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NOW IS THE TIME FOR ALL GOOD MEN. . .

LLOYD N. CUTLER*

The American Constitution usually is described as a system based on Montesquieu's principle of the separation of powers. In reality, as Richard Neustadt has observed, it is a system based on the principle of separate branches exercising shared powers.¹

In Philadelphia, Montesquieu's adherents won at best only half a loaf.² Indeed, the Convention's failure to adopt the other half was the main argument of those who opposed ratification. As the *Federalist* papers (Nos. 47-51) make clear, the framers decided to blur the strict separation of powers in order to advance the equally important and "nearly irreconcilable"³ principle of checks and balances. They decided the best way to maintain checks and balances among the branches was to allow at least one other branch to share in each power principally assigned to a different branch. As Madison stated in *The Federalist No. 48*, "unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."⁴

The Constitution contains many examples of connected and blended powers. No branch, not even the judiciary, can exercise its principal powers free of some control by at least one of the other two branches. Congress must present its legislation to the President, who can veto subject to a two-thirds override by both Houses.⁵ The President must submit his appointments and agree-

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1. R. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 101 (1976).

2. F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 258-60 (1985).

3. *Id.* at 82.

4. *THE FEDERALIST* No. 48, at 146 (J. Madison) (R. Fairfield ed. 1981).

5. U.S. CONST. art. I, § 7, cl. 2.

ments with other nations to the advice and consent of the Senate.⁶ His acts as Commander in Chief, in conducting foreign policy and in executing the laws, can be sharply restricted by congressional legislation or refusals to grant his legislative requests, or by the last resort of impeachment.⁷ Actions of Congress or the President, or of both acting together, can be set aside as unconstitutional by the Supreme Court.⁸ Congress and the President can check the courts by the appointment/confirmation process and by exercising their power under article III to enact laws defining the jurisdiction of the lower courts and the appellate jurisdiction of the Supreme Court.⁹

As is true of all shared powers, the sharers of power must figure out a way to cooperate with one another, or the result is deadlock. We sometimes tend to congratulate ourselves on the supposed virtues of inefficiency and stalemate in democratic government, but the constitutional convention was convened because of the utter despair of its members over governance under the Articles of Confederation. Although the framers carefully protected against the risk of tyranny, they also tried to design a system that would be more efficient than the one that it was intended to replace.¹⁰

The resulting system of separate branches exercising shared powers has worked well to prevent another tyranny, and continues to do so. For the first 160 years of the Republic—until about 1950—it also permitted the national government to function powerfully and decisively when a need for bold action arose at home or abroad. For the last four decades, however, the national government has been characterized by an abnormally high degree of deadlock on major issues of domestic and foreign policy. I believe the explanation lies in the changing role of our national political parties.

6. *Id.* art. II, § 2, cl. 2.

7. *Id.* art. I, § 2, cl. 5.

8. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

9. U.S. CONST. art. III, § 2, cl. 2.

10. F. McDONALD, *supra* note 2, at 2-3.

The original Constitution makes no mention of political parties.¹¹ Indeed, in *The Federalist No. 10*, Madison vigorously criticizes "faction" as the bane of all republics, and describes the system of separate branches as designed specifically to prevent the "mischiefs of faction."¹² Yet he was careful to define "faction" as those who join to pursue a selfish interest "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."¹³ That definition would not appear to cover a broadly based national political party that cuts across narrow interest groups.

In any event, when Madison and the other framers confronted the practical problem of making their brave new system work, they found it necessary to offset the centrifugal force inherent in the separate executive and legislative branches with a countervailing centripetal force. They proceeded to organize two broadly based national political parties, one led by Hamilton and Adams and committed to the concept of an expansive central government, and the other led by Jefferson and Madison and committed to the concept of more limited central government. The elected President and the elected legislators of the same party had a greater natural affinity for cooperation with one another than with the legislators of the other party, and this affinity tended to offset the institutional wariness between the Executive and Congress in exercising their shared powers. This "two-party" system has continued to the present day, although a shift of magnetic polarity has developed in the sense that the present Democratic party, the direct descendant of the party of Jefferson and Madison, has come to favor expansive central government, while the present Republican party, the indirect descendant of the party of Hamilton and Adams, has come to favor more limited central government.

