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PRINCETON UNIVERSITY
MAY 10, 1991
11 A.M.

THANK YOU, PRESIDENT SHAPIRO. GOVERNOR FLORIO; MEMBERS OF CONGRESS; MRS. SHAPIRO; BOARD OF TRUSTEES CHAIRMAN HENDERSON; DEAN WILLIAMSON; ASSOCIATE DEAN MORROW. I'M DELIGHTED TO HELP DEDICATE THIS IMPRESSIVE COMPLEX. THOUGH I MUST SAY I'M GLAD THIS IS MAY, AND NOT THE FIRST SNOWFALL. I DON'T THINK BARBARA WOULD LET ME TAKE PART IN YOUR OLYMPICS. // BIG LAUGH

SERIOUSLY, I'M HONORED TO RECEIVE AN HONORARY DEGREE FROM PRINCETON. IMAGINE THAT: A SON OF YALE GETTING A PRINCETON DEGREE. "SON OF YALE" -- YOU CAN LAUGH, BUT YOU OUGHT TO HEAR WHAT THEY CALL ME IN D.C. HA! HA!

WELL, PRINCETON IS A GREAT PLACE. YOU KNOW, WASHINGTON SAID "NO COLLEGE HAS TURNED OUT BETTER SCHOLARS OR MORE ESTIMABLE CHARACTERS." THAT INCLUDES, OF COURSE, OUR LAST TWO SECRETARIES OF STATE. BOTH HAVE BEEN OUTSTANDING PUBLIC SERVANTS. BOTH LOVE THIS UNIVERSITY. BUT ONLY ONE HAS THE TATTOO TO PROVE IT./// HA!

I'LL ALWAYS REMEMBER THE ~~FIRST~~ TIME I SAW THE GLOBE INSIDE THE WOODROW WILSON SCHOOL LOBBY. ANYWHERE YOU TOUCH IT, YOU SET OFF VIBRATIONS ACROSS THE REST OF ITS SURFACE. I CAN'T THINK OF A MORE APPROPRIATE SYMBOL FOR THIS NATION'S ROLE IN THE WORLD. WHEN WE ACT, WE DO SET OFF TREMORS ACROSS THE GLOBE.

insert Fred Greenstein - study of presidency

I WOULD LIKE TO TALK TODAY ABOUT AN AMERICAN ACHIEVEMENT THAT HAS INSPIRED MEN AND WOMEN WORLDWIDE -- MOST RECENTLY, IN EASTERN EUROPE. I'M SPEAKING OF OUR CONSTITUTION. IN THE INTEREST OF BREVITY, I WILL FOCUS ON THE ROLES OF THE TWO BRANCHES OF GOVERNMENT IN WHICH I HAVE HAD THE HONOR TO SERVE, THE LEGISLATIVE AND EXECUTIVE DEPARTMENTS.

POLITICIANS IN THOSE BRANCHES OF GOVERNMENT FACE AN UNPLEASANT CHALLENGE THESE DAYS. MANY PEOPLE HAVE LOST FAITH IN GOVERNMENT BECAUSE GOVERNMENT HAS BECOME INCOMPREHENSIBLE TO THEM. THE WASHINGTON OF THE CIVICS TEXTBOOK SEEMS TO BEAR LITTLE RESEMBLANCE TO THE WASHINGTON WE READ ABOUT IN NEWSPAPERS OR MAGAZINES, OR SEE ON THE TELEVISION SCREEN. WHAT IN THEORY IS A NICELY ORCHESTRATED SYSTEM OF CHECKS AND BALANCES CAN IN REALITY LOOK LIKE A THREE-RING MUD-WRESTLING MATCH, IN WHICH BEHEMOTHS STRUGGLE FOR SUPERIORITY.

WE CAN HELP RESTORE FAITH IN GOVERNMENT BY RESTORING THE BALANCE OF POWERS THAT FORMS ITS CORE. CONSIDER THE PRESIDENT'S ROLE. THOMAS JEFFERSON ONCE NOTED THAT THE PRESIDENT "COMMANDS A VIEW OF THE WHOLE GROUND," WHILE CONGRESS NECESSARILY ADOPTS THE VIEWS OF ITS CONSTITUENTS.

BECAUSE THE PRESIDENT AND VICE PRESIDENT ARE THE ONLY OFFICIALS ELECTED TO SERVE THE ENTIRE NATION, THE BURDEN FOR GUIDING AND DIRECTING THE NATION'S FOREIGN POLICY FALLS UPON THE EXECUTIVE. THE EXECUTIVE BRANCH ALONE MAY CONDUCT INTERNATIONAL NEGOTIATIONS, APPOINT AMBASSADORS, AND CONDUCT FOREIGN POLICY. OUR FOUNDERS NOTED THE NECESSITY OF PERFORMING THIS DUTY WITH "SECRECY AND DISPATCH," WHEN NECESSARY. THE PRESIDENT ALSO SERVES AS COMMANDER-IN-CHIEF OF OUR ARMED FORCES -- AS I DID IN THE PERSIAN GULF.

THIS DOES NOT MEAN THAT THE EXECUTIVE MAY CONDUCT FOREIGN ~~BUSINESS~~ POLICY IN A VACUUM. I HAVE GREAT RESPECT FOR CONGRESS AND I PREFER TO WORK COOPERATIVELY WITH IT WHEREVER POSSIBLE. THOUGH I FELT ~~THE PRESIDENT~~ I HAD THE INHERENT POWER TO COMMIT OUR FORCES TO BATTLE, I SOLICITED CONGRESSIONAL SUPPORT BEFORE ~~ENTERING THE~~ COMMITTING OUR FORCES TO THE GULF WAR. SO WHILE A PRESIDENT BEARS SPECIAL FOREIGN POLICY OBLIGATIONS, THOSE OBLIGATIONS DO NOT IMPLY ANY LIBERTY TO KEEP CONGRESS UNNECESSARILY IN THE DARK.

THE PRESIDENT'S VIEW OF THE WHOLE GROUND INCLUDES A SECOND RESPONSIBILITY -- SHAPING THE NATION'S DOMESTIC AGENDA. PRESIDENTS DO THIS BY SUBMITTING ANNUAL BUDGETS TO CONGRESS, ALONG WITH A COMPREHENSIVE LEGISLATIVE PROGRAM.

budget cut 300b over next 5 yrs.

WE HAVE HAD OUR SHARE OF IMPORTANT LEGISLATIVE SUCCESSES. THEY INCLUDE A CLEAN AIR ACT THAT INVOKES THE POWER OF THE MARKET TO HELP AMERICA BREATHE CLEANER AIR, AN AMERICANS WITH DISABILITIES ACT, LANDMARK CIVIL RIGHTS LEGISLATION THAT ENHANCES THE DIGNITY OF THOSE WITH DISABILITIES. A CHILD CARE BILL THAT PUTS MORE POWER AND CHOICE IN THE HANDS OF PARENTS WHEN IT COMES TO THE CARE OF THEIR CHILDREN.

BUT PRESIDENTS MAY ENCOURAGE CHANGE THROUGH MEANS OTHER THAN LEGISLATION. OUR POINTS OF LIGHT CAMPAIGN, ~~FOR INSTANCE~~, ENCOURAGES THE TRADITIONAL AMERICAN VIRTUE OF PRIVATE SERVICE. SIMILARLY, OUR AMERICA 2000 EDUCATION STRATEGY -- WHICH HAS BEEN WELL-RECEIVED ACROSS THE LAND -- INVOLVES DRAMATIC REFORMS THAT DON'T MAKE DRAMATIC NEW CLAIMS ON TAXPAYER'S EARNINGS. IT DRAWS ON PEOPLE'S COMMON FRUSTRATION WITH AN EDUCATIONAL SYSTEM THAT SIMPLY MUST DO BETTER. IT ENCOURAGES PEOPLE TO USE THEIR COMMON SENSE AND GOOD OLD AMERICAN INGENUITY IN CREATING BETTER Revolutionary, new SCHOOLS. IT WON'T HELP BUILD A NEW OFFICE BUILDING IN WASHINGTON, BUT IT VERY WELL MAY INSPIRE PEOPLE TO BUILD A BETTER FUTURE FOR THEMSELVES AND THEIR CHILDREN -- SCHOOL BY SCHOOL, COMMUNITY BY COMMUNITY.

ELSEWHERE, WE ~~HAVE~~ PROPOSED TURNING PROGRAMS BACK TO STATES AND LOCALITIES. And THIS ENABLES PEOPLE TO CRAFT THE MOST APPROPRIATE SOLUTIONS FOR THE PROBLEMS THEY CONFRONT. in this diverse land of ours

THE POINT IS SIMPLE: YOU DON'T ALWAYS NEED TO PROPOSE A NEW PROGRAM TO PURSUE A NATIONAL GOAL. OFTEN A PRESIDENT CAN LEAD BY ENCOURAGING THE VALUES OF SERVICE, BY HELPING FOSTER A NATIONAL SPIRIT OF COMMITMENT AND RESPONSIBILITY.

FOR TOO LONG, PUNDITS AND SPECIAL INTERESTS HAVE EQUATED VISION WITH BUREAUCRACY. I HOPE ONE OF THE HALLMARKS OF ~~THIS~~ our ADMINISTRATION WILL BE ITS ABILITY TO ENCOURAGE NOT JUST GOOD GOVERNMENT, BUT ALSO A GOOD SOCIETY -- ONE THAT DRAWS UPON AND ENCOURAGES THE BEST INSTINCTS, and AMBITIONS, AND VALUES OF THE AMERICAN PEOPLE.

THE COMMON THREAD OF COMMITMENT -- <u>INDIVIDUAL</u> COMMITMENT -- RUNS THROUGH ALL SUCCESSFUL EFFORTS TO SOLVE OUR MOST INTRACTABLE PROBLEMS. THE INDIVIDUAL WHO CARES -- WHO IS DETERMINED TO CHANGE THINGS FOR THE BETTER -- CAN ~~AND WILL~~ MAKE A DIFFERENCE. AND ALL OF US ~~AS~~ AMERICANS OUGHT TO DEDICATE OURSELVES TO MAKING A DIFFERENCE.

WHILE A PRESIDENT MUST TAKE ON TODAY'S PROBLEMS AND TOMORROW'S CHALLENGES, HE ALSO HAS AN OBLIGATION TO "PRESERVE, PROTECT AND DEFEND" A 200-YEAR-OLD SYSTEM OF CONSTITUTIONAL GOVERNMENT. ~~HE IS THE ONLY OFFICIAL ASSIGNED THIS VERY GREAT RESPONSIBILITY.~~

THE MOST COMMON CHALLENGE TO PRESIDENTIAL POWERS COMES FROM A PREDICTABLE SOURCE, CONGRESS. ALTHOUGH OUR FOUNDERS NEVER ENVISIONED A CONGRESS THAT WOULD CHURN OUT HUNDREDS OF THOUSANDS OF PAGES WORTH OF REPORTS, and HEARINGS, and DOCUMENTS, AND LAWS EACH YEAR, THEY DID UNDERSTAND THAT LEGISLATORS WOULD TRY TO ACCUMULATE POWER. JAMES MADISON, ~~A~~ PRINCETON 's son ~~GRADUATE~~, WARNED THAT "THE LEGISLATIVE DEPARTMENT IS EVERYWHERE EXTENDING THE SPHERE OF ITS ACTIVITY, AND DRAWING ALL POWER INTO ITS IMPETUOUS VORTEX."

SOMETIMES THIS SORT OF COMPETITION FALLS ENTIRELY WITHIN THE BOUNDS OF THE CONSTITUTION. BUT, CONSIDER THE ~~HARASSMENTS~~ THAT CAN WASTE THE TIME AND ENERGY OF THE EXECUTIVE. THIRTY YEARS AGO, WE DEVOTED NEARLY 9.5 PERCENT OF OUR GROSS NATIONAL PRODUCT TO PENTAGON EXPENDITURES. TODAY, PENTAGON SPENDING ACCOUNTS FOR ONLY 5.3 PERCENT OF OUR GNP. BUT CONGRESSIONAL OVERSIGHT HAS GROWN EXPONENTIALLY. ONE HUNDRED SEVEN COMMITTEES AND SUBCOMMITTEES OVERSEE DEFENSE PROGRAMS AND SPENDING. FOR FY 1989, THE PENTAGON DEVOTED 500 MAN-YEARS AND OVER $50 MILLION JUST TO WRITE REPORTS RESPONDING TO CONGRESSIONAL QUERIES ON SUCH ITEMS AS PLANS FOR MANNING TUGBOATS, AND ACCOUNTING FOR THE NUMBER OF ~~MILITARY~~ BANDS. DEFENSE STAFF HAS TO RESPOND YEARLY TO MORE THAN 750,000 CONGRESSIONAL STAFF INQUIRIES. OTHER EXECUTIVE AGENCIES EXHAUST THEIR TIME AND ENERGY, OFTEN GIVING IDENTICAL TESTIMONY TO A WHOLE BATTERY OF SUBCOMMITTEES AND COMMITTEES.

OVERSIGHT, WHEN PROPERLY EXERCISED, HELPS KEEP THE EXECUTIVE ACCOUNTABLE. BUT WHEN IT PROLIFERATES WILDLY, IT CAN CONFUSE THE PUBLIC AND MAKE IT MORE DIFFICULT FOR CONGRESS AND THE PRESIDENT TO DO THEIR JOBS PROPERLY.

THE CHIEF EXECUTIVE ALSO PRESERVES, PROTECTS, AND DEFENDS THE CONSTITUTION THROUGH THE USE OF THE VETO POWER.

SIX TIMES IN MY PRESIDENCY, I HAVE VETOED BILLS THAT WOULD HAVE WEAKENED THE PRESIDENTIAL POWERS. IN ONE CASE, FOR INSTANCE, CONGRESS WANTED TO MAKE THE PRESIDENT DISCLOSE A WIDE VARIETY OF SENSITIVE DIPLOMATIC CONTACTS AND DISCUSSIONS, AS WELL AS PRIVATE DISCUSSIONS WITHIN THE EXECUTIVE BRANCH -- AND WOULD HAVE THREATENED TO IMPOSE CRIMINAL SANCTIONS ON A WIDE RANGE OF NORMAL DIPLOMATIC ACTIVITIES. I NOTED IN MY VETO MESSAGE THAT "THE RESULT WOULD BE A DANGEROUS TIMIDITY AND DISARRAY IN THE CONDUCT OF U.S. FOREIGN POLICY. SUCH A RESULT IS WHOLLY CONTRARY TO THE ALLOCATION OF POWERS UNDER THE CONSTITUTION."

ELSEWHERE, CONGRESS ALSO HAS TAKEN AGGRESSIVE ACTION AGAINST SPECIFIC PRESIDENTIAL POWERS -- INCLUDING THE POWER TO APPOINT OR REMOVE EMPLOYEES WHO SERVE AT THE PRESIDENT'S PLEASURE. IT SOMETIMES TRIES TO ~~MICRO~~MANAGE EXECUTIVE-BRANCH ACTIVITIES BY WRITING TOO-SPECIFIC DIRECTIONS FOR CARRYING OUT A PARTICULAR LAW. WHEN THIS HAPPENS, THE PRESIDENT HAS A CONSTITUTIONAL OBLIGATION TO PROTECT HIS OFFICE -- AND TO VETO THE LEGISLATION. IN ADDITION, ON MANY OCCASIONS DURING MY PRESIDENCY, I HAVE ~~REMINDED CONGRESS THAT~~ STATUTORY PROVISIONS THAT VIOLATE THE CONSTITUTION HAVE NO BINDING LEGAL FORCE.

BUT THERE'S ANOTHER, OFTEN OVERLOOKED, SIDE OF THE VETO POWER. OFTEN, VETOES ENCOURAGE THE LEGISLATURE TO RECONSIDER ITS ACTIONS, ~~TO ACT WITH DELIBERATION.~~ WHEN I VETOED MINIMUM-WAGE ~~LEGISLATION, FOR INSTANCE,~~ and it wasn't an easy thing to do I SOUGHT TO PERSUADE CONGRESS THAT A SLIGHTLY LOWER RATE WOULD BEST SERVE THE PUBLIC INTEREST -- AND IN TIME, CONGRESS AGREED. [SIMILARLY, I HAVE WARNED THE CONGRESS THAT I WOULD VETO THE BRADY BILL, UNLESS IT WAS INCLUDED IN THE COMPREHENSIVE CRIME PACKAGE I HAVE PROPOSED. IN THIS CASE, A VETO IS DESIGNED NOT TO KILL A PIECE OF LEGISLATION. IT IS DESIGNED TO ENCOURAGE CONGRESS TO ENACT THE BEST LAW POSSIBLE.]

AND WHEN CONGRESS BUNDLES UP A SERIES OF UNRELATED MEASURES AND CALLS IT A SINGLE "BILL," IT FRUSTRATES THE PRESIDENT'S CONSTITUTIONAL ROLE IN RESISTING THE INFLUENCE OF SPECIAL INTERESTS. IT IS OFTEN IMPRACTICAL TO VETO A MAJOR BILL -- ESPECIALLY AN APPROPRIATIONS BILL -- BECAUSE OF UNRELATED RIDERS THAT WOULD NEVER STAND A CHANCE ON THEIR OWN.

BILLS OF THIS SORT CAN POSE AS MUCH A THREAT TO CONGRESS AS TO THE PRESIDENT. IT HAS BECOME AN ANNUAL SPORT FOR REPORTERS TO PULL PECULIARITIES OUT OF VAST SPENDING BILLS -- SUCH AS A FEDERAL GRANT TO STUDY COW BELCHES, OR A LAWRENCE WELK MUSEUM -- AND ASK CONGRESS TO DEFEND THEM. QUITE OFTEN, MEMBERS DON'T EVEN KNOW WHAT THEY HAVE VOTED FOR.

b/c of the added riders & the complexity of the whole bill — things are added in the dark night.

