGW truly goes after pork-barreling Republicans with the same fervor it pursues Democrats

—it is also a product of the organization's concerted attempt to wrap itself in the flag of nonpartisanship. "No matter how you slice it, pork is always on the menu in the halls of Congress," Schatz said at the press conference. "Some members of Congress simply couldn't resist the lure of easy money and putting partisan political interests over the best interest of taxpayers."

But it's not as if the pork-busters have no partisan or ideological agenda of their own. Some, like the Cato Institute, are explicit about their anti-government predisposition. CAGW is a little more cagey, but it remains true to the spirit of its past chairman, perennial right-wing Republican candidate Alan Keyes, as well as its cofounder, J. Peter Grace, who headed President Reagan's 1984 commission on government waste and whose antipathy to government in general was widely known. "The government is the worst bunch of stupid jerks you've ever run into in your life," he said once at a CAGW fund-raising dinner. "These people just want to spend money, money, money all the time."

That is, of course, a forgivable overstatement of a plausible argument. But it is also an overtly ideological one, and it calls into question the group's reliability when it comes to making delicate distinctions about what is truly wasteful. After all, CAGW is not just against pork, but against much of what the mainstream conservative movement considers bad or overly intrusive public policy—which encompasses an awful lot. In 1995, CAGW was not bashful about embracing the Contract With America, whose expansive definition of waste included many regulatory programs Americans deem quite worthwhile. "Taxpayers . . . demonstrated in two consecutive elections of a Republican Congress that the Washington establishment at its peril ignores the taxpayers' voice," the group's annual report boasts. "CAGW stood shoulder to shoulder with the reformers and enjoyed a sense of accomplishment at this burst of energy from revitalized taxpayers." CAGW's contributor list, not surprisingly, reads like a who's who of conservative interests, from Philip Morris Companies Inc. to the Columbia/HCA Healthcare Foundation Inc.

To be sure, CAGW is not the only Beltway organization whose partisan allegiances belie its nonprofit, nonpartisan status. At least a dozen other groups on both the left and the right do the exact same thing. Anyway, the fact that an argument may be ideologically motivated hardly means it's wrong.

But that doesn't mean it's right, either. Listen closely the next time some smug good-government type starts criticizing pork: it's an awful lot of fuss over what is, in fact, a very small amount of money. In the "Pig Book," for example, CAGW claims last year's budget included pork worth about \$13.2 billion—or, as a pork-buster would say, "\$13.2 billion!" Yes, you could feed quite a few hungry people with that much money, or you could give a bigger tax cut. But it's less than one percent of the federal budget.

And it's not even clear that all of the \$13.2 billion of waste is really, well, waste. A good chunk of CAGW's \$13.2 billion in pork comes from a few dozen big-ticket items, costing tens of millions of dollars each, scattered through various appropriations measures, particularly the Pentagon's. Among the programs: research of a space-based laser (\$90 million), transportation improvements in Utah (\$14 million), and military construction in Montana (\$32 million).

But it's hardly self-evident that these all constitute waste, as the pork-busters suggest. At least some national security experts believe the space-based laser is a necessary defense against rogue nations that might get their hands on nuclear missiles. A lot of that Utah money is to help Salt Lake City prepare for Olympic traffic. And, if you've ever been to Montana, you know that there are a lot of military bases scattered across that vast state—which means a lot of soldiers who need buildings in which to live, eat, and work. In other words, all of these serve some credible purpose.

The wastefulness of the smaller items is similarly open to interpretation. Remember Senator Inouye's "Sushi Slush Fund Award"—the \$127,000 for research on edible seaweed in Hawaii? It turns out that aquaculture is an emerging industry in Hawaii and that edible seaweed—known locally as "limu," "ogo," or "sea sprouts"—is "rich in complex carbohydrates and protein and low in calories," according to the *Honolulu Advertiser*. "It's a good source of vitamin A, calcium, and potassium, too."

Yes, the federal government is paying \$3 million for a telescope in South America. But it has to, because the telescope is part of a U.S. effort to explore the southern hemisphere sky—which, of course, is only visible from the southern hemisphere. Although the telescope will be located in Chile, it will be operated remotely from the University of North Carolina at Chapel Hill. "When completed, the telescope will hold tremendous promise for scientists and the federal government," the university chancellor said when Republican Senator Lauch Faircloth of North Carolina announced the appropriation. "We at the university also have high hopes for what the project will mean for the North Carolina economy as well as for students of all ages—on this campus, across our state, and beyond."

And Senator Stevens's "Up Ship's Creek Award"? The Ship Creek water project was part of a bill authorizing studies of environmental cleanup across the country. Some \$100,000 went to the U.S. Army Corps of Engineers to assess the impact of development on Ship Creek, which is Anchorage's primary source of freshwater. Ironically, according to the Corps of Engineers, the study is exploring not only what kind of environmental precautions are necessary, but whether the federal government really has to pay for them, and whether local private entities might be convinced to foot part of the bill. In other words, one objective of the Ship Creek appropriation was to reduce government waste.

You could argue, as pork-busters do, that, while projects like these may serve some positive function in society—perhaps even deserving of government money—they should not be on the federal dime. Let the Hawaiians pay for their own calcium-rich dinners! Let Alaskans foot the bill for their own water study! But there's a respectable argument that sometimes parochial needs are in fact a legitimate federal interest, particularly when it involves things like pollution and commerce that cross state lines.

Certainly, that's the way a lot of people outside of Washington understand it. Last month, while the national media was busy flogging unthrifty lawmakers, several local newspapers rose to their defense. "We elect people to Congress not only to see to the nation's defense and keep the currency sound but also to bring home some pork," editorialized *The Fort Worth Star-Telegram*. "Pork can mean local jobs, local beautification, local pride, etc." The *Dayton Daily News* defended one project, a museum on the history of flight, that appeared on CAGW's hit list: "It is at the heart of a community effort that has been painstakingly nurtured for years by all manner of Daytonians. It combines the legitimate national purpose of recognizing the history of flight with the top-priority local purpose of getting Dayton recognized as a center of the history of flight." Other papers were more critical: they wanted to know why their congressmen hadn't brought home *more* bacon. "Alaskans aren't going to sit still for being No. 2 for long," *Anchorage Daily News* columnist Mike Doogan wrote in a spirited defense of pork. "We need the money. And we have our pride."

This is not to say that all or even most of what gets called pork is defensible on its own terms. (Did Bedford County, Pennsylvania, which happens to be smack in the middle of Shuster's rural district, really need a new airport when there were two others nearby?) Nor is it to say that the local interest in getting federal money should always trump the national interest in balancing the budget and distributing the federal largesse fairly. (Couldn't the state of Pennsylvania have paid for the Bedford County airport instead?) Nor is it even to say that local interests defending pork aren't being incredibly hypocritical—no one thinks an appropriation is pork when it's his.

No, the point is simply that you can't call something waste just because it makes a clever pun. "From what we can tell," says John Raffetto, communications director for the Senate Transportation Committee, "CAGW does no research to determine what purpose the project serves other than to flip through the pages of the bill and find projects that sound funny. If it sounds funny, that's pork. I have not heard from any member's office that has told me they've received a call from CAGW to ask what purpose that project has served."

Pork-busters concede they lack the time or resources to investigate items thoroughly. "Some may be worthy of consideration," says CAGW media director Jim Campi. "Our concern is that, if the projects went

through the process the way they were supposed to, there would be a [better] opportunity to judge them on their merits."

This is the same argument that most animates McCain, Feingold, and other pork-busting lawmakers. But what constitutes a fair appropriations process? CAGW would have everyone believe that a project is pork if it is "not requested by the president" or if it "greatly exceeds the president's budget request or the previous year's funding." Huh? The whole point of the appropriations process is to give Congress a chance to make independent judgments about spending priorities. Particularly when Republicans control one branch of government and Democrats the other—as is the case today—differences will exist. The Republican Congress used to routinely declare the president's budget "dead on arrival." Did this mean the entire congressional budget was pork?

Two other criteria for defining pork are equally shaky. Invoking the familiar pork-busting wisdom, CAGW says a program is pork if it was "not specifically authorized"—meaning it wasn't in the original budget which contains general spending limits, but rather added on as part of the subsequent appropriations process, in which money is specifically allocated to each item. But the rationale for a separate budget and appropriations process is to allow Congress (and, for that matter, the president) an opportunity to change their minds about smaller items, as long as they stay within the broad guidelines of the budget agreement. CAGW also damns any projects "requested by only one chamber of Congress." But, just as Congress can disagree with the president over a project's merit, so the House can disagree with the Senate—that's the reason the architects of the Constitution created two houses in the first place. (Also, keep in mind that one reason the Senate doesn't propose as much pork is that senators—wary of getting stung in the national press for lacking frugality—will often wait to see how much pork the House passes. That way, they end up with the best of both worlds: they can quietly tell supporters that they backed the measure without ever incurring the wrath of pork-busting watchdogs.)

Make no mistake, though: Many pork-barrellers are trying to evade the scrutiny bills get when they move through the normal appropriations process. They stick in small bits of pork after hearings end because they know that nobody is going to vote against a multibillion-dollar bill just because it has a few million dollars of pork tucked in. And they can do so safe in the knowledge that, because there's very little in the way of a paper trail, they will not suffer any public consequences—unless, of course, a watchdog group or enthusiastic reporter manages to find out.

Pork-busters call this strategy sleazy, and it is. But remember, the whole point of our Constitution is to harness mankind's corrupt tendencies and channel them in constructive directions. In an oft-quoted passage of *The Federalist Number 51*, James Madison wrote, "if men were angels, no government would be necessary," and "the private interest

of every individual may be a sentinel over the public rights." The Founders believed that sometimes local interests should trump national interests because they recognized it was a way to keep federal power in check. It's true this process lends itself to a skewed distribution of benefits, with disproportionate shares going to powerful lawmakers. But, again, pork is such a small portion of the budget that "equalizing" its distribution would mean only modest funding changes here and there.

Which brings us to the final defense of pork, one Madison would certainly endorse. Even if every single pork-barrel project really were a complete waste of federal money, pork still represents a very cheap way to keep our sputtering legislative process from grinding to a halt. In effect, pork is like putting oil in your car engine: it lubricates the parts and keeps friction to a minimum. This is particularly true when you are talking about controversial measures. "Buying off potential coalition members with spending programs they favor is exactly what the Founders not only expected, but practiced," political scientist James Q. Wilson has argued. He has also written: "If you agree with Madison, you believe in pork."

Think of the NAFTA battle in 1993. Contentious to the bitter end, the fate of the agreement ultimately fell on the shoulders of a handful of congressmen, all of whom privately supported it but feared the political backlash if they voted for it. Clinton gave each of them a little pork—for example, a development bank in border states that ostensibly would provide start-up money for entrepreneurs who had lost jobs because of NAFTA. The bank was just another way to pump some federal money into these districts, but that was the whole point. Thanks to that money, NAFTA became politically viable; these lawmakers could tell their constituents, plausibly and truthfully, that there was something in it for their districts.

To take a more current example, just look at BESTEA. U.S. transportation infrastructure is famously inadequate; the Department of Transportation says unsafe roads cause 30 percent of all traffic fatalities. But, when fiscal conservatives questioned the pork in the original BESTEA last year, the measure failed, forcing Congress to pass an emergency extension. This year, a more permanent, six-year version will likely pass, largely because the appearance of a budget surplus has tipped the scales just enough so that the pork seems tolerable. As John W. Ellwood and Eric M. Patashnik wrote in *The Public Interest* several years ago (in what was the best defense of pork in recent memory): "Favoring legislators with small gifts for their districts in order to achieve great things for the nation is an act not of sin but of statesmanship."

Last week, of course, BESTEA's high pork content had fiscal conservatives downright apoplectic. "Frankly, this bill really is a hog," Kasich said. "It is way over the top." But, without the pork, there might be no highway bill at all. As one highway lobbyist told *National Journal* last

year, "The projects are the glue that's going to hold the damn thing together." A former transportation official said: "I've always taken the point of view that every business has some overhead. If that's what it costs to get a significant or a good highway bill, it's worth the price." Kasich would surely be aghast at such logic, but someday he and other fiscal conservatives might find it useful for their own purposes. Remember, they are the ones who say that balancing the budget will likely be impossible without severe and politically risky reforms of entitlements like Medicare. When the time comes to make those tough choices—and they need to pry a few extra votes from the opposition—you can bet they will gladly trade a little pork for *their* greater cause. They might feel guilty about it, but they shouldn't. Pork is good. Pork is virtuous. Pork is the American way.

DISCUSSION QUESTIONS

1. How would you define pork-barrel projects? Are all pork projects contrary to the national interest? How do we distinguish between locally funded projects that are in the national interest and those that are not?
2. As Mayhew argues, members of Congress face strong incentives to serve constituent needs and claim credit for delivering federal dollars. Pork-barrel projects provide the means to do just that. What changes in Congress or the political process might be made to alter legislative behavior, or to change the incentives members of Congress face for securing re-election? Do we want members of Congress to be focused primarily on broad national issues rather than local priorities?

Questions

1. Why is a unitary executive necessary, according to Hamilton? What characteristics does a single individual possess that a body of individuals—Congress, for example—lacks?
 2. Have Hamilton's arguments become stronger or weaker over the past 200 years? Has the modern presidency borne out his views or those of his opponents?
 3. What advantages does a president have in the bargaining process, according to Richard Neustadt? Does he have any significant advantages or disadvantages in dealing with Congress? with the bureaucracy? with the American people?
-

10.1 *Federalist No. 68 (1788)*

Alexander Hamilton

Outline

- I. Explanation of the means chosen for the appointment of the President of the United States.
 - A. The mode of appointment selected—involving the creation of the Electoral College—
 1. Involves the people at large.
 2. Leaves the ultimate choice to those most capable of judging wisely between candidates.
 3. Avoids "tumult and disorder."
 4. Guards against corruption.
 5. Maintains the independence of the chief executive.
 - B. Process results in a "moral certainty" that those selected will be qualified.
-

The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure or which has received the slightest mark of approbation from its opponents. The most plausible of these, who has appeared in print, has even deigned to admit that the election of the President is pretty well guarded. [Hamilton refers to the *Letters of a Federal Farmer*, written by an Antifederalist critic of the Constitution.] I venture somewhat further, and hesitate not to affirm that if the manner of it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages the union of which was to be desired.

It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men chosen by the people for the special purpose, and at the particular conjuncture.

It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation.

It was also peculiarly desirable to afford as little opportunity as possible to tumult and disorder. This evil was not least to be dreaded in the election of a magistrate who was to have so important an agency in the administration of the government as the President of the United States. But the precautions which have been so happily concerted in the system under consideration promise an effectual security against this mischief. The choice of *several* to form an intermediate body of electors will be much less apt to convulse the community with any extraordinary or violent movements than the choice of *one* who was himself to be the final object of the public wishes. And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.

Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this than by raising a creature of their own to the chief magistracy of the Union? But the convention have guarded against all danger of this sort with the most provident and judicious attention. They have not made the appointment of the President to depend on any preexisting bodies of men who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment. And they have excluded from eligibility to this trust all those who from situation might be suspected of too great devotion to the President in office. No senator, representative, or other person holding a place of trust or profit under the United States can be of the number of the electors. Thus without corrupting the body of the people, the immediate agents in the election will at least enter upon the task free from any sinister bias. Their transient existence and their detached situation, already taken notice of, afford a satisfactory prospect of their continuing so, to the conclusion of it. The business of corruption, when it is to embrace so considerable a number of men, requires time as well as means. Nor would it be found easy suddenly to embark them, dispersed as they would be over thirteen States, in any combinations founded upon motives which, though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty.

Another and less important desideratum was that the executive should be independent for his continuance in office on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor

was necessary to the duration of his official consequence. This advantage will also be secured, by making his re-election to depend on a special body of representatives, deputed by the society for the single purpose of making the important choice.

All these advantages will be happily combined in the plan devised by the convention; which is, that the people of each State shall choose a number of persons as electors, equal to the number of senators and representatives of such State in the national government who shall assemble within the State, and vote for some fit person as President. Their votes, thus given, are to be transmitted to the seat of the national government, and the person who may happen to have a majority of the whole number of votes will be the President. But as a majority of the votes might not always happen to center on one man, and as it might be unsafe to permit less than a majority to be conclusive it is provided that, in such a contingency, the House of Representatives shall elect out of the candidates who shall have the five highest number of votes the man who in their opinion may be best qualified for the office.

This process of election affords a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue. And this will be thought no inconsiderable recommendation of the Constitution by those who are able to estimate the share which the executive in every government must necessarily have in its good or ill administration. Though we cannot acquiesce in the political heresy of the poet who says:

For forms of government let fools contest—
That which is best administered is best,—

yet we may safely pronounce that the true test of a good government is its aptitude and tendency to produce a good administration. . . . ■

10.2 *Federalist No. 70 (1788)*

Alexander Hamilton

Outline

- I. The importance and components of strength and energy in the executive branch.
 - A. A strong and energetic executive branch requires unity, duration in office, adequate resources, and sufficient powers.



- II. Defense of a unitary (one-person) executive rather than a council.
- A. Importance of limiting dissent and disagreement with the executive branch.
- B. Importance of being able to fix responsibility within the executive branch.
-

There is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

There can be no need, however, to multiply arguments or examples on this head. A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

The ingredients which constitute energy in the executive are unity; duration; an adequate provision for its support; and competent powers.

The ingredients which constitute safety in the republican sense are a due dependence on the people and a due responsibility.

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justness of their views have declared in favor of a single executive and a numerous legislature. They have, with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand; while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a

much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

• • •

Whenever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide. If they should unfortunately assail the supreme executive magistracy of a country, consisting of a plurality of persons, they might impede or frustrate the most important measures of the government in the most critical emergencies of the state. And what is still worse, they might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy.

Men often oppose a thing merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike. But if they have been consulted, and have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honor, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments. Men of upright, benevolent tempers have too many opportunities of remarking, with horror, to what desperate lengths this disposition is sometimes carried, and how often the great interests of society are sacrificed to the vanity, to the conceit, and to the obstinacy of individuals, who have credit enough to make their passions and their caprices interesting to mankind. Perhaps the question now before the public may, in its consequences, afford melancholy proofs of the effects of this despicable frailty, or rather detestable vice, in the human character.

Upon the principles of a free government, inconveniences from the source just mentioned must necessarily be submitted to in the formation of the legislature; but it is unnecessary, and therefore unwise, to introduce them into the constitution of the executive. It is here too that they may be most pernicious. In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarring of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favorable circumstances palliate or atone for the disadvantages of dissension in the executive department. Here they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the executive which are the most necessary ingredients in its composition—vigor and expedition, and this without any counterbalancing good. In the conduct of war, in which the energy of the executive is the bulwark of the national security, everything would be to be apprehended from its plurality. . . .