Although this "two-party" system continues, its success in fostering cooperation between the branches has declined remarkably. In thirty-five out of the thirty-eight presidential elections held from John Adams's victory in 1796 through Harry Truman's in

11. In the Constitution as amended to date, the only reference to the existence of parties is an indirect one. The 24th amendment abolishes the poll tax for "any primary or other election." U.S. CONST. amend. XXIV, § 1.

12. *THE FEDERALIST* No. 10, at 17 (J. Madison) (R. Fairfield ed. 1981).

13. *Id.*

1948, the party winning control of the White House also won a majority in both the House and the Senate. This proposition held true for ninety-two percent of these elections.¹⁴ The only exceptions in the nineteenth century were the elections of Zachary Taylor, Rutherford B. Hayes and Grover Cleveland for his first term.¹⁵ In the twentieth century, until Dwight Eisenhower won his second term in 1956, the party winning the White House *always* won control of the House and Senate.¹⁶ Eisenhower's second term, however, signalled the beginning of a polar shift: the party winning the White House has failed to win a majority of one or both Houses in six out of the last nine presidential year elections.¹⁷ And starting with Richard Nixon's first election in 1968, the party winning control of the White House has failed to win a majority of one or both Houses in five out of the last six presidential year elections.

The modern phenomenon of divided government is the main reason we now have deadlocked government most of the time. The close correlation between the two is illustrated by the persistent high budget deficits and by the recurring struggles between the President and Congress over the use of American military forces or weapons around the world.

High budget deficits, of course, are not an intended goal of national policy. Presidents and congressional leaders of both parties oppose high deficits, and most polls show that the public shares this view by a large margin.¹⁸ High deficits occur when the President and Congress cannot form a consensus on a mix of taxes and competing expenditure programs that will create a reasonable balance between inflows and outflows. High deficits are the conse-

14. See BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 (PART 2) 1083 (1975) [hereinafter cited as HISTORICAL STATISTICS].

15. See *id.* When Republican James A. Garfield was elected in 1880, his party won a majority in the House and an even split in the Senate, which they were able to control with the tie-breaking vote of the Vice President. *Id.*

16. See *id.*

17. See *id.* (elections until 1970); BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1988, at 242 (1987) [hereinafter STATISTICAL ABSTRACT 1988] (elections after 1970).

18. See Times Mirror Co. poll conducted by the Gallup Organization, May 13-22, 1988. Fifty-nine percent of 3021 adults surveyed nationwide said deficits were a "bad thing"; 20% disagreed; 5% responded that deficits were neither good nor bad; and 16% were undecided.

quence of deadlock between the executive and legislative branches in the exercise of their shared power to legislate.

In modern times high deficits have occurred *only* with divided government. Economists generally accept that three percent or more of the GNP is the telltale sign of an unacceptably high deficit.¹⁹ We have had ten such deficits since World War II. *Every single one* occurred during a time of divided government—Truman's in fiscal 1948, Ford's in 1975 and 1976, and Reagan's seven in 1982 through 1988.²⁰ The correlation between unacceptably high deficits and divided government is much too exact to be a coincidence.

Largely because of the undeclared war in Vietnam, Congresses and Presidents since Richard Nixon's first election in 1968 have been in constant struggle over another part of their shared powers—the power to deploy and use our own armed forces abroad and to supply weapons to other governments and insurgent forces. Other contributors to this issue have described the constitutional ambiguities that give rise to this struggle.²¹ The significant point is that the War Powers Resolution itself was enacted over President Nixon's veto at a time of divided government, and that every subsequent executive-legislative dispute over the application of the Resolution (the Marines in Lebanon, the reprisal attack on Libya, the invasion of Grenada and the current naval deployment in the Persian Gulf) has arisen during a time of divided government. Similarly, Congress has checked the President by setting aside or refusing to authorize weapons transfers to foreign governments or insurgents only during times of divided government. Congress blocked President Nixon's proposed arms sales to Turkey after the 1974 Cyprus crisis. Congress checked President Reagan on proposed weapons transfers to the armed forces of the governments of Saudi Arabia, Kuwait, and Jordan²² and to the insurgent contras in

19. See, e.g., J. MCKENNA, *AGGREGATE ECONOMIC ANALYSIS* 242-44 (3d ed. 1969).

20. See OFFICE OF MANAGEMENT AND BUDGET, *BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1989*, 6g-40, Table 19.

21. See, e.g., Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989).

22. See Tompa, *The Arms Export Control Act and Congressional Codetermination Over Arms Sales*, 1 AM. U. J. INT'L L. AND POL'Y 291, 322-25 (1986) (arms for Saudi Arabia and Jordan); Pear, *Deal is Outlined for U.S. to Sell Arms to Kuwait*, N.Y. Times, July 31, 1988, at 1, col. 1 (Hawk D missiles for Saudi Arabia and Kuwait).