I HAVE SOUGHT -- AND WILL CONTINUE TO SEEK -- A LINE-ITEM VETO TO PREVENT SUCH EMBARRASSMENTS AND PROTECT THE AMERICAN PEOPLE FROM INJUDICIOUS CONGRESSIONAL LEGISLATION AND APPROPRIATION. Applause. RIGHT NOW, 43 44 GOVERNORS HAVE SUCH A POWER. IT WORKS. THE PRESIDENT OUGHT TO HAVE THAT POWER, TOO.

IN CLOSING, LET ME SUMMARIZE MY VIEW OF THE PRESIDENCY. PRESIDENTS DEFINE THEMSELVES THROUGH THEIR EXERCISE OF PRESIDENTIAL POWER. THEY MUST USE THEIR SPECIAL AUTHORITY TO SERVE THE WHOLE NATION, IN MATTERS OF FOREIGN AND DOMESTIC POLICY. THEY MUST SET A TONE FOR GOVERNANCE -- AT ONCE LEADING THE PEOPLE, ~~AND~~ YET FOLLOWING THEIR DESIRES. THEY MUST PRESERVE, PROTECT AND DEFEND THE CONSTITUTION. AND THEY MUST ENCOURAGE DELIBERATIVE BEHAVIOR ON THE PART OF CONGRESS.

BUT THE REAL POWER OF THE PRESIDENCY LIES IN THE PRESIDENT'S ABILITY TO FRAME -- THROUGH ACTION, THROUGH EXAMPLE, THROUGH ENCOURAGEMENT -- WHAT WE AS A NATION MUST DO: WHAT IS REQUIRED OF COMMUNITIES AND INSTITUTIONS -- LARGE AND SMALL -- IN SCHOOLS AND FACTORIES, AND THE HUNDREDS OF DAILY ACTS OF INDIVIDUALS.

THE GREAT JOY AND CHALLENGE OF THE OFFICE I OCCUPY IS THAT THE PRESIDENT SERVES NOT JUST AS THE UNITARY EXECUTIVE, BUT ~~ALSO~~ Hopefully AS THE <u>UNIFYING</u> EXECUTIVE.

AS PRESIDENT, I FEEL HONOR-BOUND TO STRENGTHEN THE MARVELOUS SYSTEM OF GOVERNMENT BEQUEATHED TO US, SO THAT WE MAY REMAIN THE FREEST, MOST DECENT, MOST PROSPEROUS NATION IN HISTORY. of the world

THANK YOU, AND MAY GOD BLESS THE UNITED STATES OF AMERICA.

# # # #

V

ADDRESS

By The Honorable C. Boyden Gray
Counsel to the President of the United States

The Friday luncheon session
of The American Law Institute
convened in the East and State Rooms
of The Mayflower, Washington, D.C.,
on May 18, 1990,
and was called to order at 1:30 p.m.
by President Roswell B. Perkins

PRESIDENT PERKINS: Boyden Gray, who is our speaker and is Counsel to the President, came into government service with a bit of family precedent. His father, Gordon Gray, was Secretary of the Army during the Truman Administration and later served as President Eisenhower's National Security Adviser. The family lived in Winston-Salem, and Boyd attended Harvard College and the Law School of the University of North Carolina, where he graduated in 1968, first in his class, and was Editor in Chief of the Law Review.

Mr. Gray clerked for Chief Justice Earl Warren in the year after graduation, 1968-1969, and embarked on 12 years with Wilmer, Cutler & Pickering, becoming a partner in 1976.

About nine years ago, he commenced serving George Bush. When he was asked to do so, he happened to be on a sabbatical from Wilmer, Cutler. Boyden says that, had it not been for the fact that he had the opportunity to think about something without a pile of papers on the desk and the ongoing volume of cases, it would have been a very difficult decision. As it was, he was able to free himself and decide to embark on this new career.

He served as Legal Counsel to the Vice President and then as Counsellor. During a significant part of his work with the Vice President, he was wearing a second hat, that of the Counsel to the Presidential Task Force on Regulatory Relief.

He was obviously a key player in the Bush Presidential Campaign, and the very day after the election President-Elect Bush named Boyden Gray his counsel. He became Director of the Office of Transition Counsel for the overall transition team.

Now this post of Counsel to the President is one of great scope. In fact, Boyd gave an address, which later became an article on the subject, to the City Bar Association 10 years ago. And, in his opening sentence of that address, Boyd characterized the job as being very unstructured. I think this is probably the heart of it. The incumbent has a chance to influence the relative roles of the legislative and executive branches in a very substantial

way, and the Counsel at present also is a crisis manager of sorts. He has to be ready to leap into troubled situations with a cool head. Of course, on the other side of the coin is the old saying, that we all know, that if you can remain calm while those around you are losing their heads, perhaps you just don't understand the situation. *(Laughter)*

On the extracurricular side, Boyd is a great basketball fan dating back to his days from North Carolina. He's a great tennis player. He complains generally of the fact that the White House courts are getting far more use under this Administration than they did under the prior administration. It makes it difficult to schedule tennis at that location, and he's having to seek out other locations.

He is renowned for the fact that he owns a gasahol converted car. He'll tell you a little bit about his interest in clean air and the Clean Air Act. Indeed, he's missing an important meeting on that, he says, so we've got to get him back to it. But having been friends with Boyden, I know that one of the sources of gasahol is indeed foreign. I'm bold enough to pass along the quip at one Wilmer, Cutler party that "not many people are brave enough to burn the stuff in their cars." So with that, Boyden Gray comes to the present. *(Applause)*

COUNSEL TO THE PRESIDENT C. BOYDEN GRAY: Thank you very much. That was much too nice of an introduction. I think that I should tell you how my father was once introduced, when he was President of the University of North Carolina, at a large gathering of women in the auditorium there. I think it was the League of Women Voters. He was the only man in the room, and he was the principal speaker. After a few brief speeches here and there from the members of the group, he was finally introduced by an imposing lady who said: "Our next and key speaker needs no introduction because, as you all know, Gordon Gray has the longest Who's Who in North Carolina." Apparently there wasn't even a smile in the audience. *(Laughter)*

I want to talk a little bit about the relationship of factions — that is, special interests — and the public interest. You've heard a lot here about ethics, and that is my take-off point. One of my major responsibilities is watching after the ethics of the White House and the executive branch and another major responsibility is watching out for the authority of the executive branch. These two responsibilities over the authority of the President and the question of conflicts of interest are, as I will try to show, intimately related.

I thought about this issue as I was trying to clean up my desk on Monday. A couple of meetings had been cancelled, and I had the opportunity to go through some papers that had been stacked up and try to sort them out and throw the useless ones away. I did so, getting through to about three or four feet, much of which went into the trash basket, only to find out an hour later, when I came back from lunch, that my executive assistant was fuming at having had to retrieve almost everything back out of the waste basket. Chiding me she said: "You're supposed to be the counsel and the ethics adviser; don't you know this violates the Presidential Records Act?" The point is that you cannot throw anything away because everything belongs to Congress and the archives, including any personal diary you might keep at work.

Now this is one of many, many laws that applies to us but does not apply to the Congress. What does this have to do with anything? I'm going to try to explain. Let me start out with conflicts of interest. We have Judge Wilkey here who is the chairman of our group, the President's Commission on Ethics. We tried hard to get some simplification done in this arena, but it's an endless affair. In regard to the heart of any ethics regime, whether it's in the private sector or in the public sector, we as the executive branch — Judge Wilkey, as both Judge and Ambassador, knows this well — are subject to very, very strict conflicts of interest rules that do not apply in almost any way with respect to Congress.

I probably should pay around $20 — in fact, I'll do so to demonstrate my cleanliness — for this lovely lunch. If I miss that, I'm potentially subject to criminal exposure.

This is not true on Capitol Hill. At the end of the controversy over the pay raise bill — Lloyd Cutler was involved with that last year — we tried to squeeze, as a condition of the President's giving a little more political cover for the Congressional pay increase, a little bit more out of Congress in terms of their own submission to the same standards that we live by. I tried in that context to get just a little sliver of the criminal liability that we face imposed not on the members of Congress — I wasn't thinking at all about the members — but on their staffs and their agencies. There are 30,000 of them, and they run around getting into our business all day. I have a great deal less influence with the EPA than a good many staff members on the Hill, for example.

"This would be horrible" said a leading member of the leadership, whom I'm not going to identify. He said, "To impose criminal liability on our staff for conflicts of interest would be an unconstitutional infringement on our Constitutional duty to represent the special interests." That is literally what he said.

He said: "How can you expect us to rule upon a Clean Air Act unless we have someone on the payroll of General Motors here helping us to understand what impact this will have on General Motors?" I'm sitting next to him dumbfounded. He said: "I cannot and will not have U.S. Attorneys from the executive branch looking over the shoulders of my staff here in the Congress." And I said: "Well, that is all the more reason you should accept our generous offer to be included in the coverage of the independent counsel statute." It took him a while to suppress his laugh, but he didn't take the bait.

We don't really know what the Congress does by way of intervening or interfering in the affairs of the executive branch. We did get out of them a more full disclosure of the staff's own personal financial interest, and their sources of honorariums. But since we don't know what they do, it's hard

to determine whether their own interests conflict with what they are trying to influence in the executive branch.

We are preparing an Executive Order that would require agencies to record telephonic contact and requests by the Congress, something the Pentagon does routinely, the new financial agencies do under the S & L bailout legislation, and the Office of Thrift Supervision and the Resolution Trust Corporation do routinely. If we adopt this, we expect that it would create a huge volcanic fire storm. As a result, we may not do it, thus leaving Congress with more covert influence over the regulatory agencies than the White House has.

With respect to the independent counsel, we have it, they don't. Why is this? We have Inspector Generals, they don't. They have direct influence over IGs; we have nothing we can do in return to Congress.

The President had the IGs to the Roosevelt Room in the very, very beginning of his Administration to deal with the ethics question, saying I hope you will help us keep ourselves honest. One of the themes that they kept repeating was the difficulty of policing graduates of the Congressional branch who had migrated over to the executive branch. Congressional staff live in such a permissive atmosphere there that they're a constant source of anxiety for the IGs in the executive branch.

Other statutes that apply to the executive branch but exempt Congress include the Government in the Sunshine Act, the Privacy Act, and the Civil Rights statutes. The President spoke yesterday, as you probably all know, about his reaction to the Civil Rights Act of 1990. He spoke to a polite although not necessarily favorable crowd, but he got a very, very healthy round of applause when he said that whatever Congress does it ought to do to itself as well. I'll believe it when I see it.

Now, these are there not only to hamstring the executive branch. I believe they're also there to promote Congressional reelection, by making it easier for legislators to do the things

that will assure their reelection. The point is that ethics as a discipline is abused to provide a weapon the Congress can use to disarm the executive branch and thus also to promote their own reelection. This view of ethics, in turn, invites capture, or at least, deep influence, by the special interests which have a terribly divisive and fragmenting influence on the way Congress operates. I'll give you one example about farming.

It is a rule which has been devised by the Congress, which they've actually applied to us, that there is nothing in the farm program — some $20 billion or $30 billion worth of subsidies — that has anything whatsoever to do with the value of farmland. This is a fiction that is designed to permit farmers to run their own programs at the Department of Agriculture without selling their farms. It is this fiction which may contribute to the fact that we have such a huge deficit in farm programs. We do not, by contrast, allow broadcasters to work at the FCC or brokers to work at the SEC.

Farmers have to go through an elaborate song and dance about putting their farms into professional management, but they don't have to worry at all about the appreciation of their underlying farmland. And my attitude is that, if it really is true that farm programs have no impact on the value of the farmland, then we should definitely get rid of the subsidies, but that argument doesn't seem to get anywhere because no one other than the farm community itself can review what the Agriculture Committees or the Department of Agriculture do.

We have a similar situation with marketing orders. For those of you who are not familiar with them, these are walking and talking antitrust violations by the people who grow oranges or almonds and whatnot. In the world that I grew up in under Lloyd's tutelage, we were always taught to tell the client that, if he fixed prices or allocated production, he would go straight to jail. He wouldn't pass go, he wouldn't collect $200, he would go straight to jail.

In the world of marketing orders, the rule is just the opposite — that, if you don't fix prices or limit production, you

go straight to jail. This is not good. When the Office of Management and Budget tried to take a look at this, Congress passed a law prohibiting the Office from even looking at marketing orders.

Now, the founding fathers expected that Congress would be responding to special interests to some degree. But I doubt they would have any approval for the sweeping proliferation of committees and subcommittees that began in the early 1970's.

We now have as many subcommittees as we had staff itself after the war. I mean there are about 270 committees and subcommittees. There's an old joke that, if you can't remember a committee member's name because he or she is new or you just draw a blank, which happens occasionally, you are on very safe ground if you address him or her as "Mr. or Madam Chairman." There are some 85 committees and subcommittees with jurisdiction over the State Department. There are 40 or 50 with jurisdiction over the EPA. There are 50 or 60 with jurisdiction over various aspects of the illicit drug problem. One of the reasons why we have a drug czar is because Congress is so fragmented with respect to drug oversight that Congress has to appoint a czar in the executive branch to provide coherence to drug policy that Congressional fragmentation has undermined.

For another example, the modest suggestion for a joint intelligence committee has fallen on totally deaf ears. Why do we have so much fragmentation? It is easy to raise money that way, easier to get exposure; it is a better platform, with more things to do. There are more bills to write, more staff to hire, and it goes on and on and on. It just goes on and on and on.

And it has a very bad influence. I believe one of the reasons that we have an S and L crisis is because the various interests, especially the League of Savings and Loans but not excluding insurance and securities brokerage, have made it impossible to reform the banking laws. The Vice-President, with the assistance of Richard Breeden, who is now chairman of the Securities and Exchange Commission, came up with a rather comprehensive set of proposals to reform the regulatory

structure of the financial services industry back in 1984. This was totally ignored by Congress. Had it been adopted, we would not have an S and L crisis today. Why did it get no hearing? The special interests suppressed it before we had even printed the final version, even though it had unanimous support from all the regulatory agencies including Shad, Volker, Pratt and the others.

If you look at a book called *Honest Graft* by Brooks Jackson of the *Wall Street Journal*, you will see how the PAC system was taken over by the Democrats by Tony Coelho in a way that exacerbated the S and L crisis, in a way that could not have happened had we had a more sane committee structure and had we had some reform of the regulation of banking.

I don't mean to point all this out as a way of defending the current administration or its handling of this; nor am I going to say the executive branch is totally blameless. Perhaps we could have pushed harder to get our reforms adopted. I'm just pointing out that when you have the kind of fragmentation Congress has, there are bad consequences, including the inability of the White House to police the independent agencies like the Home Loan Bank Board, which are viewed as property of the Congress.

Global warming. One senator on the energy committee called me up a year ago and said — this relates to something Lloyd was asking about — "Why aren't we moving more rapidly on an international agency for the environment?" The senator called me up and said, "You're not doing enough about global warming, you're just not doing enough." And I said, "Well, Senator, we haven't got our act together. We're trying to get the Agriculture Department integrated in this because the sinks are as important as the sources. By 'sinks' I mean the farms, the oceans, the forests, and this and that. The point is that agriculture plays an important role in absorbing CO2 and, in some cases, perhaps creating it. For example, one of the most important sources of greenhouse gas is rice farming in the far East." But the Senator said, "Oh, trees, agriculture, farming,

that's irrelevant to global warming." I said, "Why is that?" He said, "Different committee, different committee."

I was asked earlier about the regulation of autos and cars. Perhaps it might be of interest to people here that cars are about 95 percent cleaner than they were in 1987, with the help of the catalytic converter and other technologies. The gasoline that goes into the car is about 100 to 200 percent dirtier, offset by the deterioration of the quality of the gasoline. Now, this is in part the result of the fact they're regulated by different committees.

Take the question of automobile fuel economy standards, which focus conservation rules only on cars, not the fuel itself. One little known fact is that high octane gasoline is wasteful. When you go from 87 octane to 93 octane — 93 octane being totally unnecessary for 95 percent of all the cars on the road today — you lose six to 10 percent of the crude oil that goes into the refining of the gasoline. Now if one prohibited 93 octane gasoline, one would get more conservation over the next decade than one could get by increasing fuel economy standards on the car companies. But this cannot be overseen properly because regulation of oil and cars is in different committees.

Now, when we were worrying about trying to show how much global warming reduction or protection we are achieving internally in the United States because of the Clean Air Act, we had difficulty getting the Environmental Protection Agency to acknowledge what our Clean Air Act would do in terms of encouraging use of natural gas as a boiler fuel in lieu of coal. There is a big greenhouse, a big CO2 swing, involved when you switch to natural gas from coal or even oil. After considerable pressure, the EPA did acknowledge that, if you count the co-generation facilities that were on natural gas, of course there will be a global warming improvement. So we said: "Can't you count that? Just because this comes under the jurisdiction of the Energy Committee, and not the EPA's committee, doesn't mean it doesn't happen." The EPA later acknowledged that this was correct.

Now the background is that, from 1978 to 1988, we had a regime under the Clean Air Act where not only was clean coal prohibited from use, but also utilities were not permitted to burn natural gas. Only in the topsy-turvy world of the Clean Air Act can you find yourself prohibited from using the cleanest technology or process.

Now we finally got repeal of the Fuel Use Act, which prohibited the use of natural gas. That now opens up vast new markets to natural gas which will have a very, very beneficial impact on the environment.

This didn't count for the EPA. Have you guessed why? Different committees. The benefits of repealing the Fuel Use Act have been basically lost in this way, because those benefits are as much environmental as they are energy-related, and in the Senate, energy and the environment are split between separate committees.

I'll tell you one anecdote about one important Congressman who wanted to impose restrictions on a part of the Office of Management and Budget, restrictions that would basically emasculate its ability to do its regulatory oversight function for the President. This Congressman wanted to require agencies to publish the reasons for any change in a proposed or final rule that might be thought to be connected with something that somebody at OMB had said.