123

But one of the weightiest objections to a plurality in the executive, and which lies as much against the last as the first plan is that it tends to conceal faults and destroy responsibility. Responsibility is of two kinds—to censure and to punishment. The first is the more important of the two, especially in an elective office. Men in public trust will much oftener act in such a manner as to render them unworthy of being any longer trusted, than in such a manner as to make them obnoxious to legal punishment. But the multiplication of the executive adds to the difficulty of detection in either case. It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable. . . . ■

CHAPTER 5

The President: From Chief Clerk to Chief Executive

23

“The Power to Persuade” from *Presidential Power*

RICHARD NEUSTADT

*An enduring theme in analyses of the presidency is the gap between what the public expects of the office and the president's actual powers. Neustadt, who wrote the first edition of *Presidential Power* in 1960, offered a new way of looking at the office. Neustadt's main point is that the formal powers of the presidency (the constitutional powers set out in Article II and the statutory powers that Congress grants) are not the most important resource. The president cannot, Neustadt concluded, expect to get his way by command—issuing orders to subordinates and other government officials, with the expectation of immediate and unquestioning compliance. In a system of “separate institutions sharing power,” other political actors have their own independent sources of power and therefore can refuse to comply with presidential orders. Nobody, Neustadt argues, sees things from the president's perspective (or “vantage point”). Legislators, judges, cabinet secretaries, all have their own responsibilities, constituencies, demands of office, resources. Their interests and the president's will often be different. The key to presidential power is the power to persuade—to convince others that they should comply with the president's wishes because doing so is in their interest. Presidents persuade by bargaining: making deals, reaching compromise positions, in other words, the give and take that is part of politics. The question remains, as the following selection points out, whether our method of selecting presidents is appropriate to the job the winner must do.*

The limits on command suggest the structure of our government. The constitutional convention of 1787 is supposed to have created a government of “separated powers.” It did nothing of the sort. Rather, it

created a government of separated institutions *sharing* powers. "I am part of the legislative process," Eisenhower often said in 1959 as a reminder of his veto. Congress, the dispenser of authority and funds, is no less part of the administrative process. Federalism adds another set of separated institutions. The Bill of Rights adds others. Many public purposes can only be achieved by voluntary acts of private institutions; the press, for one, in Douglass Cater's phrase, is a "fourth branch of government." And with the coming of alliances abroad, the separate institutions of a London, or a Bonn, share in the making of American public policy.

What the Constitution separates our political parties do not combine. The parties are themselves composed of separated organizations sharing public authority. The authority consists of nominating powers. Our national parties are confederations of state and local party institutions, with a headquarters that represents the White House, more or less, if the party has a President in office. These confederacies manage presidential nominations. All other public offices depend upon electorates confined within the states. All other nominations are controlled within the states. The President and congressmen who bear one party's label are divided by dependence upon different sets of voters. The differences are sharpest at the stage of nomination. The White House has too small a share in nominating congressmen, and Congress has too little weight in nominating Presidents for party to erase their constitutional separation. Party links are stronger than is frequently supposed, but nominating processes assure the separation.

The separateness of institutions and the sharing of authority prescribe the terms on which a President persuades. When one man shares authority with another, but does not gain or lose his job upon the other's whim, his willingness to act upon the urging of the other turns on whether he conceives the action right for him. The essence of a President's persuasive task is to convince such men that what the White House wants of them is what they ought to do for their sake and on their authority.

Persuasive power, thus defined, amounts to more than charm or reasoned argument. These have their uses for a President, but these are not the whole of his resources. For the men he would induce to do what he wants done on their own responsibility will need or fear some acts by him on his responsibility. If they share his authority, he has some share in theirs. Presidential "powers" may be inconclusive when a President commands, but always remain relevant as he persuades. The status and authority inherent in his office reinforce his logic and his charm.

* * *

A President's authority and status give him great advantages in dealing with the men he would persuade. Each "power" is a vantage point for him in the degree that other men have use for his authority. From the veto to appointments, from publicity to budgeting, and so down a

long list, the White House now controls the most encompassing array of vantage points in the American political system. With hardly an exception, the men who share in governing this country are aware that at some time, in some degree, the doing of *their* jobs, the furthering of *their* ambitions, may depend upon the President of the United States. Their need for presidential action, or their fear of it, is bound to be recurrent if not actually continuous. Their need or fear is his advantage.

A President's advantages are greater than mere listing of his "powers" might suggest. The men with whom he deals must deal with him until the last day of his term. Because they have continuing relationships with him, his future, while it lasts, supports his present influence. Even though there is no need or fear of him today, what he could do tomorrow may supply today's advantage. Continuing relationships may convert any "power," any aspect of his status, into vantage points in almost any case. When he induces other men to do what he wants done, a President can trade on their dependence now *and* later.

The President's advantages are checked by the advantages of others. Continuing relationships will pull in both directions. These are relationships of mutual dependence. A President depends upon the men he would persuade; he has to reckon with his need or fear of them. They too will possess status, or authority, or both, else they would be of little use to him. Their vantage points confront his own; their power tempers his.

* * *

The power to persuade is the power to bargain. Status and authority yield bargaining advantages. But in a government of "separated institutions sharing powers," they yield them to all sides. With the array of vantage points at his disposal, a President may be far more persuasive than his logic or his charm could make him. But outcomes are not guaranteed by his advantages. There remain the counter pressures those whom he would influence can bring to bear on him from vantage points at their disposal. Command has limited utility; persuasion becomes give-and-take. It is well that the White House holds the vantage points it does. In such a business any President may need them all—and more.

* * *

This view of power as akin to bargaining is one we commonly accept in the sphere of congressional relations. Every textbook states and every legislative session demonstrates that save in times like the extraordinary Hundred Days of 1933—times virtually ruled out by definition at mid-century—a President will often be unable to obtain congressional action on his terms or even to halt action he opposes. The reverse is equally accepted: Congress often is frustrated by the President. Their formal powers are so intertwined that neither will accomplish very much, for very long, without the acquiescence of the other. By the same token,

though, what one demands the other can resist. The stage is set for that great game, much like collective bargaining, in which each seeks to profit from the other's needs and fears. It is a game played catch-as-catch-can, case by case. And everybody knows the game, observers and participants alike.

* * *

Like our governmental structure as a whole, the executive establishment consists of separated institutions sharing powers. The President heads one of these; Cabinet officers, agency administrators, and military commanders head others. Below the departmental level, virtually independent bureau chiefs head many more. Under mid-century conditions, Federal operations spill across dividing lines on organization charts; almost every policy entangles many agencies; almost every program calls for interagency collaboration. Everything somehow involves the President. But operating agencies owe their existence least of all to one another—and only in some part to him. Each has a separate statutory base; each has its statutes to administer; each deals with a different set of subcommittees at the Capitol. Each has its own peculiar set of clients, friends, and enemies outside the formal government. Each has a different set of specialized careerists inside its own bailiwick. Our Constitution gives the President the "take-care" clause and the appointive power. Our statutes give him central budgeting and a degree of personnel control. All agency administrators are responsible to him. But they *also* are responsible to Congress, to their clients, to their staffs, and to themselves. In short, they have five masters. Only after all of those do they owe any loyalty to each other.

"The members of the Cabinet," Charles G. Dawes used to remark, "are a President's natural enemies." Dawes had been Harding's Budget Director, Coolidge's Vice-President, and Hoover's Ambassador to London; he also had been General Pershing's chief assistant for supply in the First World War. The words are highly colored, but Dawes knew whereof he spoke. The men who have to serve so many masters cannot help but be somewhat the "enemy" of any one of them. By the same token, any master wanting service is in some degree the "enemy" of such a servant. A President is likely to want loyal support but not to relish trouble on his doorstep. Yet the more his Cabinet members cleave to him, the more they may need help from him in fending off the wrath of rival masters. Help, though, is synonymous with trouble. Many a Cabinet officer, with loyalty ill-rewarded by his lights and help withheld, has come to view the White House as innately hostile to department heads. Dawes's dictum can be turned around.

* * *

The more an officeholder's status and his "powers" stem from sources independent of the President, the stronger will be his potential pressure

on the President. Department heads in general have more bargaining power than do most members of the White House staff; but bureau chiefs may have still more, and specialists at upper levels of established career services may have almost unlimited reserves of the enormous power which consists of sitting still. As Franklin Roosevelt once remarked:

The Treasury is so large and far-flung and ingrained in its practices that I find it almost impossible to get the action and results I want—even with Henry [Morgenthau] there. But the Treasury is not to be compared with the State Department. You should go through the experience of trying to get any changes in the thinking, policy, and action of the career diplomats and then you'd know what a real problem was. But the Treasury and the State Department put together are nothing compared with the Na-a-vy. The admirals are really something to cope with—and I should know. To change anything in the Na-a-vy is like punching a feather bed. You punch it with your right and you punch it with your left until you are finally exhausted, and then you find the damn bed just as it was before you started punching.¹

* * *

There is a widely held belief in the United States that were it not for folly or for knavery, a reasonable President would need no power other than the logic of his argument. No less a personage than Eisenhower has subscribed to that belief in many a campaign speech and press-conference remark. But faulty reasoning and bad intentions do not cause all quarrels with Presidents. The best of reasoning and of intent cannot compose them all. For in the first place, what the President wants will rarely seem a trifle to the men he wants it from. And in the second place, they will be bound to judge it by the standard of their own responsibilities, not his. However logical his argument according to his lights, their judgment may not bring them to his view.

The men who share in governing this country frequently appear to act as though they were in business for themselves. So, in a real though not entire sense, they are and have to be. When Truman and MacArthur fell to quarreling, for example, the stakes were no less than the substance of American foreign policy, the risks of greater war or military stalemate, the prerogatives of Presidents and field commanders, the pride of a pro-consul and his place in history. Intertwined, inevitably, were other stakes, as well: political stakes for men and factions of both parties; power stakes for interest groups with which they were or wished to be affiliated. And every stake was raised by the apparent discontent in the American public mood. There is no reason to suppose that in such circumstances men of large but differing responsibilities will see all things through the same glasses. On the contrary, it is to be expected that their views of what ought to be done and what they then should do will vary with the differing perspectives their particular responsibilities evoke. Since their duties are not vested in a "team" or a "collegium" but in themselves, as individuals, one must expect that they will see things *for* themselves. Moreover, when they are responsible to many masters and

when an event or policy turns loyalty against loyalty—a day by day occurrence in the nature of the case—one must assume that those who have the duties to perform will choose the terms of reconciliation. This is the essence of their personal responsibility. When their own duties pull in opposite directions, who else but they can choose what they will do?

* * *

Outside the Executive Branch the situation is the same, except that loyalty to the President may often matter *less*. . . . And when one comes to congressmen who can do nothing for themselves (or their constituents) save as they are elected, term by term, in districts and through party structures *differing* from those on which a President depends, the case is very clear. An able Eisenhower aide with long congressional experience remarked to me in 1958: "The people on the Hill don't do what they might like to do, they do what they think they *have* to do in their own interest as *they* see it. . . ." This states the case precisely.

The essence of a President's persuasive task with congressmen and everybody else, is to *induce them to believe that what he wants of them is what their own appraisal of their own responsibilities requires them to do in their interest, not his*. Because men may differ in their views on public policy, because differences in outlook stem from differences in duty—duty to one's office, one's constituents, oneself—that task is bound to be more like collective bargaining than like a reasoned argument among philosopher kings. Overtly or implicitly, hard bargaining has characterized all illustrations offered up to now. This is the reason why: persuasion deals in the coin of self-interest with men who have some freedom to reject what they find counterfeit.

Let me introduce a case . . . : the European Recovery Program of 1948, the so-called Marshall Plan. This is perhaps the greatest exercise in policy *agreement* since the cold war began. When the then Secretary of State, George Catlett Marshall, spoke at the Harvard commencement in June of 1947, he launched one of the most creative, most imaginative ventures in the history of American foreign relations. What makes this policy most notable for present purposes, however, is that it became effective upon action by the 80th Congress, at the behest of Harry Truman, in the election year of 1948.

Eight months before Marshall spoke at Harvard, the Democrats had lost control of both Houses of Congress for the first time in fourteen years. Truman, whom the Secretary represented, had just finished his second troubled year as President-by-succession. Truman was regarded with so little warmth in his own party that in 1946 he had been urged *not* to participate in the congressional campaign. At the opening of Congress in January 1947, Senator Robert A. Taft, "Mr. Republican," had somewhat the attitude of a President-elect. This was a vision widely shared in Washington, with Truman relegated, thereby, to the role of

caretaker-on-term. Moreover, within just two weeks of Marshall's commencement address, Truman was to veto two prized accomplishments of Taft's congressional majority: the Taft-Hartley Act and tax reduction. Yet scarcely ten months later the Marshall Plan was under way on terms to satisfy its sponsors, its authorization completed, its first-year funds in sight, its administering agency in being: all managed by as thorough a display of executive-congressional cooperation as any we have seen since the Second World War. For any President at any time this would have been a great accomplishment. In years before mid-century it would have been enough to make the future reputation of his term. And for a Truman, at this time, enactment of the Marshall Plan appears almost miraculous.

How was the miracle accomplished? How did a President so situated bring it off? In answer, the first thing to note is that he did not do it by himself. Truman had help of a sort no less extraordinary than the outcome. Although each stands for something more complex, the names of Marshall, Vandenberg, . . . Bevin, Stalin, tell the story of that help.

In 1947, two years after V-J Day, General Marshall was something more than Secretary of State. He was a man venerated by the President as "the greatest living American," literally an embodiment of Truman's ideals. He was honored at the Pentagon as an architect of victory. He was thoroughly respected by the Secretary of the Navy, James V. Forrestal, who that year became the first Secretary of Defense. On Capitol Hill Marshall had an enormous fund of respect stemming from his war record as Army Chief of Staff, and in the country generally no officer had come out of the war with a higher reputation for judgment, intellect, and probity. Besides, as Secretary of State, he had behind him the first generation of matured foreign service officers produced by the reforms of the 1920's, and mingled with them, in the departmental service, were some of the ablest of the men drawn by the war from private life to Washington.

* * *

Taken together, these are exceptional resources for a Secretary of State. In the circumstances, they were quite as necessary as they obviously are relevant. The Marshall Plan was launched by a "lame duck" Administration "scheduled" to leave office in eighteen months. Marshall's program faced a congressional leadership traditionally isolationist and currently intent upon economy. European aid was viewed with envy by a Pentagon distressed and virtually disarmed through budget cuts, and by domestic agencies intent on enlarged welfare programs. It was not viewed with liking by a Treasury intent on budget surpluses. The plan had need of every asset that could be extracted from the personal position of its nominal author and from the skills of his assistants.

Without the equally remarkable position of the senior Senator from

Michigan, Arthur H. Vandenberg, it is hard to see how Marshall's assets could have been enough. Vandenberg was chairman of the Senate Foreign Relations Committee. Actually, he was much more than that. Twenty years a senator, he was the senior member of his party in the Chamber. Assiduously cultivated by F.D.R. and Truman, he was a chief Republican proponent of "bipartisanship" in foreign policy, and consciously conceived himself its living symbol to his party, to the country, and abroad. Moreover, by informal but entirely operative agreement with his colleague Taft, Vandenberg held the acknowledged lead among Senate Republicans in the whole field of international affairs. This acknowledgement meant more in 1947 than it might have meant at any other time. With confidence in the advent of a Republican administration two years hence, most of the gentlemen were in a mood to be responsive and responsible. The war was over, Roosevelt dead, Truman a caretaker, theirs the trust. That the Senator from Michigan saw matters in this light, his diaries make clear. And this was not the outlook from the Senate side alone; the attitudes of House Republicans associated with the Herter Committee and its tours abroad suggest the same mood of responsibility. Vandenberg was not the only source of help on Capitol Hill. But relatively speaking, his position there was as exceptional as Marshall's was downtown.

* * *

At Harvard, Marshall had voiced an idea in general terms. That this was turned into a hard program susceptible of presentation and support is due, in major part, to Ernest Bevin, the British Foreign Secretary. He well deserves the credit he has sometimes been assigned as, in effect, co-author of the Marshall Plan. For Bevin seized on Marshall's Harvard speech and organized a European response with promptness and concreteness beyond the State Department's expectations. What had been virtually a trial balloon to test reactions on both sides of the Atlantic was hailed in London as an invitation to the Europeans to send Washington a bill of particulars. This they promptly organized to do, and the American Administration then organized in turn for its reception without further argument internally about the pros and cons of issuing the "invitation" in the first place. But for Bevin there might have been trouble from the Secretary of the Treasury and others besides.

If Bevin's help was useful at that early stage, Stalin's was vital from first to last. In a mood of self-deprecation Truman once remarked that without Moscow's "crazy" moves "we would never have had our foreign policy . . . we never could have got a thing from Congress." George Kenan, among others, had deplored the anti-Soviet overtone of the case made for the Marshall Plan in Congress and the country, but there is no doubt that this clinched the argument for many segments of American

opinion. There also is no doubt that Moscow made the crucial contributions to the case.

* * *

The crucial thing to note about this case is that despite compatibility of views on public policy, Truman got no help he did not pay for (except Stalin's). Bevin scarcely could have seized on Marshall's words had Marshall not been plainly backed by Truman. Marshall's interest would not have comported with the exploitation of his prestige by a President who undercut him openly, or subtly, or even inadvertently, at any point. Vandenberg, presumably, could not have backed proposals by a White House which begrudged him deference and access gratifying to his fellow-partisans (and satisfying to himself). Prominent Republicans in private life would not have found it easy to promote a cause identified with Truman's claims on 1948—and neither would the prominent New Dealers then engaged in searching for a substitute.

Truman paid the price required for their services. So far as the record shows, the White House did not falter once in firm support for Marshall and the Marshall Plan. Truman backed his Secretary's gamble on an invitation to all Europe. He made the plan his own in a well-timed address to the Canadians. He lost no opportunity to widen the involvement of his own official family in the cause. Averell Harriman the Secretary of Commerce, Julius Krug the Secretary of the Interior, Edwin Nourse the Economic Council Chairman, James Webb the Director of the Budget—all were made responsible for studies and reports contributing directly to the legislative presentation. Thus these men were committed in advance. Besides, the President continually emphasized to everyone in reach that he did not have doubts, did not desire complications and would foreclose all he could. Reportedly, his emphasis was felt at the Treasury, with good effect. And Truman was at special pains to smooth the way for Vandenberg. The Senator insisted on "no politics" from the Administration side; there was none. He thought a survey of American resources and capacity essential; he got it in the Krug and Harriman reports. Vandenberg expected advance consultation; he received it, step by step, in frequent meetings with the President and weekly conferences with Marshall. He asked for an effective liaison between Congress and agencies concerned; Lovett and others gave him what he wanted. When the Senator decided on the need to change financing and administrative features of the legislation, Truman disregarded Budget Bureau grumbling and acquiesced with grace. When, finally, Vandenberg desired a Republican to head the new administering agency, his candidate, Paul Hoffman, was appointed despite the President's own preference for another. In all of these ways Truman employed the sparse advantages his "powers" and his status then accorded him to gain the sort of help he had to have.

* * *

Had Truman lacked the personal advantages his "powers" and his status gave him, or if he had been maladroit in using them, there probably would not have been a massive European aid program in 1948. . . . The President's own share in this accomplishment was vital. He made his contribution by exploiting his advantages. Truman, in effect, lent Marshall and the rest the perquisites and status of his office. In return they lent him their prestige and their own influence. The transfer multiplied *his* influence despite his limited authority in form and lack of strength politically. Without the wherewithal to make this bargain, Truman could not have contributed to European aid.

* * *

DISCUSSION QUESTIONS

1. Using recent presidents (Clinton, Bush, Reagan), identify and discuss some examples of Neustadt's argument that presidents cannot get their way by "command," and that they must bargain to get what they want.
2. Is Neustadt right? Can presidents ever rely on "command?"

