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THE CONSTITUTIONAL ORGANIZATION OF THE GOVERNMENT*

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The organization of the federal government reflects the organization of the constitutional text. The preamble speaks of the people of the United States as ordaining and establishing the Constitution. The first, and presumably most important, article deals with the election and legislative powers of the Congress. Article II vests the executive power in a President and provides for the election of the President and Vice-President. Article III speaks of the judicial power and its jurisdiction. Article V sets forth methods for amending the Constitution.

The basic structure has remained intact for two hundred years, notwithstanding the addition of several important organizational amendments to the Constitution. For example, the seventeenth amendment provided for the popular election of senators. The amendment ratified a trend that had led a majority of the states to circumvent the intentions of the Framers, but at the same time it substantially undercut the rationale for the Senate's constitutional prerogatives. In addition to this 1913 amendment, some of the rules pertaining to eligibility, election, and succession of presidents have been clarified and changed relatively frequently. The first change occurred as early as 1804; other instances arose in 1933,

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1951, and 1967.

The redirection of the electoral college, one of the most central institutions designed by the Framers, into a mechanism for the popular election of the President was achieved without constitutional amendment. This extraconstitutional, if not unconstitutional, transformation was closely related to the first of two other extraconstitutional developments with equally profound consequences for the organization of the government.

The first such extraconstitutional development was the formation of political parties that have come and, some commentators argue, have gone without ever receiving recognition in the text of the Constitution. The emergence of identifiable parties cannot be accounted for by any single explanatory variable, but rather appears to have resulted from a confluence of political factors and organizational trends traceable to the first major "partisan" congressional controversy in 1791 concerning the First Bank of the United States. This initial controversy extended to the field of foreign policy when President Washington proclaimed American neutrality in the war between France and Great Britain in 1793. Presently, the two major political parties lead only a precarious organizational existence—a fact which may account for many, if not most, of the difficulties that we encounter in the governance of the United States.

The second extraconstitutional development, the creation of a bewildering array of federal administrative agencies and mechanisms, is of even greater import than the rise and decline of political parties. This growth has been summarized by such catchwords as the "administrative state" or, by Justice Jackson more than thirty years ago, as a "veritable fourth branch of the Government, which has deranged our three-branch legal theories."[1]

Although few formal changes in the organizational provisions of the Constitution have occurred, the structure of the federal government has been a topic of discussion throughout the two hundred years of constitutional government in the United States. Unfortunately, much of this discussion has been couched in "separation of power" terms, and this customary characterization

1. Federal Trade Comm. v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

inhibits clear thinking. The Constitution combines elements of separate and independent powers, such as an independent judiciary and a President independent of Congress for his term of office, with a thorough mixing of powers, which is best summarized by the concept of checks and balances. The primary issue surrounding our system of checks and balances continues to be that which was in fact one of the main concerns of the Framers—the appropriate constitutional allocation of authority between the legislative and executive branches. As the actual allocation of power has shifted back and forth, doubts about the entire organizational scheme have increased.

It is impossible to sample in the course of this lecture even some of the views concerning the organization of the government that were expressed in the early nineteenth century. Fortunately, noteworthy commentators have provided more recent opinions. Toward the end of the nineteenth century, for instance, the young Woodrow Wilson found that the United States had a system of "congressional government" and the Congress had a system of government by committees. He considered both systems inadequate.[2] The distinguished New Deal historian, Barry Karl, in his most recent book, *The Uneasy State*, opened with the following paragraph:

> I[n] S[eptember] 1932, as Americans awaited an election they prayed would save them from the seemingly endless Depression, the president of Dartmouth said, in a letter to a recent graduate, "I don't believe we can go on much longer without a very major change in our form of government." He hoped that the alternative might be a parliamentary form, but he was willing to accept even more revolutionary changes—changes that would involve picking strong leaders and giving them the authority to lead "rather than having them [be] street-runners to whom we signal our will and from whom we expect immediate obedience."[3]

Almost thirty years later, Senator Fulbright, in a lecture at Cornell University entitled "American Foreign Policy in the 20th Century under an 18th Century Constitution," used a cliché which is well familiar to those concerned with the organization of the public for the conduct of foreign policy:

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2. *See* W. WILSON, CONGRESSIONAL GOVERNMENT (1913).
3. B. KARL, THE UNEASY STATE 9 (1984).