And I said, "That's an impossible thing to follow. Any change of a rule is already required to be published by the agency that makes the change. And it's all one executive branch anyway, supposedly, so what's the deal?" I said, "You know, Governor Sununu talks to the Cabinet Offices every day; changes get made every day. How is anyone to know precisely what changes are attributable to Governor Sununu as opposed to any other policy maker with an interest in a rule? Are we to have a special publication for the sayings of Governor Sununu?"

And this Congressman said: "Oh, these restrictions do not apply to the Executive Branch." And I said: "Oh, okay." He

really thought the OMB belonged to Congress, like the old Home Loan Bank Board or the SEC. "Thank you very much," I said. "We will take that to heart."

Now his staff realized this was something of a mistake since the OMB, last time I looked, was part of the Executive Branch and not an independent agency. And they then came back, the staff did, and said, "What the gentleman meant to say was that these restrictions don't apply to the Executive Office of the President." Well, the OMB is part of the Executive Office of the President, too, so they struck out twice, but they're still working on it.

What's the solution to all this? I don't know, but there has to be some reform. There has to be reduction or elimination of PACs. There has to be some consolidation of committees in Congress. A lot of the problems go back to 1974. It is true that President Nixon and Watergate carry some of the blame for this because a lot of the problems stem from overreaction that occurred after Watergate. They tried to take Presidents out of the budget process for the first time in 200 years, in the Impoundment Control Act of 1974. A lot of other reforms, including PAC reforms, grew out of that period. The committee fragmentation started about then, as did the tremendous growth in staffs.

Most of the Congressmen who were in the Watergate class of 1974 were elected from traditional Republican districts. When they went in, they realized that, if they didn't do something to perpetuate their own existence, they would lose the next election when memories of Watergate had faded. The result was all of the reelection benefits — increased staff, increased Subcommittees, PACs, the franking privilege — that have been adopted.

Now we have a 99 percent reelection rate as part of the result of this overreaction. Something's got to be done about it; I don't have the ultimate solution, but something has to be done.

Thank you very much. *(Applause)* Thank you. *(Applause)*

PRESIDENT PERKINS: Whether honorary or accepted or not, I'm going to return your $20 because you deserve it, Boyd. Now that was wonderful. I suspect we're going to have to give the legislative branch equal time next year. We heard from the judicial branch yesterday. I must say that nobody is making any of the problems of Washington sound any easier than we thought they were.

But this was most enlightening. We have the perspective of the office of the President, and dealing with legislative problems today is indeed a benefit to all of us. So thank you for taking the time out. We'll let you go back to your Clean Air Act and cleaning up everything for us. Thank you. We'll go back to our two separate sessions, Complex Litigation and the UCC.

PRINCETON COLOR

New President of Senior Class -- Sabrina Comizzoli
258-9692
Former Chair of Student Paper -- Alexandra Bradner
258-7209
Student Reporter for the Alumni Weekly, also basketball player
-- Matt Henshon
258-9544

From Sabrina Comizzoli

Princeton University
Princeton, NJ 08544

A bizarre tradition that takes place during the first snowfall every year is the "nude olympics". Sophomore class members run nude at midnight through the dormitory, and then down Nassau Street, sometimes into the library.

On weekends, people hang out at the eating clubs. There is food and they hire bands to play music for dancing.

Princeton has, as does the rest of NJ, a convenience store called "Wawa", but students refer to it as "Wa".

From Alexandra Bradner
36 Spelman
Princeton University
Princeton, NJ 08544

Alma Mater -- "Old Nassau"
Motto -- "nation's service" is the one that all will know.

At the time POTUS will be speaking, seniors will have just turned in their theses, and juniors, their "J.P.s" (junior papers). Following these assignments turned in on Friday May 3, the campus goes wild with House parties (university-wide "proms") May 4th. At this point, everyone is pretty much finished with schoolwork, and there are parties until it's time to leave campus. It's safe to assume that the bulk of the students attending POTUS's speech might be a wee bit hung over.

The campus is always under construction. This has definite growth, high sights, future betterment written all over it. A lot of "Bethism" potential here.

First-year students (they're not called freshman on this campus) go through what is known as "Clapper Hunt". They are responsible for stealing the clapper in the bell tower every year, so that, in effect -- if the bell doesn't ring, no one has to go to class.

One of the biggest things at Princeton is their squirrel problem. Sqirrels climb through windows into rooms and eat everything in sight. Maybe a joke along the lines of -- "The Secret Service asked me to keep my windows rolled up. They've heard about Princeton's overexuberant squirrels."

George Schulz, a Princeton grad, has a tiger tatoo on his butt.

Sports: Pete Carril, the basketball coach is a well-liked man at Princeton. Being an Ivy, they don't attract the kind of talent that the Big Ten schools do. This year, however, Princeton went to the NCAA tournament, and now everyone loves the team, and the coach.

Venturi, the architect who designed the buildings being dedicated, has designed buildings all over campus -- from a one-person proctor kiosk to giant classroom buildings. It's almost becoming Venturi University now.

It is a tradition in the springtime that sometime before a student graduates, he must swim in the Woodrow Wilson School Fountain. POTUS could say something like, "I am pleased and proud to be honored with this esteemed degree, but let it be known, I WILL NOT SWIM IN THE WOODROW WILSON SCHOOL FOUNTAIN !!" I'm sure the Princeton president and faculty will be thrilled by this -- not.

There are iron gates in front of Nassau Hall. It is an old campus tradititon that you may enter the campus through them whenever you please, but you may only exit the campus through them after you've graduated. Everyone pretty much stays clear of them until graduation time.

Campus lingo: "dinky" -- the shuttle from campus to the train station. "The Stone" -- the Firestone Library; "Let's go study at the stone."

From Matt Henshon
609-258-9544
24 Little Hall
Princeton University
Princeton, NJ 08544

The fountain in front of the Woodrow Wilson School is called the "Woody Woo".

The basketball team beat Yale this year.

Exams begin May 17-18, the week after POTUS visit.

Bob Durkee
609-258-6428

Honorary Doctor of Laws

Doctor of Laws, Honoris Causa

Princeton University
Vice President for Public Affairs
223 Nassau Hall
Princeton, New Jersey 08544

April 24, 1991

May 10 Visit of President and Mrs. Bush

orig. hldg.

9:45 a.m. Arrive at Nassau Hall and proceed to President's Office; greeted there by President and Mrs. Shapiro, former Presidents William G. Bowen and Robert F. Goheen, and other principals in the honorary degree ceremony. Robing and pictures.

hist ?

10:00 a.m. Honorary degree procession and ceremony (separately described). Press arrangements need to be made. May be broadcast over local cable. Ceremony should last approximately 20 minutes.

remarks ?

faculty trustees sr. admin students ~150

Marcel Marceau hon. degree

POTUS, Pres., 2 Trustees (Henderson, Carpenter)

10:30 a.m. Presidential motorcade (and President Shapiro) leave for Corwin-Fisher-Bendheim Halls. There they meet with the principal donors for the spaces being dedicated, the chairs of the relevant departments and programs (Economics, Politics, Center of International Studies, Woodrow Wilson School), and the architect (Robert Venturi and his wife/partner, Denise Scott Brown). A ~~group photo~~ will be taken. Meanwhile other guests from the degree ceremony make their way to reserved seating at the dedication site.

staff photo ?

into ?

11:00 a.m. Dedication ceremony begins. Guests will have been entertained by student orchestra and singers from 10:15 until just before 11. Participants in indoor photo session will sit in special reserved seating. Platform party will enter from door of Bendheim Hall. Program will be as follows:

- Call to Order by **James A. Henderson '56**, chair, Executive Committee, Board of Trustees, and President, Cummins Engine, who serves as master of ceremonies.
- Invocation by **Joseph Williamson**, Dean of the Chapel.

- Greetings from **Governor James J. Florio**, an ex officio Princeton Trustee.
- Remarks by **President Shapiro**, concluding with an introduction of President Bush.
- Address by **President Bush.**
- Benediction by **Sue Anne Steffey Morrow**, Associate Dean of the Chapel.

We anticipate live television coverage by the local cable company.

Attendance, in addition to those present for the degree ceremony, will include current and former Trustees and spouses; actual and potential donors and spouses; selected alumni and spouses; faculty in the departments and programs whose spaces are being dedicated and spouses; senior University administrators and spouses; New Jersey Congressional delegation, local political figures, and community leaders; graduate and undergraduate students on the departmental committees for the spaces being dedicated; staff who work in the spaces being dedicated; contractors and others who designed and constructed the spaces being dedicated; and other special guests. In addition, we will conduct lotteries to assign tickets to interested undergraduates (200), graduate students (50), and staff (75). 12-1500

Rain location: Jadwin Gymnasium (already set up from Governor's award ceremony of the previous day). All invited to the outdoor ceremony can be accommodated.

12:00 noon Ceremony ends. We assume President and Mrs. Bush depart, although they certainly would be welcome to stay for lunch. Many of those attending the dedication will be having lunch outdoors at Prospect.

Honorary Degree Ceremony
Faculty Room, Nassau Hall

Scenario
10:00 procession begins. Order of march is as follows:

chief marshal
mace bearer
associate chief marshal and marshal II
Dean Joseph Williamson and Dean William Gipson (dean and associate dean of the chapel)
James A. Henderson and Edmund N. Carpenter (trustees)
President Bush and President Shapiro
marshals II and III

Chief marshal stands in front of the platform, in the center aisle to direct procession as it reaches the platform.

Mace bearer puts mace in its cradle and takes place at east side

Assoc. chief marshal and marshal I take places at west side

Deans Williamson and Gipson take places at west side

Mr. Henderson goes to his place on the platform, east side; Mr. Carpenter goes to his place on the platform, west side.

Pres Bush goes to his place on platform, east side; Pres Shapiro goes to his place on platform, west side

Marshals II and III go to places on east side; CM goes to his place on east side.

Ceremony
All remain standing.

President announces that invocation will be given by Dean Williamson.

The Dean walks to podium off platform, gives invocation, returns to his seat. [all sit]

President announces that greetings will be given by Mr. Henderson.

Mr. Henderson gives greetings from platform, then returns to his seat.

President announces that the honorary degree citation will be read by Mr. Carpenter. President remains standing.

Mr. Carpenter, Mr. Henderson, chief marshal and associate chief marshal stand. Mr. Carpenter goes to podium off platform; marshals take places on platform. Mr. Carpenter reads citation. President Shapiro reads Latin to confer degree. Chief marshal puts hood over president's head; associate chief marshal hands President Shapiro the diploma and he hands it to President Bush. They shake hands. All return to places and sit.

? President Bush gives remarks if he so wishes.

HTS announces that benediction will be give by Dean Gipson.

The Dean goes to microphone off platform and gives benediction.

Chief Marshal goes to center of aisle. Mace Bearer joins him, and recessional forms.

Go back to 1 Nassau Hall.

Attending as guests:
Trustees and their spouses
Faculty chairs of departments and faculty program heads (or their representatives)
elected student undergraduate and graduate officers; chairs of representative student groups
members of the Committee on Honorary Degrees
members of the president's cabinet
chair of the Alumni Council

91 MAY 10 A8:4

REPUBLICAN GOVERNORS ASSOCIATION

FACSIMILE TRANSMITTAL

DATE: 5/9/91

TO: CAROL

COMPANY: PRESIDENTIAL SPEECHWRITING

TELEFAX NUMBER: 456-6218

FROM: Tim McGinnis

RGA TELEFAX NUMBER: 202/863-8659

NUMBER OF PAGES (including this this sheet): 3

COMMENTS:

310 First Street, Southeast, Washington, D.C. 20003 202/863-8587

SSING

Committee bills

d session.

Table 3.20
ENACTING LEGISLATION: VETO, VETO OVERRIDE AND EFFECTIVE DATE

State or other jurisdiction	Governor may item veto appropriation bills: Amount	Governor may item veto appropriation bills: Other (b)	Days allowed governor to consider bill (a): During session: Bill becomes law unless vetoed	Days allowed governor to consider bill (a): After session: Bill becomes law unless vetoed	Days allowed governor to consider bill (a): After session: Bill dies unless signed	Votes required in each house to pass bills or items over veto (c)	Effective date of enacted legislation (d)
Alabama	* (f)	*	6		10A	Majority elected	Immediately (g)
Alaska	* (f)		15	20P		2/3 elected (g)	90 days after enactment
Arizona	*		5	10A		2/3 elected	90 days after adjournment
Arkansas	* (f)		5	20A (h)		Majority elected	90 days after adjournment
California	* (f)		12 (b,i)	(i)		2/3 elected	(i)
Colorado	*	*	10 (b)	30A (b)		2/3 elected	Immediately (k)
Connecticut	*		5	15P (b)		2/3 elected	Oct. 1
Delaware	*		10		30A (h)	3/5 elected	Immediately
Florida	*	*	7 (b)	15P (b)		2/3 elected	60 days after adjournment
Georgia (l)	*		6	40A (m)		2/3 elected	July 1 (n)
Hawaii (l)	* (f)		10 (o,p)	45A (o,p)	(p)	2/3 elected	Immediately
Idaho	* (f)		5	10A		2/3 elected	60 days after adjournment
Illinois	* (f)		60 (b)	60P (a)		3/5 elected (q)	Jan. 1 (e)
Indiana			7	7A		Majority elected	(q)
Iowa	*	*	3	(r)	(r)	2/3 elected	July 1 (s)
Kansas			10 (b)	10P		2/3 elected	Upon publication
Kentucky	*		10	10A		Majority elected	90 days after adjournment
Louisiana (l)	*	*	10 (b)	20P (b)		2/3 elected	60 days after adjournment
Maine			10	(m)		2/3 present	90 days after adjournment
Maryland (l)	*		6	30P (m)		3/5 elected	June 1 (s)
Massachusetts	* (f)		10		10P	2/3 present	90 days after enactment
Michigan	*	*	14 (b)		14P (b)	2/3 elected and serving	90 days after adjournment
Minnesota	*		3		14P	2/3 elected	Aug. 1 (t)
Mississippi	*	*	5	15P (m)		2/3 elected	60 days after enactment
Missouri	*		15 (r)	45P (m,r)		2/3 elected	90 days after adjournment (t,u)
Montana	* (f)	*	5 (b)	25A (b)		2/3 present	Oct. 1 (u)
Nebraska	* (v)		5	5A		3/5 elected	3 months after adjournment
Nevada			5	10A		2/3 elected	July 1
New Hampshire			5		5P	2/3 elected	60 days after enactment
New Jersey	* (f)		(w)	(w)	(w)	2/3 elected	July 4
New Mexico	*		3		20A	2/3 present	90 days after adjournment (t)
New York	*		10		30A	2/3 elected	20 days after enactment
North Carolina	* (f)	*	3	15A		2/3 elected	90 days after adjournment
North Dakota	*	*	10	10A		3/5 elected	90 days after enactment
Ohio	*				15A	2/3 elected (a)	90 days after adjournment
Oklahoma	*		3	20A		2/3 present	90 days after enactment
Oregon	* (f)	*	10 (b)	30A (b)		2/3 elected	60 days after adjournment
Pennsylvania	* (f)		6	10A (b)		3/5 present	10 days after adjournment
Rhode Island			5	(m)		2/3 present	20 days after enactment
South Carolina	*	*					
South Dakota	* (f)	*	5	15A		2/3 elected	90 days after enactment
Tennessee	* (f)		10	10A		Majority elected	40 days after enactment
Texas	*		10	20A		2/3 present	90 days after adjournment
Utah			10 (b)	20A (b)	3A	2/3 elected	60 days after adjournment
Vermont			5			2/3 present	July 1

VETO, VETO OVERRIDE AND EFFECTIVE DATE—Continued

State or other jurisdiction	Governor may item veto appropriation bills: Amount	Governor may item veto appropriation bills: Other (b)	Days allowed governor to consider bill (a): During session: Bill becomes law unless vetoed	Days allowed governor to consider bill (a): After session: Bill becomes law unless vetoed	Days allowed governor to consider bill (a): After session: Bill dies unless signed	Votes required in each house to pass bills or items over veto (c)	Effective date of enacted legislation (d)
Virginia	★	★	7 (h)		30A (h)	2/3 present (g)	July 1 (v,z)
Washington	★	★	5	20A		2/3 present	90 days after adjournment
West Virginia	★ (ff)	★	5	15A (aa)		Majority elected (g)	90 days after enactment
Wisconsin	★	☆	6		6P	2/3 present	Day after publication
Wyoming	★	...	3	15A (b)		2/3 elected	Immediately
American Samoa	★	...	10		30P	2/3 elected	60 days after adjournment (bb)
Guam	★ (f)	...	10		30P	2/3 elected	Immediately (cc)
No. Mariana Islands	★	...	40 (dd)			2/3 elected	Immediately
Puerto Rico	★ (f)	★	10		30P (h)	2/3 elected	Specified in act
U.S. Virgin Islands	★	★			30P (h)	2/3 elected	Immediately

Note: Some legislatures reconvene after normal session to consider bills vetoed by governor. Connecticut—if governor vetoes any bill, secretary of state must reconvene General Assembly on second Monday after the last day on which governor is either authorized to transmit or has transmitted every bill with his objections, whichever occurs first; General Assembly must adjourn *sine die* not later than three days after its reconvening. Hawaii—legislature may reconvene on 45th day after adjournment *sine die*, in special session, without call. Louisiana—legislature meets in a maximum five-day veto session on the 40th day after final adjournment. Missouri—if governor returns any bill on or after the fifth day before the last day on which legislature may consider bills (in even-numbered years), legislature automatically reconvenes on first Monday in September for a maximum 10C session. New Jersey—legislature meets in special session (without call or petition) to act on bills returned by governor on 45th day after *sine die* adjournment of the first year of a two-year legislature; a special session may not be convened if the 45th day falls on or after the last day of the legislative year in which the second session occurs. Virginia—legislature reconvenes on sixth Wednesday after adjournment for a maximum three-day session (may be extended to seven days upon vote of majority of members elected to each house). Utah—if 2/3 of the members of each house favor reconvening to consider vetoed bills, a maximum five-day session is set by the presiding officers. Washington—upon petition of 2/3 of the members of each house, legislature meets 45 days after adjournment for a maximum five-day session.