Nicaragua,²³ as well as to the police forces of South Africa and South Korea.²⁴

Conversely, during President Carter's administration—the only unified government since 1968—Congress never challenged the President's deployment or use of our forces abroad, for example in the attempt to rescue our hostages in Iran. Further, although Congress insisted on various minor modifications, Congress never acted to block his arms transfers to Arab governments, to El Salvador and to the insurgents in Afghanistan.²⁵ Once again, the correlation between divided government and deadlock on these critical foreign policy-national security issues is too exact to be a coincidence.

Another political sea change helps to explain the remarkable rise in the incidence of divided government: the steady decline since World War II in voter loyalty to a single party. Until recently, most voters regarded themselves as Republicans or Democrats and voted for all of their favored party's candidates for the open offices, at least at the federal level. Today thirty percent of all voters, and approximately one-half of young voters, regard themselves as independents rather than as adherents of a party.²⁶ Even those who still register as Democrats or Republicans have developed a penchant for "ticket splitting"—voting for one party's candidate for President and the other party's candidate for member of the House or Senate. For example, in 1900 the voters in less than four percent of all congressional districts cast a majority of their ballots for one party's candidate for President and the other party's candidate for the House.²⁷ Most of them voted what politicians call the "straight ticket" of their party. Since then, the percentage of ticket splitting has increased steadily, until in 1984 the voters in forty-five percent of all congressional districts cast a majority of their

23. See 41 CONG. Q. ALMANAC 75-80 (1985); see generally HOUSE FOREIGN AFFAIRS COMM., CONGRESS AND FOREIGN POLICY SERIES No. 7, EXECUTIVE-LEGISLATIVE CONSULTATION ON U.S. ARMS SALES (Comm. Print 1982) [hereinafter EXECUTIVE-LEGISLATIVE CONSULTATION].

24. See Forsythe, *Congress and Human Rights in U.S. Foreign Policy: The Fate of General Legislation*, 9 HUM. RTS. Q. 383 (1987).

25. See EXECUTIVE-LEGISLATIVE CONSULTATION, *supra* note 23.

26. "Young voters" includes voters between 18 and 29. See G. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1987, at 124, 236 (1988 ed.); J. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 477 (1981).

27. N. ORNSTEIN, T. MANN & M. MALBIN, VITAL STATISTICS ON CONGRESS 1984-1985 EDITION 56 (1984).

votes for President Reagan and for the Democratic candidate for the House.²⁸ Estimates vary widely as to how many voters in recent presidential elections split their federal tickets. According to James Sundquist, less than one-fourth of them did so in 1984, while George Ranney noted that two-thirds of them did so in 1980.²⁹

The weakening voter loyalty to a particular party is the result of many factors, most of them probably irreversible. Changes in technology have had a major impact. In the days of paper ballots, straight ticket voting was promoted by each party's practice of having its workers outside the polling place offer each voter a printed ballot bearing only the names of its own candidates for each office. The voter then could place the printed ballot directly into the ballot box. These straight ticket ballots were much easier to use than the official ballot carrying the names of all candidates and requiring the voter to check the preferred name for each office.³⁰ This handy arrangement became outmoded with the shift from paper ballots to state-supplied voting machines. The development of radio and television was an even more important technological change, exposing individual candidates to many more voters than in the past and permitting candidates to impress their individual personalities on each voter's mind. Until political radio broadcasts became widespread in the 1930s, whether even one percent of all voters actually heard or saw the presidential candidates is doubtful. Even the Senate and House candidates were heard and seen by much lower percentages of their constituents than they are today. Now that all candidates can expose their individual characteristics to all voters, the candidate's party label has much less significance.

The other principal factors that led to the decline in voter party loyalty are the "progressive" reforms of the patronage system and of the nominating and electoral processes. These reforms began before the turn of the century and continue to this day. Under the

28. This figure is derived from the data in M. BARONE & G. UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1986 (1985).

29. See J. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 88 (1986); Ranney, *What Constitutional Changes Do Americans Want?* in *THIS CONSTITUTION: A BICENTENNIAL CHRONICLE* 13, 18 (1984).