NOTES

1. Reprinted from Marriner S. Eccles, *Beckoning Frontiers* (New York: Knopf, 1951), p. 336.

THE DEBATE: THE REACH OF PRESIDENTIAL POWER

Just how powerful is the president? Have the fears of some of the Framers—that the president would degrade into an imperial despot—been realized, or does the separation of powers effectively check the President's ability to misuse the powers of office? We offer two perspectives here. In his chapter "Perspectives on the Presidency," Charles O. Jones argues that we should view the president as only one of the players in American government; the presidency exists only as one part of a set of institutions where responsibility is diffused, where the bulk of political activity takes place independent of the presidency, and where the different players and institutions learn to adjust to the others. Consider, for example, that the Republican 104th Congress and President Clinton managed to reach compromises on a number of important issues despite early predictions that they would never agree on anything.

Michael Lind, in contrast, believes that the presidents have far more power than they are given credit for, that the presidential office has grown to the point where it constitutes a "fourth branch" of government, and that the apparent weakness of recent presidents is an illusion. According to Lind, presidents remain supreme in foreign affairs (George Bush claimed the authority to carry out the Persian Gulf War with or without congressional authorization), they can interpret statutes according to their own whim, and they can rely on an enlarged staff that has grown into a "fourth branch" of government. Lind concludes that the apparent weakness of recent presidents is due more to transient political forces than any inherent institutional features; in fact, he believes that the imperial presidency "is merely waiting to be powered up and taken out of the hangar."

26

"Perspectives on the Presidency" From *The Presidency in a Separated System*

CHARLES O. JONES

The president is not the presidency. The presidency is not the government. Ours is not a presidential system.

I begin with these starkly negative themes as partial correctives to the more popular interpretations of the United States government as

presidency-centered. Presidents themselves learn these refrains on the job, if they do not know them before. President Lyndon B. Johnson, who had impressive political advantages during the early years of his administration, reflected later on what was required to realize the potentialities of the office:

Every President has to establish with the various sectors of the country what I call "the right to govern." Just being elected to the office does not guarantee him that right. Every President has to inspire the confidence of the people. Every President has to become a leader, and to be a leader he must attract people who are willing to follow him. Every President has to develop a moral underpinning to his power, or he soon discovers that he has no power at all.¹

To exercise influence, presidents must learn the setting within which it has bearing. [Then] President-elect Bill Clinton recognized the complexities of translating campaign promises into a legislative program during a news conference shortly after his election in 1992:

It's all very well to say you want an investment tax credit, and quite another thing to make the 15 decisions that have to be made to shape the exact bill you want.

It's all very well to say . . . that the working poor in this country . . . should be lifted out of poverty by increasing the refundable income tax credit for the working poor, and another thing to answer the five or six questions that define how you get that done.²

For presidents, new or experienced, to recognize the limitations of office is commendable. Convincing others to do so is a challenge. Presidents become convenient labels for marking historical time: the Johnson years, the Nixon years, the Reagan years. Media coverage naturally focuses more on the president: there is just one at a time, executive organization is oriented in pyramidal fashion toward the Oval Office, Congress is too diffuse an institution to report on as such, and the Supreme Court leads primarily by indirection. Public interest, too, is directed toward the White House as a symbol of the government. As a result, expectations of a president often far exceed the individual's personal, political, institutional, or constitutional capacities for achievement. Performance seldom matches promise. Presidents who understand how it all works resist the inflated image of power born of high-stakes elections and seek to lower expectations. Politically savvy presidents know instinctively that it is precisely at the moment of great achievement that they must prepare themselves for the setback that will surely follow.

Focusing exclusively on the presidency can lead to a seriously distorted picture of how the national government does its work. The plain fact is that the United States does not have a presidential system. It has a *separated* system. It is odd that it is so commonly thought of as otherwise since schoolchildren learn about the separation of powers and checks and balances. As the author of *Federalist* 51 wrote, "Ambition must be made to counteract ambition." No one, least of all presidents,

the Founders reasoned, can be entrusted with excessive authority. Human nature, being what it is, requires "auxiliary precautions" in the form of competing legitimacies.

The acceptance that this is a separated, not a presidential, system, prepares one to appraise how politics works, not to be simply reproachful and reformist. Thus, for example, divided (or split-party) government is accepted as a potential or even likely outcome of a separated system, rooted as it is in the separation of elections. Failure to acknowledge the authenticity of the split-party condition leaves one with little to study and much to reform in the post-World War II period, when the government has been divided more than 60 percent of the time.

Simply put, the role of the president in this separated system of governing varies substantially, depending on his resources, advantages, and strategic position. My strong interest is in how presidents place themselves in an ongoing government and are fitted in by other participants, notably those on Capitol Hill. The central purpose of this book is to explore these "fittings." In pursuing this interest, I have found little value in the presidency-centered, party government perspective, as I will explain below. As a substitute, I propose a separationist, diffused-responsibility perspective that I find more suited to the constitutional, institutional, political, and policy conditions associated with the American system of governing.

* * *

The Dominant Perspective

The presidency-centered perspective is consistent with a dominant and well-developed perspective that has been highly influential in evaluating the American political system. The perspective is that of party government, typically one led by a strong or aggressive president. Those advocating this perspective prefer a system in which political parties are stronger than they normally can be in a system of separated elections.

* * *

The party government perspective is best summarized in the recommendations made in 1946 by the Committee on Political Parties of the American Political Science Association.

The party system that is needed must be democratic, responsible and effective. . . .

An effective party system requires, first, that the parties are able to bring forth programs to which they commit themselves and, second, that the parties possess sufficient internal cohesion to carry out these programs. . . .

The fundamental requirement of such accountability is a two-party system in which the opposition party acts as the critic of the party in power, devel-

oping, defining, and presenting the policy alternatives which are necessary for a true choice in reaching public decisions.³

Note the language in this summary: party in power, opposition party, policy alternatives for choice, accountability, internal cohesion, programs to which parties commit themselves. As a whole, it forms a test that a separated system is bound to fail.

I know of very few contemporary advocates of the two-party responsibility model. But I know many analysts who rely on its criteria when judging the political system. One sees this reliance at work when reviewing how elections are interpreted and presidents are evaluated. By this standard, the good campaign and election have the following characteristics:

- Publicly visible issues that are debated by the candidates during the campaign.
- Clear differences between the candidates on the issues, preferably deriving from ideology.
- A substantial victory for the winning candidate, thus demonstrating public support for one set of issue positions.
- A party win accompanying the victory for the president, notably an increase in the presidential party's share of congressional seats and statehouses so that the president's win can be said to have had an impact on other races (the coattail effect).
- A greater than expected win for the victorious party, preferably at both ends of Pennsylvania Avenue.
- A postelection declaration of support and unity from the congressional leaders of the president's party.

The good president, by this perspective, is one who makes government work, one who has a program and uses his resources to get it enacted. The good president is an activist: he sets the agenda, is attentive to the progress being made, and willingly accepts responsibility for what happens. He can behave in this way because he has demonstrable support.

It is not in the least surprising that the real outcomes of separated elections frustrate those who prefer responsible party government. Even a cursory reading of the Constitution suggests that these demanding tests will be met only by coincidence. Even an election that gives one party control of the White House and both houses of Congress in no way guarantees a unified or responsible party outcome. And even when a president and his congressional party leaders appear to agree on policy priorities, the situation may change dramatically following midterm elections. Understandably, advocates of party government are led to propose constitutional reform.

* * *

An Alternative Perspective

The alternative perspective for understanding American national politics is bound to be anathema to party responsibility advocates. By the rendition promoted here, responsibility is not focused, it is diffused. Representation is not pure and unidirectional; it is mixed, diluted, and multidirectional. Further, the tracking of policy from inception to implementation discourages the most devoted advocate of responsibility theories. In a system of diffused responsibility, credit will be taken and blame will be avoided by both institutions and both parties. For the mature government (one that has achieved substantial involvement in social and economic life), much of the agenda will be self-generating, that is, resulting from programs already on the books. Thus the desire to propose new programs is often frustrated by demands to sustain existing programs, and substantial debt will constrain both.

Additionally there is the matter of who *should* be held accountable for what and when. This is not a novel issue by any means. It is a part of the common rhetoric of split-party government. Are the Democrats responsible for how Medicare has worked because it was a part of Lyndon Johnson's Great Society? Or are the Republicans responsible because their presidents accepted, administered, and revised the program? Is President Carter responsible for creating a Department of Energy or President Reagan responsible for failing to abolish it, or both? The partisan rhetoric on deficits continues to blame the Democrats for supporting spending programs and the Republicans for cutting taxes. It is noteworthy that this level of debate fails to treat more fundamental issues, such as the constitutional roadblocks to defining responsibility. In preventing the tyranny of the majority, the founders also made it difficult to specify accountability.

Diffusion of responsibility, then, is not only a likely result of a separated system but may also be a fair outcome. From what was said above, one has to doubt how reasonable it is to hold one institution or one party accountable for a program that has grown incrementally through decades of single- and split-party control. Yet reforming a government program is bound to be an occasion for holding one or the other of the branches accountable for wrongs being righted. If, however, politics allows crossing the partisan threshold to place both parties on the same side, then agreements may be reached that will permit blame avoidance, credit taking, and, potentially, significant policy change. This is not to say that both sides agree from the start about what to do, in a cabal devoted to irresponsibility (though that process is not unknown). Rather it is to suggest that diffusion of responsibility may permit policy reform that would have been much less likely if one party had to absorb all of the criticism for past performance or blame should the reforms fail when implemented.

Institutional competition is an expected outcome of the constitutional arrangements that facilitate mixed representation and variable electoral horizons. In recent decades this competition has been reinforced by Republicans settling into the White House, the Democrats comfortably occupying the House of Representatives, and, in very recent times, both parties hotly contending for majority status in the Senate. Bargains struck under these conditions have the effect of perpetuating split control by denying opposition candidates (Democratic presidential challengers, Republican congressional challengers) both the issues upon which to campaign and the means for defining accountability.

The participants in this system of mixed representation and diffused responsibility naturally accommodate their political surroundings. Put otherwise, congressional Democrats and presidential Republicans learn how to do their work. Not only does each side adjust to its political circumstances, but both may also be expected to provide themselves with the resources to participate meaningfully in policy politics.

Much of the above suggests that the political and policy strategies of presidents in dealing with Congress will depend on the advantages they have available at any one time. One cannot employ a constant model of the activist president leading a party government. Conditions may encourage the president to work at the margins of president-congressional interaction (for example, where he judges that he has an advantage, as with foreign and defense issues). He may allow members of Congress to take policy initiatives, hanging back to see how the issue develops. He may certify an issue as important, propose a program to satisfy certain group demands, but fail to expend the political capital necessary to get the program enacted. The lame-duck president requires clearer explanation. The last months and years of a two-term administration may be one of congressional initiative with presidential response. The point is that having been relieved of testing the system for party responsibility, one can proceed to analyze how presidents perform under variable political and policy conditions.

* * *

In a separated system of diffused responsibility, these are the expectations:

- Presidents will enter the White House with variable personal, political, and policy advantages or resources. Presidents are not equally good at comprehending their advantages or identifying how these advantages may work best for purposes of influencing the rest of the government.
- White House and cabinet organization will be quite personal in nature, reflecting the president's assessment of strengths and weaknesses, the challenges the president faces in fitting into the ongoing government, and the political and policy changes that occur during the term of of-

White House by Newt Gingrich's* Republican Congress foreshadows what promises to be the new pattern. Meanwhile, Congress has become bloated and arrogant, swelling the ranks of its own staff while encroaching on the constitutional prerogatives of the White House. Congressional supremacy would be a disaster, particularly in foreign affairs. We cannot have 535 commanders in chief.

This tale of the decline of the presidency and the rise of Congress is the emerging conventional wisdom in Washington. It is familiar, widely believed—and wrong. In fact, the relative power of Bill Clinton and Newt Gingrich says more about the political abilities of those individual men during a passing moment in national life than about the relative legitimacy and effectiveness of the modern presidency and Congress. Congress actually continues to lose the long-term battle for legitimacy with the presidency, while the imperial presidency, thought to have perished during Watergate, is alive and well, having been quietly rehabilitated by Carter, Reagan and Bush.

And Clinton? The weakness of the Clinton administration is real. But that weakness is the result not of long-term trends but of a peculiar conjunction of politics and personality. Politically, a Democratic Party reduced to minority status and split into warring factions is facing a new Republican congressional majority intent, fleetingly, on electing a united Republican government in 1996. Personally, a president with no strong convictions confronts a speaker of the House who is a zealot.

When these patterns of politics and personality inevitably change, it will become clear that the presidency is still on top. Newt Gingrich, especially, does not represent traditional congressional power. The authority of the major speakers of the past was based on their control of their parties and their mastery of the House as an institution. Republican Joseph “Czar” Cannon, speaker during the 1900s, and Democrat Sam Rayburn, speaker during the 1940s and ‘50s, could take for granted enduring, parallel party and committee power structures in the House. Gingrich, by contrast, has spent his congressional career in the fluid environment of the post-Watergate House. He is a speaker like none before.

In the 1970s, congressional reformers weakened the principle of seniority that had made possible the reign of powerful, often Southern, committee chairmen for most of the century. During the same period, the parties experienced a general decay: boss-dominated state and local

NOTES

- 1. Lyndon Baines Johnson, *The Vantage Point: Perspectives on the Presidency, 1963-1969* (New York: Holt, Rinehart and Winston, 1971), p. 18.
- 2. Ruth Marcus, “In Transition Twilight Zone, Clinton’s Every Word Scrutinized,” *Washington Post*, November 22, 1992, p. A1.
- 3. American Political Science Association, *Toward a More Responsible Two-Party System* (New York: Rinehart, 1950), pp. 1-2.

“The Out-of-Control Presidency”

MICHAEL LIND

The president is shrinking. The institution of the presidency, magnified by half a century of world war and cold war, is rapidly diminishing in terms of both power and respect. The eclipse of Bill Clinton’s

* [Following his selection as Speaker of the House in early 1995, Gingrich moved quickly to centralize power and assumed an unusual degree of control over committee assignments, the legislative agenda, and House procedures. However, his tight control backfired when the public blamed the Republicans for the budget stalemate in 1995 (when congressional Republicans clashed with President Clinton over budgetary priorities). In 1998, Gingrich insisted on making impeachment a major theme for the midterm elections, and when Republicans lost seats in the house (the first time in decades that the president’s party picked up seats in a midterm election), Gingrich opted to step down as Speaker and resign his seat in the House in the face of a collapse of rank-and-file confidence in his leadership.]

134

party machines gave way to today's ideological factions, interest groups and media machines.

In this kaleidoscopic swirl, a strong speaker cannot rely on an established order; he has to improvise his own. Gingrich has done so, borrowing the techniques not of historic speakers of the House but of contemporary presidents. Gingrich resembles a president, for example, in that his formal party organization is but one instrument of his power. The others are his former personal patronage machine (GOPAC) that funds other members of Congress, his own corporate-funded think tank (the Progress and Freedom Foundation), extragovernmental conservative pressure groups and, not least, the media industries he manipulates so well. To the extent that Gingrich has predecessors in Congress, they are entrepreneurial types who have set up their own personally based organizations, such as the Hollywood liberal network of [Representatives] Henry Waxman and Howard Berman and [Senator] Jesse Helms's ideological-conservative organization in North Carolina.

Gingrich has also adopted the sound-bite techniques of modern presidents and co-opted the presidential style in the 1994 congressional campaign, using the Contract with America in the manner of a presidential platform and, after victory, claiming a "mandate" from the people. (The mandate theory is implausible enough when presidents invoke it—only nineteen presidents have been elected with more than 50 percent of the vote. It is utterly absurd when applied to Congress, since a congressional majority can result from a shift of a few seats, in a few regions, and may say little or nothing about the national mood.)

That the speaker has been able to jury-rig a personal power base by borrowing the techniques of the plebiscitary presidency and maverick congressional ideologues testifies to the institutional weaknesses, not the strengths, of Congress. Indeed, the rise of Gingrich is a sign of the fall of Congress. Even in the unlikely event that Gingrich is followed by other Bonapartist speakers, the prominence of the speaker will likely prove to be temporary. A tribune-speaker like Gingrich would be no match for a tribune-president like Reagan.

* * *

The election of a Republican president, more than anything else, would show how illusory the apparent resurgence of Congress is. Republican or Democrat, the next president will be handed the Nixonian imperial presidency, with most of its powers intact and with a few new prerogatives added.

In foreign policy, the next president would discover that, like every president since Truman, he can wage war at will, without consulting Congress. Though he might consent to a congressional vote as a matter of public relations (as Bush did before the Gulf war), he is more likely to invoke his supposed "inherent" authority as commander-in-chief. If

necessary, his aides will concoct legalistic rationalizations, citing dangers to U.S. citizens (Grenada, Panama), authorization by the United Nations (Somalia, Haiti), NATO treaty obligations (Bosnia) or anti-terrorism (Libya). Whether a liberal or a conservative, the next president will dismiss the War Powers Resolution as unconstitutional.

Nor is de facto presidential supremacy in foreign affairs limited to war-making, the next president will discover. Bush and Clinton will have bequeathed an important technique for ramming economic treaties through Congress with little debate: fast-track legislation, which limits the time allowed for debate and forbids amendments. The Senate, which the Founders wanted to have weigh treaty commitments deliberately, was granted a mere twenty hours to consider the treaty that committed the United States to the jurisdiction of the World Trade Organization (WTO). Perhaps the next president can insist that it be limited even further—to, say, half an hour or fifteen minutes.

In the domestic arena, the next president will find even greater enhancements of his prerogatives. Thanks to Jimmy Carter, who reformed the Senior Executive Service to give the White House more control over career bureaucrats, and Ronald Reagan, who politicized the upper levels of the executive branch to an unprecedented degree, the next president will find it easy to stack government with his spoilsmen or reward party bureaucrats. And he can thank George Bush for a technique that enhances presidential prerogative even further—signing laws while announcing he will not obey them.

Bush engaged in the greatest institutional power grab of any president since Nixon. In 1991 Bush, delivering a commencement address at Princeton, said: "[O]n many occasions during my presidency, I have stated that statutory provisions that violate the Constitution have no binding legal force." As Charles Tiefer points out in the *Semi-Sovereign Presidency*, Bush used "signing statements"—statements accompanying his signing of a bill, during which he announced he would not enforce this or that provision—to exercise an unconstitutional line-item veto. . . . In one such instance, when Congress amended the Clean Air Act in 1990 to permit lawsuits by citizen groups against companies that had violated the act, Bush used a signing statement to declare, on supposed "constitutional grounds," that the executive branch would continue to act as though such citizen lawsuits were prohibited—nullifying the intent of Congress. Ironically, the "take care" clause of the Constitution was intended to compel the president to enforce laws he disapproved of (often, Colonial governors had refused to enforce parts of legislation passed by Colonial legislatures).

* * *

Yet another new instrument of arbitrary presidential power is the "czar." The institution of presidential commissars with vague, sweeping charges

that overlap with or supersede the powers of department heads is utterly alien to the American constitutional tradition. Most famous is the celebrated position of "drug czar," . . . which arrogates duties that were previously handled perfectly adequately by agencies of Justice and other departments. Similarly, Vice President Dan Quayle acted as a "czar" as the head of Bush's Council on Competitiveness, designed to circumvent Cabinet heads and Congress in regulatory matters.