> In a world beset by unparalleled forces of revolution and upheaval, we Americans are confronted with the painful and urgent duty of re-examining the functional adequacy of some of our most hollowed [sic] and hitherto unquestioned institutions. The question we face is whether our basic constitutional machinery, *admirably suited to the needs of a remote agrarian republic* in the 18th century, is adequate for the formulation and conduct of the foreign policy of a 20th-century nation, preeminent in political and military power and burdened with all the enormous responsibilities that accompany such power.[4]

While the main issue in the thirties was the capacity of the government to deal with economic and social emergencies, the cold war period raised questions about the government's capacity to cope with the rest of the world, or, as McGeorge Bundy would have it, the President's power as "mankind's Chief Executive for Peace."[5] The debates of the seventies about an "imperial presidency" and congressional abdication are simply the inverse of those concerns.

A somewhat muted fear presently exists that the federal government has lost the ability to cope with any major difficulties, foreign or domestic. The issue is phrased not simply in terms of the ability of incumbent administrations or the willingness of sitting Congresses to shoulder responsibility, but in terms of the capacity of the system. In the wake of the various reactions to the Vietnam War and the Watergate affair, some observers characterize the condition of the country as one of institutionalized stalemate between Congress and President.[6]

Lloyd Cutler, one of the most articulate expounders of an institutionalized stalemate theory, first spoke in a widely noted article in *Foreign Affairs*, at a time when his service as Legal Counsel to President Carter was drawing to a close:

> A particular shortcoming in need of a remedy is the structural inability of our government to propose, legislate and administer a balanced program for governing. In parliamentary terms one

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4. Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1 (1961) (emphasis added).

5. Bundy, *The Presidency and the Peace*, 42 FOREIGN AFF. 353 (1964).

6. *See, e.g.*, J. BURNS, THE POWER TO LEAD: THE CRISIS OF THE AMERICAN PRESIDENCY 182-89 (1984).

> might say that under the U.S. Constitution it is not now feasible to "form a Government." The separation of powers between the legislative and executive branches, whatever its merits in 1793, has become a structure that almost guarantees stalemate today. As we wonder why we are having such a difficult time making decisions we all know must be made, and projecting our power and leadership, we should reflect on whether this is one big reason.[7]

Cutler's formulation deserves close reading. Cutler posits that we fail to legislate "balanced programs for governing," "to make decisions we all know must be made," or to project "our power and leadership." He attributes these failures to our inability to "form a Government," which, in turn, he attributes to the evolution of the separation of powers doctrine.

It would be unfair to respond to Cutler merely by pointing out that political preferences influence assessments of this kind, or by criticizing his criteria as vague and his etiology as less than compelling. Cutler already is aware of these difficulties. His critique must be taken seriously, however, because it comes from an experienced public servant who reflects on his observations both in and out of government.

Nevertheless, I should like to ask: "How do we know that the government works badly and needs repair? If it does work badly, how do we know the proximate cause?" These, it seems to me, are the questions that those who debate the efficacy of the federal government often ignore. Isolated facts, even a whole array of them, do not make for a diagnosis. The Senate's failure to ratify SALT II, the present budget deficits, and the complaints of our allies about the unpredictability of American foreign policy may all be deplorable, yet still not indicate a malfunctioning system. What time frame should we use to evaluate the performance of our government: the last ten years? the post-World War II period? or the entire two hundred years of constitutional government? In addition, when we find a time frame, the more difficult question may be the standards to apply.

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7. Cutler, *To Form a Government*, 59 FOREIGN AFF. 126-27 (1980).

I. Standards for Evaluating the Performance of American Government

A search for standards must distinguish between external and internal standards. External standards are supplied by normative theories of government, the practice of justice, political ideologies, and theories of statecraft. Internal standards are those which reflect peculiarly American aspirations, however they are determined. Given the American tendency to articulate aspirations in constitutional terms, this kind of inquiry frequently does not advance beyond an inquiry into the performance of the system as measured by its own terms.

Some standards, of course, will be both external and internal. It is difficult to conceive of a state which would not seek to accomplish certain purposes common to all states. For instance, one could argue that whatever else government may be about, one of its main purposes must be to secure the polis internally or, less fancily expressed, to secure the streets. In this respect, both absolutely and by comparison to other advanced democracies, the United States and its states have not done well.

This is not the place to discuss theories of government or theories of justice. Let me pose the issue at a more mundane level. For example, those critics who would argue that it is one of the main functions of government to minimize poverty may very well conclude that the United States has failed to accomplish this task. This conclusion does, of course, depend on the precise formulation of one's standard because in this regard, the United States clearly can stand comparison with most of the world, though by no means all of the world.

On the other hand, persons who believe and argue that government should play only a small role in the affairs of its citizens may also conclude that the United States has been a failure. Again, this conclusion depends on the precise formulation of one's standard because, by comparison with most of the world, including Western Europe, individual liberty has a quality of robustness in the United States that remains unparalleled elsewhere.