30. See J. SUNDQUIST, *supra* note 29, at 80.

patronage system, local, state and national party leaders dispensed government jobs. Even welfare and medical assistance to the needy was often provided directly through party leaders, rather than by the government as such.³¹ The shift to a professional civil service and state welfare systems deprived the parties of these important tools for cementing voter loyalty. With the introduction of the primary system for party nominations, the power to nominate passed from party leaders to the voters at large, and candidates became free to go over the heads of the leaders in direct appeals to voters. Once primaries became widespread, candidates no longer depended on the party to finance their nomination and election campaigns; they turned instead to well-heeled individuals and interest groups, who quickly learned they could exert far more influence on the issues by giving money directly to candidates than by giving money to a political party.

Another remarkable consequence of these developments has been the transfer of political power from party leaders, both in and out of office, to individual candidates for the House and Senate. Incumbent Congressmen and Senators who become candidates for reelection are the most conspicuous beneficiaries of this transfer. The views of party leaders are far less important to these candidates than the views of the individuals and interest groups who provide the candidates with the money needed to win election or reelection.

Incumbent candidates, of course, can deliver more immediate legislative results than mere challengers. This fact enables them to raise much more money for the next campaign than their challengers, giving incumbents an enormous advantage in primary and general elections. They not only have more money; they have it much earlier, a factor that discourages many would-be challengers from even making the race.³² In 1986, an astounding ninety-eight percent of all House incumbents of both parties who ran for reelection

31. *Id.* at 178.

32. Federal Election Committee records show that as of June 30, 1988, four months before the election, congressional incumbents of both parties had raised an average of \$257,506, compared to \$30,117 for challengers. Political Action Committees, who provided 40% of these funds, gave over 95% of their contributions to incumbents. Wash. Post, Aug. 29, 1988, at A4, col. 4.

were reelected.³³ Equally astounding, over the past thirty years a weighted average of ninety percent of all House and Senate incumbents of both parties who ran for reelection were reelected, even at times when their own party lost control of the Presidency itself.³⁴ As these statistics show, even when the congressional minority party wins control of the White House, it faces long odds in its efforts to win back a majority of the House and Senate. This result is in sharp contrast to what happens in parliamentary governments in which the chief executive is not elected by a separate ballot. When Canada voted the Liberal Party out of power in 1984, only sixty percent of all incumbents who ran for reelection, and only twenty-six percent of all Liberal incumbents, were reelected.³⁵ Canada's economic and cultural patterns are very similar to our own, but modern Canadian voters, with only one federal ballot to cast, remain much more party-conscious than American voters with multiple federal ballots to cast.

One may fairly ask what is so bad about the rising phenomenon of divided government. Many thoughtful people fully recognize the cost of deadlock but see a heavier cost in a return to party loyalty and unified government.³⁶ They regard the hodgepodge of inconsistent national decisions and nondecisions under divided government as the best available consensus that can be achieved among the diverse interest groups that make up so huge and variegated a nation. They see the consensus as conceding enough to each group to avoid a degree of divisiveness that would impair the national unity. They fear that unified government would give an administration too much power to work its will, leading to the kind of extreme swings in national policy that have occurred since World War II in the United Kingdom and creating the bitterness that has grown among Britain's competing interest groups. They also note that in 1974 divided government helped to expose the excesses of an arbitrary and corrupt President and force his resignation. They

33. See 42 CONG. Q. ALMANAC 11-B, 14-B (1986).

34. STATISTICAL ABSTRACT 1988, *supra* note 17, at 242, 244.

35. Letter from Allan Gotlieb, Canadian Ambassador to the United States, to the author (Dec. 18, 1984).

36. See generally Schlesinger, *Leave the Constitution Alone* (1982), in REFORMING AMERICAN GOVERNMENT 50 (D. Robinson ed. 1985) (constitutional reform moving towards a parliamentary system would eliminate a crucial check on executive power).

read the results of the 1984 election, with its wide degree of ticket splitting, as showing that many who voted for President Reagan affirmatively wanted the insurance policy of a Democratic majority in the House. They would interpret the reelection of the President and ninety-five percent of the congressional incumbents of both parties in 1984 as a public endorsement of divided government.