The White House staff that has ballooned since World War II seems close to becoming an extraconstitutional "fourth branch" of government. For obvious reasons, presidents have preferred to govern through their staffers, most of whom need not be confirmed by the Senate and many of whom are young and pliant, rather than deal with the heads of Cabinet departments and independent agencies, experienced people who are less likely to be mere tools of the president's will. Nor is it any accident that the major presidential scandals of the past generation—Watergate and Iran-contra—have involved attempts by shadowy and scheming courtiers of law-breaking presidents to circumvent or suborn the older, established executive departments. Every time the high-handed actions of White House courtiers drag a president into scandal, Congress, the press and the public denounce the courtiers—Nixon's plumbers, Ollie North—or the president and then, under a new president, sigh with relief: the system worked. That future presidents will almost certainly be tempted to use their White House staffers as Nixon and Reagan did is ignored.

The imperial presidency, then, is intact, merely waiting to be powered up and taken out of the hangar. If today's Congress has its way, the presidency will become even more imperial. Having captured Congress after half a century, the Republicans are hastening to give away the powers of the branch they control.

Some of these powers are formal, such as the line-item veto. States whose governors have the line-item veto don't balance their budgets any better than states without it. A line-item veto simply shifts the power to protect pork from a legislature to an executive. Giving the president the line-item veto would not balance the budget; it would merely permit the president to zero out the bounties of his enemies while keeping bounties for his allies. It would also wreck the constitutional design, which intended the branch closest to the people to have the last word on spending the people's money.

Other reforms backed by Republicans in Congress would weaken their institution indirectly. Term limits would reduce the expertise of representatives and senators—and boost their reliance on executive-branch experts, as well as on K Street lobbyists and think-tank flacks. Abolishing such independent congressional fact-finding agencies as the Office of Technology Assessment would hardly make a dent in the deficit but would make it easier for Congress to be hoodwinked by the execu-

tive branch it is supposed to oversee. A balanced budget amendment would shift the final arena of budgetary policy from the Capitol to federal courts, civil servants or White House staffers.

Why did the Republicans campaign so hard to win control of an institution whose powers they want to delegate to the White House? Most Republican members of Congress see themselves as members of their party first and members of Congress incidentally (as do most of their Democratic colleagues). The separation of powers was based on the assumption that, though there might be small factions in the different branches, there would not be permanent, large-scale parties intent on capturing all three branches of government simultaneously. Such simultaneous capture, of course, is the goal of the modern parties, each of which is organized primarily around electing presidents. The congressional Republicans are counting on a resumption of Republican presidential hegemony after what they hope will prove to be the interregnum of the Clinton years. Once a Republican is sworn in as president, his followers on Capitol Hill will rubber-stamp initiatives emanating from the White House. (That, at least, is the plan; as the troubles of FDR and LBJ [presidents Franklin Delano Roosevelt and Lyndon Baines Johnson, respectively] show, the control of both branches by the same party does not mean even a strong president gets his way.)

* * *

II

James Madison, in a seldom-noted passage in *Federalist* No. 63, notes that American democracy differs from ancient republicanism not in replacing direct democracy with representative democracy but in the absence, from the American constitutional scheme, of politicians who could claim to represent the American people as a whole, in the manner of the Spartan Ephori and the Roman tribunes. There are no officers, Madison writes, "elected by the whole body of the people, and considered as the representatives of the people, almost in their plenipotentiary capacity. . . . The true distinction between these and the American governments lies in the total exclusion of the people in their collective capacity, from any share in the latter, and not in the total exclusion of the representatives of the people from the administration of the former." More pitifully: the president does not "represent" the people as a whole. No officer and no branch "represents" the people as a whole. If one did, all other branches would seem parochial and illegitimate by comparison.

Madison and other Founders did not conceive of the president as a "representative" with a popular constituency at all. The president was to be a nonpartisan chief magistrate. The Founders designed the Electoral College with the expectation that presidents would frequently be chosen

by the House, voting by states, from lists of candidates nominated by special state electors. The idea of the chief executive as chief representative is French, not American. As Louis Napoleon observed, his uncle Napoleon I "earnestly claimed the title of first Representative of the People, a title which seemed about to be given exclusively to members of the Legislative Body."

Andrew Jackson was the first president to claim, like the two Napoleons, to be a tribune of the masses: "The president is the direct representative of the American people." His attempt to act as a democratic monarch produced a backlash against such claims until the twentieth century. Lincoln justified his sweeping war powers using legal arguments, not the claim that he was the sole legitimate representative of the nation; indeed, this former Whig opponent of "King Andrew" Jackson was hesitant about suggesting legislation to Congress, for fear of arousing suspicions of executive supremacy. "My political education," he declared, "strongly inclines me against a very free use of any of these means [recommending legislation and using the veto], by the Executive, to control the legislation of the country. As a rule, I think it better that Congress should originate, as well as perfect its measures, without external bias."

The modern conception of the president as an all-powerful tribune of the people comes from Woodrow Wilson. Wilson preferred the British parliamentary system to the American system of separated powers: "It is, therefore, manifestly a radical defect in our federal system that it parcels out power and confuses responsibility as it does. The main purpose of the Convention of 1787 seems to have been to accomplish this grievous mistake." Wilson argued for a different, Rousseauian conception of democracy, in which the president is the nation personified: "The nation as a whole has chosen him, and is conscious that it has no other political spokesman." Wilson was the first president since Washington to address Congress in person. He argued that the American constitutional tradition should never obstruct an activist president: "If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its president is of such insight and caliber. Its instinct is for unified action, and it craves a single leader."

The Great Leader is to lead not only the United States but the world: "Our president must always, henceforth, be one of the great powers of the world, whether he act wisely or not." Not the United States, but the presidency itself, is to be a great power! Wilson called for the president to ignore the prerogatives of the House and the Senate in foreign policy and to present the legislature with treaties as faits accomplis [accomplished facts]. "He need disclose no step of negotiation until it is complete." This strategy backfired when Wilson tried to impose the League of Nations treaty on the Senate, but later presidents have used it effec-

137

tively. Bush's military buildup in the Gulf more or less forced Congress to ratify his planned war against Iraq, while the Clinton administration followed its Republican predecessors in ramming through GATT and NAFTA by means of fast-track legislation.

The plebiscitary theory of the presidency, the theory that the president, like Napoleon I, is First Representative of the Nation, is shared by all presidents today, Republican or Democratic. Though most presidents are elected with a plurality, not a majority—meaning most voters wanted someone else—every president today claims a "mandate" from the "majority" of "the people," considered as an undifferentiated mass with one General Will. The nomination of today's presidential candidates by primaries, rather than by congressional caucuses (the first system) or brokered party conventions (the system from the 1830s to the 1960s), has reinforced the illusion that the president represents the popular will, unmediated by either government structures or party organizations. The plebiscitary president is free to run against Washington, and even against political parties, in the manner of Ross Perot.

Running against Washington means running against Congress and "the bureaucracy," which are treated as villains in a morality play. The virtuous heroes are the president, and (for conservatives) state governments and an idealized free market. Presidentialists build up the legitimacy of the presidency by grossly exaggerating the faults of Congress and the parts of the executive branch that the White House does not directly control, such as the civil service and the independent agencies.

Consider the myth that the budgets and staffs of Congress and federal agencies have been escalating out of control. The money spent on the entire legislative branch is minuscule compared to that which goes to the executive. As James Glassman has pointed out, "You can eliminate all of Congress . . . just get rid of the whole darn thing, you'd save exactly as much as you would save if you cut the defense budget by less than 1 percent." What's more, during the 1980s, appropriations for Congress actually fell, in real terms. U.S. representatives are paid much less than their counterparts in many other democracies, such as Japan, and their salaries compare unfavorably with those of professionals and corporate executives, many of whom have less onerous responsibilities. Congressional staff, though it has grown along with government in general, actually declined in the 1980s, while the number of employees in the executive and judicial branches expanded. As for turnover in Congress, the median length of terms for members of the House has been the same—four—from 1957 to the present. A twelve-year term limit for House members would hardly increase the present rate of turnover at all.

Why, then, do so many Americans believe Congress is a bloated, unresponsive, out-of-control institution? The American people have been misled by the propaganda of Republican members of Congress, who

riddled the institution of Congress with bullet-holes in their bitter attack on the Democratic congressional majority. Voters have been misled, as well, by Democratic candidates, who profit in running against Congress and have no incentive to denounce the excesses of the office they hope to occupy.

Nor has the other half of the hated "Washington establishment," the federal bureaucracy, been growing out of control. Most Americans would be surprised to learn that in terms of manpower—around 2 million—the federal government has hardly grown at all since World War II. State bureaucracies have grown faster, local bureaucracies even faster still. Federal funds, to be sure, have paid for much of the expansion of state and local bureaucracies, but conservatives have been concentrating their attacks not on federal funds, but on federal employees.

But, unlike Congress and the federal civil service, one federal institution does resemble the caricature of an ever-expanding, arrogant, corrupt bureaucracy. Since World War II, the White House staff and the Executive Office of the President have metastasized. Dwight Eisenhower made do with twenty-nine key assistants as his White House staff in 1960; Bush needed eighty-one in 1992. The Executive Office of the President, created in 1939, has grown to include thousands of bureaucrats functioning in a presidential court, a miniature executive branch superimposed on the traditional departmental executive envisioned by the Constitution.

Meanwhile, the number of presidential appointees and senior executives has ballooned an astonishing 430 percent between 1960 and 1992, from 451 to 2,393. Most of this growth has not been in jobs for the hated career civil servants, but in positions for upper-middle-class political activists who donated money to, or worked in, presidential campaigns, or roomed with somebody in college, or whatever.

Presidents have consistently sought to expand the number of these political appointees. Mostly from elite law, lobbying, business, banking or academic backgrounds, these courtiers have ever more elaborate titles: principal deputy assistant secretary, assistant associate office director. As the titles grow, the average tenure shrinks (down to eighteen months from three years during the Johnson years). The in-and-outers, once in, can't wait to get out and cash in their fancy titles for higher lobbyist fees or an endowed professorship of government. If conservatives are serious about cutting back government, why not abolish most of the post-'60s presidential branch? Where is the outcry against the expansion of the presidential bureaucracy? Why is a congressional barbershop a greater enormity than four White House staffers devoted to dealing with flow-

Part of the answer may be that most politically active people in Washington long to get one of these mostly useless but impressive-sounding jobs. A stint as an assistant deputy secretary or associate division director

can raise the fees of a lawyer or lobbyist in the private market or increase the prestige of a professor who returns to campus. By contrast, lawyers, lobbyists and professors do not salivate at the thought of jobs as congressional staffers. Some of Washington's elite journalists, too, rotate in—or have family members or friends connected to—jobs in the executive branch. While the presidency grows out of control, politicians and pundits bemoan the illusory expansion of Congress but never take aim at the White House.

Ideologues of all persuasions have an interest in promoting presidential prerogative. Why battle over years to build a congressional majority, when you can persuade a president to enact your favored reform—gays in the military or gays out of the military—with a stroke of a pen? This accounts for the spitting fury with which op-ed pundits, think tankers and spin doctors pounce on any president who does not use "the power of his office" to enact their pet projects by ukase,* preferably in the next few days or weeks.

Our press also helps the presidentialists of right and left by its obsessive focus on the person of the president at the expense of other executive branch officials, to say nothing of members of Congress and the judiciary. It makes for an easier story, of course, but laziness is no excuse for distorted coverage. Would the country crumble into anarchy if the major networks ignored the president for a week and followed the speaker, or the Senate majority leader, or the chief justice of the Supreme Court? Newspaper editors are just as bad. Several times, when I have written op-eds concerning government policy, I have been told by an editor, "You need to conclude by saying what the president should do."

Robert Nisbet has it right: "It is nearly instinctual in the political clerisy . . . to portray the president as the elected representative of the entire people . . . with congressmen portrayed as like mayors and city councilmen, mere representatives of wards, sections and districts." When appeals to plebiscitary legitimacy are insufficient, presidentialists can turn to the "court party" of legal and constitutional scholars, who are always ready with a defense of this or that supposed presidential prerogative. Judge Robert Bork, for example, has argued "that the office of the president of the United States has been significantly weakened in recent years and that Congress is largely, but not entirely, responsible." If one were comparing Reagan, Bush or Clinton to FDR at the height of his power, this might seem plausible. In a 200-year perspective it is absurd.

It is equally wrong to imagine cycles of presidential and congressional supremacy. As Theodore Lowi has pointed out, there have been only two eras: from 1789–1932, the U.S. was a congressional republic; after FDR, a presidential regime has been superimposed upon the former

* [Edict, originally the imperial law of the Russian czar.]

structure. In the remote era of the congressional republic, a president like William Henry Harrison could promise, as he did in his 1841 inaugural address, that he would: (a) refuse to run for a second term and support a constitutional amendment limiting presidents to a single term, (b) refuse to use the veto, except, in the manner of Washington and Madison, to send back laws he thought unconstitutional, and (c) seek to persuade Congress to remove the Treasury secretary from control by presidents, beginning with himself. All of this, in reaction to the "virtual monarchy" that Harrison and other Whigs perceived in the administration of Andrew Jackson, who never dreamed of wielding the power used routinely by even a modest contemporary president such as Bush.

III

That the views of a Harrison or a Madison seem so bizarre to us shows how hard it is to make the case for Congress today. Still, the case must be made. Presidential democracy is not democracy. In theory a single politician could be answerable to a constituency of hundreds of millions—but only in theory. In practice, the more presidential the U.S. government becomes, the less responsive it is to most Americans. Stunts like Jimmy Carter's "Phone the President" notwithstanding, any president will necessarily be remote from most citizens and accessible chiefly to concentric tiers of CEOs, big-money contributors, big-labor leaders, network anchors and movie stars. Any reader who doubts this should try to get appointments with both his or her representative and the president.

Under the Constitution of 1787, representative democracy in the United States means congressional democracy. Restoring congressional democracy must begin with discrediting in the public mind the plebiscitary theory of democracy. Americans must conclude that democracy does not mean voting for this or that elective monarch every four years and then leaving government to the monarch's courtiers. Democracy means continuous negotiation among powerful and relatively autonomous legislators who represent diverse interests in society.

This battle on the level of theory should be accompanied by a campaign at the level of symbolism. Congress, as an institution, is slighted by our public iconography. "We celebrate Presidents' Day," Thomas Langston notes in his * * * book about the presidency, *With Reverence and Contempt*. "Why not celebrate Speakers' Day? How about a Speakers' Memorial in Washington, D.C., . . . [or] proposing that famous speakers of the House, or senators, also ennoble our currency[?]" The royalism symbolized by pharaonic presidential libraries should be combated by a law requiring that all presidential papers hereafter be deposited permanently in a single, modest presidential library in Washington.

Changes in government organization would need to accompany

changes in perceptions of congressional legitimacy. An electoral reform such as proportional representation for the House might actually strengthen the separation of powers; it would encourage a multiparty system, but the same multiparty coalition would not likely hold the House, Senate and White House at once. In a multiparty system, the president might also be forced to appoint coalition Cabinets, as in parliamentary régimes. He would have less influence over a Cabinet secretary of another party than over some servile functionary from his own.

As for the executive branch, the slow seeping of authority from Cabinet secretaries to courtiers needs to be halted and reversed. Congress could drastically cut the White House staff—if representatives aren't intimidated by the divinity that hedges our elected king. The depths of the reverence surrounding the presidential court became clear on Thursday, June 25, [1995] when a House Appropriations subcommittee released a plan to abolish the Council of Economic Advisers. "Democrats," *The New York Times* reported, "said they were startled at the lack of respect for a separate and equal branch of government displayed by the gesture, and even the subcommittee chairman, [Republican] Representative Jim Ross Lightfoot of Iowa, said he recognized that they could be accused of 'micromanagement' and lack of proper respect for the office of the president." It is as though the British parliament had threatened to cancel the changing of the guard at Buckingham Palace. The irony is particularly delicious since the Council of Economic Advisers was imposed on the presidency as part of the Employment Act of 1946 by conservatives in Congress hoping to check a free-spending White House.

The evolution of the council is typical of the process by which every augmentation of the executive branch in the interest of "efficiency" soon serves to enhance the power and prestige of the presidency. An even better example is the Office of Management and Budget, which was created after World War I as an independent agency (the Bureau of the Budget), drifted under presidential control during the administration of FDR and under Reagan became one of the White House's chief instruments of partisan control of executive agencies. Like a black hole, the presidency grows by absorbing ever more power and light.

Unlike a black hole, however, the presidency can be shrunk. Congress can not only scale back the White House to bring it in line with the staffs of prime ministers, but it can also make the heads of executive departments more independent of the president. The Founders expected department heads to carry out their duties more or less on their own (the Constitution gives the president the modest power to request reports in writing from department heads). The idea that department heads should be mere creatures of particular presidents is a modern misconception. Their duty is to use their own judgment to implement the laws passed by Congress, not to promote an imaginary "mandate" given the president by 40 or 45 percent of the voters. The Constitution permits Congress

to vest the appointment of "inferior officers" in the heads of departments. Why not give it a try? It would strengthen their ties to their department head—and make it more likely that they would hang up when a White House staffer phoned to intervene, for the short-run political benefit of his boss, in the department's operations.

Reducing the president from a Latin American-style caudillo [military dictator] to something like a nineteenth- or eighteenth-century U.S. chief magistrate can be done, then, without revising the Constitution, merely by passing a few laws. It is hard to see how else the U.S. can avoid the completion of its slow evolution from a congressional republic into a full-fledged presidential state. The real trend in the world at the end of the twentieth century, it can be argued, is not so much from "dictatorship" to "democracy" as from unelected dictatorship to elective dictatorship—from Gorbachev to Yeltsin. The executive rulers have to face election, but rule by decree still tends to supplant rule by laws passed by representative legislatures. It could happen here—as the Founding Fathers feared it would. Ben Franklin, among others, predicted, "The Executive will always be increasing here, as elsewhere, till it ends in a monarchy." The new Republican majority in Congress should ponder that warning, as it sets about the further dismantling of the popular branch of government.

DISCUSSION QUESTIONS

1. Did the Framers succeed in establishing an executive with sufficient energy combined with sufficient checks to prevent abuse of power? What are some examples of how the system works? How it has broken down?
2. Examine Article II of the Constitution (in the appendix) and list the powers specifically granted to the president. Do these bear much relation to the powers identified by Jones and Lind? Judging from these readings, do you think the powers in the Constitution are sufficient or insufficient?

ARTICLES OF IMPEACHMENT

1973

On June 17, 1972, police caught seven men during a burglary of the Democratic National Headquarters in Washington, D.C. An investigation found that a number of President Nixon's top aides were involved in the planning of the burglary, but the key question remained: How much did Nixon know, and when did he know it? It was then revealed that secret tapes had recorded all of the president's conversations, but Nixon refused to release the tapes. In *United States v. Nixon* the Supreme Court ruled against Nixon, ordering him to release the tapes. In the following week the House Judiciary Committee adopted the following Articles of Impeachment. Nixon resigned the presidency on August 8, 1974.

THINK THROUGH HISTORY: Forming and Supporting Opinions

Do the Articles of Impeachment represent democracy at work, or a break down in the American system of government?