Key:
★ — Yes
... — No
A — days after adjournment of legislature
P — days after presentation to governor

(a) Sundays excluded, unless otherwise indicated.
(b) Includes language in appropriations bill.
(c) Bill returned to house of origin with governor's objections.
(d) Effective date may be established by the law itself or may be otherwise changed by vote of the legislature. Special or emergency acts are usually effective immediately.
(e) Penal acts, 60 days.
(f) Governor can also reduce amounts in appropriations bills. In Hawaii, governor can reduce items in executive appropriations measures, but cannot reduce nor item veto amounts appropriated for the judicial or legislative branches.
(g) Different number of votes required for revenue and appropriations bills. Alaska—3/4 elected. Illinois—appropriations reductions, majority elected. Oklahoma—emergency bills, 3/4 vote. West Virginia—budget and supplemental appropriations, 2/3 elected.
(h) Sundays included.
(i) A bill presented to the governor that is not returned within 12 days becomes a law; provided that any bill passed before Sept. 1 of the second calendar year of the biennium of the legislative session and in the possession of the governor on or after Sept. 1 then is not returned by the governor on or before Sept. 30 of that year becomes law. The legislature may not present to the governor any bill after Nov. 15 of the second calendar year of the biennium of the session. If the legislature, by adjournment of a special session prevents the return of a bill with the veto message, the bill becomes law unless the governor vetoes within 12 days by depositing it and the veto message in the office of the secretary of state.
(j) For legislation enacted in regular sessions: Jan. 1 next following 90-day period from date of enactment. For legislation enacted in special sessions: 91 days after adjournment. Does not apply to statutes calling elections, statutes providing for tax levies or appropriations for the usual current state expenses or urgency statutes, all of which take effect immediately.
(k) An act takes effect on the date stated in the act, or if no date is stated in the act, then on its passage.
(l) Constitution withholds right to veto constitutional amendments.
(m) Bills vetoed after adjournment are returned to the legislature for reconsideration. Georgia: bills vetoed during last three days of session and not considered for overriding, and all bills vetoed after *sine die* adjournment may be considered at next session. Maine: returned within three days after the next meeting of the same legislature which enacted the bill or resolution. Maryland: reconsidered at the next meeting of the same General Assembly. Mississippi: returned within three days after the beginning of the next session. Missouri: bills returned within four days of adjournment or later in first session are considered at beginning of second session; bills returned in second session are considered in automatic veto session. South Carolina: within two days after the next meeting.
(n) Effective date for bills which become law on or after July 1. Georgia—Jan. 1, unless a specific date has been provided for in legislation. Illinois—a bill passed after June 30 does not become effective prior to July 1 of the next calendar year unless legislature, by a 3/5 vote provided for an earlier effective date. Iowa—if governor signs bill after July 1, bill becomes law on Aug. 15; for special sessions, 90 days after adjournment. South Dakota—91 days after adjournment.
(o) Except Sundays and legal holidays. In Hawaii, except Saturdays, Sundays, holidays and any days in which the legislature is in recess prior to its adjournment.
(p) The governor must notify the legislature 10 days before the 45th day of his intent to veto a measure on that day. The legislature may convene on the 45th day after adjournment to consider the vetoed measures. If the legislature fails to reconvene, the bill does not become law. If the legislature reconvenes, it may pass the measure over the governor's veto or it may amend the law to meet the governor's objections. If the law is amended, the governor must sign the bill within 10 days after it is presented to him in order for it to become law.
(q) No act takes effect until it has been published and circulated in the counties, by authority, except in cases of emergency.
(r) Governor must sign or veto all bills presented to him. Iowa—any bill submitted to the governor for his approval during the last three days of a session must be deposited by him in the secretary of state's office within 30 days after adjournment with his approval or objections. Missouri—otherwise, legislature, by joint resolution, reciting fact of such failure, may direct the secretary of state to enroll the bill as an authentic act and it becomes law.
(s) Bills passed over governor's veto are effective in 30 days or on date specified in bill, whichever is later.
(t) Different date for fiscal legislation. Minnesota, Montana—July 1. Missouri, New Mexico—immediately.
(u) In event of a recess of 30 days or more, legislature may prescribe, by joint resolution, that laws previously passed and not effective shall take effect 90 days from beginning of recess.
(v) No appropriation can be made in excess of the recommendations contained in the governor's budget except by a 2/3 vote. The excess is not subject to veto by the governor.
(w) If a bill is not returned by the governor within 10 days after it is presented to him (excluding Sundays), it becomes law, unless the house of origin is in temporary adjournment. In that case, the bill becomes law on the day the house of origin reconvenes. If on the 10th day, the legislature is in adjournment

SENT BY:Xerox Telecopier 7020 ; 5- 9-91 ; 21:17 ; ; 2024566218;# 3

To Carol

Date 5-9 Time 1:10

WHILE YOU WERE OUT

M Alice Coccoonese

of Princeton

Phone (609) 258-6429

Area Code Number Extension

TELEPHONED	X	PLEASE CALL	
CALLED TO SEE YOU		WILL CALL AGAIN	
WANTS TO SEE YOU		URGENT	
RETURNED YOUR CALL			

Message Honorary Dr of Laws Degree "

AMPAD EFFICIENCY®

To Carol

Date 5/9 Time 5:40

WHILE YOU WERE OUT

M Call Bill at ~~work~~ home

of

Phone

Area Code Number Extension

TELEPHONED		PLEASE CALL	
CALLED TO SEE YOU		WILL CALL AGAIN	
WANTS TO SEE YOU		URGENT	
RETURNED YOUR CALL			

Message

Operator

23-023 CARBONLESS

THE WHITE HOUSE
WASHINGTON

Lisa - NGA - Executive Director's Office.

43

→ Ad Asst. to Exec. Dir.

From Tim Simonson as of 6:35 5/8

Acknowledgements

President Shapiro, Mrs. Shap.

GOV. James Florio

Dr. Harold Shapiro

[redacted] James Henderson
Board of Trustees Ch.,

Members of Congress

Dean Williamson
[redacted] Joseph W[redacted].

ASSO. Dean Sue Ann Steffey Morrow
gives benediction
seated next to POTUS

4/11/91

THE WHITE HOUSE
WASHINGTON

From Cong. Yellow book

Senate

Comm - 20
Subcomm - 87 } 108
TF - 1

304

House

Comm - 27
Subcomm - [redacted] 136 } 184
TF - 13
Panels - 8

Joint

Comm - 4
Sub - 8 } 12

1989
Pentagon report
Col. Betty Price [redacted]-0732

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ADDRESS

By The Honorable C. Boyden Gray
Counsel to the President of the United States

The Friday luncheon session
of The American Law Institute
convened in the East and State Rooms
of The Mayflower, Washington, D.C.,
on May 18, 1990,
and was called to order at 1:30 p.m.
by President Roswell B. Perkins

PRESIDENT PERKINS: Boyden Gray, who is our speaker and is Counsel to the President, came into government service with a bit of family precedent. His father, Gordon Gray, was Secretary of the Army during the Truman Administration and later served as President Eisenhower's National Security Adviser. The family lived in Winston-Salem, and Boyd attended Harvard College and the Law School of the University of North Carolina, where he graduated in 1968, first in his class, and was Editor in Chief of the Law Review.

Mr. Gray clerked for Chief Justice Earl Warren in the year after graduation, 1968-1969, and embarked on 12 years with Wilmer, Cutler & Pickering, becoming a partner in 1976.

About nine years ago, he commenced serving George Bush. When he was asked to do so, he happened to be on a sabbatical from Wilmer, Cutler. Boyden says that, had it not been for the fact that he had the opportunity to think about something without a pile of papers on the desk and the ongoing volume of cases, it would have been a very difficult decision. As it was, he was able to free himself and decide to embark on this new career.

He served as Legal Counsel to the Vice President and then as Counsellor. During a significant part of his work with the Vice President, he was wearing a second hat, that of the Counsel to the Presidential Task Force on Regulatory Relief.

He was obviously a key player in the Bush Presidential Campaign, and the very day after the election President-Elect Bush named Boyden Gray his counsel. He became Director of the Office of Transition Counsel for the overall transition team.

Now this post of Counsel to the President is one of great scope. In fact, Boyd gave an address, which later became an article on the subject, to the City Bar Association 10 years ago. And, in his opening sentence of that address, Boyd characterized the job as being very unstructured. I think this is probably the heart of it. The incumbent has a chance to influence the relative roles of the legislative and executive branches in a very substantial

way, and the Counsel at present also is a crisis manager of sorts. He has to be ready to leap into troubled situations with a cool head. Of course, on the other side of the coin is the old saying, that we all know, that if you can remain calm while those around you are losing their heads, perhaps you just don't understand the situation. *(Laughter)*

On the extracurricular side, Boyd is a great basketball fan dating back to his days from North Carolina. He's a great tennis player. He complains generally of the fact that the White House courts are getting far more use under this Administration than they did under the prior administration. It makes it difficult to schedule tennis at that location, and he's having to seek out other locations.

He is renowned for the fact that he owns a gasahol converted car. He'll tell you a little bit about his interest in clean air and the Clean Air Act. Indeed, he's missing an important meeting on that, he says, so we've got to get him back to it. But having been friends with Boyden, I know that one of the sources of gasahol is indeed foreign. I'm bold enough to pass along the quip at one Wilmer, Cutler party that "not many people are brave enough to burn the stuff in their cars." So with that, Boyden Gray comes to the present. *(Applause)*

COUNSEL TO THE PRESIDENT C. BOYDEN GRAY: Thank you very much. That was much too nice of an introduction. I think that I should tell you how my father was once introduced, when he was President of the University of North Carolina, at a large gathering of women in the auditorium there. I think it was the League of Women Voters. He was the only man in the room, and he was the principal speaker. After a few brief speeches here and there from the members of the group, he was finally introduced by an imposing lady who said: "Our next and key speaker needs no introduction because, as you all know, Gordon Gray has the longest Who's Who in North Carolina." Apparently there wasn't even a smile in the audience. *(Laughter)*

I want to talk a little bit about the relationship of factions – that is, special interests – and the public interest. You've heard a lot here about ethics, and that is my take-off point. One of my major responsibilities is watching after the ethics of the White House and the executive branch and another major responsibility is watching out for the authority of the executive branch. These two responsibilities over the authority of the President and the question of conflicts of interest are, as I will try to show, intimately related.

I thought about this issue as I was trying to clean up my desk on Monday. A couple of meetings had been cancelled, and I had the opportunity to go through some papers that had been stacked up and try to sort them out and throw the useless ones away. I did so, getting through to about three or four feet, much of which went into the trash basket, only to find out an hour later, when I came back from lunch, that my executive assistant was fuming at having had to retrieve almost everything back out of the waste basket. Chiding me she said: "You're supposed to be the counsel and the ethics adviser; don't you know this violates the Presidential Records Act?" The point is that you cannot throw anything away because everything belongs to Congress and the archives, including any personal diary you might keep at work.

Now this is one of many, many laws that applies to us but does not apply to the Congress. What does this have to do with anything? I'm going to try to explain. Let me start out with conflicts of interest. We have Judge Wilkey here who is the chairman of our group, the President's Commission on Ethics. We tried hard to get some simplification done in this arena, but it's an endless affair. In regard to the heart of any ethics regime, whether it's in the private sector or in the public sector, we as the executive branch – Judge Wilkey, as both Judge and Ambassador, knows this well – are subject to very, very strict conflicts of interest rules that do not apply in almost any way with respect to Congress.

I probably should pay around $20 — in fact, I'll do so to demonstrate my cleanliness — for this lovely lunch. If I miss that, I'm potentially subject to criminal exposure.

This is not true on Capitol Hill. At the end of the controversy over the pay raise bill — Lloyd Cutler was involved with that last year — we tried to squeeze, as a condition of the President's giving a little more political cover for the Congressional pay increase, a little bit more out of Congress in terms of their own submission to the same standards that we live by. I tried in that context to get just a little sliver of the criminal liability that we face imposed not on the members of Congress — I wasn't thinking at all about the members — but on their staffs and their agencies. There are 30,000 of them, and they run around getting into our business all day. I have a great deal less influence with the EPA than a good many staff members on the Hill, for example.

"This would be horrible" said a leading member of the leadership, whom I'm not going to identify. He said, "To impose criminal liability on our staff for conflicts of interest would be an unconstitutional infringement on our Constitutional duty to represent the special interests." That is literally what he said.

He said: "How can you expect us to rule upon a Clean Air Act unless we have someone on the payroll of General Motors here helping us to understand what impact this will have on General Motors?" I'm sitting next to him dumbfounded. He said: "I cannot and will not have U.S. Attorneys from the executive branch looking over the shoulders of my staff here in the Congress." And I said: "Well, that is all the more reason you should accept our generous offer to be included in the coverage of the independent counsel statute." It took him a while to suppress his laugh, but he didn't take the bait.

We don't really know what the Congress does by way of intervening or interfering in the affairs of the executive branch. We did get out of them a more full disclosure of the staff's own personal financial interest, and their sources of honorariums. But since we don't know what they do, it's hard

to determine whether their own interests conflict with what they are trying to influence in the executive branch.

We are preparing an Executive Order that would require agencies to record telephonic contact and requests by the Congress, something the Pentagon does routinely, the new financial agencies do under the S & L bailout legislation, and the Office of Thrift Supervision and the Resolution Trust Corporation do routinely. If we adopt this, we expect that it would create a huge volcanic fire storm. As a result, we may not do it, thus leaving Congress with more covert influence over the regulatory agencies than the White House has.

With respect to the independent counsel, we have it, they don't. Why is this? We have Inspector Generals, they don't. They have direct influence over IGs; we have nothing we can do in return to Congress.

The President had the IGs to the Roosevelt Room in the very, very beginning of his Administration to deal with the ethics question, saying I hope you will help us keep ourselves honest. One of the themes that they kept repeating was the difficulty of policing graduates of the Congressional branch who had migrated over to the executive branch. Congressional staff live in such a permissive atmosphere there that they're a constant source of anxiety for the IGs in the executive branch.

Other statutes that apply to the executive branch but exempt Congress include the Government in the Sunshine Act, the Privacy Act, and the Civil Rights statutes. The President spoke yesterday, as you probably all know, about his reaction to the Civil Rights Act of 1990. He spoke to a polite although not necessarily favorable crowd, but he got a very, very healthy round of applause when he said that whatever Congress does it ought to do to itself as well. I'll believe it when I see it.

Now, these are there not only to hamstring the executive branch. I believe they're also there to promote Congressional reelection, by making it easier for legislators to do the things

that will assure their reelection. The point is that ethics as a discipline is abused to provide a weapon the Congress can use to disarm the executive branch and thus also to promote their own reelection. This view of ethics, in turn, invites capture, or at least, deep influence, by the special interests which have a terribly divisive and fragmenting influence on the way Congress operates. I'll give you one example about farming.

It is a rule which has been devised by the Congress, which they've actually applied to us, that there is nothing in the farm program — some $20 billion or $30 billion worth of subsidies — that has anything whatsoever to do with the value of farmland. This is a fiction that is designed to permit farmers to run their own programs at the Department of Agriculture without selling their farms. It is this fiction which may contribute to the fact that we have such a huge deficit in farm programs. We do not, by contrast, allow broadcasters to work at the FCC or brokers to work at the SEC.

Farmers have to go through an elaborate song and dance about putting their farms into professional management, but they don't have to worry at all about the appreciation of their underlying farmland. And my attitude is that, if it really is true that farm programs have no impact on the value of the farmland, then we should definitely get rid of the subsidies, but that argument doesn't seem to get anywhere because no one other than the farm community itself can review what the Agriculture Committees or the Department of Agriculture do.

We have a similar situation with marketing orders. For those of you who are not familiar with them, these are walking and talking antitrust violations by the people who grow oranges or almonds and whatnot. In the world that I grew up in under Lloyd's tutelage, we were always taught to tell the client that, if he fixed prices or allocated production, he would go straight to jail. He wouldn't pass go, he wouldn't collect $200, he would go straight to jail.

In the world of marketing orders, the rule is just the opposite — that, if you don't fix prices or limit production, you

go straight to jail. This is not good. When the Office of Management and Budget tried to take a look at this, Congress passed a law prohibiting the Office from even looking at marketing orders.

Now, the founding fathers expected that Congress would be responding to special interests to some degree. But I doubt they would have any approval for the sweeping proliferation of committees and subcommittees that began in the early 1970's.

We now have as many subcommittees as we had staff itself after the war. I mean there are about 270 committees and subcommittees. There's an old joke that, if you can't remember a committee member's name because he or she is new or you just draw a blank, which happens occasionally, you are on very safe ground if you address him or her as "Mr. or Madam Chairman." There are some 85 committees and subcommittees with jurisdiction over the State Department. There are 40 or 50 with jurisdiction over the EPA. There are 50 or 60 with jurisdiction over various aspects of the illicit drug problem. One of the reasons why we have a drug czar is because Congress is so fragmented with respect to drug oversight that Congress has to appoint a czar in the executive branch to provide coherence to drug policy that Congressional fragmentation has undermined.

For another example, the modest suggestion for a joint intelligence committee has fallen on totally deaf ears. Why do we have so much fragmentation? It is easy to raise money that way, easier to get exposure; it is a better platform, with more things to do. There are more bills to write, more staff to hire, and it goes on and on and on. It just goes on and on and on.