Woodrow Wilson had a very different view. When Wilson ran for President in 1912 the Republicans controlled the White House and Senate, but the Democrats had won back control of the House.³⁷ One of Wilson's major campaign themes was the importance of unified government. As he put it in a Philadelphia speech:

The most interesting thing about the government of the United States is that under its constitutional balances it postpones everything. You can capture your House of Representatives in any second-year period, but you cannot capture your Senate in two years; and it may be that at the time you capture your House you haven't a chance to capture your Presidency. The present House of Representatives is Democratic because the Republican party broke its promises. But, even with the assistance of the independent Republicans in the Senate of the United States, it wasn't possible to put the program for which the country had been waiting past the veto of the President. So that you have an arrested government. You have a government that is not responding to the wishes of the people. You have a government that is not functioning, a government whose very energies are stayed and postponed. If you want to release the force of the American people, you have got to get possession of the Senate and the Presidency as well as of the House.³⁸

Under Wilson's leadership, the Democrats recaptured the White House and control of the Senate as well as the House.³⁹ The resulting unified government enacted Wilson's "New Freedom" program, generally regarded as the most constructive period of domestic legislation between the abolition of slavery and the New Deal.⁴⁰ The

37. HISTORICAL STATISTICS, *supra* note 14, at 1083.

38. W. WILSON, *A CROSSROADS OF FREEDOM* 496 (1956).

39. HISTORICAL STATISTICS, *supra* note 14, at 1083.

40. See generally Hofstadter, *The Conservative as Reformer*, in WILSON 148-52 (J. Braeman ed. 1972) (New Freedom was an effective synthesis of progressivism and conservatism).

unified government was also able to conduct a cautious but decisive foreign policy that brought us into World War I on the side of the Allies. Yet when the Democrats lost control of the Senate in 1918, Wilson failed to carry his most important initiative — the ratification of the Versailles Treaty, which brought his vision of a League of Nations into being. Of all the deadlocks produced by divided American government, our failure to join the League was probably the most fateful. With the United States as a leading member, the League might well have prevented the aggressions of the Axis Powers that led to World War II.

Wilson's 1912 views remain valid today. On balance, the negative values of divided government clearly outweigh the positive ones, while the positive values of unified government clearly outweigh the negative ones. My reasons are as follows:

- Our national government makes far more major decisions today than ever before. The competing interests involved in each decision are much more complex, but the decisions still must be made. We hold government responsible today not merely for the goals set forth in the preamble of the Constitution — to establish justice, insure domestic tranquility, and provide for the national defense. We also hold government responsible for the management of the national and world economies and the defense of the entire free world. Even conservative incumbents like President Reagan now accept this broad mandate.

- Because of the growing interdependence between our own national economy, national security, and domestic tranquility and that of other nations, many of our government's decisions involve reaching and keeping agreements with other governments. As the Italian Prime Minister so vividly put it at the Venice Economic Summit of 1981, "we are all in the same gondola."⁴¹ Without unified government, agreements with other governments are extraordinarily difficult to make because the danger of checkmate or deadlock is so high.⁴² In times of divided government, the Presi-

41. See generally *Venice Economic Summit*, 87 DEP'T OF STATE BULLETIN, Aug. 1987, at 1 (summarizing the events and accomplishments of the summit).

42. The problem is of course aggravated by the constitutional requirement that a two-thirds vote of the Senate is required for its consent to a treaty. U.S. CONST. art. II, § 2, cl. 2. Over 40 treaties submitted to the Senate since World War II either have been rejected or

dent of the United States is likely to be the only major head of government who cannot commit the government he heads.

- In a divided government, both parties and their elected officials usually condemn the resulting hodgepodge of outcomes, yet manage to avoid being held accountable for them. As we have seen, the ability of incumbents of both parties to shift the blame and win reelection has been phenomenal. A unified government usually will be held accountable for its errors and omissions—such as an intolerably high deficit—at the next election. A divided government will not; indeed, most of its participants will be reelected.⁴³

- If we can succeed in restoring unified government, there is little risk that we will veer from one extreme policy to its opposite, or that significant interest groups will become severely disaffected. We had unified government for most of the time before World War II, and putting the split over the constitutional entrenchment of slavery to one side, neither of these grievous consequences befell us. In contrast to the United Kingdom, the constitutional role of the Supreme Court limits the extremes to which unified government can take us. The Court will not permit a unified government to legislate beyond its constitutional powers or to impair basic constitutional rights. Moreover, the security of congressional incumbents encourages them to vote independently of their party leaders, and even a unified government cannot count on the votes of its legislative members to carry extreme measures that they and their financial supporters oppose. In part because of our diversity and size, but primarily because of the separation of the branches, unified government in America has never been efficient enough to achieve extreme and divisive results.