141

ARTICLE I: OBSTRUCTION OF JUSTICE

Following is the text of the obstruction of justice article approved by the House Judiciary Committee:

In his conduct of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States, and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, in that:

On June 17, 1972, and prior thereto, agents of the Committee for the Re-election of the President committed unlawful entry of the headquarters of the Democratic National Committee in Washington, District of Columbia, for the purpose of securing political intelligence. Subsequent thereto, Richard M. Nixon, using the powers of his high office, engaged personally and through his close subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.

The means used to implement this course of conduct or plan included one or

more of the following:

(1) making false or misleading statements to lawfully authorized investigative officers and employees of the United States;

(2) withholding relevant and material evidence or information from lawfully authorized investigative officers and employees of the United States;

(3) approving, condoning, acquiescing in, and counseling witnesses with respect to the giving of false or misleading statements to lawfully authorized investigative officers and employees of the United States and false or misleading testimony in duly instituted judicial and congressional proceedings;

(4) interfering or endeavoring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the Office of Watergate Special Prosecution Force, and Congressional Committees;

(5) approving, condoning, and acquiescing in, the surreptitious payment of substantial sums of money for the purpose of obtaining the silence or influencing the testimony of witnesses, potential witnesses or individuals who participated in such unlawful entry and other illegal activities;

(6) endeavoring to misuse the Central Intelligence Agency, an agency of the United States;

(7) disseminating information received from officers of the Department of Justice of the United States to subjects of investigations conducted by lawfully authorized investigative officers and employees of the United States, for the purpose of aiding and assisting such subjects in their attempts to avoid criminal liability;

(8) making or causing to be made false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the executive branch of the United States and personnel of the Committee for the Re-election of the President, and that there was no involvement of such personnel in such misconduct; or

(9) endeavoring to cause prospective defendants, and individuals duly tried and convicted, to expect favored treatment and consideration in return for their silence or false testimony, or rewarding individuals for their silence or false testimony.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

—Adopted July 27, 1974, by a 27-11 vote

ARTICLE II: ABUSE OF POWER

Following is the text of the abuse of power article approved by the House Judiciary Committee:

Using the powers of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies.

This conduct has included one or more of the following:

- (1) He has, acting personally and through his subordinates and agents, endeavored to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law, and to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.
- (2) He misused the Federal Bureau of Investigation, the Secret Service, and other executive personnel, in violation or disregard of the constitutional rights of citizens, by directing or authorizing such agencies or personnel to conduct or continue electronic surveillance or other investigations for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; he did direct, authorize, or permit the use of information obtained thereby for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; and he did direct the concealment of certain records made by the Federal Bureau of Investigation of electronic surveillance.
- (3) He has, acting personally and through his subordinates and agents, in violation or disregard of the constitutional rights of citizens, authorized and permitted to be maintained a secret investigative unit within the office of the President, financed in part with money derived from campaign contributions, which unlawfully utilized the resources of the Central Intelligence Agency, engaged in covert and unlawful activities, and attempted to prejudice the constitutional right of an accused to a fair trial.
- (4) He has failed to take care that the laws were faithfully executed by failing to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial, and legislative entities concerning the unlawful entry into the headquarters of the Democratic National Committee, and the coverup thereof, and concerning other unlawful activities including those relating to the

confirmation of Richard Kleindienst as Attorney General of the United States, the break-in into the offices of Dr. Lewis Fielding and the campaign financing practices of the Committee to Re-elect the President.

(5) In disregard of the rule of law, he knowingly misused the executive branch, including the Federal Bureau of Investigation, the Criminal Division, and the Office of Watergate Special Prosecution Force, of the Department of Justice, and the Central Intelligence Agency, in violation of his duty to take care that the laws be faithfully executed.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

—Adopted July 29, 1974, by a 28-10 vote

CONTEMPT OF CONGRESS

Following is the text of the contempt of Congress article approved by the House Judiciary Committee:

In his conduct of the office of President of the United States, Richard M. Nixon, contrary to his oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives on April 11, 1974, May 15, 1974, May 30, 1974, and June 24, 1974, and willfully disobeyed such subpoenas. The subpoenaed papers and things were deemed necessary for the Committee in order to resolve by direct evidence

fundamental, factual questions relating to Presidential direction, knowledge, or approval of actions demonstrated by other evidence to be substantial grounds for impeachment of the President. In refusing to produce these papers and things Richard M. Nixon, substituting his judgment as to what materials were necessary for the inquiry, interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States.

Wherefore, Richard M. Nixon by such conduct, warrants impeachment and trial and removal from office.

— July 30, 1974
21 to 17

142



Chapter 11

The Bureaucracy

Bureaucracy is a pervasive and inescapable fact of modern existence. Every large organization in society—not just the government—is managed by a bureaucratic system: tasks are divided among particular experts, and decisions are made and administered according to general rules and regulations. No one who has attended a university, worked for a large corporation, served in the military, or dealt with the government is unfamiliar with the nature of bureaucracies.

Bureaucracies, as the sociologist Max Weber observed, are a necessary feature of modern life. When social organizations are small—as in a small business or a small academic department—decisions can be made and programs carried out by a few individuals using informal procedures and with a minimum of red tape and paperwork. As these organizations grow, it becomes increasingly necessary to delegate authority, develop methods of tracking and assessment, and create general rules instead of deciding matters on a case-by-case basis. Suddenly a bureaucracy has arisen.

In the political realm, bureaucracies serve another purpose. Beginning with the Pendleton Act of 1883, civil service reformers sought to insulate routine governmental decisions from the vagaries of partisan politics—to ensure, in other words, that decisions were made on the basis of merit instead of on the basis of party affiliation. The Pendleton Act greatly reduced the number of presidential appointments in such departments as the Customs Service and the Post Office, putting in place an early version of the merit system. As the federal government's responsibilities grew, the need to keep politics out of such functions as tax collection, administration of social security and welfare, and similar programs became even greater.

The bureaucratization of government therefore serves important purposes: increasing efficiency, promoting fairness, ensuring accountability. Yet at the same time, it creates problems of its own. Bureaucracies have a tendency to grow, to become rigid, to become answerable only to themselves, and to create barriers between citizens and the government. These bureaucratic "pathologies" are well known; they are the subject of frequent editorials and commentaries. Politicians can always count on stories about bureaucratic inefficiency and callousness to strike a chord with the voting public.

As you read the selections in this chapter, keep in mind that the alternative to bureaucratic government in the modern world is not some sort of utopian system in which all decisions are fair, all programs efficient, all children above average. Limiting the power of bureaucracies means increasing the power of other institutions: Congress, the

presidency, private businesses, or the courts. Reducing the power of the bureaucracy may also create a government that is less fair or less accountable.

Also keep in mind that bureaucrats—like baseball umpires—are most noticeable when they make mistakes. Americans tend to take for granted the extraordinary number of government programs that work well: the letters delivered correctly and on time, the meat inspected properly, the airplanes that land safely. Criticism and evaluation of the bureaucracy must be kept in a reasonable perspective.

Chapter Questions

1. What role does the bureaucracy play in any large social system? What functions does the bureaucracy perform? What are its most significant characteristics?
2. What is the relationship between the bureaucracy and the other political institutions in the United States? What are the alternatives to bureaucratic power? What are the advantages and disadvantages of these other forms of power?



Foundations

Any discussion about bureaucracy—in the United States or anywhere else—must begin with Max Weber, who is best known for his work laying the intellectual foundation for the study of modern sociology. Weber wrote extensively on modern social and political organization; his works include the unfinished *Wirtschaft und Gesellschaft* [*Economy and Society*] (1922) and the influential *The Protestant Ethic and the Spirit of Capitalism* (1904–1905).

Weber was born in Thuringia, in what is now eastern Germany, in 1864; he died in 1920. Although his observations on bureaucracy draw on historical and contemporary European examples, they were heavily informed by his experiences in the United States. While traveling in the New World, Weber was struck by the role of bureaucracy in a democratic society. The problem, as he saw it, was that a modern democracy required bureaucratic structures of all kinds in the administration of government and even in the conduct of professional party politics. Handing over the reins to a class of unelected “experts,” however, threatened to undermine the very basis of democracy itself. In particular, Weber stressed two problems: the unaccountability of unelected civil servants and the bureaucratic tendency toward inflexibility in the application of rules.

In this brief selection, Weber describes the essential nature of bureaucracy.

Questions

1. What are the characteristics of the bureaucratic form of governmental power? What are bureaucracy’s strong points? weak points?

2. Why are rules so important in a bureaucracy? What are the advantages and disadvantages of making decisions on the basis of general rules, rather than on a case-by-case basis?

11.1 Bureaucracy (1922)

Max Weber

I: Characteristics of Bureaucracy

Modern officialdom functions in the following specific manner:

1. There is the principle of fixed and official jurisdictional areas, which are generally ordered by rules, that is, by laws or administrative regulations.
1. The regular activities required for the purposes of the bureaucratically governed structure are distributed in a fixed way as official duties.
2. The authority to give the commands required for the discharge of these duties is distributed in a stable way and is strictly delimited by rules concerning the coercive means, physical, sacerdotal, or otherwise, which may be placed at the disposal of officials.
3. Methodical provision is made for the regular and continuous fulfillment of these duties and for the execution of the corresponding rights; only persons who have the generally regulated qualifications to serve are employed.

In public and lawful government these three elements constitute “bureaucratic authority.” In private economic domination, they constitute bureaucratic “management.” Bureaucracy, thus understood, is fully developed in political and ecclesiastical communities only in the modern state, and, in the private economy, only in the most advanced institutions of capitalism. Permanent and public office authority, with fixed jurisdiction, is not the historical rule but rather the exception. This is so even in large political structures such as those of the ancient Orient, the Germanic and Mongolian empires of conquest, or of many feudal structures of state. In all these cases, the ruler executes the most important measures through personal trustees, table-companions, or court-servants. Their commissions and authority are not precisely delimited and are temporarily called into being for each case.

II. The principles of office hierarchy and of levels of graded authority mean a firmly ordered system of super- and subordination in which there is a supervision of the lower offices by the higher ones. Such a system offers the governed the possibility of appealing the decision of a lower office to its higher authority, in a definitely regulated manner. With the full development of the bureaucratic type, the office hierarchy is monocratically organized. The principle of hierarchical office authority is found in all bureaucratic structures: in state and ecclesiastical

“Power” from Max Weber. *Essays in Sociology* edited by H. H. Gerth and C. Wright Mills, translated by H. H. Gerth and C. Wright Mills, Translation copyright 1946, 1958 by H. H. Gerth and C. Wright Mills. Used by permission of Oxford University Press, Inc.

structures as well as in large party organizations and private enterprises. It does not matter for the character of bureaucracy whether its authority is called "private" or "public."

When the principle of jurisdictional "competency" is fully carried through, hierarchical subordination—at least in public office—does not mean that the "higher" authority is simply authorized to take over the business of the "lower." Indeed, the opposite is the rule. Once established and having fulfilled its task, an office tends to continue in existence and be held by another incumbent.

III. The management of the modern office is based upon written documents ("the files"), which are preserved in their original or draught form. There is, therefore, a staff of subaltern officials and scribes of all sorts. The body of officials actively engaged in a "public" office, along with the respective apparatus of material implements and the files, make up a "bureau." In private enterprise, "the bureau" is often called "the office."

In principle, the modern organization of the civil service separates the bureau from the private domicile of the official, and, in general, bureaucracy segregates official activity as something distinct from the sphere of private life. Public monies and equipment are divorced from the private property of the official. This condition is everywhere the product of a long development. Nowadays, it is found in public as well as in private enterprises; in the latter, the principle extends even to the leading entrepreneur. In principle, the executive office is separated from the household, business from private correspondence, and business assets from private fortunes. The more consistently the modern type of business management has been carried through the more are these separations the case. The beginnings of this process are to be found as early as the Middle Ages.

It is the peculiarity of the modern entrepreneur that he conducts himself as the "first official" of his enterprise, in the very same way in which the ruler of a specifically modern bureaucratic state spoke of himself as "the first servant" of the state. The idea that the bureau activities of the state are intrinsically different in character from the management of private economic offices is a continental European notion and, by way of contrast, is totally foreign to the American way.

IV. Office management, at least all specialized office management—and such management is distinctly modern—usually presupposes thorough and expert training. This increasingly holds for the modern executive and employee of private enterprises, in the same manner as it holds for the state official.

V. When the office is fully developed, official activity demands the full working capacity of the official, irrespective of the fact that his obligatory time in the bureau may be firmly delimited. In the normal case, this is only the product of a long development, in the public as well as in the private office. Formerly, in all cases, the normal state of affairs was reversed: official business was discharged as a secondary activity.

VI. The management of the office follows general rules, which are more or less stable, more or less exhaustive, and which can be learned. Knowledge of these rules represents a special technical learning which the officials possess. It involves jurisprudence, or administrative or business management.

The reduction of modern office management to rules is deeply embedded in its very nature. The very nature of modern public administration, for instance, assumes

granted to public authorities—does not entitle the bureau to regulate the matter by commands given for each case, but only to regulate the matter abstractly. This stands in extreme contrast to the regulation of all relationships through individual privileges and bestowals of favor, which is absolutely dominant in patrimonialism, at least in so far as such relationships are not fixed by sacred tradition. . . .

Technical Advantages of Bureaucratic Organization

The decisive reason for the advance of bureaucratic organization has always been its purely technical superiority over any other form of organization. The fully developed bureaucratic mechanism compares with other organizations exactly as does the machine with the nonmechanical modes of production.

Precision, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, reduction of friction and of material and personal costs—these are raised to the optimum point in the strictly bureaucratic administration, and especially in its monocratic form. As compared with all collegiate, honorific, and avocational forms of administration, trained bureaucracy is superior on all these points. And as far as complicated tasks are concerned, paid bureaucratic work is not only more precise but, in the last analysis, it is often cheaper than even formally unremunerated honorific service.

Honorific arrangements make administrative work an avocation and, for this reason alone, honorific service normally functions more slowly; being less bound to schemata and being more formless. Hence it is less precise and less unified than bureaucratic work because it is less dependent upon superiors and because the establishment and exploitation of the apparatus of subordinate officials and filing services are almost unavoidably less economical. Honorific service is less continuous than bureaucratic and frequently quite expensive. This is especially the case if one thinks not only of the money costs to the public treasury—costs which bureaucratic administration, in comparison with administration by notables, usually substantially increases—but also of the frequent economic losses of the governed caused by delays and lack of precision. The possibility of administration by notables normally and permanently exists only where official management can be satisfactorily discharged as an avocation. With the qualitative increase of tasks the administration has to face, administration by notables reaches its limits—today, even in England. Work organized by collegiate bodies causes friction and delay and requires compromises between colliding interests and views. The administration, therefore, runs less precisely and is more independent of superiors; hence, it is less unified and slower. All advances of the Prussian administrative organization have been and will in the future be advances of the bureaucratic, and especially of the monocratic, principle.

Today, it is primarily the capitalist market economy which demands that the official business of the administration be discharged precisely, unambiguously, continuously, and with as much speed as possible. Normally, the very large, modern capitalist enterprises are themselves unequalled models of strict bureaucratic organization. Business management throughout rests on increasing precision, steadiness, and, above all, the speed of operations. This, in turn, is determined by the peculiar nature of the modern means of communication, i.e., among

1415

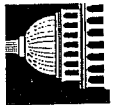
speed by which public announcements, as well as economic and political facts, are transmitted exerts a steady and sharp pressure in the direction of speeding up the tempo of administrative reaction towards various situations. The optimum of such reaction time is normally attained only by a strictly bureaucratic organization.

Bureaucratization offers above all the optimum possibility for carrying through the principle of specializing administrative functions according to purely objective considerations. Individual performances are allocated to functionaries who have specialized training and who by constant practice learn more and more. The "objective" discharge of business primarily means a discharge of business according to *calculable rules* and "without regard for persons."

"Without regard for persons" is also the watchword of the "market" and, in general, of all pursuits of naked economic interests. A consistent execution of bureaucratic domination means the leveling of status "honor." Hence, if the principle of the free-market is not at the same time restricted, it means the universal domination of the class situation." That this consequence of bureaucratic domination has not set in everywhere, parallel to the extent of bureaucratization, is due to the differences among possible principles by which politics may meet their demands.

The second element mentioned, "calculable rules," also is of paramount importance for modern bureaucracy. The peculiarity of modern culture, and specifically of its technical and economic basis, demands this very "calculability" of results. . . . [The] specific nature [of bureaucracy], which is welcomed by capitalism, develops the more perfectly the more the bureaucracy is "dehumanized," the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation. This is the specific nature of bureaucracy and it is appraised as its special virtue.

The more complicated and specialized modern culture becomes, the more its external supporting apparatus demands the personally detached and strictly "objective" expert, in lieu of the master of older social structures, who was moved by personal sympathy and favor, by grace and gratitude. Bureaucracy offers the attitudes demanded by the external apparatus of modern culture in the most favorable combination. As a rule, only bureaucracy has established the foundation for the administration of a rational law conceptually systematized on the basis of such enactments as the latter Roman imperial period first created with a high degree of technical perfection. During the Middle Ages, this law was received along with the bureaucratization of legal administration, that is to say, with the displacement of the old trial procedure which was bound to tradition or to irrational presuppositions, by the rationally trained and specialized expert. ■



American Politics Today

Critics of the American bureaucracy frequently attack the public sector as wasteful, inefficient, and unaccountable to the public. Such criticisms, however, are frequently nothing more than the view of the great differences between the

146



Chapter 12

The Judiciary

Some forty years ago, the constitutional scholar Robert G. McCloskey surveyed the history of the Supreme Court of the United States and concluded, "Surely the record teaches that no useful purpose is served when the judges seek the hottest political cauldrons of the moment and dive into the middle of them." Instead, "The Court's greatest successes have been achieved when it has operated near the margins of rather than in the center of political controversy, when it has nudged and gently tugged the nation, instead of trying to rule it."^{*} Writing after the Court's 1954 school desegregation decision but before the controversies over reapportionment of state legislatures, abortion, busing, and school prayer, McCloskey feared for the Court's future if it did not learn the lessons of its past.

The Court, of course, did not follow McCloskey's advice. Over the past four decades, the Supreme Court has become an increasingly important force in American politics and the subject of intense, and at times bitter, political controversy. In the 1960s and 1970s, the Court's most controversial decisions involved questions of civil rights and civil liberties. Although such cases remain prominent on the Court's agenda, in recent years the justices have also turned their attention to other controversial issues, including those arising from the separation of powers, federalism, and economic rights.

All of this judicial activity has created a highly charged political debate over the proper role of the courts in American society. Presidents Reagan and Bush endeavored to reshape the Court along more conservative lines; several of their nominees provoked considerable controversy, and the nomination of Judge Robert Bork was defeated by the Senate. When his turn came, President Bill Clinton tried to push the Court back in the opposite direction. Each new nomination, and each controversial Court decision, has set off a new round of debate.

This chapter surveys the many aspects of the judiciary's role in American politics and society. Related material on questions of civil rights and civil liberties can be found in Chapters 3 and 4.

^{*}Robert McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960), p. 229.