And it has a very bad influence. I believe one of the reasons that we have an S and L crisis is because the various interests, especially the League of Savings and Loans but not excluding insurance and securities brokerage, have made it impossible to reform the banking laws. The Vice-President, with the assistance of Richard Breeden, who is now chairman of the Securities and Exchange Commission, came up with a rather comprehensive set of proposals to reform the regulatory

structure of the financial services industry back in 1984. This was totally ignored by Congress. Had it been adopted, we would not have an S and L crisis today. Why did it get no hearing? The special interests suppressed it before we had even printed the final version, even though it had unanimous support from all the regulatory agencies including Shad, Volker, Pratt and the others.

If you look at a book called *Honest Graft* by Brooks Jackson of the *Wall Street Journal*, you will see how the PAC system was taken over by the Democrats by Tony Coelho in a way that exacerbated the S and L crisis, in a way that could not have happened had we had a more sane committee structure and had we had some reform of the regulation of banking.

I don't mean to point all this out as a way of defending the current administration or its handling of this; nor am I going to say the executive branch is totally blameless. Perhaps we could have pushed harder to get our reforms adopted. I'm just pointing out that when you have the kind of fragmentation Congress has, there are bad consequences, including the inability of the White House to police the independent agencies like the Home Loan Bank Board, which are viewed as property of the Congress.

Global warming. One senator on the energy committee called me up a year ago and said — this relates to something Lloyd was asking about — "Why aren't we moving more rapidly on an international agency for the environment?" The senator called me up and said, "You're not doing enough about global warming, you're just not doing enough." And I said, "Well, Senator, we haven't got our act together. We're trying to get the Agriculture Department integrated in this because the sinks are as important as the sources. By 'sinks' I mean the farms, the oceans, the forests, and this and that. The point is that agriculture plays an important role in absorbing CO2 and, in some cases, perhaps creating it. For example, one of the most important sources of greenhouse gas is rice farming in the far East." But the Senator said, "Oh, trees, agriculture, farming,

that's irrelevant to global warming." I said, "Why is that?" He said, "Different committee, different committee."

I was asked earlier about the regulation of autos and cars. Perhaps it might be of interest to people here that cars are about 95 percent cleaner than they were in 1987, with the help of the catalytic converter and other technologies. The gasoline that goes into the car is about 100 to 200 percent dirtier, offset by the deterioration of the quality of the gasoline. Now, this is in part the result of the fact they're regulated by different committees.

Take the question of automobile fuel economy standards, which focus conservation rules only on cars, not the fuel itself. One little known fact is that high octane gasoline is wasteful. When you go from 87 octane to 93 octane — 93 octane being totally unnecessary for 95 percent of all the cars on the road today — you lose six to 10 percent of the crude oil that goes into the refining of the gasoline. Now if one prohibited 93 octane gasoline, one would get more conservation over the next decade than one could get by increasing fuel economy standards on the car companies. But this cannot be overseen properly because regulation of oil and cars is in different committees.

Now, when we were worrying about trying to show how much global warming reduction or protection we are achieving internally in the United States because of the Clean Air Act, we had difficulty getting the Environmental Protection Agency to acknowledge what our Clean Air Act would do in terms of encouraging use of natural gas as a boiler fuel in lieu of coal. There is a big greenhouse, a big CO2 swing, involved when you switch to natural gas from coal or even oil. After considerable pressure, the EPA did acknowledge that, if you count the co-generation facilities that were on natural gas, of course there will be a global warming improvement. So we said: "Can't you count that? Just because this comes under the jurisdiction of the Energy Committee, and not the EPA's committee, doesn't mean it doesn't happen." The EPA later acknowledged that this was correct.

Now the background is that, from 1978 to 1988, we had a regime under the Clean Air Act where not only was clean coal prohibited from use, but also utilities were not permitted to burn natural gas. Only in the topsy-turvy world of the Clean Air Act can you find yourself prohibited from using the cleanest technology or process.

Now we finally got repeal of the Fuel Use Act, which prohibited the use of natural gas. That now opens up vast new markets to natural gas which will have a very, very beneficial impact on the environment.

This didn't count for the EPA. Have you guessed why? Different committees. The benefits of repealing the Fuel Use Act have been basically lost in this way, because those benefits are as much environmental as they are energy-related, and in the Senate, energy and the environment are split between separate committees.

I'll tell you one anecdote about one important Congressman who wanted to impose restrictions on a part of the Office of Management and Budget, restrictions that would basically emasculate its ability to do its regulatory oversight function for the President. This Congressman wanted to require agencies to publish the reasons for any change in a proposed or final rule that might be thought to be connected with something that somebody at OMB had said.

And I said, "That's an impossible thing to follow. Any change of a rule is already required to be published by the agency that makes the change. And it's all one executive branch anyway, supposedly, so what's the deal?" I said, "You know, Governor Sununu talks to the Cabinet Offices every day; changes get made every day. How is anyone to know precisely what changes are attributable to Governor Sununu as opposed to any other policy maker with an interest in a rule? Are we to have a special publication for the sayings of Governor Sununu?"

And this Congressman said: "Oh, these restrictions do not apply to the Executive Branch." And I said: "Oh, okay." He

really thought the OMB belonged to Congress, like the old Home Loan Bank Board or the SEC. "Thank you very much," I said. "We will take that to heart."

Now his staff realized this was something of a mistake since the OMB, last time I looked, was part of the Executive Branch and not an independent agency. And they then came back, the staff did, and said, "What the gentleman meant to say was that these restrictions don't apply to the Executive Office of the President." Well, the OMB is part of the Executive Office of the President, too, so they struck out twice, but they're still working on it.

What's the solution to all this? I don't know, but there has to be some reform. There has to be reduction or elimination of PACs. There has to be some consolidation of committees in Congress. A lot of the problems go back to 1974. It is true that President Nixon and Watergate carry some of the blame for this because a lot of the problems stem from overreaction that occurred after Watergate. They tried to take Presidents out of the budget process for the first time in 200 years, in the Impoundment Control Act of 1974. A lot of other reforms, including PAC reforms, grew out of that period. The committee fragmentation started about then, as did the tremendous growth in staffs.

Most of the Congressmen who were in the Watergate class of 1974 were elected from traditional Republican districts. When they went in, they realized that, if they didn't do something to perpetuate their own existence, they would lose the next election when memories of Watergate had faded. The result was all of the reelection benefits — increased staff, increased Subcommittees, PACs, the franking privilege — that have been adopted.

Now we have a 99 percent reelection rate as part of the result of this overreaction. Something's got to be done about it; I don't have the ultimate solution, but something has to be done.

Thank you very much. *(Applause)* Thank you. *(Applause)*

PRESIDENT PERKINS: Whether honorary or accepted or not, I'm going to return your $20 because you deserve it, Boyd. Now that was wonderful. I suspect we're going to have to give the legislative branch equal time next year. We heard from the judicial branch yesterday. I must say that nobody is making any of the problems of Washington sound any easier than we thought they were.

But this was most enlightening. We have the perspective of the office of the President, and dealing with legislative problems today is indeed a benefit to all of us. So thank you for taking the time out. We'll let you go back to your Clean Air Act and cleaning up everything for us. Thank you. We'll go back to our two separate sessions, Complex Litigation and the UCC.

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THE LINE-ITEM VETO: THE BEST RESPONSE WHEN CONGRESS PASSES ONE SPENDING "BILL" A YEAR

L. GORDON CROVITZ

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The Line-Item Veto: The Best Response When Congress Passes One Spending "Bill" a Year

L. Gordon Crovitz*

There has never been a prop used in a State of the Union address quite like the one President Ronald Reagan used in 1988. He pointed to a stack of paper several inches thick. The stack was the year's Continuing Resolution, a method of putting all government funds into one giant budget bill that the President must either sign or veto and close down the government. President Reagan threatened never to sign another such behemoth. Under the 1974 Budget and Impoundment Control Act,[1] Congress is supposed to pass thirteen separate appropriations bills. It is no coincidence that Congress has repeatedly failed to meet its own legal requirements, that the same law purported to end the presidential impoundment power, and that the federal budget deficit has exploded since the 1974 budget "reform."

This paper attempts to set out one possible constitutional response by the President to the current practice of presenting the entire budget of the United States in one piece of legislation usually described as a Continuing Resolution. By adopting this procedure of an all-in-one budget "bill," Congress has effectively vitiated the veto power guaranteed by the presentment clause[2] by creating a Hobson's choice of signing for all spending or vetoing all spending. This article argues for the exercise of the inherent line-item veto in these circum-

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1. Congressional Budget and Independent Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified at 2 U.S.C. §§ 681-688 (1982)).

2. U.S. CONST. art. I, § 7, cl. 2.

stances as a proportionate response to an abuse of the presentment clause by Congress. Indeed, although the action has attracted little attention, President George Bush, in November 1989, exercised the line-item veto through a signing statement. As described below, it is significant that no one has challenged his legal right to do so.

I. THE GLAZIER THESIS

> I'd like to test [the line-item veto] the way it is. I can't quite find the right case. I'm sure you're familiar with the theory that the President has that inherent power, and if I found the proper, narrowly-defined case, I'd like to try that and let the courts decide whether it's there.
>
> *-President George Bush.*[3]

The theory that President Bush has embraced was first publicly presented by Stephen Glazier,[4] in an article published by *The Wall Street Journal*. This and several subsequent articles[5] set out a new view of the interplay between the constitutional powers of the legislative and executive branches of government in the handling of the federal budget. The issue is important because of the continuing debate over the federal deficit, which has grown inexorably since Congress adopted, over the veto of President Richard Nixon, the Budget and Impoundment Control Act of 1974, which purported to deprive the President of the power to impound funds.[6]

The argument for a line-item veto requires a close analysis of how a legislative provision first becomes a bill and then becomes a law. This process is more complex than commonly thought. Two constitutional clauses govern the question. The first is Article I, § 7, Clause 2, which states in relevant part, "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States" for his signature or veto.[7] The Glazier thesis relies on the next clause which

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3. Interview of President George Bush with Knight-Ridder News Service, White House, (July 25, 1989)(on file with White House Office of Press Secretary).

4. Stephen Glazier is an attorney now practicing in Washington, D.C.

5. *Reagan Already Has Line-Item Veto*, Wall St. J., Dec. 4, 1987, at A14, col. 4; *see* Glazier, *Line-Item Veto Hides Under an Alias*, Wall St. J., Mar. 18, 1988, at A26, col. 4; Glazier, *A Plank Bush Should Stand On*, Wall St. J., Feb. 12, 1988, at A14, col. 4. Editors at The Wall Street Journal, including this writer, were at first skeptical that there could be an inherent power in the President to exercise a line-item veto. No President had claimed such a power before, and several Presidents had campaigned for a statute or constitutional amendment to grant a line-item veto. Mr. Glazier's thesis was original enough to be published and persuasive enough to be a magnet for constitutional analysis. *See, e.g.*, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO (1988) [hereinafter PORK BARRELS].

6. "[I]mpoundment occurs whenever the President spends less than Congress appropriates for a given period." Fisher, *Funds Impounded by the President. The Constitutional Issue*, 38 GEO. WASH. L. REV. 124, 124 (1969).

7. U.S. CONST. art. I, § 7, cl. 2.

begins: "Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States . . . ."[8]

This is curious language indeed. Clause 2 refers simply to the requirement that "every bill" be presented to the President. Clause 3 was clearly an effort by the Founders to prevent Congress from eviscerating the President's veto power by using legislative legerdemain to evade presentment altogether, or to describe legislation as a "bill" that is in fact a bundling of many bills as a way to increase congressional leverage over the President to avoid a veto. Under this reading of Clause 3, the phrase "Every Order, Resolution, or Vote" was intended to encompass every then-recognized stratagem for undermining the presentment procedure.

There is strong evidence from the constitutional debate that the Founders intended Clause 3 as a defense of the presentment clause that a President could invoke to maintain the intended separation of powers. On August 15, 1787, James Madison suggested to the Constitutional Convention that Clause 2 alone was inadequate to limit Congress. Madison argued, "If the negative of the President was confined to *bills*; it would be evaded by acts under the form and name of Resolutions, votes, & c . . . ."[9] He proposed that "or resolve" be added to Clause 2 after "bill," to make the reference to "Every bill or resolve." The use of "& c" indicates that Madison was hoping to find some term of art that would cover any possible legislative technique to avoid calling a bill a "bill."

The reports of the Constitutional Convention indicate that "after a short and rather confused conversation on the subject,"[10] Madison's proposal was defeated. The next day, however, Edward Jennings Randolph offered an alternative provision. His proposal was accepted and became Clause 3, with its reference to "Every Order, Resolution or Vote," which would be subject to presidential veto just as would a "bill" under Clause 2.[11] As Stephen Glazier concluded,

> In contemplating a bicameral legislature that could act only by majority vote of each house, Randolph had found the broadest possible formula in the language of the day to describe the "etceteras" of "form and name," as yet not invented or described, that Madison feared. It only remained for future Con-

8. U.S. CONST. art. 1, § 7, cl. 3.
9. J. MADISON, JOURNAL AT THE CONSTITUTIONAL CONVENTION, 536-37 (1893) (emphasis in original).
10. *Id.* at 537.
11. *Id.*

gresses to invent it and name it, in order for the President to be able to veto it."[12]

By clarifying the reference in Clause 2 to "bill," it seems likely that the Founders anticipated congressional efforts to evade the risk of a veto in either of two ways. One would be for Congress to label a provision something other than a "bill" in order to avoid presentment at all. The other would be to create a "bill" that in fact contained many more items than it would in the natural scheme of statutory drafting, that is, than it would but for the effort to avoid constitutional presentment. Under this second method, Congress could use bundling of some kind to present the President with a series of bills masquerading as one.

Indeed, the question of who decides what "bill" means goes to the core of the issue. The closely related question of whether the President may veto non-germane riders raises the question of whether the President can unbundle legislation for presentment purposes. For example, if Congress announces that it has presented all of its legislative business in a single "bill" at the end of each session, does a President have to treat this as a single "bill" for veto purposes? Is it closer to the intent of the Founders for a President to swallow all of the legislative pronouncements of a session in one decision to sign or veto, or for him to sign parts and veto other parts? Under any theory of accountable government, it seems clear that, when necessary, the President should break down legislation in such a way as to reflect the Founders' concern for "Every Order, Resolution or Vote."

There is some evidence from the Founders that a President should exercise a veto which is proportionate to the legislation presented to him. In *The Federalist*, Hamilton made an argument about the veto power that makes sense only with a flexible veto, one that could include a line-item veto. Hamilton worried that the risk was that a President would exercise the veto less frequently than he should rather than too often. The wording of Hamilton's argument is significant: "It is evident that there would be greater danger of his not using his power when necessary, than of his using it too often or too much."[13] Using a veto too often can be understood under the current interpretation of the extent of a possible veto; "too often" might mean, for example, vetoing half of all bills. But what can "too much" mean? It seems likely that this refers to using the veto power not too much in the sense of vetoing too many bills, but instead refers to us-

12. Glazier, *The Line-Item Veto: Provided in the Constitution and Traditionally Applied*, in PORK BARRELS, *supra* note 5, at 9-10.

13. THE FEDERALIST NO. 73, at 497 (A. Hamilton) (J. Cooke ed. 1961). I am indebted for the observation of the Hamilton quotation and the reading of its meaning to Don Mark North, *The Item Veto: Has It Been There All Along?* (August 24, 1990) (paper on file, Pepperdine University Law Review).

ing the veto too much within a single bill—such as, for example, vetoing half of the provisions of a single bill. This excess, of course, would only be possible if Presidents can veto parts of a "bill," such as by use of a line-item veto.

There is good historical evidence that the veto power of the Constitution as understood by its Eighteenth Century drafters and ratifiers includes what we now call a line-item veto. Professor Forrest McDonald has noted that the body that reviewed legislation passed by the colonies between 1696 and 1776, which was created by His Majesty's Privy Council and called the Board of Trade, routinely exercised a line-item veto.[14] "During the course of that eighty-year period the Board reviewed 8,563 pieces of legislation," Professor McDonald has reported.[15] "The members made it clear almost from the beginning, in 1702, that the veto that they were exercising in the name of the Crown was a selective veto, a line-item veto."[16] Professor McDonald wrote that the Board of Trade vetoed all or part of 469 pieces of legislation during that period.[17]

Professor McDonald wrote that after the colonial experience, the states followed a system under which "appropriations were always permissive, not mandatory."[18] That is, the legislature voted a sum and the governor could spend up to that amount at his discretion—he could spend less but not more. This is the earliest version of the impoundment power discussed below, which is closely related to the line-item veto. Professor McDonald reported that "Anti-Federalist tracts against the Constitution objected to the Constitution, among other reasons, because Article I, § 7, Clause 3 made too strong a line-item veto in the hands of the President."[19]

Secretary of the Treasury Alexander Hamilton and President George Washington continued to take the position that appropriations were permissive and not mandatory, and shifted funding around fairly freely. President Thomas Jefferson refused to spend $50,000 appropriated by Congress for gunboats. The expectation that we would have a war with Spain dampened while Congress was in recess, but this amounted to a line-item, absolute veto—an impound-

14. McDonald, *The Framers' Conception of the Veto Power*, in PORK BARRELS, *supra* note 5, at 2.
15. *Id.*
16. *Id.*
17. *Id.* at 2.
18. *Id.* at 3.
19. *Id.* at 5.

ment.[20] It is important to remember, however, that the question of the line-item veto of spending by a President would not have been a pressing issue in the first 150 years or so of the Republic. As Professor McDonald noted, it was in the states that real spending occurred.[21] In 1900, for example, state and local expenditures were ten times the amount of federal spending.[22] In this context, it is instructive to recall that the governors in some forty-six states clearly have the power under state constitutions or by legislation to exercise the line-item veto.

