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# *Praise It, Bury It, Change It?*

## *The United States Constitution at 200*

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*Roger H. Davidson*

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**T**he Americans are about to launch another of their periodic civic extravaganzas. This time, the subject is not independence or the Statue of Liberty or even the Olympic Games. It is the United States Constitution, drafted 200 years ago.

The constitutional convention met in Philadelphia from May to September of 1787. Their original mandate was to propose amendments to the nation's first governmental charter, the Articles of Confederation. With boldness rarely displayed by modern-day constitutionalists, the Framers quickly cast aside their mandate and started to draft an entirely new blueprint for the government. The Articles, in force since 1781, had proven too anemic to discipline the thirteen states (interstate commerce and currency were chaotic, for instance); the national apparatus, with no executive to speak of, lacked "energy," which Alexander Hamilton pronounced the most prized attribute of government. While innovative and even experimental, the Constitution was in fact a counter-revolutionary plan, intended to provide strength, stability, and accountability.

The Constitution's bicentenary celebration promises to be a sober affair – fireworks perhaps, but certainly not the tall ships or 200 Elvis look-alikes that accompanied the 1986 Statue of Liberty fête. Project '87, a joint venture of the American Historical Association and the American Political Science Association, has been earnestly at work since 1978, planning scholarly, educational, and promotional activities. The official Bicentennial Commission, headed by Chief Justice Warren Burger (who resigned his seat on the Supreme Court to devote full time to it) dates only from 1985 and had to struggle to put together a program. It was hampered not only by lack of time but also by its ideologically divided composition.

In truth, however, the Constitution is a difficult symbol for a nation to rally around. It is, after all, a piece of paper – not a flesh-and-blood monarch, or even a statue in a harbor. It receives reverential treatment, of course. Along with the Declaration of Independence, the Constitution is kept at the National Archives in helium-filled bronze cases lowered each night into a 50-ton vault for protection. About a million people view these docu-

ments each year – only a fraction of those who visit the artifacts of flight across the mall in the National Air and Space Museum.

The Constitution and the flying machines reveal the character of our people. They respect the law (though not necessarily specific laws) and display almost fanatic faith in institutional structure and process. "We are all children of this faith in a rational written arrangement for governing."<sup>1</sup> To this is added a passion for tinkering and a belief that such tinkering leads to perfection. If something goes wrong, in a machine or in government, changing the mechanism will surely set it right. No less than the Wright Brothers, flying machine or the Apollo XI space capsule, the Constitution bears testimony to this cultural trait.

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### **The Reformist Tradition**

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The constitutional reform tradition, while never strong, has nonetheless a long and respected place in American history, commanding allegiance from a number of intellectuals and reform-minded politicians. This constitutional bicentennial focuses attention on the document itself – its virtues, its defects, and its subtle transformations over the years. One group that takes the Constitution seriously is called the Committee on the Constitutional System – a loosely organized network cochaired by Senator Nancy Landon Kassebaum (R-Kansas), Washington lawyer Lloyd N. Cutler, and banker C. Douglas Dillon. A study guide for their deliberations has been assembled by Smith College government professor Donald L. Robinson.<sup>2</sup> A study by a distinguished Brookings Institution scholar, James L. Sundquist, provides historical and political background for the controversies surrounding constitutional reform.<sup>3</sup>

Getting people to pay attention to constitutional debates is no small challenge. Although constitutional rights and guarantees are often contested, the basic structure of government has rarely been reviewed since 1787. At no time in the past 200 years has the Constitution itself been seriously questioned. It has been amended only 26 times – seven of them expansions of civil rights and several more technical or trivial.

Only five amendments have dealt with government structure. Several of these were technical: the 12th (ratified in 1804) separated presidential from vice presidential balloting; the 20th (1933) adjusted the political calendar; and the 25th (1967) dealt with presidential death or disability, setting forth procedures for designating an acting president and choosing a new vice president.

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Two of the amendments made momentous changes in governmental structure. The 17th amendment (1913) provided that senators would be directly elected, and the 22nd (1951) limited presidents to two terms. Most observers judge the two-term limit a mistake. Before the 1986 elections a boomlet for repealing that amendment broke out among Republicans eager to see Ronald Reagan stay beyond two terms – an irony because Republicans, angered by Franklin D. Roosevelt's 12 years in office, pushed for the two-term limit when they captured the two houses of Congress after World War II.

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## The Structural Problem

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The key problem, as the reformers see it, is coherence between the executive and legislative arms of government. Cutler terms it "the structural inability of our government to propose, legislate, and administer a balanced program for governing. In parliamentary terms, one might say that under the U.S. Constitution it is not now feasible to 'form a government'."<sup>4</sup> The remedy is seen to be an injection of parliamentary forms.