147

Chapter Questions

1. What are the advantages and disadvantages of leaving political decisions to the courts instead of to the political branches of the federal government or to the states? What qualities do the courts have that make such activism attractive? Unattractive, or even dangerous?
 2. What is the relationship between the federal judiciary and the other branches of the federal government? In what ways do the three branches of government work together to make policy? In what ways is the relationship competitive or adversarial?
-



Foundations

The Supreme Court's power to review acts of Congress and decide whether they are unconstitutional is perhaps the most extraordinary power possessed by any court in the world; the decision of five of nine justices can nullify the expressed will of the people's representatives in Congress. Moreover, the Court can strike down laws passed by state or local officials based on a conflict with federal law. Although Supreme Court decisions striking down major acts of Congress have been relatively infrequent, the Court has acted often to nullify unconstitutional measures passed by the states.

Despite the enormity of the Court's power of judicial review, as it is known, this power was not explicitly granted to the Court by the Constitution. The lack of specific language in the Constitution on this point—probably because the delegates could not agree as to whether the state or the federal courts should have the last word—made it necessary for the Supreme Court to claim and defend its power of judicial review later. The justices who were most influential in this struggle were Chief Justice John Marshall and his ally, Justice Joseph Story.

The following two selections trace the highlights of this struggle. The first is Alexander Hamilton's classic defense of judicial review in the *Federalist Papers* No. 78. The second is Marshall's 1803 decision in *Marbury v. Madison*, in which the Supreme Court first claimed the power of judicial review.

Questions

1. Hamilton begins his argument with a defense of the Constitution's provision for life appointment of justices of the Supreme Court. How does this argument relate to his and John Marshall's defense of judicial review?
2. Considering the other readings in this chapter, how reasonable is Hamilton's observation that the courts possess "neither FORCE nor WILL but merely judgment"?

3. Consider the validity of this statement by Justice Oliver Wendell Holmes: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."*
-

12.1 *Federalist No. 78 (1788)*

Alexander Hamilton

Outline

- I. Mode of appointment of federal judges.
 - II. Necessity of lifetime appointments for federal judges.
 - A. The judiciary is the least dangerous and the weakest branch; life tenure is essential to preserving its independence from the other branches.
 - B. Life tenure is particularly important in a system with a limited Constitution, which cannot be preserved in practice except if judges have the authority to strike down laws that are inconsistent with the Constitution (a power known as judicial review).
 1. Defense of judicial review.
 - i. Congress merely acts as the agent of the people; the Constitution sets out the terms of agency and must take precedence over acts of Congress.
 - ii. The Constitution is a fundamental law; it belongs to the judges to give it meaning and to enforce it in preference to any legislative act.
 - iii. The Courts cannot substitute their own judgment for that of the legislature; they must exercise judgment, not will.
 - iv. Judges must be independent (and thus hold life tenure) in order to play this role without legislative interference.
 2. An independent judiciary also protects against legislative acts which do not violate the Constitution but do interfere with private rights.
 3. There are a few individuals in society who combine the necessary skill and integrity to be federal judges; life tenure may be necessary to encourage such people to leave the private practice of law for the federal bench.
-

*Oliver Wendell Holmes, "Law and the Court," address delivered February 15, 1913, in *Collected Legal Papers* (New York: Peter Smith, 1952), pp. 295–296.

149

perior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an EQUAL authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate

among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies, in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if

to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or the persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established GOOD BEHAVIOR as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution. ■

12.2 *Marbury v. Madison* (1803)

John Marshall

[In 1801, at the very end of his presidential term, John Adams made a number of last-minute judicial appointments, hoping to install members of his own Federalist party in key positions before the Republican president, Thomas Jefferson, took over. One of these

Battle for Justice

Ethan Bronner

The story of the defeat by the Senate of the nomination of Judge Robert Bork for the Supreme Court is a classic portrait of the confirmation process, as well as a microcosm of the nature of interest group politics. Since 1974 Bork's name had been among the two dozen that were brought up whenever a Republican president had a Supreme Court seat to fill. Events always seemed to work against him, however. In 1981, Ronald Reagan appointed Sandra Day O'Connor to the vacancy created by the retirement of Potter Stewart because of his campaign promise to put a woman on the Court. And in 1986, the much younger and more conservative Antonin Scalia was appointed when Chief Justice Warren Burger retired (and Associate Justice William Rehnquist replaced Burger as chief justice).

Bork finally got his appointment in 1987. In politics, however, timing is everything. Now he would be a conservative justice replacing the moderate Lewis Powell on what had been a balanced Court; liberals feared that Bork would tip the Court to the right. And in 1987 the Republicans did not control the Senate as they had for the two prior Rea-

gan appointments, meaning that the Judiciary Committee was headed by the Democrat Joseph Biden of Delaware, who opposed Bork, rather than by the sympathetic Republican Strom Thurmond of South Carolina. Knowing that they had a chance to win, liberal interest groups around the nation coalesced and lobbied in a way that had not been seen since the 1960s. In the two decades that Bork's name had been mentioned as a Supreme Court hopeful, those groups had gathered more than enough material for their files on him to make the fight very interesting and very dirty.

This dramatic account of the confirmation battle by Ethan Bronner effectively captures the desperation mode adopted by the liberal interest groups to combat Bork. Notice as you read this selection how little mention there is of a countermovement by conservative interest groups. That is not an oversight. In fact, while all of the events portrayed in this selection were occurring, there was very little effort by conservative activists to defend Bork. Later on, these groups would claim that they had never been mobilized by the White House. Indeed, the White House staff was on vacation for the whole

month of August 1987, when the liberal groups were mobilizing. Apparently, the administration did not fully appreciate the danger facing the nomination.

As you read this selection, place yourself in the Reagan White House planning

HOWARD BAKER White House chief of staff.

WILLIAM BALL White House congressional liaison.

JOSEPH BIDEN Chair of the Senate Judiciary Committee.

ROBERT BORK Federal appeals judge for the District of Columbia; Supreme Court nominee.

ARTHUR CULVAHOUSE White House counsel.

EDWARD KENNEDY Member of the Senate Judiciary Committee; led Senate anti-Bork fight.

a pro-Bork counterattack. Is this fight winnable? More specifically, how would you advise the candidate as he prepares to testify before the Senate?

PATRICK MCGUIGAN Conservative lobbyist.

ANTHONY PODESTA Anti-Bork lobbyist.

LEWIS POWELL Appointed by Nixon to the Supreme Court in 1971; resigned in 1987.

RONALD REAGAN President of the United States, 1981-1989.

PHIL SPARKS, EMILY TYNES Media consultants for the anti-Bork forces.

For Washington's liberals, it would have been hard to invent less welcome news [than Justice Lewis Powell's retirement]. As news agency teleprinters rang with bells to signal recipients of an urgent breaking story, and radio stations announced it, and Cable News Network broadcast it, the capital's telephones began buzzing. The lobbyists remembered precisely where they were when they got the news. They recalled it the way they recalled where they had been a quarter century earlier, when they heard that President John F. Kennedy had been assassinated.

Ralph G. Neas, executive director of the Leadership Conference on Civil Rights, a grouping of 180 organizations, was in his 1984 Renault just north of Georgetown, fighting muggy weather and traffic. While the news shocked him, it did not surprise him. Only a month earlier, at the annual meeting of his group, he was going over legislative priorities for the coming year. He said then that if Lewis Powell or anyone else retired from the Supreme Court, the Supreme Court nomination would become the top priority. He had no idea how prescient his words were. Neas, who was to head the unprecedented lobbying campaign against a Supreme Court nomination, stepped on the gas and planned the next half dozen telephone calls. As he put it later, "Everyone realized immediately what was going to be at stake, and our lives would be consumed, obsessed by the fight over the Powell seat."

Kate Michelman, installed not long before as director of the National Abortion Rights Action League, was giving a speech to a group of women's rights attorneys on Maryland Street in Washington, assessing progress and concerns of the previous year. She opened a note passed to her on the dais, looked up, and announced without a trace of irony: "Our worst fears have just been realized."

Paul Gewirtz, a liberal constitutional scholar at Yale Law School, was at a conference of judges in Virginia. The panel included Walter Dellinger of Duke University, Gerald Gunther of Stanford, and Paul Bator of the University of Chicago. Gewirtz,

206 4.3 / THE SUPREME COURT

Dellinger, and Gunther were standing around chatting idly when they got the word.

"There was this explosion, this sinking feeling that after all this uncertainty, the moment of truth had come for the Court," Gewirtz remembered. "We knew the direction of the Court was at stake. For the next three days we talked about it endlessly. Endlessly. . . ."

Powell's departure meant one thing to most Court watchers: Robert H. Bork, federal appeals judge for the District of Columbia and favorite of the Reagan administration, would be nominated.

When Kate Michelman of the National Abortion Rights Action League returned to her office from giving a speech, she found two television network crews waiting. What would her organization do if Bork were chosen? It would mount an unprecedented campaign against his confirmation by the Senate, Michelman shot back.

"We have researched his background, and we know what he stands for," she said. When Althea Simmons, chief Washington lobbyist for the National Association for the Advancement of Colored People (NAACP), heard of the Powell departure, she was in Nassau, the Bahamas, about to address the annual convention of Delta Sigma Theta, the black women's sorority and service organization. News came via a call from her legislative aide in Washington, and her response was: "Oh, my God. That's Bork. We've got our work cut out for us. Pull our Bork files." When she went to the podium to deliver her talk, she told the audience: "Justice Powell has resigned, and Robert Bork is on his way to the Supreme Court. We've got to get to work."

But Bork himself was skeptical. When word of the Powell resignation reached the judge, Bork was in his chambers just down Capitol Hill from the Supreme Court working on an *en banc* opinion with fellow conservative judges Douglas Ginsburg, James Buckley, and Kenneth Starr. . . .

. . . Buckley mentioned the Powell resignation and said Bork looked like the nominee. Bork dismissed it. "The administration has a well-entrenched tradition of passing me over," he said.

Bork was not alone in his concern that the administration would pass him over one more time. His supporters worried, too. Patrick McGuigan, a young, fervent Oklahoman, was director of the Judicial Reform Project for the Free Congress Foundation, a grouping of conservative organizations. He was in his cramped office in a town house near the Capitol when his summer intern peeked in the door. Had McGuigan heard about Powell's resignation?

"I immediately called John Richardson, the attorney general's chief of staff," McGuigan recounted. "John, tell the attorney general and everyone else that if you guys don't do Bork this time, I'm going to slash my wrists."

McGuigan added that he would explain to his people that this one was worth fighting for. He then called Peter Keisler, a twenty-seven-year-old Yale Law School graduate and former Bork clerk who was working in the White House counsel's office. He repeated his desperate message. Next, McGuigan called Dan Casey, director of the American Conservative Union, and said they ought to inundate the White House and the Hill with pro-Bork telephone calls.

"That ought to be a pretty easy sell, don't you think?" asked Casey.

"I don't trust the jerks to do the right thing, do you?" countered McGuigan. "Not really," agreed Casey.

Bork's admirers in the Justice Department had their own jitters. Their two bosses, Attorney General Edwin Meese and his top adviser, Assistant Attorney General William Bradford Reynolds, were in flight over the Atlantic. So Charles Cooper, head of the Office of Legal Counsel, called a meeting in his office with, among others, John Bolton, the department's liaison to Congress, and Terry Eastland, the department's spokesman. The aim was to plot a strategy to get Bork nominated as quickly as possible.

These were the self-described ideological foot soldiers of the Reagan Revolution. Tough, smart, and zealous in their devotion to right-wing principles, they saw Powell's resignation in epic terms. The moment of truth had arrived. Conservatives could finally regain control of the Supreme Court and the nation's moral and legal agenda. These young Reaganites had come to government service brimming with hope. For them, it *was* morning in America and they would return their nation to its roots and traditions. What they decried as a racial and gender spoils system—the efforts of previous administrations and courts to help blacks and women as groups, rather than to correct wrongs suffered only by individuals—would end. In their Justice Department, young white men would be no less deserving of government help than anyone else. Justice would be provided to *all* Americans rather than set one group against another. Americans were decent and God-fearing. No need existed to spy out racism and sexism in every corner of the land. The existing system, which occasionally offered jobs to blacks over better qualified whites, and developed elaborate schemes of equal pay for equal work to promote gender equality, and set aside percentages of government contracts for minority-controlled firms was unjust. It must go.

The work of conservative reform proved more difficult than imagined. Radical change comes hard and slowly in a stable country. Much of what the Reagan foot soldiers objected to had become institutionalized and widely accepted.

Now came the godsend. The Court, which had legitimized so much in existing liberal programs, could also put a stop to them if it had the right people up there. But the men at Justice were afraid that the newly pragmatic White House, now run by moderate Tennesseean Howard Baker, the chief of staff, would scuttle the nomination. It would push for a candidate easier to confirm in the defiant, newly Democratic-controlled Senate. Such a nomination would be a colossal waste of a unique opportunity.

Charles Cooper, a handsome Alabamian with ice blue eyes, who had clerked for [Supreme Court Justice William] Rehnquist, finally reached Reynolds on the airplane as he and Meese returned from Europe. They agreed that Bork was, without question, their choice. They would lobby for him. John Bolton got on the phone and went so far as to suggest that when Meese-landed, he go by helicopter to the White House and that the selection of Bork be made that very night. This should be accompanied, he believed, by public pressure on Senator Joseph R. Biden, Jr., of Delaware, chairman of the Judiciary Committee, to hold early confirmation hearings.

Bolton and his colleagues wanted to mount a fierce pro-Bork offensive, one impossible for Baker or the Senate to counter. This time everything they cared about was on the line. As one of them said later, "If you can't get Bob Bork on the Court, you might as well shut the door and turn all the lights out."

If right-wing activists and Justice Department officials were alarmed and wary, they were justified in being so. Within the new group running Reagan's White House, not Chief of Staff Howard Baker nor Counsel Arthur B. Culvahouse nor Communications Director Thomas Griscorn was a Bork devotee. They each knew Bork was a federal judge in Washington, a smart, vociferous conservative to be found on all right-wing lists for nomination to the Supreme Court. But Baker and Culvahouse, soft-spoken southern gentlemen, were themselves closer in style and outlook to Lewis Powell than to Robert Bork. They were pragmatists, accommodators, concerned more with unity and accord than with rigid principle. They rarely used harsh words. They had come to the White House only months earlier to restore order and dignity to a presidency damaged by the Iran-contra scandal. The administration had secretly sold arms to Iran in hopes of freeing American hostages held in Lebanon. Profits from the sales were sent to right-wing Nicaraguan rebels, known as *contras*, despite a congressional ban on such aid. The plan failed, and both Congress and a special prosecutor were investigating. In addition, the Senate had been lost to the Democrats the previous November. The new men in the White House were not in search of a fight. . . .

At 6:30 A.M. on Wednesday, July 1, 1987, Robert Bork left his red-brick three-story house in the Potomac Palisades section of Washington and drove to 716 Jackson Place NW, a minute's walk from the White House. The nineteenth-century town house was used to lodge former presidents when they came to town. None was in residence that day. It was this house, with its pre-Victorian furnishings, that White House Counsel Arthur B. Culvahouse had chosen as a place to discuss with Bork his nomination to the Supreme Court.

It was 7:00 A.M., and Culvahouse, tall, blond, and open-faced, was waiting. As the confirmation process got under way and his exposure to Bork increased, he was to become a fan. At the moment he was not. He knew only that trouble lay ahead.

Bork and Culvahouse climbed to the third-floor dining room, where they sat facing each other. Culvahouse pulled out of his briefcase a handwritten list of some twenty questions, referring to it as his "skeleton" questionnaire.

The counsel had nicknames for a couple of them, such as the Gary Hart question, named for the former Colorado senator who had withdrawn from the 1988 race for the Democratic presidential nomination because of his sexual indiscretion: Had Bork ever had any extramarital affairs?

"No," Bork replied.

Now, Culvahouse said, the John Fedders question, after the former head of the investigative branch of the Securities and Exchange Commission whose wife had sued him for divorce: Did Bork beat his wife or children?

"No, but don't ask them," Bork offered, trying to inject humor. Culvahouse was stone-faced.

"Look, I've led a pretty dull life," Bork added in another attempt to loosen things up.

"That's good," Culvahouse responded coolly.

Bork did his best to answer the other questions simply.

The questioning over, Culvahouse told Bork that he could expect a call from Chief of Staff Howard Baker in the next few hours. Brimming with expectation, Bork went to his chambers at the federal courthouse. Just after noon Baker called and told Bork he should meet Baker's executive assistant, John Tuck, at Third and D streets, a discreet street corner, so as to avoid the eyes of the media. While prominently mentioned as the leading choice for the nomination, Bork was still under wraps. The White House wanted to keep him that way until the press conference.

Bork went with his secretary to the appointed spot. Dressed in a blue blazer and gray flannel slacks, he was perspiring heavily in the midday heat. He got into Tuck's station wagon. There was no air conditioning. Tuck took a circuitous route, driving down Independence Avenue, past the Jefferson Memorial, to enter the White House. But his car and passenger were seen by a reporter for Cable News Network, who immediately went on the air to report that Bork was the nominee.

Tuck took Bork to Baker's handsome and airy office in the White House's West Wing. There he met Baker; Culvahouse; Kenneth Duberstein, the deputy chief of staff; Thomas Griscorn, director of communications; and William Ball, White House liaison to Congress. All congratulated him. They accompanied him up to the Oval Office.

Although they were soldiers in arms in the conservative movement, Bork had never known Reagan well. He had not worked for Reagan in 1980 as he had for Richard Nixon and Barry Goldwater in 1968 and 1964. Reagan, of course, had named Bork to the D.C. Circuit in 1982, but they had had minimal contact before that.

"I'd like to offer you the nomination to the Supreme Court. Will you accept it?" the president said solemnly to the judge.

"I've been thinking about it for ten to twelve minutes, and I think I like the idea," Bork responded with a satisfied twinkle. He had trouble adjusting to the seriousness of the White House.

The president didn't get it. "Does that mean yes?"

Incredulous, Bork stiffened and gravely responded, "Yes, sir. I'd be honored, Mr. President."

From there, the two moved to the Queen Anne chairs in front of the fireplace and the White House photographers were asked in. With staff members on the couches, Bork and Reagan smiled at each other in awkward silence. In a rarity, Bork couldn't think of anything to say.

Baker explained to Bork that the president would announce his nomination to a press conference a few minutes later; Bork was to take no questions and make no remarks. It seemed strange to the nominee that he would not be allowed at least to express his gratitude publicly to the president and say how much he looked forward to the confirmation process. But as far as he could tell, the White House men were on top of the situation, and he figured they, not he, were the political professionals.

157

As the group entered the press conference, Sam Donaldson, the White House correspondent of ABC News, and Bill Plante, of CBS, were sitting in the front row and feigned shock at the sight of Bork. "Surprise, surprise, surprise," they offered aloud.

With Bork at his side, President Reagan announced the nomination and said of his choice: "Judge Bork, widely regarded as the most prominent and intellectually powerful advocate of judicial restraint, shares my view that judges' personal preferences and values should not be part of their constitutional interpretations." The battle was joined.

After the announcement Bork accompanied William L. Ball III, an affable southerner with a honey-coated accent, to his West Wing office. As Bork settled into an armchair, Ball flicked on the television to the C-SPAN network, which broadcasts live the proceedings of the Senate. He wanted to see if there was any reaction yet to the nomination made less than an hour before.

There was.

Even before the picture blinked on, Ball and Bork could detect the inimitable Brahmin accent of the senior senator from Massachusetts, Edward M. Kennedy. He declared:

Robert Bork's America is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, school children could not be taught about evolution, writers and artists could be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is—and is often the only—protector of the individual rights that are the heart of our democracy.