A. External Standards

Among external standards, however, substantive standards of

the kind to which I have just referred are not the real focus of the debate.[8] Instead, the debate centers on standards which can guide us in assessing "the role of leadership and planning, the role of the popular will and the political institutions for expressing it."[9] As suggested by the manner in which Cutler phrased the issue of organizational shortcomings[10] and in accord with a long tradition originating with the Framers themselves, the search for external standards looks abroad for models. To some extent, the search is a comparative one. Because hardly anyone is foolish enough to believe that nondemocratic countries can provide much insight to this debate, the search concentrates on sister democracies. Special emphasis is placed on the parliamentary democracies, which seem to be ideally suited for this purpose: although their values and aspirations do not appear much different from ours, they organize their governments in a rather dissimilar form or, in Cutler's terms, they manage to "form governments," while we do not. I am not suggesting that anybody wants to adopt parliamentary government lock, stock, and barrel. There does exist, however, a strong fascination with the parlimentary model.

A comparative law approach to the constitutional organization of the government unfortunately reintroduces almost immediately the matter of substantive standards. Comparison is hardly worthwhile unless parliamentary countries perform in a superior way, and that forces us to explore the definition of superior performance. Merely asking the question immediately brings to the fore two important issues which commentators cannot ignore, although these issues admittedly may be impossible to resolve. The first of these issues is the matter of the appropriate comparative time frame. The second issue pertains to requisite comparability. In what follows, I shall make passing references to only the three largest West European democracies—Great Britain, France, and Germany. Because of my personal ignorance and for the sake of convenience, I shall ignore a host of additional candidates for comparison, especially other democracies in the Commonwealth.

The first issue, the comparative time frame, presents obvious

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8. *But cf.* J. BURNS, *supra* note 6, at 11-17.

9. B. KARL, *supra* note 3, at 230.

10. *See supra* text accompanying note 7.

difficulties. We simply cannot compare present American performance with present European performance. For instance, only ten years ago it was part of conventional wisdom that Great Britain had become more or less ungovernable and was sinking into a quagmire. Prime Minister Thatcher seems to have been the *dea ex machina* who, for the time being, has put to rest many of those fears. Also, a few years ago many people in France believed that the Gaullist constitution might not survive a Socialist regime. As it has turned out, France seems as difficult to govern as ever, but the constitution has little to do with the problem. Finally, while the Federal Republic of Germany, by and large, has been a model of stability, only a year ago it seemed quite possible that a parliament would be returned in which the government would find it impossible to obtain a working majority.[11]

Even if we resolve the time frame issue by stipulating a comparatively short temporal frame of reference, we still cannot pinpoint with any precision the elements that we are comparing. For instance, Great Britain has its own version of parliamentary government which, of course, is very different from that which prevails in Germany. Similarly, Britain's form of parliamentary government differs from that of France, where the constitution restricts the legislative powers of parliament to enumerated subject matters and reserves all other lawmaking for the executive branch. Given that the British constitution is unwritten and ever-changing, moreover, it is unclear what their parliamentary government means at any particular moment. Churchill allegedly told Roosevelt that, in contrast to the American president, who had to worry about the extent to which he could act without congressional approval, but did not need to worry about his cabinet, the British Prime Minister never worried about Parliament but continuously had to consult his cabinet.[12] Proponents of parliamentary government tend to

11. It does not take any imagination to figure out what press commentary would have been if the "Greens" had become the controlling splinter faction in the Bundestag as they have in a number of German states. The 1983 election resulted from the fact that the small Free Democratic party, a few months earlier, had decided to switch from its long-term coalition partner, the Social Democrats, to the then opposition, the Christian Democrats. This kind of "betrayal," often contrary to voter expectations, is a rather common phenomenon in parliamentary governments.

12. Schlesinger, *Time for Constitutional Change*?, WALL ST. J., Dec. 24, 1982, at 4, col. 4.

stress this element: the British cabinet as a council of powerful and experienced professional politicians. A sober and influential British magazine, incidentally, believes that the major change wrought by Margaret Thatcher in the British constitution has been her abolition, for all practical purposes, of cabinet government and the substitution of rule by Downing Street.[13]

If the comparative time frame were to include the first half of the twentieth century, comparison with Germany and probably also France, loses most of its luster. The Reichstag of the Weimar Republic, for example, which was hailed as a model of parliamentary democracy, was much too confused, split and passive to counter vigorous Presidents, one of whom, in the end, proved himself capable of delivering the Republic into the hands of its enemies. The enemies lost no time in establishing one of the worst regimes known to the history of mankind.