To join the executive and legislative branches, the reformers are intrigued with the idea of juggling the political calendar to encourage candidates to run as a "team ticket" for office. Much time has been spent figuring how to make terms for the president, Senate, and House of Representatives parallel, or nearly so. The idea is to induce voters to think of candidates together, and to prevent the "midterm election phenomenon," in which the president's party almost always loses ground in congressional elections two years after the president's election.

The team-ticket idea clashes with two ingrained habits of American voters: independence and localism. The cherished independence of the two branches sunk the idea of four-year terms for the House of Representatives the last time it was seriously proposed. When President Lyndon Johnson highlighted the idea in his 1966 State of the Union address, it drew more applause than anything else he said – from Representatives who looked forward to running at four-year rather than two-year intervals. But when hearings were held, the proposal foundered. Should the elections be held in presidential years (the team approach), in mid-years, or staggered half and half? No one could agree on the implications of making such a shift.

For their part, voters seem unimpressed with the team notion. Massive ticket-splitting has marked recent elections. Reagan's landslide victory of 1984, for example, was not matched in the congressional election results, where the president's party gained only 15 seats in the House and lost two in the Senate.

While the election calendar occupies much of the reformers' attention, other proposed changes would bring the two ends of Pennsylvania Avenue closer together. The president might be empowered to call for new congressional elections as a "vote of confidence." Or Congress might be empowered to call for a referendum on a "failed presidency" – a procedure that would have come in handy after Richard Nixon resigned in 1974. Most important, Article I, Section 6, which prohibits individuals from serving in the two branches at once, could be repealed or modified. This would allow Cabinet members to play a role in House or Senate debates, or would allow sitting lawmakers to serve in the Cabinet without losing their seats.

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## Strengthening the Executive

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Bringing the branches closer together is not the only goal of reformers. Many wish also to shift the balance of power between the two branches, mainly in favor of the president and the executive branch.

Among the reform proposals designed to buttress the president's power are: (1) granting the president an item veto over funding bills passed by Congress; (2) rewriting the 1973 War Powers Resolution to grant the president more latitude for committing troops abroad; (3) allowing treaties to be ratified by majority vote (rather than the present two-thirds) in the Senate; and (4) providing for a national referendum to break deadlocks between the two branches. Sundquist attempts to balance the equation somewhat by suggesting partial restoration of the so-called "legislative veto" – a congressional practice designed to constrain executives and recently declared unconstitutional in most of its forms.<sup>5</sup> But while Sundquist has long defended the legislative veto, many other scholars and legal experts do not share his assessment. One gets the impression that they view the practice simply as unwarranted legislative meddling in executive duties.

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## The Reformers' Executive Biases

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If evidence of current reformism is any guide, constitutional reformers in the United States prefer executive over legislative power and lean toward parliamentary reforms. These biases go hand in hand, and are of long duration.

The "modified rapture" with which reformers view Congress is rooted both in history and values. At critical junctures – the Woodrow Wilson and Franklin Roosevelt eras, for example – vigorous, progressive leadership came from the White House, with lawmakers taking the part of secondary partners or reluctant foes. After World War II, presidents stood for civil rights and international involvement, whereas Congress was notorious for obstructionism – the Senate filibuster, blockades by the House Rules Committee, and the seniority system for choosing committee leaders in both houses.

Congress has changed dramatically since those days, and during the Nixon years intellectuals even came to renounce the "imperial presidency" and flirt briefly with the idea of legislative supremacy.<sup>6</sup> Choosing sides in the Reagan era is somewhat harder. Although a majority of intellectuals probably disagree with Reagan's domestic and foreign policies, his leadership is openly admired. Criticism of the policy substance is usually mixed with awe at his personal style.

One suspects that antipathy toward Congress runs deeper than policy preferences, and goes to underlying differences in styles and values. American intellectuals, like those elsewhere, are drawn to universal values, whereas Congress is the home of particularism. In other ways, Congress displays attributes not always prized by scholars or commentators: localism rather than internationalism, anecdotalism rather than consistency, organizational dispersion rather than neatness. Woodrow Wilson, one of the early Ph.D.'s in political science, wrote his doctoral dissertation, *Congressional Government*, to describe how the legislative supremacy of his day thwarted the basic constitutional design.<sup>7</sup> Quoting Walter Bagehot's description of Parliament, Wilson called Congress "nothing less than a big meeting of more or less idle people." Since World War II the American Political Science Association has launched three major inquiries at least partially directed to examining the workings of Congress; needless to say, none have put the executive under similar scrutiny. Neil MacNeil, until recently *Time* magazine's chief Capitol Hill correspondent, once remarked that Congress felt toward its academic critics the way the catfish must have felt toward the fisherman. "Hold still catfish," the fisherman said. "I only want to gut you!"