America is a better and freer nation than Robert Bork thinks. Yet in the current delicate balance of the Supreme Court, his rigid ideology will tip the scales of justice against the kind of country America is and ought to be.

The damage that President Reagan will do through this nomination if it is not rejected by the Senate could live on far beyond the end of his presidential term. President Reagan is still our president. But he should not be able to reach out from the muck of Irangate, reach into the muck of Watergate, and impose his reactionary vision of the Constitution on the Supreme Court and on the next generation of Americans. No justice would be better than this injustice.

Watching the proceedings on a television was Kennedy aide Jeffrey Blattner. He admired the way the senator unwound, delivering the statement with style and force. But he realized it was a risky speech. When it was over, he said to himself, "Now we better win."

Kennedy's was an altogether startling statement. He had shamelessly twisted Bork's world view—"rogue police could break down citizens' doors in midnight raids" was an Orwellian reference to Bork's criticism of the exclusionary rule, through which judges exclude illegally obtained evidence, and Bork had never suggested he opposed the teaching of evolution—but equally startling was that

Kennedy discussed Bork's world view at all. The speech was a landmark for judicial nominations. Kennedy was saying that no longer should the Senate content itself with examining a nominee's personal integrity and legal qualifications, as had been the custom—at least publicly—for half a century. From now on the Senate and the nation should examine a nominee's vision for society. In fulfilling its constitutional duty of "advice and consent" on judicial appointments, the upper house should take politics and ideology fully into account. This was part of a growing assertion of power by the Congress and an unambiguous acknowledgment of the political nature of the Supreme Court, popularly portrayed as above politics.

To Bork and Ball, Kennedy's words seemed such a departure from tradition and such a distortion of the nominee's record as to be of no consequence. They shrugged off the speech as the ravings of a desperate politician. Kennedy, they thought, had blown it.

They were dangerously wrong in their assessment. Kennedy did distort Bork's record, but his statement was not the act of a desperate man. This was a confident and seasoned politician, one who knew how to combine passion and pragmatism in the Senate. Unlike the vast majority of those who were to oppose Bork, Kennedy believed from the beginning that the nomination would be defeated and that the loss would prove decisive in judicial politics. . . .

But for Bork and his family, Kennedy's attacks on Bork were hard to understand except as *ad hominem* assaults. Once, toward the end of a long day of the Bork hearings at which Kennedy had repeatedly assailed the nominee, the senator was walking alone out of his office. Coming in the other direction was Mary Ellen Bork, accompanied by Nancy Kennedy, a White House aide. Mrs. Bork had slept poorly the previous night and was washed out from hours of sitting in the glare of television lights. She had no desire to run into Senator Kennedy. She was afraid she would burst into tears. But the senator sought her out.

"Mrs. Bork, you must be so tired. It's a very difficult time, I know. I hope you understand that it is nothing personal," Kennedy told her, shaking her hand.

Then, before she had a chance to say much of anything, the senator turned on his heels and took his leave.

She couldn't believe he had dared speak to her at all. So surprised and fatigued was she that she had no time for response. It was a moment she played back often in her mind, relishing some choice words she wished she had addressed to the Massachusetts lawmaker.

Kennedy was unaware of how offended Mrs. Bork was by his comment. He had said something similar to Bork himself at the judge's courtesy call in early July. "Nothing personal, you understand." Bork did not understand.

To Kennedy, it really was *not* personal. Little in politics was. He had led his entire life in the public eye; his life was fodder for the supermarket tabloids. He could not be within camera distance of an attractive woman without ending up on the cover of a gossip magazine. If he took everything said about him personally, he would never survive. He had always been a symbol and had learned to operate within the politics of symbolism. Heated rhetoric was part of the game of government. When the day was over, win or lose, everyone could have a drink together.

He had been trained to disjoin his inner feelings from the domain of public affairs. You could sense it when you were with him. His eyes revealed nothing. The man had venetian blinds on his soul. . . .

In his fight against Bork, as in all his battles, Kennedy did not handle the issues gently. He clawed them. Uninterested in the historical and theoretical bases of Bork's views, Kennedy shredded the legal niceties, searching for the larger societal meaning of what was at stake. When law professors briefed him on Bork's theories, he would seek ways to bring the issue down to a level everyone would understand. One scholar remembered him saying, "Look, the masses are not going to rise up over the issue of congressional standing. But they will over freedom in the bedroom."

He was dogged in his dedication. In August, September, and October 1987 he held meetings with liberal lobby groups; demanded endless hours of work from his huge, dedicated staff; sent a letter to every one of the sixty-two hundred black elected officials in the country asking for their help; stroked and poked his Senate colleagues in the cloakroom, on the floor, in the dining room; gathered key witnesses for the hearings; and exploited the inchoate sense around the country that when a Kennedy commits himself this fiercely to something, it is rarely in vain. He called on hundreds of his and his brothers' former aides, the people who made up the extended Kennedy political family, and asked them for legal and political analyses, speeches, newspaper opinion pieces, and contacts.

Anthony Podesta, a talented liberal lobbyist hired by Kennedy for the Bork fight, remembered going up to the Kennedy summer compound in Hyannis Port to help the senator make phone calls. He said that he went to Cape Cod dubious about how much work Kennedy really would do, given that he only had a few weeks off from the Senate. But Kennedy kept calling and Podesta kept phoning back to Kennedy's Capitol Hill office for more phone numbers to pass on to the senator.

Kennedy called Ernest Morial, former New Orleans mayor, and Sidney Barthelemy, the current mayor. In Alabama, he spoke with Mayor Richard Arrington of Birmingham, Mayor Johnny Ford of Tuskegee, and Joseph Reed, the Alabama Democratic Conference chief. In Atlanta he spoke at length with Mayor Andrew Young, a longtime family friend. All were black southern leaders.

At one point Kennedy woke up the Reverend Joseph Lowery at the Hyatt Hotel in New Orleans before the Southern Christian Leadership Conference's annual convention. Lowery, head of the SCLC, had planned to discuss Bork at the meeting. But after hearing from Kennedy, he turned the entire day into an anti-Bork strategy session. He told the convention about Kennedy's call, and one participant remembered how it fired up the crowd. From there the issue penetrated black churches across America. Preachers would hand out pen and paper and take ten minutes from the service for anti-Bork letter writing.

From the Cape, Kennedy called every one of the thirty executive members of the AFL-CIO. When he took his yacht out for a sail, Bork was still on his mind. He sailed up to the Maine coast, where he dropped in on Burke Marshall, Yale law professor and assistant attorney general for civil rights under President Kennedy. Stopping in at Marshall's island retreat on North Haven, Kennedy asked him if he would testify against the judge. Marshall agreed. Later in September Kennedy held a conference call with forty state labor leaders around the country.

Bork's defeat was ever present on Kennedy's mind that summer. A few weeks after the nomination the car taking Kennedy to his home in McLean, Virginia, was struck by a falling tree. The senator flew forward and hit the windshield. "I thought for a moment that there would be one vote less against Bork" was his immediate comment when he realized he was unhurt.

"The question was how to convince people that this should be a priority item, not just another cause to sign your organization's name to," reflected Podesta. "Ted would get on the phone and say, 'This is the most important fight we've had in the Senate in years. We need you to mobilize, to activate your people, to make this a top priority issue.'"

The letter Kennedy sent to the thousands of black officials included people at all levels—federal, state, city council, board of education. Written mostly by Michael Frazier, the Kennedy aide whose sole responsibility was liaison to the black community, the letter said: "The most important vote this year in the United States Senate will take place on the question of President Reagan's nomination of Robert Bork to the Supreme Court. Bork has been a lifelong opponent of civil rights, and he does not deserve a lifetime seat on the Supreme Court—and so I urge you to join me in actively opposing the nomination."

The letter, dated August 12, 1987, went on to say that in his twenty-five years of public life, Bork had "worked tirelessly against justice and progress." It said: "The Bork appointment could profoundly diminish the promise of our nation for the next decade and beyond. Everything we have worked for together in the past quarter century may be jeopardized if Bork is confirmed, and if the narrowly divided Supreme Court of today shifts in the direction of Bork's extremist ideology." Frazier said that the idea for the letter was his and that he was the keeper of the list in the office. "The Senate was going into recess, and we had to have some way to keep this thing going, not to let it die," he said. "We were determined to show that Kennedy would go to the mat on this one."

There were two advantages to fighting this kind of nomination, as opposed to working for a piece of legislation. First, it allowed groups to focus on an individual. That had drawbacks for the senators, who had to look the man in the eye and meet his family. But for members of lobbying groups around the country it allowed vague feelings and fears to be crystallized in one person who would be seen only from afar. He could be demonized, caricatured, and made to embody all they hated. Secondly, the fight was limited in time. Three months, that was the commitment, whereas legislative fights could carry on for years. Moreover, this would be win or lose. No compromises were possible; no watered-down version could emerge. The stakes were high.

Kennedy, chairman of the Senate Labor Committee and longtime friend of organized labor, was especially effective with union leaders. Worried about Alan Dixon, Democratic senator of Illinois, who seemed inclined in Bork's favor, Kennedy called up Edward Hanley, head of the hotel and restaurant workers' union. The union was based in Chicago; Hanley and Dixon were close. Many of Hanley's members were close in temperament and attitude to teamsters. With Hanley, Kennedy didn't talk about women and minorities. He didn't discuss legal briefs. He made a few comments about Bork's attitude toward business and labor. But he said essentially: Ed, we don't call often. This one matters to us. Dixon's shaky. Give him a call.

214 4.3 / THE SUPREME COURT

So Dixon, a senator for whom such things made a huge difference—his nickname, Al the Pal, flowed from his unparalleled ability to cut deals and keep constituents happy with him—would get a call from Hanley. And after prompting from Kennedy, Dixon would also hear from Chicago Mayor Harold Washington and Representative Gus Savage, among many others. Dixon voted against Bork. Podesta, who had once been counsel to the machinists' union, analyzed Kennedy's calls this way: "Our opponents complained a lot about the money spent in this campaign. But given a choice between ten thousand dollars and two phone calls from Ed Hanley, I'd much rather have the phone calls."

Kennedy called key financiers for other senators, including those of several southern Democrats. In one case, the man reached was due to hold a fund raiser for Senator Lawton Chiles, Democrat of Florida, the next evening. Chiles, who was to face what he described as ugly and unmatched pressure on this vote, came out against Bork. Later, for unrelated reasons, he decided not to run again for the Senate.

The message communicated by Kennedy's calls was that this fight could be won. People knew that Ted Kennedy was no Don Quixote. If he invested his summer in this campaign, it could probably be done. . . .

Toward the end of the week of September 14, 1987, listeners to small radio stations in Alabama heard the following news item from a man named Henry Griggs in Washington:

[Voice of Griggs] "As Senate hearings on the nomination of Robert Bork to the Supreme Court continue, a number of civil rights leaders raised opposition to Bork, saying his stands on constitutional rights of minorities are critical. The Reverend Jesse Jackson had these comments: [Voice of Jackson] Judge Bork is a threat to the future of civil rights, workers' rights and women's rights. The achievements of the last 30 years are threatened by Judge Bork not only because he disagreed with those decisions and the Civil Rights Act of '64 or the Voting Rights Act, but he also would have the power on the Supreme Court to overrule or undercut those decisions. He is not just conservative; he is backwards. He is activist in his intent to undercut progress." (End report.)

Henry Griggs was not a news reporter. He was a public relations man for the American Federation of State, County and Municipal Employees, a huge trade union active in liberal causes. For August and September 1987, AFSCME lent Griggs to the anti-Bork effort full time. An important part of his job was to make radio spots that sounded like news and to call hundreds of radio stations around the country, offering the spots without charge. The aim was to get the reports included in the regular news broadcasts.

The term for such spots is *actualities*. Usually no more than snatches of speeches, they are used by many political campaigns. But in the Bork campaign they were more than that. They were meticulously produced and aggressively promoted with a wide variety of spokesmen and differing themes.

"Actualities are free, low tech, and highly effective," Griggs commented. "The idea is to get them as close to a radio report as we can get. For a lot of small radio stations around the country, it's great. They have budget cuts and often only have

one or two reporters. They don't have that much stuff, but they have lots of time to fill. The trick is not to give them anything that is half-and-half. It's got to be a full-court press for your side. It's a kind of invisible publicity. People don't realize when they hear it that the station didn't send out a reporter and that we're the ones providing it."

Aided by comprehensive guides to radio stations around the country, Griggs sorted out formats and audiences countrywide. He targeted black stations with Jesse Jackson and NAACP Executive Director Benjamin Hooks. In the Southwest he offered interviews with Antonia Hernandez of the Mexican-American Legal Defense and Educational Fund. On the West Coast he provided officials of the Sierra Club and warning that Bork would be bad for environmental protection.

One Griggs job was to keep a stable of interview subjects available for stations with last-minute needs. For example, he stayed in touch with a big Pittsburgh station that carried the Pirates' baseball games. When a rainout occurred, the station had three hours to fill. Griggs, with an eye on weather reports, would quickly offer a Bork-related interview. The Griggs campaign was quite successful. Morning and evening news broadcasts on small stations accepted some three-quarters of his offerings. He made two or three per day during the hearings.

"Often the station would take only the sound bite of the interview and take my intro off, but sometimes they would play the whole package I sent them," Griggs said.

The White House had a toll-free actualities number that played snatches of President Reagan's speeches supporting Bork's confirmation and other administration goals. But the two efforts were very different. The anti-Bork forces reached out to tiny stations in Tempe, Arizona, and St. Petersburg, Florida. Those stations rarely called the White House actualities line. And the anti-Bork spots came fully packaged and produced.

Griggs's radio work was complemented by that of a colleague, James ("Skip") Prior, in television. Prior was telecommunications coordinator at AFSCME, directing what the union dubbed the Labor News Network. Run out of the basement of AFSCME's massive Washington headquarters building, the network had a first-class studio that was put to frequent use during the Bork fight.

Prior's products were called not actualities but video news releases, or VNRs. They were occasionally fully packaged interviews but often simply the chance for television stations to interview Bork opponents without having to set up the interviews in advance. The anti-Bork campaign would gather effective spokesmen in the studio and call around to small stations in targeted states, offering free direct satellite hookups. Stations nearly always took them. The local anchor would then ask the guests why they so objected to Judge Bork's nomination. The speakers would oblige with long, well-rehearsed explanations.

Actualities and video news releases were but one aspect of the media campaign. The day after Reagan nominated Bork, People for the American Way, a high-profile, well-financed liberal lobbying group, sent out "editorial memos" to twelve hundred newspaper editorial boards and individual reporters, according to Melanne Verveer, the organization's vice-president. It continued to do so several

times a week, expanding the list to seventeen hundred in the course of the campaign. The organization, by far the biggest spender in the anti-Bork camp, spent \$1.4 million on its campaign, including \$684,000 on advertising in newspapers, television, and radio. But the key to the anti-Bork strategy was not money. All the anti-Bork groups together did not spend more than a few million dollars. And the Justice Department and White House had more potential manpower and resources at their disposal than the opposition. The key to the battle lay elsewhere.

"The idea was to frame a strategic message," said Phil Sparks, Griggs's former boss at AFSCME and one of the liberal community's savviest public relations men. "We put out a three-page memo, listing the key themes and making sure that everyone in the coalition was singing from the same sheet. We also identified the two hundred most important reporters on this issue in Washington and constantly sent them huge amounts of stuff."

Much of the media strategy was framed by a liberal consulting firm known as the Communications Consortium, which advertised its list of nearly two thousand key media people, including such gatekeepers as assignment and news editors. Emily Tynes, who worked for the group, said her guiding notion was: If you could have a headline in the *New York Times*, what would you want it to say? She said the key to good media strategy was to give a sense of ownership on an issue, to set the terms of its debate.

Over the course of the summer the nation's high brow journals—nearly all of them more liberal than conservative—aided the anti-Bork forces. Anthony Lewis, the influential liberal columnist for the *New York Times*, devoted half a dozen columns to denouncing Bork's narrow view of constitutional liberty. Magazines such as the *New Yorker*, the *New York Review of Books*, and the *New Republic* printed long, thoughtful, and angry pieces linking Bork to an unprincipled activism of the right and the Reagan social agenda and condemning him in the harshest of terms. Ronald Dworkin, a left-wing constitutional scholar at New York University, had long opposed Bork, both when they were colleagues at Yale, and later in print. He called Bork's positions "radical" and "antilegal." Renata Adler, a liberal Republican who had taken her law degree at Yale and wrote on legal issues in a highly intellectual fashion, labeled Bork's views on the Constitution "hard to read, cynical, poorly reasoned, and ideologically extreme to a degree that is unusual even on the outermost fringes of our public life." Philip Kurland, the conservative constitutional professor at the University of Chicago, attacked Bork in the *Chicago Tribune*. Kurland charged that Bork adjusted his views to political sentiment on the right at any given time to promote himself. The notable exception to this anti-Bork barrage was the *Wall Street Journal*, whose pro-Bork editorials matched in emotional timbre the most fervent anti-Bork material.

Bork's critics were steeped in the constitutional thinking of the past quarter century. To harness their rage made it much easier to label Bork as "outside the mainstream."

Apart from seeking to frame the debate, the Communications Consortium workers played the role of media monitor, seeking out trends and themes in Bork coverage during the hearings.

"Every morning someone would come in at six-thirty and do a summary of press coverage," Tynes said. "Then there would be a meeting to develop the message for

that day. My job was damage control, to see how the message was playing in the targeted areas."

Tynes recalled an incident. A leader of the anti-Bork coalition had unforgivably told a reporter that support of Bork by attorney Lloyd Cutler—former counsel to President Jimmy Carter and an establishment Democrat—was a "setback." Such a remark was forbidden. Tynes had to spend a great deal of time getting everyone to tell reporters, as casually as possible, that this was not what was meant, that in fact, things couldn't be better.

Most agreed that the anti-Bork forces worked magic. When the battle was over, Bork and his advocates made much of the full-page newspaper, radio, and television advertisements. Their concerns were partly misdirected. Paid advertising around the country amounted to between one and two million dollars, not a magnificent figure in the circumstances. Of more importance was what public relations people called "free" or "earned" media—in other words, the news media.

"Never before had I felt so much like raw meat," commented Linda Greenhouse of the *New York Times*, speaking about liberal message framing. "Even while you knew it was happening, it seemed impossible to do anything about it. You couldn't avoid it. It was like Mount Rushmore in the middle of the flight path." . . .

Ironically, Sparks and Tynes, the anti-Bork media consultants, had learned their lessons from the right wing.

"In the past decade, the right learned how to get popular support for a notion and, through the use of polls and media, spread it," Sparks said. "For every dollar spent on creating an issue, they spent three on promoting it. They really had a better feel for the sense of the nation than we did."

Emily Tynes agreed. She noted that the antiabortion movement had learned from its 1960s opponents and had taken to using songs, rhetoric, and staged events to carry its cause to the people. The right also promoted issues through television and the co-opting of popular images, a standard Madison Avenue technique.

Liberals felt themselves unable to compete, and, Tynes said, the progressive movement was in a malaise during most of the Reagan era. Tynes, a black woman, had nearly given up on political activity. For her the Bork victory was "a shot in the arm, pure adrenaline. We spoke to how people were feeling."