If, alternatively, the time frame were the full two hundred years of constitutional government in the United States, comparison would probably favor the United States but also would be largely pointless because the United States government would have to be compared with successions of constitutional monarchies which have long since disappeared. Problems of time frame aside, the fact that the United States may have done reasonably well in the nineteenth century gives us scant reason for smugness in an age when one wrong move by our government could literally obliterate the world.

Assuming, for the sake of argument, that the time frame raises no problems, the question of requisite comparability remains. Does it really make sense to measure the government of the vast, federal, multiethnic, multiracial United States by yardsticks derived from medium-size, relatively homogeneous West European democracies? Even if it were clear that their performance is superior to ours, the question would remain whether this performance is attributable to their form of government or to their national situation and character. Other factors also may provide explanatory variables. Arguably, the crucial difference between the United States government and governments of other countries lies in the

13. *Denting the Contraption*, ECONOMIST, Mar. 10, 1984, at 18; *see also Machinery of Government*, ECONOMIST, Mar. 10, 1984, at 57.

continued existence in Western Europe of political parties which still perform the functions of organizing the electorate, aggregating interests, and training professional politicians. Our parties, on the other hand, especially under the obnoxious system of open primaries, seem to be reduced mostly to the production of candidates who can provide momentum to the satisfaction of the media.

Any American visitor to one of the three countries mentioned cannot help but be impressed by the relatively smooth functioning of government services in general and the welfare state in particular. This state of affairs is due, at least in part, to a lower level of tolerance for social insecurity than seems acceptable in the United States, even under Democratic administrations. When it comes to defense or foreign policy, fields where many critics believe the United States is doing poorly, the European performance is generally undistinguished. In defense, Western Europe continues to rely heavily on American umbrellas and leadership, even in areas vital to European energy needs, such as the Mideast.

A comparison with the European Economic Community also may be instructive because that community can be characterized as a vast, federal, multiethnic polity similar to the United States. This European Economic Community, to which all three countries that I have mentioned belong, seems a deadlocked and stalemated version of the administrative state in which one special interest group after another manages to thwart the most timid initiatives aimed at forward movement. Furthermore, the Community shares American concerns about the appropriate allocation of authority between legislative and executive branches of government.

Clearly, then, the search for external comparative standards by which to measure the performance of governments is a very complex enterprise. While engaging in it is desirable, we must concentrate, in the final analysis, on the essential characteristics of this country to determine whether American government works badly and, if so, whether the organization of government is at fault.

B. Internal Standards

Seeking internal standards is also a complex and dubious undertaking. It may be useful to begin our examination by asking simply whether the system performs according to constitutional design. In the last decade or so, at least three major acts of Congress have

addressed this question. We have seen the near impeachment of a President, one Supreme Court decision of great importance, and innumerable congressional and other inquiries. All of these actions were triggered by widely held beliefs that the system was malfunctioning.

II. Framework Legislation

Given the rather unusual nature of the acts of Congress, I should like to spend a few minutes reviewing them. The National Emergencies Act of 1976,[14] the Congressional Budget and Impoundment Control Act of 1974,[15] and the War Powers Resolution[16] all attempt to support the organizational skeleton of the Constitution by developing a more detailed framework for government decision making. The precursors to such legislation go back as far as the 1789 acts setting up the executive departments of government, especially the Act establishing the Treasury Department, making the Secretary of the Treasury as much an arm of the Congress as the President, and containing elaborate provisions for intradepartmental checks and balances.[17]

Another and even better known example of such legislation is the statute which organized an entire branch of the government—the Judiciary Act, also of 1789. In our time, the 1970's saw a rash of statutes intended to ensure that the collective judgment of both President and Congress applied to important subject matters.

I have coined the term "framework legislation" to characterize this type of statute.[18] Framework legislation differs from ordinary legislation by not formulating policies and procedures for the resolution of specific problems, but rather attempting to implement structural goals of the Constitution. Both declaratory and regulatory in nature, framework legislation describes the constitutional allocation of authority and regulates the decisionmaking of the

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14. 50 U.S.C. §§ 1621-1651 (1982).

15. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 31 U.S.C.).

16. 50 U.S.C.A. §§ 1541-1548 (West Supp. 1984).

17. An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65 (1789).

18. Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Non-judicial Model*, 43 U. Chi. L. Rev. 463, 482 (1976).