Political scientists' view of Congress has brightened considerably in recent years. Congress is a favorite subject for behavioral and quantitative research, and often a site for fellowships or internships for young scholars. Yet the old antipathies are still in

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evidence, especially outside the coterie of congressional specialists.

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## Parliamentary Longings

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The fascination of American reformers for parliamentary or majoritarian forms of government is easier to trace. The idea goes back even before Woodrow Wilson, who admired the British system ("by far the best . . .") and continues through James MacGregor Burns, who pronounced the British system "an almost ideal form of representative government."<sup>8</sup> Looking at such systems as the Canadian or the British, such scholars envision a group of officeholders capable of organizing the executive and legislative branches into a coherent, energetic, and effective government. For a time in the 1950's the notion of "party government" was more or less official doctrine of the American Political Science Association.

Such views no doubt exaggerate the degree of tidiness and coherence found in parliamentary systems. (Ironically, reformers in parliamentary countries look fondly at divided systems. Is this a case of the grass always looking greener on the other side?)

More important, reforms designed to promote majoritarian government do not fit the nation's pluralistic political culture. The absence of a unified elite and the cacaphony of groups and interests render virtually impossible the kind of broad-gauged consensus that would have to underlie such a regime, making a fragmented, open system of decision-making arenas virtually inevitable. Citizens themselves seem to like divided government, and for about the same reason given by James Madison (in *Federalist* essay number 47): it checks possible excesses on the part of one or another elements in the system. At the very moment that Reagan was winning his 1984 landslide victory, a majority in one national poll expressed the view that it would be dangerous to give the president control of both houses of Congress.

Nor does the fragmented structure of our government preclude vigorous, purposive action under the right conditions. At the moment that critics like Cutler were lamenting the leadership crisis of the weak presidencies of Ford and Carter, Reagan demonstrated that very kind of leadership with his 1981 economic package. No doubt some of those same critics, reflecting on the results of "Reaganomics," would now wish that checks and balances had worked more forcefully than they did in those early months of the Reagan administration. Opportunities for such major policy shifts are rare in our system. Most of the time, citizens seem happy to leave checks and balances firmly in place.

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## Preventive Maintenance?

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Whatever the debates among reformers, public indifference means that major reforms are unlikely. Even among governmental elites, little serious or sustained discourse on governmental forms and processes takes place. The controversy over the so-called Gramm-Rudman-Hollings balanced budget measure is a case in point. Although the law delegated massive legislative powers to nonelected officials, relatively little debate occurred in either chamber about the constitutional implications. Instead, the matter was turned over to the courts for expedited review. When the Supreme Court eventually found the measure unconstitutional (*Bowsher v. Synar*, 1986), the decision itself turned on what one justice called a "triviality," and added little to the constitutional debate. Indeed, the constitutional side of the issue received very little attention.

As most reformers concede, only a genuine crisis will force a serious debate over the Constitution's efficacy. Even then – perhaps especially then – a frantic search for quick-fix solutions would be the most likely response. For that reason, if no other, the present constitutional discussion is welcome. Even those who, like myself, are skeptical of the reformers' emphases and many of their proposed remedies, praise them for raising the issues. Their deliberations may provide a historical record that could be drawn upon when and if a constitutional crisis occurred. For now, however, it is enough that this small band of activists and thinkers is taking the Constitution seriously on the eve of its bicentenary. There is no better way to celebrate, and none more congenial to the men who framed the document in the first place.

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## Notes

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<sup>1</sup>Lloyd Cutler, "To Form a Government," in Donald L. Robinson, ed., *Reforming American Government: The Bicentennial Papers of the Committee on the Constitutional System*, Westview Press, Boulder, Colorado, 1985, p. 11.

<sup>2</sup>Ibid.

<sup>3</sup>James L. Sundquist, *Constitutional Reform and Effective Government*, The Brookings Institution, Washington D.C., 1986.

<sup>4</sup>Robinson, p. 12

<sup>5</sup>*Immigration and Naturalization Service v. Chadha* (1983).

<sup>6</sup>See Arthur M. Schlesinger, Jr., *The Imperial Presidency*, Houghton Mifflin, Boston, Massachusetts, 1973.

<sup>7</sup>Woodrow Wilson, *Congressional Government*, The Johns Hopkins University Press, Baltimore, 1981, Original edition 1885.

<sup>8</sup>James MacGregor Burns, *Congress on Trial*, Harper and Brothers, New York, 1949, p. 110.