Unified government does not assure creative and effective government, but divided government comes close to assuring stagnant and ineffective government. All of the acknowledged great Presidents—the Mt. Rushmore quartet of Washington, Jefferson, Lin-

have never come to a vote. See Letter from Robert E. Dalton, Esquire, Assistant Legal Adviser for Treaty Affairs, U.S. Department of State, to the author (Nov. 13, 1984).

43. This applies even to the incumbent President. Of the five incumbent Presidents since World War II who ran for another term at a time of divided government (Truman, Eisenhower, Nixon, Ford and Reagan), all but Ford were returned to office, and Ford missed only by a narrow margin. Conversely, the voters held President Carter accountable in 1980 for the results of his unified government.

coln and Theodore Roosevelt, as well as Wilson and Franklin Roosevelt—presided over unified governments.⁴⁴ One can hardly think of a single major legislative program in this century—with the exception of the Reagan 1981 tax cuts—that was adopted during a period of divided government; and that change occurred in the brief honeymoon period during the first year of President Reagan's first term.⁴⁵

A return to unified government would not impair the congressional power to oversee executive performance and curb executive excesses. Nor would it restore the arbitrary power of party bosses and legislative leaders. Popular primaries and the democratization of congressional procedures are here to stay. These reforms, together with the penetrating surveillance of the investigative press, are sufficient guarantees that the basic constitutional checks and balances will continue to function. They do not depend on divided government to work. The Republican Teapot Dome scandal, for example, was exposed during a time of Republican unified government, with Republican lawyer Owen Roberts⁴⁶ playing the same independent prosecutor's role that Archibald Cox was to fill in the Watergate scandal half a century later.

Even if the case for reducing the current high incidence of divided government is accepted, one can fairly ask whether this is possible today, or whether the factors that have led to divided national government are now too strong to overcome. If we look beyond Washington, however, we can see that unified government is not an anachronism in modern democratic society. It exists in most of the other industrial democracies. It also exists in a substantial number of our own states.⁴⁷ The fact that unified government continues to flourish in these other nations and in many of our own

44. Wilson presided over a unified government until the Republicans captured the Senate for the last two years of his second term. As a result, he was unable to win Senate consent to the Treaty of Versailles. *See supra* text accompanying note 38.

45. J. SUNDQUIST, *supra* note 29, at 76-78.

46. *See* Burner, *Owen J. Roberts*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT (1789-1969), at 2255 (1969).

47. After the 1982 elections, we had unified government in 28 of the 49 states with bicameral legislatures. *See* 38 CONG. Q. ALMANAC 13-B (1982). After the 1986 elections, we had unified government in 20 of these 49 states. *See* 42 CONG. Q. ALMANAC 20B-21B (1986).

state governments is strong evidence that its recent decline in our national government is neither inevitable nor irreversible.

If we consider the available methods of reducing the possible frequency of divided government, changing our laws governing elections is preferable to the far more difficult task of adopting constitutional amendments. Indeed, constitutional amendments may not prove necessary. Although some elements of the Constitution do raise significant barriers, unified government managed to prevail for most of the time until about 1950.

Three possible changes in our election laws are worthy of study:

1. Providing by federal statute that the presidential election be conducted two to four weeks before the congressional election.⁴⁸ If voters already knew to which party they had entrusted the White House before they cast their votes for members of the House and Senate, they could make a more deliberate decision as to whether they wished to give the President-elect's party a majority in both Houses so that the party's program could be enacted. Although voter participation in a separate and later congressional election might be slightly lower than in the earlier presidential election, a two-stage election would maximize the new President's chances, in the early euphoria of his own election, to win a majority for his party in the House and Senate. This has been the effect of the two-stage elections now conducted in France under the Constitution of the Fifth Republic.⁴⁹

48. Under article I, section 4 and article II, section 1 of the Constitution, Congress has clear power to fix the day of elections to federal office, and is free to fix different days for elections to different offices. See *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932); *Ex parte Yarbrough*, 110 U.S. 651, 660-63 (1884).