President and the Congress. By providing for information, consultation, and the legal consequences in cases of disagreement between the two branches, such legislation provides greater specificity to the notion of legal constraints and attempts to stabilize expectations about the ways in which governmental power is exercised. Finally, by providing procedures for the evaluation and control of the exercise of governmental power, framework legislation strives to increase the constitutional legitimacy of governmental action.[19]

The youngest and least known of the framework statutes, the National Emergencies Act of 1976,[20] well illustrates the type. The Constitution has no provision explicitly giving the President the power either to declare a national emergency or to legislate independently of Congress during an emergency. Since the earlier part of this century, Presidents have declared national emergencies on the basis of real or imagined authority delegated by statutes, and on the basis of executive powers allegedly conferred by article II. For reasons of bureaucratic convenience and slovenliness, some of these states of emergencies remained in force for decades. The longest lasting seems to have been the Great Depression emergency, which, having begun in 1933, was called off by Congress some forty years later.

The National Emergencies Act seeks to confer no power on the President other than the power to declare a national emergency. Substantive powers to deal with emergencies derive from statutes other than the National Emergencies Act and from the Constitution. For instance, President Carter's order seizing Iranian government property during the Hostage Crisis was primarily based[21] on the International Emergency Economic Powers Act of 1977.[22] On the other hand, Carter's declaration of a national emergency to deal with "an unusual and extraordinary threat . . . to the national security, foreign policy and economy of the United States"[23] was subject to the procedural provisions of the National Emergen-

19. *See id.* at 482.

20. 50 U.S.C. §§ 1621-1651 (1982).

21. *See* Dames & More v. Regan, 453 U.S. 654 (1981).

22. 50 U.S.C. § 1701 (1982).

23. Exec. Order No. 12170, 3 C.F.R. 457 (1980), *reprinted in* 50 U.S.C. § 1701 app. at 148 (1982).

cies Act.[24] Only such statutory emergency powers as the President specifically invokes may be employed in dealing with an emergency; an emergency declared by the President can be terminated by a concurrent resolution of Congress, and an emergency ends automatically on the anniversary of its declaration unless the President publishes a notice of continuation.[25]

President Nixon's extraordinary claims[26] that he possessed authority to impound funds appropriated by Congress triggered the Congressional Budget Impoundment and Control Act of 1974.[27] The legislation dealt successfully with that problem. As suggested by its title, however, the Act had even more ambitious objectives—to revamp the congressional budget process in the interest of making the legislature more independent of presidential budget proposals and to force the legislature itself to pay more attention not only to the appropriate level of federal revenues and expenditures but also to national budget priorities. The statute is an all too rare example of a congressional attempt to revamp its own institutional structure in the interest of "good government." Unfortunately, the legislation can hardly be viewed as having achieved this broad purpose.

The most controversial framework statute is, of course, the War Powers Resolution.[28] Any assessment of the statute must keep in mind its character as framework legislation. The statute is not simply one of those more than one hundred "prohibitions and restrictions on executive branch authority to formulate and implement foreign policy" with which President Reagan lumped it in his Georgetown University speech.[29] While some, many, or all of these congressional initiatives to limit the President's authority in the areas of trade, human rights, arms sales, foreign assistance, and intelligence operations may or may not be wise, they deal with spe-

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24. 50 U.S.C. § 1622 (1982).

25. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 31 U.S.C.).

26. *See, e.g.*, Address by President Nixon, Press Conference (Jan. 31, 1973).

27. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 31 U.S.C.).

28. 50 U.S.C.A. §§ 1541-1548 (West Supp. 1984).

29. President's Remarks at the Center For International Strategic Studies of Georgetown University, 20 WEEKLY COMP. PRES. DOC. 490, 496 (Apr. 6, 1984).

cific problems rather than the general issue of war powers.

What does the War Powers Resolution attempt to do? It imposes consultation and reporting requirements on the President concerning the introduction of armed forces into "danger spots"; it limits such deployment to a maximum of ninety days unless Congress extends the time limit; it provides for a legislative veto; it streamlines congressional procedures; and, finally, it goes out of its way to say that it does not intend to alter the constitutional authority of the Congress or of the President.[30]

Why do we have a War Powers Resolution? In the aftermath of Vietnam, a widely held view emerged that the constitutional scheme had not worked as intended. More specifically, the notion arose that, as feared by some of the Framers, the executive branch had become too imperial and Congress too deferential. The War Powers Resolution itself states that its purpose was "to fulfill the intent of the framers of the Constitution . . . and ensure that the collective judgment of both the Congress and the President will apply" to steps which have the potential of leading to war.[31] The Resolution was an effort to deal with the deficiency in legitimacy which had marked the Vietnam War.