Another way of looking at the constitutional provisions is to ask what the word "bill" means. Even before the Glazier thesis, Professor William Clineburg argued that the common assumption that the presentment clause requires the President to choose to sign or veto a "bill" may be incorrect:

> [T]his view rests on the assumed premise that any legislative instrument passed by the Congress is a "Bill" *if so entitled*—whether it treats of one subject or of many, unrelated subjects. This assumption is, at best, a tenuous one, and such validity as can be ascribed to it must derive from the notion that a baseless assumption achieves a degree of invulnerability with age and repetition.[23]

In the extreme case, consider the result if Congress can simply collect any number of bills into one "bill" and deliver it to the President. This seeming fantasy has in recent years approached reality. Indeed, in the budget context, this is precisely what Congress has done for the past several years. Instead of the required thirteen separate spending bills mandated by the 1974 budget bill, Congress has passed what it labels a "Continuing Resolution" that can include up to all the spending bills for the year. This was precisely the strategy Congress followed in the fall of 1990, when Continuing Resolutions were presented to President Bush. He had the choice either of "closing down the government," which he did over the Columbus Day weekend in October 1990,[24] or signing a mammoth spending bill in its entirety.

Yet the clear purpose of the addition of the otherwise otiose Clause 3 was to ensure the accountability that underpins our political system. If Congress can simply overwhelm the President and the public with a single spending provision once a year, responsibility for the budget begins to disappear. Indeed, in recent years the "budget bill"

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20. *Id.*
21. *Id.* at 6.
22. *Id.*
23. Clineburg, *The Presidential Veto Power*, 18 S.C.L. REV. 732, 751 (1966) (emphasis added).
24. Statement on the Veto of a Resolution Providing Funding for Continued Government Operation, 26 WEEKLY COMP. PRES. DOC. 1532-33 (Oct. 5, 1990). President Bush proclaimed, "The hour of reckoning is at hand . . . . Congress . . . must face up to the shutdown of government services . . . because we could not produce a budget." *Id.*

has in fact been a collection of pieces of paper collected in several cardboard boxes that not one congressman has read in its entirety before being called on to vote for the new budget. Likewise, it is a mockery of the ten-day veto period to imagine that the President, with all his officials, can seriously read the entire document before deciding whether to sign or veto the budget.

We have had several examples of the practical vitiation of the veto power. Once the 1989 budget was approved by Congress and signed by President Reagan, it was learned that the bill contained a patently unconstitutional provision aimed at breaking up a media company that was hostile to the author of the provision, Democratic Senator Kennedy. The provision had the clear and intended effect of forcing Rupert Murdoch to sell either his profitable television stations or his money-losing (and anti-Kennedy) Boston Herald and New York Post newspapers.[25] There eventually was litigation invalidating the provi-

25. Provisions inserted into massive budget bills are often only discovered by most congressmen, the executive branch and the public after the bills are passed and signed. The following editorial published by *The Wall Street Journal* in February 1988 describes one such provision, which was aimed at punishing a certain newspaper publisher for political reasons:

> There is a lot of talk about Ronald Reagan's legacy of budget deficits, despite the fact that only Congress appropriates. The true legacy is the insight by the liberal leadership that Congress can destroy all presidential influence over the budget by obliterating his veto power. This is done by passing an all-in-one appropriations bill each year, "Continuing resolutions" that can't be vetoed without closing down the entire government.
>
> Secret expenditures snuck into these resolutions, even the 20% pay hike for congressional staffers, do not embarrass leading congressmen. Far from it. We have found an official congressional boast over its budget tyranny. In a remarkable legal brief, lawyers for House Speaker Jim Wright asked a court to dismiss a lawsuit by Rupert Murdoch by proclaiming legislators as the new untouchables. They argue that there is nothing anyone can do to stop dead-of-night provisions that dish out pork or that use the budget process to attack Mr. Murdoch's New York Post and Boston Herald.
>
> The attack on Mr. Murdoch, you will recall, came in the form of an appropriations rider prohibiting any Federal Communications Commission expenditure to extend any waivers of the cross-ownership rule "currently in effect." That affects only Mr. Murdoch, who on Saturday arranged a forced sale of the Post. His lawyers told the Federal Court of Appeals in Washington, D.C., that this violated several constitutional provisions, including equal protection, due process, the First Amendment, the rule against bills of attainder and the takings clause.
>
> The most intriguing argument to us, though, was that the provision violates the presentment clause, which says that the President must have the opportunity to veto all legislation. "The appropriations process is used as a Trojan Horse to smuggle new substantive legislation into being," the Murdoch brief argued, "without providing the President a meaningful option to veto it." This is very similar to the argument made by our contributor Stephen Glazier that a President faced with a $604 billion, all-in-one continuing resolution could legitimately assert a line-item veto and blue-pen offending provisions. The

sion, but the point is that in a massive, all-in-one budget all sorts of mischief becomes possible. There is little likelihood that a President or his staff would discover such a provision in the limited time before a President must choose between signing and vetoing.

Merely identifying a continuing abuse of the budget process by Congress, even an abuse that raises constitutional questions, does not alone answer the question of what response a President can or should make. However, once we see that a single spending bill violates the very purpose which Clause 3 was added to serve, the only question that remains is what constitutional powers the President can invoke to force Congress to cease this practice. It is here that invocation of the inherent line-item veto may seem an appropriate, measured, and proportional response to congressional evisceration of the President's powers under the presentment clause.

II. The Impoundment Power

One alternative is the more radical step of exercising impoundments in violation of the 1974 law, arguing with good evidence that

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White House has cited the Kennedy attack on Mr. Murdoch as an example of a line item it would have liked to veto.

There is some precedent for courts disciplining the political branches for usurping the other's legislative authority. There are cases against the aggressive use by Presidents of the pocket veto. Irony of ironies, Teddy Kennedy himself won one of these cases, when in 1974 the courts invalidated a pocket veto during an intrasession adjournment because one house had arranged a system to receive the veto message.

The Murdoch brief pointed out that the continuing resolution has precisely the same problem on the other side. "Just as the President is obliged to exercise the pocket-veto power in accordance with both its letter and spirit," the brief said, "so Congress is obliged to respect both the letter and spirit of the presentment clause."

To all this, the brief for Rep. Wright says simply that substituting last-minute continuing resolutions for separate budget bills has "been Congress' practice of late," and for that reason alone is perfectly proper. The brief asserted: "There can be little dispute over Congress' right to deal with appropriations as it decides," even if it nullifies the veto threat. Congress has become the son who kills his parents, then pleads for leniency on the grounds that he is an orphan.

Rep. Wright is lucky that the court probably won't have to reach this presentment-clause issue to rescue Mr. Murdoch. The judges could invalidate the Kennedy provision on a narrower ground. The Supreme Court has said that constitutionality of the crossover rules depends on FCC discretion to waive the rules when a newspaper otherwise could close. The Kennedy provision denies such discretion. Still, we wouldn't be surprised if the court had something to say about congressional budget power plays. Especially because, coincidentally, two of the three judges hearing this case are Laurence Silberman and Stephen Williams, who signed the recent opinion invalidating "independent counsels" for violating separation of powers.

Outside of the congressional leadership, patience is wearing thin on pork-barreling continuing resolutions. There are even congressmen who say they want to pass separate budget bills this year. We'll see. What seems more likely is that either a President or the courts or both someday will have to rescue the veto by forcing Congress to give up its arrogant ways.

Legislating Trojan Horses, Wall St. J., Feb. 22, 1988, at 20, col. 1.

impoundment is an inherent executive branch power that cannot be removed by statute. Instead, it has been argued that the failure of Presidents to invoke a line-item veto during a period when they routinely exercised the impoundment power is somehow evidence that there is no line-item veto power. One such criticism is in the form of an observation that apparently, until recently, no one thought the line-item veto existed. Charles Cooper, former Assistant Attorney General of the Office of Legal Counsel, has written that those who assert that there is an inherent line-item veto "are met first with the question: Why has no President in 200 years noticed this fact?"[26] The simplest answer is that until 1974, Presidents exercised a power far broader than a veto over spending: the impoundment power. At the very least, the fact that the impoundment power existed for nearly 200 years rebuts any negative inference that could be drawn from the fact that no President before George Bush asserted or exercised an inherent line-item veto.[27] Impoundment differs from the line-item veto in its absolute character. Unlike other vetoes, there is no opportunity for Congress to override an impoundment. There is no specific constitutional authority for impoundment, although it may be inherent in the executive power as it was understood at the time of the Founding; that is, appropriations were considered permissive but not mandatory. Whatever the justification for the impoundment power, its frequent use by Presidents until 1974 explains why no President was left with the choice of line-item vetoing a spending bill or facing omnibus appropriations that Congress took care to make inevitable under the then-current political circumstances.[28]

In more recent years, every President, from Franklin D. Roosevelt through Richard Nixon, used the impoundment power to limit spending. President Roosevelt, for example, impounded $500 million that had been appropriated for public works.[29] President John Kennedy cut spending by six percent through the impoundment power.[30] President Lyndon Johnson in 1966 alone impounded some five billion

26. Cooper, *The Line-Item Veto: The Framers' Intentions*, in PORK BARRELS, *supra* note 5, at 29.

27. Glazier, *Line-Item Veto Hides Under an Alias*, Wall St. J., March 18, 1988, at 26, col. 4. Presidents Washington and Adams exercised the impoundment power by "mak[ing] specific spending decisions." *Id.*

28. *See* Comment, *Addressing the Resurgences of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693, 695-98 (1988).

29. Crovitz, *Introduction*, in PORK BARRELS, *supra* note 5, at x.

30. *Id.*

dollars.[31] It was when a politically weakened President Nixon attempted to impound twelve billion dollars in appropriated funds, including six billion dollars of an eleven billion dollar sewage treatment bill, that Congress passed the budget law in 1974, over his veto, that purported to take away the impoundment power.[32]

III. The Line-Item Veto Passes Its Test

There is even a case to be made that President Bush has already exercised the line-item veto. One provision in the Fiscal Year 1990 appropriations act purported to limit the activities of the Office of Management and Budget, an office that reports directly to the President. It included a rider that prohibited the President from spending any funds to apply a cost-benefit analysis to agricultural marketing orders.[33] J. Gregory Sidak has noted that this provision is in apparent violation of the recommendation clause,[34] under which the President shall make recommendations to Congress on matters of his choosing.[35]

In his signing statement of November 3, 1989, President Bush exercised what appears to be a line-item veto. He wrote that the muzzling restrictions on the Office of Management and Budget "raise constitutional concerns because they impair my ability as President to supervise the executive branch."[36] President Bush wrote that he had the authority to order executive branch officials to "implement the provisions [of the appropriations rider] in a manner consistent with the Constitution."[37]

Relying on *INS v. Chadha*,[38] President Bush also effectively line-item vetoed a legislative veto provision:

> In addition, numerous provisions of H.R. 2989 purport to condition my authority, and the authority of affected executive branch officials, to use funds otherwise appropriated by the Act on the approval of various committees of the House of Representatives and the Senate. These provisions constitute legislative veto devices . . . . Accordingly, I will treat them as having no legal force of effect in this or any other legislation in which they appear. I direct agencies confronted with these devices to consult with the Attorney General

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31. Glazier, *Line-Item Veto Hides Under an Alias*, Wall St. J., March 18, 1988, at 26, col. 4.

32. Crovitz, *Introduction*, in Pork Barrels, *supra* note 5, at x.

33. Treasury, Postal Service and General Government Appropriations Act of 1990, Pub. L. No. 101-136, § 1, 103 Stat. 783, 793 (1989).

34. U.S. Const. art. III, § 3.

35. Sidak, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 Nw. U.L. Rev. 437, 458 (1990). *See generally* Sidak, *The Recommendation Clause*, 77 Geo. L.J. 2079 (1989).

36. Statement on Signing the Treasury, Postal Service and General Government Appropriations Act of 1990, 25 Weekly Comp. Pres. Doc. 1669, 1670 (Nov. 3, 1989).

37. *Id.*

38. 462 U.S. 919 (1983)(wherein the Supreme Court held that a legislative veto provision was unconstitutional).

> to determine whether the grant of authority in question is severable from the unconstitutional condition.[39]

President Bush included similar declarations in subsequent signing statements making clear that he would refuse to enforce certain provisions in a bill, yet enforce the remainder. Along with the legislative veto problem, for example, President Bush also vetoed parts of a State Department authorization bill stating that nine separate provisions unconstitutionally violated his foreign-policy powers under the Constitution.[40] These examples illustrate one kind of the line-item veto — where the President considers the provisions unconstitutional. It would be a different sort of line-item veto to reject a provision on the ground that it included unwise or foolish spending, but there is no obvious reason why a line-item veto could be asserted by a President for constitutional reasons and not for prudential ones.

IV. OTHER INHERENT EXECUTIVE BRANCH BUDGET AUTHORITY

The debate about the line-item veto cannot occur in a constitutional vacuum. Ultimately, the question is what political steps a President is willing to take in order to protect his constitutional powers and duties. In this respect, the mirror issue of the line-item veto in the context of spending is the President's own power of the purse to order funding that is not appropriated. To the degree that such a power exists and that Presidents have used such a power, there may be some lessons in the powers of a President to defend his ability to stop expenditures through a veto.

The appropriations clause of the Constitution states that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[41] This clause has been generally understood to establish a "sole power of the purse" by Congress through legislation. J. Gregory Sidak has noted, however, that "by Law" can include as sources of legal legitimacy not only legislation but also the "Constitution, . . . treaties, the common law and contract."[42] Indeed, the Justice Department has taken the position that there are inherent constitutional powers in the executive branch to order or authorize the expenditure of funds even without prior congressional approval. President Abraham Lincoln's expenditures at the outbreak

39. 25 WEEKLY COMP. PRES. DOC., *supra* note 36, at 1670.
40. Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 26 WEEKLY COMP. PRES. DOC. 266-68 (Feb. 16, 1990).
41. U.S. CONST. art. I, § 9, cl. 7.
42. Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1167-68.

of the Civil War[43] are a well known example.

Attorney General Benjamin Civiletti, who served under President Jimmy Carter, wrote an opinion in 1981 for the Office of Legal Counsel, Department of Justice, that justifies many incidents of presidential authorization for funding. These include many occasions of presidential funding authorization during short periods of suspended budget authority when Congress temporarily failed to pass new budgets in time to replace old budget authority.[44] One justification is purely statutory. The Anti-Deficiency Act provides that "[a]n officer or employee of the United States . . . may not accept voluntary services for [the United States] or employ personal services exceeding that authorized by law, except for emergencies involving the safety of human life or the protection of property."[45] The emergency exception for expenditures to protect life or property is a statutory authorization for presidential approval of spending that has not been specifically authorized by Congress.

There is a good case, however, that this statutory delegation to the President merely codifies an inherent constitutional power in the President. Attorney General Civiletti explained that the Anti-Deficiency Act "is not the only source of law or the only exercise of congressional power that must be weighed in determining whether the President has authority for an initiative that obligates funds in advance of appropriations."[46] Instead, Mr. Civiletti wrote, "[t]he President's obligational authority may be strengthened in connection with initiatives that are grounded in the peculiar institutional powers and competency of the President," which might include, for example, "the conduct of foreign relations essential to national security."[47] Thus, Mr. Civiletti concluded that the authorized "by Law" language of the appropriations clause would include "those obligations necessarily incident to presidential initiatives undertaken within his constitutional powers."[48]

If the President has inherent constitutional powers to order appropriations, this provides a check against possible congressional efforts to prohibit appropriations to pay for core executive branch functions.[49] Likewise, there may be an inherent power in the President that enables the executive branch to defeat congressional efforts to

43. *See id.*, at 1189-90.

44. Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. Off. Legal Counsel 1, 4-5 (1981) [hereinafter *Civiletti Memorandum*].

45. 31 U.S.C. § 1342 (1988).

46. *Civiletti Memorandum*, *supra* note 44, at 6.

47. *Id.* at 6-7.

48. *Id.* at 7.

49. Sidak, *supra* note 42, at 1193. One example is that Congress could not prohibit spending for a pen that the President would use to veto a bill.

usurp the other political branch's spending powers. The inherent line-item veto thus gains justification as analogous to the inherent power to authorize appropriations when necessary to protect the constitutional design of separated powers and duties.

V. CONCLUSION

The question of whether the President has an inherent line-item veto power has never been clearly determined by any court, although there have been dicta suggesting that no such power exists.[50] There is a good case that the power does exist. There is also a good case that the invocation of the line-item veto is a proportional response to the congressional practice of evading the presentment clause by offering last-minute, all-in-one spending bills that give the President the dubious choice of signing or closing down the government. Powers may exist in the text or the structure of the Constitution, but unexercised powers exist only in the abstract. A President has a duty to enforce the presentment clause as it was intended, which includes defending his veto power. Invocation and exercise of an inherent line-item veto may be the best, and perhaps only, way for a President to re-establish the political accountability that the Founders' Constitution intended each political branch to have for the federal budget and its deficits.

50. *See, e.g.*, Lear Singler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988)(line-item veto does not exist in federal constitution), *reh'g ordered*, 863 F.2d 693 (9th Cir. 1988), *withdrawn on other grounds*, 893 F.2d 205 (9th Cir. 1989) (per curiam).

Info for speech's p. 5 & 3 & 4

Micromanaging foreign policy

L. GORDON CROVITZ

THE UNITED STATES was built on the idea that there is no greater political danger or political temptation than the exercise of power without accountability. The Founders would not have been surprised that Congress today routinely yields to this temptation. Congress now tries to micromanage most those affairs—foreign policy—for which its members are held least responsible.

More than any other government program, foreign policy has since the founding of the Republic been the clearest duty and burden of presidents. But ever since sensing the opportunities for expanding congressional power during the Nixon administration, legislators have made unprecedented incursions into the ability of the executive branch to set and to administer foreign policy. This trend helps explain the sometimes ambiguous or irresolute role of the U.S. abroad.

Nearly two decades of micromanagement teach that Congress has one great power in foreign policy. With enough meddling and constraints on the executive branch's discretion to act, Congress can eventually drain the energy of the executive branch.