Jackie Blumenthal helped write anti-Bork advertisements put out by People for the American Way. She felt the ads were less important as keys to stopping Bork than as a public announcement of a liberal counteroffensive.

"When Powell resigned, there was a simultaneous electric shock," she said. "We had been sitting on our hands for eight years waiting for the exact issue that would allow us to state what had been going wrong. For eight years the conservatives had been beating our brains out. Our ads broke the notion of our kowtowing to the new ethic in town. They were a sign that that period was over. We felt it was time for us to say, 'You can't set the tone anymore.'"

These ads came under frequent attack as a distortion of the judicial selection process. But Jackie Blumenthal defended them, saying they were "kindling to make this a truly political, ideological battle, not partisan, but political."

People for the American Way had been started in 1981 by Hollywood producer Norman Lear, creator of "All in the Family" and other innovative television shows. Lear liked to say that his was probably the only organization in America that began as a TV spot. Lear's notion was that the group would enter the fray for control of the national agenda through the use of media and symbols. He understood that Americans like America, that they feel good about their country. This was something the right had understood; Lear wanted the left to realize it. That was one reason for the self-consciously—almost self-parodying—patriotic name for his organization. Lear wanted to counteract the hours of far right evangelical preaching on television and what he saw as the right's ability to control the national dialogue.

People for the American Way was particularly involved in battles over textbook banning and for freedom of information. It ran newspaper advertisements over judicial nominations, such as Daniel Manion's,* and rapidly built up a budget of more than ten million dollars and a staff of about a hundred.

Focusing on the Bork nomination was a natural for the group. As Blumenthal put it, "Jerry Falwell needed an enemy to prosper. He and others used liberalism, the Trilateral Commission, communism. So we have done the same with figures like Bork. But the right didn't match us on this one. They showed an unbelievable failure of intelligence over Bork. They didn't know what this was about."

The advertisement that became a lightning rod for right-wing indignation was one Blumenthal helped put together for television, with Gregory Peck as narrator. It was Lear's idea to do a television commercial. Although he rarely got involved in the daily workings of People for the American Way, he had taken a special interest in the Bork nomination and contacted Peck, who had also become concerned over Bork. Jackie Blumenthal's two young sons and her deputy and the deputy's husband were the actors in the spot, put together in twenty-four hours because of Peck's schedule. The television family was shown on the steps of the Supreme Court looking up at its slogan, "Equal Justice Under Law." A gentle breeze ruffled their hair, as Peck introduced himself on the sound track and accused Bork of opposing civil rights, privacy, and much free speech protection.

"Robert Bork could have the last word on your rights as citizens, but the Senate has the last word on him," Peck said. "Please urge your senators to vote against the Bork nomination, because if Robert Bork wins a seat on the Supreme Court, it will be for life—his life and yours."

As David Kusnet, the organization's vice-president, explained it, the ad showed two positive symbols—the Court and the American family—interacting with each other. Juxtaposed on top of them was a looming Bork threatening the people and the institution. The ad won an award from *Millimeter* magazine, a trade journal for the film and broadcasting industry.

Perhaps the greatest irony of the Peck advertisement was that it was received with cynicism by the Washington press corps when People for the American Way presented it at a news conference. Few reporters wrote about it; few news pro-

* Daniel Manion was a controversial, conservative Reagan appointee to the Seventh Circuit Court of Appeals; he was confirmed by the U.S. Senate despite vehement objections from liberal senators and interest groups.

grams aired it. The ad received little attention; it was aired only eighty-five times, tiny by advertising standards, and on mostly obscure stations for two weeks. Few Americans saw it, and few reacted. But on the last day of its airing White House spokesman Marlin Fitzwater attacked it, bringing it the attention it had never received. Once it was an object of controversy, it played for free over and over again on network news programs. . . .

The goal was fifty-one senators (to defeat Bork). To get to those senators, the anti-Bork coalition had to go out to the people. If the campaign were left as an inside-Washington maneuver, Bork, himself an insider, would win.

Ricki Seidman, legal director of People for the American Way and an experienced political campaigner for liberal causes and candidates, said: "We could have all the substance in the world on our sides and go talk to senators. But to get their votes on this one, we needed to have their constituency against Bork. Rousing interest in legislation is hard enough. The Court is so removed. No one knows about it. We had to look for strategies that would serve as attention getters. People are not worried or knowledgeable about the Supreme Court but they are about the question of turning back the clock on civil rights and the Reagan agenda. We had to make clear that the Court and Bork are linked to those things."

Within a month of the nomination the public relations specialists in the coalition all agreed that polls would be central to a comprehensive, thoughtful campaign. The Boston firm of Martilla and Kiley, which had links to the Biden campaign and had done work in the past for AFSCME, was hired to carry out the poll. AFSCME offered forty thousand dollars to pay for it.

The poll, carried out in mid-August, was a watershed. It set out not only to test feelings about the nomination but also "to gauge the potential effect on voters' attitudes of many elements of Bork's record and background that have been subject to criticism in recent weeks." In other words, which issues could be best exploited? The poll reinforced the gut feelings of the anti-Bork leaders that the thrust of their message was appropriate. But it also offered important guidance on several overlooked points.

First of all, only about a third of Americans knew the Court had nine members; therefore, a campaign built on the concept of Court "balance" promised to have little impact. While balance continued as an underlying motivator and was frequently discussed with knowledgeable audiences, its prominence in coalition literature faded.

Secondly, the conservatives' belief that most Americans were unhappy with the Supreme Court, that they saw it as usurping the power of legislatures, was misguided. Only 27 percent thought that the Court was too conservative and 23 percent that it wielded too much influence on the country's affairs.

As Tom Kiley put it in his summation of the poll, "Supporters of Robert Bork, who is already positioned as a very conservative choice, cannot predicate their campaign on the existence of a public mandate for change on the Court. Quite the contrary; when it comes to the Supreme Court, most Americans are inclined to support the status quo."

Thirdly, the poll showed the American people to be more jaundiced about the judicial selection process than many inside Washington had believed. The vast

majority of Americans—70 percent—believed that Reagan had chosen Bork for his political philosophy. Those polled seemed to scoff at the notion that Bork had been selected for his competence. The public saw the Court as an instrument of political power, not as the keeper of some abstract set of principles.

Fourthly, by a surprising five-to-one margin, Americans believed the Senate should carefully scrutinize a presidential nominee from all points of view, not merely his competence and personal integrity.

A fifth point noted in the coalition's analysis was that the nomination became increasingly unattractive the more Bork could be painted as someone with biases against groups or causes. It would not be enough to show that Bork was extremely conservative; he would have to harbor some kind of agenda.

In addition, there was populist resentment of officials and others, whether businessmen or academics, who sought to interfere with the freedom of individuals to conduct their lives as they wished. Bork's failure to support a constitutional guarantee of privacy—his opposition to the Supreme Court decision that struck down a law forbidding the use of contraceptives—could be deeply mined for that theme. The poll made clear that abortion should not be stressed in the headlines since it was a divisive issue. But the contraceptive case could be used as a kind of code.

Finally, Kiley warned the coalition against too much substance in its efforts to appeal to the nation: "To engage public opinion, Bork's opponents must keep their message clear, simple and direct. Again and again, we find that forays into constitutional law or judicial theory have the effect of impeding public understanding of the fundamental objections to Bork's nomination."

Nikki Heidepriem, a political message consultant hired by the anti-Bork forces, said that casting Bork as a right-wing ideologue seemed to her a bad idea because that put liberals in the bind of one day fighting off the notion that one of their nominees was a left-wing ideologue.

"Then we had the idea of simply labeling him a rigid ideologue, someone off the charts with a stifling interpretation of a living document," she said. "The key surrogate for that notion was privacy. That allowed some southern Democrats to talk about populism without our having to do it since it had bad connotations for blacks and ethnics. Privacy as an overarching concept gave us a chance to talk about control, as in choice, and integrity of the home as government becomes more intrusive. It was especially effective in the South."

And so, while fearing Bork would turn back the clock, the anti-Bork coalition actually *did* turn back the clock to beat him. It forced the debate into the domain of issues long settled, raising the specter of birth control police, poll taxes, and literacy tests. . . .

One aim of the anti-Bork coalition was to impart a sense of unstoppable momentum. The coalition made sure that reports critical of Bork were evenly spaced, coming out when little else was happening so as to create news events. Leaders also sought constantly to expand the coalition membership, adding groups every week. Ultimately some three hundred organizations joined the anti-Bork movement. They included such groups as the Association of Flight Attendants, B'nai B'rith Women, the Disability Rights Education and Defense Fund, the Jewish War

163

Veterans of the USA, the Organization of Chinese Americans, the National Council of Senior Citizens, the Sierra Legal Defense and Education Fund, and the YWCA. Most had never considered taking a stand on a Supreme Court nomination before. But this one was cast in such dire terms, it so concentrated the struggle between those hoping to shape the country that it was nearly impossible to remain neutral on it. As columnist George Will derisively put it, "The ease with which such groups have been swept together for the first time in such a campaign reflects, in part, the common political culture of the people who run the headquarters of the compassion industry."

Opposition became especially noteworthy among women's groups. Bork had opposed the Equal Rights Amendment, the Court's 1973 abortion decision, and the application of the Fourteenth Amendment to women as a group. Hence even moderate women's organizations felt their fate and power on the line.

The National Federation of Business and Professional Women's Clubs, Inc., whose membership is nearly half Republican and active especially in the South and Midwest, made a huge commitment to the anti-Bork effort. Monica McFadden, the group's Washington lobbyist, said this was a first for the 125,000-member organization. The Bork nomination provided the group an opportunity it had sought for several years: a public policy issue that stirred the membership.

"Here were all the issues we cared about embodied in one fight," she said. "Senators know we're not nut cases. We're very moderate as a group. The average age of our members is late forties, early fifties." She added that what excited many of the members was the way the Bork battle attracted younger women to the organization, offering it a chance to reinvigorate its role and purpose in the country.

Patrick Caddell, the Democratic pollster and Biden adviser, remembered addressing a lunch of staff members of the Republican National Convention in early September. He had been asked to offer a Democrat's perspective to a discussion with Ed Rollins, former Reagan campaign chairman and political adviser. Caddell, who enjoyed nothing more than being provocative, started attacking the Bork nomination as poison for the Republicans. He said there was no better way to drive moderates and young women into the arms of the Democrats than to threaten them on issues such as privacy and equal protection for women.

"I thought I was throwing red meat at them, but the response was amazing," Caddell remembered. "Many women there agreed. One woman said to me that the nomination could be a Pandora's box for the party."

Two organizations hesitated for many weeks about whether to take a public stand on the nomination: the American Civil Liberties Union and Common Cause. Both, while liberal in orientation, prided themselves on being process-rather than result-oriented and on fighting issues in a principled, nonpartisan fashion. The fact that the Bork battle was seen as the domain of liberal Democrats made their decisions harder because it opened them to charges of politicization. That became a major issue a year later, when Republican presidential candidate George Bush used the ACLU membership of his opponent, Massachusetts Governor Michael Dukakis, as a blunt instrument with which to club him.

For the ACLU, Bork's consistent majoritarianism, his derision of the kinds of individual rights the organization championed made it almost impossible to stay out.

The problem was a fifty-year-old rule forbidding the group from taking a stand on high court nominees. At an emergency meeting at the end of August the ACLU joined the opposition. It was not unexpected, but it was newsworthy and significant. Common Cause, which had made the same decision some weeks earlier, said that because Bork rejected the traditional role of the Supreme Court, that of defender of the rights of minorities, it had no choice but to oppose his confirmation.

The work against Bork went forward long before the hearings began and well away from the Senate chamber where he would officially be questioned. It took the White House by surprise. The administration expected a difficult confirmation battle. It thought, however, that the fight would occur *inside* the hearing room, as it had with Rehnquist. All the while, it was priming its candidate on his role in Watergate and on technical legal issues. The country beyond Washington was virtually ignored until too late. While liberals had discovered an issue to embody their anger and frustration of seven years and were mobilizing their troops, the administration was in a state of confusion. . . .

White House officials protested after the confirmation had failed that they had been unfairly accused of not working hard enough. Shortly before the final Senate vote Tom Gibson, then director of public affairs at the White House, drew up an extensive listing of pro-Bork activities by various sections of the White House. It was meant to be proof that they had worked hard. And they had. But a glance at the list makes clear that the bulk of the work began in mid-September, around the time of the hearings themselves. By then the anti-Bork offensive was well on its way to victory.

For example, the first lobbying telephone call to a senator by President Reagan on the Bork nomination was listed on September 30, after most senators had made up their minds. He did not call most southern Democrats. His first meeting with Republican Senate leaders took place on the day the hearings began, September 15.

Howard Baker called all the southern Democrats on July 21 and 22 but did no more personal lobbying until mid-September. In August he did sit for eight interviews and made a dozen speeches on the subject, mostly to Republican groups. Beginning in mid-September, when he was under fire, Baker gave a lot of interviews and speeches. He also personally lobbied sixty senators in September and October.

Various lower echelons in the White House produced op-ed pieces, letters to the editors, drafts of speeches, and so on for different administration officials to sign. Again, most of that work was done in late September and October.

While the White House tried to keep conservative groups from getting too publicly involved during the summer, many were doing so on their own anyway and resented the admonition.

Patrick McGuigan of the Free Congress Foundation in Washington, recalled that Culvahouse called him once and asked him to prevail upon Daniel Popeo, legal director of the Washington Legal Foundation, from speaking out for Bork's conservative views. Popeo had made a number of just the kinds of supportive comments about Bork that worried the White House, saying Bork would overturn half a century of bad law.

McGuigan said he replied: "No way. I'm not going to call a guy who's like a brother to me and say those things."

Culvahouse replied that the worst thing that could happen would be for conservatives to use the nomination to promote their agenda. McGuigan shot back that no, the worst thing that could happen would be to lose the Bork war.

McGuigan meant that. Animated by a combination of religious fervor—he was a devout Catholic—and conservative political goals, he toiled like a beast for Bork. For McGuigan, the contest over Bork was a personal struggle. When the battle was over, McGuigan wrote a book offering his views on what happened. In the preface he thanked his wife for her understanding, writing: "My wife Pamela has for these many years endured hours, days and weeks of separation to support my work but never so intense a time of tension and sadness in our life as the final weeks of Bork's struggle, when it gradually became clear to me he would not prevail."

Conservatives were especially effective at generating mail to senators and ultimately beat the anti-Bork forces in number of letters sent. Religious fundamentalists, hopeful that Bork would contribute to overturning the abortion decision, were the most active, although some such groups stayed away, concerned that Bork was areligious. The Public Affairs Committee of the Southern Baptist Convention urged that its 14.6 million members "prayerfully consider writing letters to their United States Senators to support the Bork nomination." The author of the resolution, Les Csorba of the First Baptist Church in Alexandria, Virginia, said: "Judge Bork's opinions that the Constitution does not protect pornography, that homosexual activity is not a constitutional right, that some public recognition of the role of religion in our history should appear in textbooks, and his respect for the Establishment Clause, are consistent with the sentiments of the Southern Baptist Convention."

Dr. Robert Grant, chairman of the Christian Voice, wrote to his followers: "Robert Bork does not support the idea of a constitutional right to engage in sodomy. He may help us stop the gay rights issue and thus help stem the spread of AIDS. Don't wait—act now! We must return the law of our land to godly foundations while we have a chance."

Concerned Women for America, which championed traditional family values, worked hard for Bork. The group launched a huge direct mail campaign and ran newspaper advertisements in Pennsylvania and Alabama, homes of Senators Arlen Specter and Howell Heflin, undecided members of the Judiciary Committee. McGuigan's group also ran radio advertisements in Washington, D.C., to counter a similar campaign by People for the American Way.

In Chicago a group called Free the Court! generated grass-roots activity for Bork. The name suggested the need to liberate the Court from "liberal special interests," according to Steven Baer, its director as well as director of the United Republican Fund of Illinois. The group had no contact with the White House other than an encouraging nod of approval from officials there when Baer called to announce its formation. He set up Senators Biden and Simon as targets since both were committee members running for president and were against Bork. Baer's group sent a

* The establishment clause of the First Amendment to the Constitution says that "Congress shall make no law respecting an establishment of religion. . . ."

stop and search vehicles, confiscating unregistered firearms. Anything that might detract from the free possession of guns was perceived as a threat by the NRA. When one of the most powerful conservative groups in the country, one which had frequently poured its funds into fights over judicial nominations, felt threatened by Bork's strict interpretation of the Constitution, it was an omen.

Discussion Questions

1. Should Robert Bork have been confirmed for the United States Supreme Court? Why or why not?
2. What role should interest groups play in the confirmation process for the Supreme Court?
3. Has the confirmation process for the Supreme Court been irreparably damaged by the Bork nomination fight, and if so, what has been the impact on the Court itself?

couple of dozen demonstrators to many of their campaign appearances in Iowa and Illinois.

"We wanted to spook the southern senators with coverage of our anti-Biden work," Baer said later. "Our work was small-scale. We only spent twenty-five thousand dollars. But we did manage to have Biden met by pro-Bork crowds. He was visibly irritated."

Baer's group sent a banner over the Iowa State Fair during a debate, saying BIDEN AND SIMON, BORK BASHERS, LIBERAL LAPDOGS. At the Illinois fair it handed out large tickets to a Biden and Simon Puppet Show, "starring Joe 'Absolutely Open Mind' Biden and Paul '50 Ways to Leave Your Principles' Simon, produced by bootlicking, sycophantic political ambition, directed by the liberal special interests that control the Democratic presidential primary process and the activist agenda of the Supreme Court."

The work drew some local press coverage.

But more significant were the right's failings in grass-roots efforts. A sign of that failure was the poor organization of a group begun in Southern California by Bill Roberts, onetime campaign director for Reagan. Called We the People, the group vowed to raise two million dollars but never brought in more than two hundred thousand.

Just before the hearings began, McGuigan called one of his friends at the White House to complain that [conservative lobbyist Thomas] Korologos had disparaged outside groups for not doing enough to help the confirmation. McGuigan protested that he had been killing himself over this thing and that it was the White House that had done too little. The official said Korologos was complaining about the corporate establishment, which promised help and did not deliver.

McGuigan said it was most important for the White House to begin raising money for the pro-Bork campaign. "This nomination won't get by unless some bucks get plowed into television advertising pronto," he said. Then, referring to the anti-Bork ad recorded by Gregory Peck, McGuigan added, "For God's sake, the other side has Abe Lincoln in their TV spots. You need to get the president on the horn to some of his rich buddies, and the word needs to go out that this needs to happen."

"We can't do that," the official replied. "It's just not appropriate for the president to raise money for a lobbying operation." This was partly a reference to the Iran-contra scandal when money for the contras was raised privately by those connected to the administration.

"I don't care how you do it," McGuigan replied. "I don't care if it's done with winks and nudges." The official said he would see what he could do. Nothing materialized.

Another serious setback was the failure of pro-Bork forces to persuade the National Rifle Association to help them. Perhaps the most effective conservative lobby in Washington, and one of the wealthiest, the NRA stayed out of the Bork fight despite two decisions Bork had handed down as a judge in its favor. The main reason the group sat out the fight was its concern over what it saw as Bork's cramped view of the Fourth Amendment prohibition against search and seizure. NRA leaders feared Bork would seek to close loopholes in the law regarding state troopers who

165