The principal criticisms of the War Powers Resolution are twofold. Most fundamentally, critics argue that the resolution unconstitutionally limits the constitutional powers of the President as Commander-in-Chief of the armed forces.[32] Secondarily, many feel that it interferes with the President's powers as what the White House likes to refer to as the "Chief Executive."[33] Both complaints are based on separation-of-powers rhetoric and are exceedingly weak. It simply does not stand to reason that the President's military command authority includes the unilateral power, in peacetime, to commit American military power abroad when the circumstances indicate that such a step may draw the United States into war. That the President has the authority to repel sudden attacks on the United States or its armed forces stationed abroad is uncon-

30. *See* 50 U.S.C.A. §§ 1541-1548 (West Supp. 1984).

31. 50 U.S.C. § 1541 (1982).

32. *See, e.g.*, President's statement on signing S.J. Res. 159 into law, 19 WEEKLY COMP. PRES. DOC. 1422-23 (Oct. 12, 1983).

33. *See, e.g.*, Carter's report to Congress on the aborted Iranian Hostage Mission, 1 PUB. PAPERS 777, 779 (1980-1981) (Apr. 26, 1980).

troverted even when the President acts without a declaration of war or specific statutory authorization. Apart from this single context, however, unilateral action by the President cannot be thought of as constitutionally authorized even though under exceptional circumstances the President may find it necessary to make such a move, hoping for subsequent congressional acquiesence.

An additional criticism of the War Powers Resolution focuses on the sixty- to ninety-day durational limit imposed on the introduction of forces into danger spots. Critics speculate that the limitation blunts the use, or threatened use, of the military as a diplomatic tactic. The argument presupposes that, without the War Powers Resolution, the President could deploy troops for a longer period without seeking congressional permission. While this may be so de facto, de jure presidential unilateralism is of questionable legitimacy, with or without the War Powers Resolution.

This is not to say that we might not have been better off without an artificial limit which, by its very nature, is unresponsive to particular circumstances and which enables Congress to allow legal consequences to flow from its very passivity while simultaneously suggesting a temporary license. Before the Supreme Court's decision in *INS v. Chadha*[34] in which the Court declared the legislative veto constitutionally invalid, Congress could have dispensed with the time limit mechanism because it could have accomplished the curtailment of troop deployment by means of a concurrent resolution. The legislative veto device had the added advantage of forcing Congress to make a judgment rather than to hide behind an automatic terminating provision.

The legislative veto provision was, of course, the subject of a third objection to the War Powers Resolution. This provision presumably fell when the Supreme Court announced its opinion in *Chadha* which has since been characterized by Professor Elliot as "formalistic" and "inflexible."[35] In the words of Justice White, *Chadha* struck down "in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated

34. 103 S. Ct. 2764 (1983).

35. Elliot, *INS v. Chadha: The Administrative Constitution, the Constitution and the Legislative Veto*, 1983 SUP. CT. REV. 125, 126-127.

in its history."[36] *Chadha* was the Supreme Court's contribution to the debate on the constitutional organization of the government. Regarding *Chadha*'s implications for the War Powers Resolution, the Court has failed to convince me that the Constitution bars the legislative veto in a situation where its unavailability has the effect of making it easier for the President to commit troops to action for as long as the appropriations last or for ninety days, whichever comes earlier, if the President has the support of over one-third of the membership of either house. *Chadha*'s effect on governmental practice can be judged by the joint resolution with which Congress granted a veto-wielding President Reagan authority to keep the Marines in Lebanon for eighteen months, only to be blamed shortly afterwards by the President for not having immediately stopped all further debate on the issue.[37]

A fourth, and in a way the most crucial, criticism of the War Powers Resolution concerns the consultation clause. It implicates a whole range of constitutional, institutional, and political concerns about the organization of the government that go beyond the War Powers Resolution. Section 3 of the Resolution imposes on the President an obligation to consult: "The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement is clearly indicated by the circumstances . . . ."[38] Section 3 suffers from inherent ambiguity. Who is the "Congress" which is to be consulted? Chairmen of relevant committees like to believe that they are the Congress, as does the so-called leadership in both parties. One could argue that any consultation of selected leaders is not a consultation of Congress.

Under the Constitution, there is little doubt that questions involving war are committed to both branches. Consulting congressional leaders may be a requirement of statecraft although it

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36. *Chadha*, 103 S. Ct. at 2810-11 (White, J., dissenting).

37. Yet we must be careful not to overrate the impact of *Chadha* on the war powers problem. The American penchant for writing politics into law has the unfortunate consequence of making us forget the power of political criticism. For all practical purposes, a "sense of Congress" resolution should be just as effective as the now illegal legislative veto. The only cost attached to political tools of this kind is that it encourages irresponsibility on the part of legislators whose vote is freed of legal import.