Congress can then exercise an effective veto over action. What Congress cannot do, by and large, is mandate action of its own. This relationship between the political branches was very convenient for liberal Congresses that favored a more passive foreign policy but that found themselves confronted with conservative presidents, who have been more willing to pursue aggressive foreign policies. The typical result, though, is that we have neither presidential policy nor congressional policy—we have no policy, only paralysis.

This was one lesson of the Reagan administration, which foundered for its last two years when the Iran-*contra* affair was allowed to reach scandal proportion. In any current review of congressional micromanagement of foreign policy, it is important to recall that this was also the political environment in which George Bush prepared for the presidency. Although it is too early to predict, President Bush may be able to reduce micromanaging by fighting back, using the constitutional powers intended to protect his branch of government from Congress.

George Bush and recent micromanagement

At a Federalist Society conference in January 1987, George Bush gave a speech that his aides in the White House Counsel office and in the Justice Department now view as a call to arms. He complained:

> Over the last twenty years we have witnessed a departure from the way we have conducted foreign policy for nearly two centuries. Congress has asserted an increasingly influential role in the micromanagement of foreign policy—foreign operations, if you will—and at the same time Congress through use of laws ... ushered courts and lawyers into an uncomfortable but very visible role in the development of our foreign policy.

As candidate Bush put it a few months later in August 1987 to the American Legion's national convention:

> What kind of wacky world is this where the President is taken to court every time he moves our troops around in the national interest? Sometimes a president must take risks for peace, and he doesn't need to be blocked every step of the way.

It is a sign of how routine congressional micromanagement has become that of the twelve bills that President Bush has vetoed, five were vetoed because they violated the separation of powers by

putting unlawful and unwise fetters on the executive branch. The good news, largely unnoticed by Congress and the public, is that President Bush already has taken greater action to protect the prerogatives of his branch of government than any president perhaps since Truman. President Bush's veto statements are often excellent constitutional essays, explaining how legislation would usurp presidential powers and why it is important for everyone (and not just for the President's convenience) that such legislation be vetoed. None of his vetoes based on the separation of powers has yet been overridden.

President Bush's first veto of congressional micromanagement was in July 1989, when he vetoed a resolution that had purported to specify the details of negotiations with Japan on development of the FS-X fighter jet. He also said that provisions ordering the Pentagon to confer with the Commerce Department were an unconstitutional fetter on the unitary executive branch in which only one person—the president—can decide which officials will be consulted for what purposes. President Bush said that Congress had tried to "intrude into areas entrusted by the Constitution exclusively to the executive." He also vetoed a bill that would have legislated protections for Chinese students in the U.S., explaining that he would offer the same protections to the students, but he wanted the flexibility to deal with Beijing without Congress.

An excellent example of micromanaging by Congress was the Foreign Relations Authorization Act for 1990-1991. This act contained a provision aimed at executive-branch officials who solicited funds from other countries. The purpose was to prevent activities similar to those in the Reagan White House that managed to get funds to the *contras* during periods when Congress was vacillating between supporting the rebels financially and cutting off this support. The act would have made it possible for executive-branch officials to be sentenced to five years for their official acts. President Bush explained his veto this way:

> Under some circumstances, this provision purports to prohibit, under peril of criminal sanctions, the use of U.S. assistance of third-party funds by executive-branch officials, and requires presidential reporting of certain discussions concerning provision of assistance even within the executive branch. Because of its vague and sweeping language, it threatens to subject to criminal investigation a wide range of entirely legitimate diplomatic activity, the authority and responsibility for which is vested in the executive branch by the Constitution. The result would be a dangerous timidity and disarray in the conduct of U.S. foreign policy. Such a result is wholly contrary to the allocation of powers under the Constitution.... In addition to these constitutional problems, Section 109 would hamper the nation's foreign policy by criminalizing foreign policy disputes, rather than leaving resolution of such disputes to the political process. By making those who formulate and execute foreign policy serve under a vague and sweeping prohibition, Section 109 would clearly circumscribe the effective, forceful and entirely lawful representation of the nation's foreign policy interests. It is neither wise nor fair to expect the men and women of our foreign service to represent the nation with a sword of Damocles over their heads.

Imagine if President Reagan had used such language to veto the Boland amendments and the law reauthorizing the appointment of unsupervised independent counsel, also known as special prosecutors.

Most micromanaging does not give a president the option of a clean veto. President Bush exercised what appears to be a line-item veto in February 1990, when he said that he would not bind the executive branch to several provisions in the State Department appropriations bill. Congress wanted to prevent more secret diplomatic discussions such as those held in Beijing a few weeks after the Chinese communist government reacted against the democracy groups. The bill would have required President Bush to disclose to Congress any sensitive diplomatic discussions, but Bush said in signing the bill that he did not consider as binding "blanket reporting requirements" because these might "compel the disclosure" of sensitive information. "Legislatively mandated sanctions represent an unwise constraint upon the President's ability to conduct foreign policy," he said.

President Bush again exercised what might be called a partial veto in the form of constitutional excision when he finally signed the Foreign Relations Authorization Act. He signed, but said that he would view several provisions as "advisory," offering the "sense of Congress" but not binding as a matter of law. These were provisions that banned funding for the U.S. delegation to the Conference on Security and Cooperation in Europe unless a congressional representative was included; barred admission to any United Nations representatives who had engaged in espionage against the U.S.; and denied funds for "dialogue" with any PLO representatives who had engaged in terrorism that had killed an American. At least the latter two provisions have great merit as policy, but as purported legal obligations on the executive branch they also violate the constitutional structure under which only the president

negotiates treaties (which the Senate only then decides whether to ratify) and recognizes ambassadors.

The Justice Department has filed legal papers justifying its view that presidents have the right and even the obligation to refuse to enforce laws or parts of laws that violate the separation of powers. "The President has the authority to decline, in the absence of a judicial resolution of the matter, to implement a statute that is patently unconstitutional or that he reasonably believes undermines his powers under the Constitution," the Department argued in 1989.

Similar micromanagement has occurred with foreign aid, which typically gets bogged down with extraordinary congressional demands on how money is spent—and which congressional district gets any contracts that might be available. The House Foreign Affairs Committee estimated that in 1989 various laws required 288 separate reports on foreign aid. These laws earmarked the specifics of how 92 percent of military aid would be spent, 98 percent of economic aid, and 49 percent of development aid.

Those who suspect that foreign aid does more harm to the supposed beneficiaries than good will be amused by what happened when President Bush tried to streamline the foreign-aid process to benefit Nicaragua and Panama. Freed of illegitimate regimes by untested new governments, both these countries must be among the most clearly deserving of U.S. aid. There were few partisan disputes over the need to help these governments. Yet Congress missed no opportunity to leave its imprint on the aid bills. Though President Bush asked for $500 million for Panama in January 1990 and $300 million for Nicaragua in March 1990, by late spring no money had been released to either country.

The money was available all along from unspent funds, but several (mostly Democratic) congressmen insisted on trying to tie the aid to extraneous issues. A group of liberal senators decided to tack onto the aid bill a provision that would allow the District of Columbia to use taxpayer funds to pay for abortions. Senate Majority Leader George Mitchell announced that there would be no aid until a child-care bill was passed. Appropriations Committee Chairman Robert Byrd insisted on a $185-million correctional facility for his native West Virginia. Senator Timothy Wirth tried to remove some of the aid intended for Panama to fund prosecutions of white-collar criminals in connection with the savings-and-loan crisis.

President Bush urged in a May 1990 press conference that he be given more discretion in spending foreign-aid funds. Especially

with fast-changing events in Eastern Europe, he said, the U.S. cannot wait for Congress to act. "I've suggested that the President be given a discretionary fund out of all this foreign aid so we can accommodate a person that is trying to take his small country and firm up its democracy," President Bush said in response to a question about Eastern Europe. "But I remember my days in Congress."

The decline of presidential powers

Although President Bush has started to use his powers to block micromanagement through vetoes (and even through what appear to be line-item vetoes) of what he considers unconstitutional usurpations of his foreign-policy powers, he still has quite a task. A review of how the separation of powers became so unbalanced gives some idea of how great a challenge remains to restore presidential powers to their place of a generation ago.

The fear that congressional meddling will threaten national security predates the Constitution—and, indeed, helps explain why we had a constitutional convention in the first place. After the Revolutionary War, the states were still at significant risks from the British and Spanish. The federal legislature proved that it could not administer national defense; in modern terms, the country learned that 535 Secretaries of State could not function. The Constitution created a new kind of executive branch, a unified executive that would be checked by Congress but that would also have separate powers that could not be limited by legislation. The Founders envisioned a legislative branch that would deliberate and an executive branch that would act.

The Constitution defines congressional power in limited terms, while the executive power is defined expansively. "All legislative powers herein granted shall be vested in a Congress of the United States," the Constitution says. There is no such "herein granted" to limit the executive branch: "The executive Power shall be vested in a President of the United States." As Blackstone had informed the Founders, one sole executive-branch prerogative must be "national intercourse with foreign nations." That is, the sovereignty required to deal with foreign nations must be somewhere, and that somewhere would be in the executive.

This arrangement required an executive with energy, a word that appears frequently in the arguments supporting the Constitution in the *Federalist*. "Energy" in the executive branch, Alexander

Hamilton wrote there, is "a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws." The executive branch would be the one of "decision, activity, secrecy and dispatch." It would have to behave with energy to confront what James Madison predicted, in another *Federalist* essay, would be an omnivorous Congress. "The legislative department," he wrote, "is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."

One debate from the Constitutional Convention underscores the preeminent role envisioned for the president. The Constitution says that only Congress has the power to "declare war," but the original proposal was that only Congress should have the ability to "make war." Several delegates objected, saying that the president must have the power to "repel sudden attacks" even if it meant that the president would have the power to "commence war."

The distinction between declaring and making war has been of tremendous significance. The United States has been in only five declared wars, but it has used force overseas dozens of times, ranging from Marine landings to protect citizens and property to the Korean and Vietnam Wars. From the beginning of the Republic to 1970 (the last time a formal accounting was made), presidents ordered troops or significant levels of arms abroad 199 times. In two-thirds of these cases, there was no explicit or implicit authorization by Congress by treaty or resolution, while indeed in several cases there was clear congressional prohibition.

Presidents have taken a broad range of actions without congressional approval. Jefferson sent warships to the Mediterranean to sink Barbary pirate ships; Monroe ordered attacks on Spanish Florida; Buchanan landed troops in Canton, China, after an attack on a U.S. ship; Theodore Roosevelt sent a squadron to Moroccan waters ("We want either Perdicaris alive or Raisuli dead!"); Wilson sent aid to the anti-Bolshevik insurgents; Franklin Roosevelt ignored neutrality legislation in 1940 in order to transfer a flotilla of naval vessels to Britain; Truman sent troops to Korea; Eisenhower sent troops to Cuba; Kennedy quarantined Cuba during the missile crisis; Johnson sent troops to the Dominican Republic; and Nixon sent Marines to Lebanon. More recently, President Carter tried to rescue the Iranian hostages, and President Reagan, without prior

authorization, liberated Grenada, attacked Libya, and deployed warships in the Persian Gulf.

In addition to what the Constitution says and what presidential actions indicate about the role of the two political branches of government in foreign policy, the courts also have tended to grant presidents wide unilateral powers. Very few cases have actually been litigated; federal judges wisely often refuse on justiciability grounds even to consider cases. Among the reported cases is one that limits the most blunt tool Congress has for affecting foreign policy—the power of the purse. In *U.S.* v. *Lovett* in 1946, the Supreme Court invalidated a provision that would have denied salaries to three executive-branch officials who had been accused of subversive activities. The justices held, in part, that only the president has the power to hire and fire members of what the Founders intended would be a unitary executive branch. The justices recognized that all moneys appropriated out of the Treasury must be authorized by Congress, but said that the spending power cannot be used to alter the constitutional powers of the other branches. By this reasoning, Congress could not, for example, prohibit the president from spending public funds to purchase a pen to sign veto statements, nor could it withhold funding from any court that invalidated a law.

The leading Supreme Court case in this area raises issues interestingly similar to the legal issues that arose from the Iran-*contra* affair. In the 1930s, Franklin Roosevelt prohibited any arms sales by Americans to warring factions in Bolivia. There was also a joint congressional resolution taking a similar position, but the Supreme Court explicitly upheld Roosevelt's unilateral act. In *U.S.* v. *Curtiss-Wright Export Co.*, the justices explained at some length the preeminence of the executive branch in foreign affairs as distinct from the more equally shared powers in domestic affairs. "Not only ... is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited," the Court wrote. "In this vast external realm, with its important, complicated, delicate, and manifest problems, the President alone has the power to speak or listen as a representative of the nation."

The Court also identified a "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not

require as a basis for its exercise an act of Congress, but which, of course, like every other government power, must be exercised in subordination to the applicable provisions of the Constitution." The Court concluded that the discretion required in foreign affairs "discloses the unwisdom of requiring Congress in this field of government power to lay down narrowly defined standards by which the President is to be governed."

Indeed, until recent years, even members of Congress acknowledged that the president must retain a wide range of discretion in foreign affairs; even the most isolationist legislators understood that they could not stop the president from acting as he saw fit to protect national security. Consider the debate after World War I when many in Congress wanted all the troops brought home from Germany. A freshman senator, James Reed, was dissuaded from proposing any legislation by—of all people—isolationist Senator William Borah. The *Congressional Record* of December 27, 1922, notes this exchange:[1]

> MR. REED: Does the Senator think and has he not thought that the American troops in Germany ought to be brought home?
> MR. BORAH: I do.
> MR. REED: So do I.... Would it not be easier to bring the troops home than it would to have the proposed [disarmament] conference?
> MR. BORAH: You can not bring them home, nor can I.
> MR. REED: We could make the President do it.
> MR. BORAH: We could not make the President do it. He is the Commander-in-Chief of the Army and Navy of the United States, and if in the discharge of his duty he wants to assign them there, I do not know of any power that we can exert to compel him to bring them home. We may refuse to create an Army, but when it is created he is the commander.
> MR. REED: I wish to change my statement. We cannot make him bring them home.... [B]ut I think if there were a resolution passed asking the President to bring the troops home where they belong, the President would recognize that request from Congress.

We have the same Constitution we had in 1922, yet now it is a safe bet that few congressmen would endorse the view of the relative powers of the two branches held even by a Senator Borah.

Or by Senator William Fulbright. In 1961, he expressed this pre-Vietnam consensus on the foreign-affairs power:

[1]This fascinating colloquy was uncovered by Robert F. Turner of the University of Virginia Law School, whose comments on the Reed-Borah exchange at a conference on separation of powers in March 1988 are printed in the *George Mason University Law Review*, vol. 11, no. 1 (1988), pp. 108-109.

> The source of an effective foreign policy under our system is presidential power. It is my conviction that for the existing requirements of American foreign policy we have hobbled the President with too niggardly a grant of power. It is highly unlikely that we can successfully execute a long-term program for the taming or containing of today's aggressive and revolutionary forces, by continuing to leave vast and vital decision-making in the hands of a decentralized, independent-minded, largely parochial body of legislators.

The differences between then and now are Vietnam, Watergate, and the era of divided government, with a Democrat-controlled Congress that prefers inaction confronting a Republican-controlled White House that favors a more aggressive foreign policy.

The War Powers Resolution

The model for congressional micromanagement today is the War Powers Resolution, made law over the veto of the weakling president that Richard Nixon had become by 1973. Along with its progeny, the resolution put significant fetters on presidential power. The War Powers Resolution itself is a lawyer's delight, full of internally inconsistent details that would make its application impossible even if any president had acknowledged its constitutionality—which none has ever done. The resolution says that the president may not use force without congressional approval unless the territory of the United States is under direct attack. Presidents must give Congress a written justification for the deployment of troops into "imminent hostilities" within forty-eight hours; Congress can then require the president to bring the troops back, which the president must do within sixty days (or in some cases ninety days) unless Congress grants an extension of time or declares war.

Presidents may not accept the legality of the War Powers Resolution, but it has had practical consequences. Any deployment of troops—such as the Marines sent to Beirut in 1983 as a quick show of force, only to be killed in their barracks—is subject to a possible sixty-day limit, which must affect strategy. Probably the main effect of the resolution, however, comes from its requirement that the president "consult" with Congress before risking imminent hostilities. This makes secrecy nearly impossible, while giving congressmen a chance to blackmail the president by threatening to go public before or during a secret operation.

Legislation after the War Powers Resolution mimics its reporting requirements by mandating a continuing justification for policy

by administrative officials. Such requirements are appropriate to the extent that Congress needs information in order to deliberate, but they can also foster obstructionism. One measure of this burst of new reporting requirements is the number of legislative restrictions on the executive branch's conduct of foreign policy. According to Senate Foreign Relations Committee volumes entitled *Legislation on Foreign Affairs through 1986*, there was one such statute before 1900; fewer than thirty by 1950; 189 between 1950 and 1980; and 191 just between 1980 and 1986. There are dozens of congressional committees to "oversee" foreign policy. The new role of Congress is signaled by the fact that over the past twenty years, committee staffs have tripled in the House of Representatives and nearly doubled in the Senate.

Congressional oversight of the Central Intelligence Agency is a perfect example. Eight congressional committees now receive copies of the agency's daily national-intelligence report. Congress receives some 5,000 reports of one kind or another from the CIA every year. Robert Gates, who was deputy director of the CIA, has written in *Foreign Affairs* that this information has many uses; among other things, intelligence is "often used to criticize and challenge policy, to set one executive agency against another, and to expose disagreements within the administration." Gates wrote that the agency is now "involuntarily poised nearly equidistant between the executive and legislative branches." He added, "Such a central legislative role with respect to an intelligence service is unique in American history and in the world. And policy-makers know it."