49. Under this constitution, which creates strong separate executive and legislative branches, the presidential term is seven years, CONST. OF THE FIFTH FRENCH REPUBLIC, reprinted in FIVE CONSTITUTIONS art. 6 (1979), while the Assembly term (fixed by statute) is currently five years. *Id.* art. 24. However, the President may dissolve the Assembly, after consultation with the Prime Minister and Presidents of both Houses, and call for prompt new Assembly elections. *Id.* art. 12. When Socialist Francois Mitterand was elected President in 1981 and reelected in 1988, he faced a conservative opposition majority in the Assembly on both occasions. Each time, he moved promptly to dissolve the Assembly and called for a new Assembly election. See D. SINGER, IS SOCIALISM DOOMED?: THE MEANING OF MITTERAND 101-02 (1988). His party won a decisive Assembly majority in 1981 and a narrow coalition majority in 1988. See *id.* (1981 election); Painton, *Mitterand's Short Coattails*, TIME, June 20, 1988, at 28.

2. Providing by federal statute that every state must include on its official ballot for all federal elections an additional line or lever by which a voter may (but need not) cast a block vote for all the candidates of one party for the open federal offices. Connecticut has such a ballot, and in 1984 President Reagan's coattails enabled the Republicans to displace a Democratic incumbent and gain a House seat in Connecticut, even though they lost a net of ten seats nationwide.⁵⁰

3. Amending federal campaign financing laws to provide for public financing of congressional campaigns, on the condition that the candidates agree not to raise or spend any other funds. This same condition is in the law establishing the Presidential Election Campaign Fund,⁵¹ which the Supreme Court upheld as constitutional⁵² and which has worked remarkably well.⁵³ If Congress enacted such a law for congressional campaigns, incumbents would lose their present money-raising advantage. The law also would greatly enhance the congressional minority party's chances of winning House and Senate majorities as well as the White House.

If these statutory measures did not achieve the desired result, lowering some of the barriers raised by the Constitution itself would be necessary. One significant barrier is that half of all House and Senate elections are held in years when there is no election for President. In these "off-year" elections, voters are even less likely to think of a party's incumbent President and its congressional candidates as a team. Indeed, it is a political truism that the President's party usually loses House and Senate seats in an off-year election,⁵⁴ thus increasing the prospects for divided government or aggravating the tendency to deadlock in an already divided government. This result could be corrected by amending the Constitution to provide for four-year terms for House members, running simul-

50. See 40 CONG. Q. ALMANAC 16-B to 17-B (1984); 36 CONG. Q. ALMANAC 18-B to 19-B (1980).

51. 26 U.S.C. §§ 9001-9013 (1982).

52. *Buckley v. Valeo*, 424 U.S. 1, 90-109 (1976) (per curiam).

53. In all four subsequent presidential elections, both major party candidates accepted the funds and abided by the condition. H. ASHER, *PRESIDENTIAL ELECTIONS AND CAMPAIGN POLITICS: VOTERS, CANDIDATES, AND CAMPAIGNS SINCE 1952*, at 222 (1988 ed.).

54. See *HISTORICAL STATISTICS*, *supra* note 14, 1083-84; U.S. CONST. art. I, § 2, cl. 1 (two-year term for Representatives); art. I, § 3, cl. 1 (six-year term for Senators); and art. II, § 1, cl. 1 (four-year term for President).

taneously with the presidential term, and for a change in the Senate term that would result in holding all Senate elections in presidential election years. For example, all Senate terms could be shortened to the same four years as the presidential term, or the present three-class, six-year Senate term, with one-third elected every two years, could be changed to a two-class, eight-year Senate term, with half (one senator from each state) being elected every presidential election year.

The other significant constitutional barrier is the Supreme Court's ruling in *Buckley v. Valeo*⁵⁵ that the first amendment bars Congress from imposing any direct limit on campaign expenditures.⁵⁶ Under this ruling, and in the absence of a public campaign financing law such as that proposed above,⁵⁷ congressional incumbents cannot be deprived of their enormous money-raising and money-spending advantage. This ruling severely diminishes the congressional minority party's chances of winning congressional majorities when it wins the White House. An amendment specifically authorizing Congress to impose reasonable statutory limits on campaign expenditures for federal office would remove this constitutional barrier to unified government.

These are all rather modest proposals. None of them would shake the foundations of the Republic. Singly or in combination, they would not alter the basic political system. But in my view at least, they would significantly improve the chances of restoring unified government as the normative condition of governance under the American system of separate branches exercising shared powers.

55. 424 U.S. 1 (1976) (per curiam).

56. *Id.* at 39-59.

57. *See supra* notes 51-53 and accompanying text.