38. 50 U.S.C. § 1542 (1982).

hardly satisfies constitutionally based requirements to give "Congress" its due. Consulting the entire Congress, on the other hand, is occasionally incompatible with the perceived needs for "dispatch, secrecy, and vigour."[39]

III. Executive-Legislative Cooperation

Syllogistic reasoning should not be used to resolve the conflict. The constitutional disputes we have seen in the areas of defense and foreign policy over the last twenty years have to some extent been caused by the unwillingness of the executive branch to do everything humanly possible to involve Congress in a spirit of honesty and fair play. In addition, when confronted with deception of the Gulf of Tonkin variety or executive branch legalisms, Congress has frequently exacerbated the power struggles by its own legalisms and absurdities, such as the recent accusation that the President, with respect to Nicaragua, may have violated the 1794 Neutrality Act.[40] I think much of the "stalemating" which we hear about is due not only to exaggerated separation-of-powers claims, especially on the part of the executive branch, but also to a lack of candor, and to the indulgence in hyperbole at both ends of Pennsylvania Avenue. The remedy is obvious. Congress and the executive branch must act in accordance with the constitutional mandate that both together form "the government" of the United States. The person in charge of congressional liaison should be the most senior person on the White House staff. Absent genuine coordination, no measure of institutional change is going to ameliorate the tendency to turn every political power play—especially when the two branches are controlled by different political parties—into a constitutional morality play.

The debate over the War Powers Resolution illustrates the tension arising from the natural desire of administrations to act without getting bogged down in legal and political bickering. The tension is between "projection of power and leadership" on the one hand, and the constitutional system of checks and balances on the other. In the "golden age" of a "bipartisan foreign policy," party leaders would see to it that the followers followed where the Presi-

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39. J. Story, 3 Commentaries on the Constitution 60 (1970).
40. 128 Cong. Rec. E4535 (daily ed. Oct. 1, 1982) (Statement of Rep. Barnes).

dent wanted to lead. Under those conditions, consulting Congress caused no pain.[41] At present, parties and party leadership today are weak and the President is confronted with the untidy mass of 535 members of Congress, each following his own counsel, constituents, financial backers, and conscience. One of the ironies of our present situation is that the individualism of members of Congress and the diffusion of power in that body make it more like it was in the early years of the Republic and bring it closer to the model of representation the Framers may have had in mind. The one great difference, which may make all the difference, is that "political action committees" were hardly contemplated as the way to finance election campaigns.

The framework statutes were an effort on the part of Congress to enforce the internal standards of the Constitution as they understood them. The statutes were not meant to constitute a reorganization of the government, but were an attempt at restoration. The Congressional Budget and Impoundment Control Act aside, the statutes have not dealt with the main institutional characteristic of Congress and of the executive branch: the multiplicity of competing and compartmentalized decisionmakers. This factor, more than any other, makes it difficult and, at times, frustrating to formulate a coherent approach to problems, both domestic and foreign.

Of course, it is excruciating to have 535 Secretaries of State on Capitol Hill. While the experience is irritating for every new administration, the problem is as old as the Republic. I recently came across a letter from Jefferson to the newly installed President Madison, dated Monticello, March 17, 1809:

> If peace can be preserved, I hope and trust you will have a smooth administration. I know no government which would be so embarrassing in war as ours. This would proceed very much from the lying and licentious character of our papers; but much also from the wonderful credulity of the members of Congress in the floating lies of the day. And in this no experience seems to correct them. I have never seen a Congress during the last 8 years a great majority of which I would not implicitly rely on in

41. *See* J. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 103-26 (1981).

> any question, could their minds have been purged of all errors of fact.[42]

Jefferson notwithstanding, if I were to purge minds of errors of fact, my purge would not be restricted to Capitol Hill. While the foreign policy makers on Capitol Hill may be a nuisance, how many are there in the executive branch at any given moment and in the course of a single administration? The main problem of American foreign policy still may be the fact that administrations usually do not speak publicly or privately with one calm voice and do not manage the steady pursuit of a coherent and realistic scheme of priorities extending over the life of more than one administration.

To me, the main problem of the organization of American government is that both Congress and the executive branch have been responding to new needs by multiplying decisionmakers who have a tendency to deadlock. If the bicentenary of the Constitution is to stimulate our thinking about organizational issues, let us rethink this topsy-turvy multiplication which is neither demanded nor contemplated by the Constitution. Let us consider, at the subconstitutional level, new decision-making frameworks which give both Congress and the executive branch their due. The congressional committee system, for instance, suffers from too much decentralization, too much overlap, too many responsibilities for the members and too much delegation of responsibility to staff. These are evils which impede the formulation and implementation of coherent public policy.[43]

Let us seek clear and coordinated lines of responsibility in the executive branch. The de facto coordinating role of the Office of Management and Budget may require expansion, and it may also be desirable to place the so-called independent agencies under presidential control.[44] These matters are within our grasp. At the same time, amending the Constitution hardly seems feasible in this

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42. 1 PAPERS OF JAMES MADISON, PRESIDENTIAL SERIES 59 (1984).

43. *Cf.* Casper, *The Committee System of the United States Congress*, 26 (Suppl.) AM. J. OF COMP. LAW 359 (1978).

44. *On the Impact of the Supreme Court Decision in the Case of* Immigration and Naturalization Service v. Chadha *Which Found the Legislative Veto Unconstitutional*, 98th Cong., 2d Sess. 776-78 (1984) (statement of Professor Cass R. Sunstein).

conservative country of ours, even if we knew the constitutional amendments that are clearly desirable.

If my sense of realism did not stand in the way, there would, incidentally, be one constitutional amendment I would favor. This amendment was most recently proposed by President Johnson in 1966.[45] Given the preposterous expenses, the corrupting impact of campaign financing, and the diversionary effects of elections every two years, I would adopt a system of quadrennial elections for the House of Representatives. Such a scheme might have the fringe benefit of occasionally providing presidents with something resembling a majority in the Congress if House elections were held in presidential election years.[46] I shall spare you, however, the litany of objections this modest and sensible proposal generates even in the House where many members apparently believe that permanent electioneering and "pulse taking," which benefits incumbents by keeping them in the limelight, is the only method to keep the country democratic.

IV. Conclusion

What, in any event, are the implications for the organization of the government of the desire to maintain democratic government? The puzzle remains as great today, and not just in the United States, as it was in 1787. If the people are the source of all power, the organizational issue is not separation of powers in the manner in which the British and colonial governments separated popular, aristocratic, and monarchical elements and mixed them with governmental functions and institutions. Instead, the doctrine of popular sovereignty focuses on the separation of *power* to maintain both majority government and individual liberty.[47] Emergency situations aside, Americans have tended to emphasize the latter over the former. This emphasis, in turn, has led to the multiplication of

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45. Annual message to the Congress on the State of the Union, 1 Pub. Papers 3-4 (1966) (Johnson, Jan. 12, 1966); Special Message to the Congress Proposing Constitutional Amendments Relating to Terms for House Members and the Electoral College System, 1 Pub. Papers 36-37 (1966) (Johnson, Jan. 20, 1966).

46. *Cf.* Cutler, *supra* note 7, at 139-43. Quadrennial elections for the House would make it necessary to adjust Senate terms to eliminate all off-year elections.

47. *See* W. Adams, The First American Constitutions: Republican Ideology and the Making of State Constitutions in the Revolutionary Era 256-75 (1980).

checks and balances, with the result of making it very difficult to act—a result which is by no means all bad.

Our penchant for institutionalizing checks, however, may have carried us to a point where we no longer can conceive of majority government. We think of ourselves only as members of minorities or as individuals. Professor Karl believes this to be the root cause of the "uneasy state:"

> Americans have always preferred to avoid the consequences of their commitment to individual choice by assuming that, somehow, the sum total of such choices will be compatible with larger historic goals. They have preferred to pay the price of mismanagement, rather than suffer the restrictions that effective management places on the individual's right to choose. Our fundamental populism, our faith in our own intuitions and in the forms of government in which we believe them to be embodied, is essential to our sense of security in ourselves as citizens.[48]

While much of this sentiment can already be found in Federalist No. 10,[49] we must remind ourselves of the fact that, much folklore to the contrary, the Framers were not opposed to effective government.

The House debates on the establishment of the executive departments were opened by Representative Boudinot with the following remarks:

> If we take up the present constitution we shall find it contemplates departments of an executive nature in aid of the President: it then remains for us to carry this intention into effect, which I take it will be best done by settling principles for organizing them in this place . . . I need say little to convince gentlemen of the necessity which presses us into a pursuit of this measure. They know that our national debt is considerable . . . . [It] is of great magnitude, and it will be attended with the most dreadful consequences to let these affairs run into confusion and ruin, for want of proper legislation to keep them in order.[50]

It is an appropriate task for the bicentennial of the Constitution to

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48. B. KARL, *supra* note 3, at 238.
49. THE FEDERALIST No. 10 (J. Madison).
50. 1 ANNALS OF CONG. 368 (J. Gales ed. 1789).

rethink principles of organization and "proper regulation." We do not need to change the Constitution in order to do so.