President Bush tried but failed to avoid a new fetter on the CIA. In December 1989 he signed legislation creating a post for an outside "inspector general" within the agency. The holder of this statutory office is required to report to congressional intelligence committees twice a year on a wide range of issues, including any "abuses and deficiencies" in any CIA programs. This vague mandate effectively puts a creature of Congress inside the CIA, charged with reporting back on any issue that might interest members of Congress. President Bush signed the authorization bill despite his concerns that this new position "could impair the ability of the CIA to collect vitally needed intelligence information by creating a perception that confidentiality cannot be guaranteed." He warned Congress, probably in vain, not "to micromanage the CIA through the vehicle of a statutory inspector general."

Criminalizing politics

The fight over new legal constraints on the CIA is related to the newest weapon in the congressional arsenal to be used against the executive branch: the criminalizing of policy differences between Congress and the presidency. Many fear that the new potential prosecutor in the CIA will lead to criminal indictments against agents who, after all, are in the business of routinely violating the laws of other countries. Under some views of U.S. law, these "offenses" abroad could be the basis of prosecutions at home. This fear seems especially well justified after the Iran-*contra* affair, which showed how Congress—armed with an independent counsel whose sole task is to investigate alleged wrongdoing by executive-branch officials—can send officials to jail.

The most famous descendant of the War Powers Resolution is the series of Boland amendments that restricted aid to the *contras* in the mid-1980s. The version passed in 1984, as a rider to an omnibus appropriation bill, said that "no funds available to the Central Intelligence Agency, Department of Defense, or any other agency or entity of the United States involved in intelligence activities" can help the *contras*. This wording removed the CIA from the field. The best reading of the amendment is that it did not apply to the National Security Council, which is how the executive branch interpreted Boland. Oliver North became the *contras*' lifeline. In one of the famous computer messages uncovered during the Iran-*contra* investigation, North complained to his superior, John Poindexter, about this limitation by Congress. "What we need is to get the CIA re-engaged in this effort," he wrote in 1986, "so that it can be better managed than it is now by one slightly confused Marine Lt. Col."

It's worth remembering that no court in any of the Iran-*contra* prosecutions held either that the NSC was covered by the Boland amendments or that the diversion of profits from the Iranian arms sales to the *contras* violated any law or the Constitution. Independent Counsel Lawrence Walsh decided not to bring any charges that the diversion was illegal. Instead, he prosecuted defendants largely for secondary offenses, such as misleading Congress. Walsh was probably wise not to bring broader cases; when he issued legal papers suggesting that Congress was intended to have the preeminent role in foreign affairs, the Justice Department issued a brief withdrawing that interpretation as the view of the U.S. government.

But it is also clearly true that President Reagan weakened the institution of the presidency by failing to veto the omnibus appropriations bill that included the Boland amendments, and then by contributing to Congress's efforts to criminalize policy differences by appointing an independent counsel of unlimited duration to prosecute his loyal aides. President Reagan did not authorize the diversion to the *contras*, but the diversion itself was not illegal. As the minority congressional report on Iran-*contra* pointed out, President Reagan could simply have said that the diversion was not authorized, but that there was also no reason to treat it as a criminal act. Instead, President Reagan's last two years in office were badly marred by the affair.

Nicaragua may soon emerge from its Marxist era, but the battle at home will have a longer-term impact on American policymaking. The institution of the independent counsel has transformed the locus of policymaking from the two ends of Pennsylvania Avenue to the federal criminal courtrooms. Consider this exchange between judges on the U.S. Court of Appeals for the District of Columbia Circuit and a deputy to Lawrence Walsh:

> COURT: So if the President and the Independent Counsel have a disagreement over foreign policy and its implications for a prosecution, then the Independent Counsel has the last word?
>
> INDEPENDENT COUNSEL: That's right, that's right. If I understand the hypothetical, I think in principle the answer has to be yes.

In other words, once an independent counsel has been appointed in such cases, foreign policy can become the jurisdiction of the courts. Congress can now add possible criminal punishment to its arsenal of weapons against the executive branch.

This criminalization of policy differences is related to the more general erosion of *political* accountability for foreign policy that has resulted from the confusion over who's in charge. Voters have no one to point to when neither political branch and neither political party accepts accountability for the results of foreign policy. Individual legislators rarely have to answer for their foreign-policy actions; House of Representatives Speaker Jim Wright, for example, was brought down because of ethical lapses, not for running his own foreign policy and negotiations that benefited the Sandinistas. Presidents may still have ultimate responsibility for defending the national security, but they can with some justification point to a meddling Congress.

One bonus of improving East-West relations could be a respite from these acrimonious and partisan battles over the separation of powers waged by an imperial Congress against increasingly weakened presidents. George Bush has done more in his first two years in office than any president in many years to protect the tattered powers of the office from further micromanaging. But he has plenty of work ahead if he aspires to go beyond containment to roll back Congress's power.

Micromanaging the administrative agencies

JEREMY RABKIN

THE FEDERAL BAILOUT of savings-and-loan institutions is now projected to cost more than $400 billion over the next decade—more than the total cost of the Vietnam War. Many individual scandals went into making the debacle, but to focus on them may be to miss the central point. A recent paper prepared for the National Bureau of Economic Research by two long-time students of congressional involvement with administrative programs, Thomas Romer of Carnegie-Mellon and Barry Weingast of the Hoover Institution, blames much of the problem on congressional champions of the thrift industry; as the authors demonstrate, key congressional factions entrenched in particular committees and subcommittees were preoccupied with assisting narrowly defined "constituencies" and averted their gaze from the larger issues at stake. Though it was this behavior that allowed the crisis to reach its current staggering dimensions, the authors insist that Congress's activity was "relatively routine" and "fits into a more general pattern of the way Congress responds to constituencies and to regulatory developments."

Ever since the Vietnam War, champions of congressional power have consistently warned against excessive executive discretion—and Congress has become far more assertive in a whole range of areas. Perhaps the S&L scandal can finally focus attention on the corresponding dangers of an unchecked Congress. Whatever disagreements there may be about the proper apportionment of blame, the fiasco illustrates a pervasive characteristic of congressional politics: Congress is preoccupied with parochial constituencies at the expense of larger national concerns. As a result, Congress's increased readiness to assert its will—or the will of its committees—in even the smallest details of administrative programs is a recipe for dangerous and costly abuses.

It is in this context that complaints about congressional "micromanagement" of administrative activity ought to be assessed. Such complaints are bound to have a partisan edge when Congress is dominated by one party and the White House is in the hands of its partisan rival. And defenders of Congress can rightly assert that complaints about excessive congressional meddling are as old as Congress itself. Still, there is more than partisan griping in contemporary complaints about congressional meddling, for "micromanagement" takes on a different and more ominous meaning in the contemporary constitutional context.

Micromanagement in the past

In the nineteenth century, it is true, Congress kept an extremely tight hand on government operations. A glance at *Statutes at Large* reveals Congress busying itself with the most minute details of administration. In the 1850s, for example, Congress thought it worthwhile to specify that civilian paymaster clerks making their rounds through army forts should be able to eat with the soldiers but should receive only "one ration per day when on duty at their stations, to be commuted at the price now authorized when travelling on duty." Post Office contracts with Atlantic shipping lines were also regulated by appropriations in astonishing detail ("one additional trip on the Havana line and one additional trip on the Bremen line"), and Congress was quite prepared to single out individual projects for protection ("the bridges across the Ohio River at Wheeling in the State of Virginia and at Bridgeport in Ohio ... are hereby declared lawful structures in their present position of elevation ... anything in the laws of the United States to the contrary notwithstanding"). During the Civil War, Congress was

constantly directing the War Department on the details of contracts with military suppliers, and it often intervened even on individual promotions and staffing decisions within the army. Afterward, Congress was more than willing to concern itself with the details of a vastly shrunken government budget (an 1888 appropriation specifies $540 for "an encaustic tile floor for the laboratory connected with the Bureau of the Mint") and to intervene in military administration for the sake of individual constituents. All such matters were duly published as "public bills."

The scale of "private bills"—usually appropriating money from the treasury for specified individuals to settle particular financial claims against the government—had increased to such an extent by the turn of the century that they had to be published in a separate volume each year, as large again as the annual volume of "public bills." This pattern did not cease until 1948, when the newly expanded jurisdiction of the Court of Claims allowed Congress to cut back on such private bills. By that time Congress could look back on more than a half-century of similar reform efforts designed to accommodate the demands of modern government.

This seemed to be the inescapable trend of the twentieth century: Congress was to pull back from petty details so as to consider important public-policy issues more rationally. Civil-service reform at the turn of the century was supposed to relieve Congress of the temptation to play patronage games with the federal work force. The Budget and Accounting Act of 1921, which established an executive budget bureau and an annual process for developing comprehensive executive budget proposals, was intended to help Congress view individual appropriations in a larger context and in more systematic terms. And the organization of an official Executive Office of the President at the end of the 1930s was designed to extend the staff capacities of the chief executive to provide overall guidance to Congress. As late as the mid-1960s political scientists complained that Congress had become preoccupied with screening or thwarting the legislative proposals of the president; despairing of any productive legislative role for Congress, some political scientists actually urged Congress to focus more energy on oversight activities, where it might usefully highlight administrative failings.

Congress did, however, produce many new legislative ventures in the early 1970s. Most of the environmental, safety, and civil-rights regulations of the period were initiated by Congress and developed with only marginal influence from the Nixon and Ford

administrations. By the mid-1970s, Congress had become much more cautious about new legislation, and it has since become much more engaged in oversight—or micromanaging. Yet in several ways this is not simply a return to the historic patterns.

Big government, big Congress

The first and most important difference between contemporary micromanagement and the traditional pattern is that the scale of government today is vastly larger. And perhaps the most important implication of this fact is the most obvious: the costs of misguided interventions can now be staggering. The S&L crisis is the obvious example.

It is perfectly true that programs with enormous and miscalculated costs can be directly enacted in general statutes. This has happened often enough. Social-security payments rose at a staggering pace during the 1970s, in large measure because of misguided congressional tinkerings with benefit formulas. Wishful thinking in Congress also produced dramatic increases in payments under particular programs, like the compensation system for coal miners suffering from black-lung disease. But such directly legislated disasters are only part of the problem.

More often, Congress does not miscalculate but simply refuses to calculate—at least as a deliberative body. It initiates large projects without providing much statutory guidance. But it does not want to trust executive agencies to use their discretion, even when Congress as a whole has trouble deciding how to limit executive discretion. So committees and subcommittees, claiming to speak for the whole Congress, often have almost complete free rein to impose favored schemes. This tendency has been exacerbated by the proliferation of subcommittees in the early 1970s and the overall tripling of congressional staff.

Recently the trend toward micromanagement has been most evident in the Defense Department, but examples are legion in other programs too. As a report from the Office of Management and Budget has recently noted, minutely detailed restrictions in appropriations riders and committee reports impose sizable management burdens on every department and agency of the government. The Department of Veterans' Affairs, for example, has been prohibited from contracting out any activities that it classifies as related to direct patient care, though savings from such arrangements might reach almost half a billion dollars. The department and its precur-

sor have not closed a hospital in forty years, and Congress seems determined to perpetuate this state of affairs. By law the department must notify Congress six months in advance of staffing changes that affect as few as three of its 240,000 employees; in recent cases, pressures from individual congressmen and senators have blocked measures affecting as few as ten employees. To make its point, Congress has attached riders to the department's budgets prohibiting the department from even considering cost-benefit issues in its allocation of resources and services. The result is not to ensure generous service to veterans but to freeze service patterns from earlier decades, even when this means that particular areas are now poorly served.

Similar kinds of parochialism are evident in many other congressional interventions. Congress has enacted numerous measures to encourage energy conservation. But it is so solicitous of users of federally produced hydroelectric power that, since the early 1980s, it has ritually reenacted appropriations riders prohibiting executive agencies from conducting "any studies relating to or leading to the possibility of changing from the currently required 'at cost' to a 'market rate' method for the pricing of hydroelectric power."

The House Agriculture Committee has been similarly intent on protecting indebted farmers. In 1987 it drastically slashed funds for the Office of the Administrator in the Farmers' Home Administration (FmHA), preventing the agency from developing effective loan-repayment policies and procedures. The following year, the committee inserted an appropriations rider that directed FmHA to ignore past delinquency or indebtedness in reviewing farmers' applications for new "loans."

Unfortunately, the pork barrel is not the only motivation for micromanagerial interventions of this kind, nor are such interventions limited to programs in which there is ongoing ideological conflict. Armed with extensive staff support—and the capacity to punish inattentive agencies with budget restrictions and highly burdensome reporting requirements—congressional committees have even hampered the administration of programs with broad congressional support and few pork-barrel implications.

The war on drugs is a good example. Across Congress, fifty-four committees and subcommittees now claim some oversight responsibility for combatting drugs. Although most of their activity consists of posturing for diverse constituencies, rival committees have been quite prepared to press divergent or tangential concerns in

ways that significantly affect policy. In the fall of 1989, for example, the Bush administration launched the so-called Andean initiative to help governments in Latin America limit cocaine production in their countries, and Congress readily appropriated funds to supply helicopters to Bolivia and Peru. But nine months later the helicopters still had not been delivered. The reason was that the law under which Congress had appropriated the funds specified that the equipment must actually be "sold" to the foreign recipients, who would then have legal title to such equipment. In 1986, however, Congress had amended a different law, the Foreign Assistance Act, to specify that aircraft provided to foreign governments to combat narcotics must only be lent, so that the United States retains the legal right to repossess aircraft that are used for improper purposes. Staffers on the House Foreign Affairs Committee have insisted that this amendment ought to apply to the helicopters slated for Bolivia and Peru, even though the appropriation was not made under the Foreign Assistance Act. This stance has generated much objection from the Defense Department and from lawyers in the State Department, whose position seems to square with the expectations of the Armed Services Committees. But the executive Office of National Drug Control Policy—which was created by Congress to smooth over jurisdictional disputes—characteristically has feared to buck the congressional committees and to make a decision on its own. The helicopters have stayed in the United States.

As this example reminds us, the federal government today is not only vastly larger but also has far more ambitious global responsibilities than in the nineteenth century. Congressional micromanagement thus has very different implications today than when Congress fussed over bridges in Ohio.

More regulation, more reformers

Like spending programs, regulation has increased dramatically in the past twenty years, providing many new opportunities for piecemeal intervention. And as in spending programs, congressional micromanagement in regulatory programs can be extremely costly, because cumulative costs imposed by regulatory programs now run in the hundreds of billions of dollars. In some ways, intervention in regulatory matters is even more troubling than intervention in spending programs, because the costs are not borne directly by the taxpayer. Now that the deficit imposes budgetary constraints

on Congress, this feature of regulation makes it a particularly tempting field for intervention.

The underlying problem is not new. However one assesses the general social value of regulation, particular regulatory standards or decisions will impose particularized costs on some interests and generate a range of particularized benefits for others. But apart from the sheer increase in volume, the politics of regulation has changed in two ways over the past twenty years. First, most of the new regulatory programs make much more use of general rules and standards, rather than relying on case-by-case adjudication; this seems to encourage congressional involvement, by making it appear more legitimate. Second, advocates of most new regulatory programs have claimed higher social ideals—such as environmental quality or racial justice—than those invoked for older regulatory programs. Even ostensibly high-minded programs, however, invite less high-minded political pressures, since they impose costs in some areas and generate benefits in other areas.

Of course, high-minded programs with messy politics are hardly unique to the last twenty years. As economist Bruce Yandle has noted, a simple model of such politics is nicely illustrated by the strange alliance behind one of the great moralistic programs of the nineteenth century—prohibition. Campaigns to suppress the sale of intoxicating spirits in individual counties were usually led by well-meaning reformers, like Baptist clergymen. But there was also strong support for such measures from bootleggers, who expected to profit from the suppression of legitimate vendors. One simple way of characterizing the change in regulatory politics in recent decades is that the contemporary climate ensures that special interests have many more reformers to strike alliances with.

Sometimes these alliances can shape decisively even general statutory enactments. Yale law professor Bruce Ackerman called attention to one such venture in his account—aptly named *Clean Coal, Dirty Air*—of special-interest provisions in the Clean Air Act Amendments of 1977: by requiring expensive scrubbing equipment for all coal-burning plants, regardless of what sort of coal they used, Congress contrived to encourage use of cheaper but more-polluting eastern coal—much of which just happened to be mined in the home state of Robert Byrd, then Senate Majority Leader. Similarly, economist B. Peter Pashigian has demonstrated that support for the same statute's blanket prohibition of increases in air pollution, even in areas untroubled by pollution, was most strongly supported by the representatives of northeastern and midwestern states, which stood to gain from imposing tight restrictions on competitive economic development in less polluted western and southern states. The Clean Air Act Amendments of 1990, now making their way through Congress, are sure to provide similar examples for scholarly analyses.

The trend toward micromanagement

But getting such deals through the entire Congress and past the president, especially in general legislation, is difficult. That is surely why Congress has postponed the reconsideration of Clean Air Act amendments (supposed to be enacted in 1982) for almost a decade. Enter micromanagement.

A few recent examples illustrate the pattern. The 1980 Superfund legislation, amended in 1986, prescribes standards for the cleanup of toxic-waste dump sites under the direction of the Environmental Protection Agency. The legislation directs the EPA to ensure that water flowing under or through a cleaned-up site should be "clean," without adequately defining the term. In the spring of 1989, after years of consideration, the EPA proposed applying standards that it had developed under the Safe Drinking Water Act, which requires that water be entirely safe for human consumption but not free of all detectable impurities. But a subcommittee of the House Energy and Commerce Committee issued a report protesting that this standard was motivated by the EPA's reluctance to impose a more rigorous standard—in other words, motivated by the EPA's consideration of costs. And the subcommittee insisted that the EPA was not authorized to consider cost at all under the relevant provisions of the Superfund program. Evidently in response to this censure, the EPA reversed ground and promulgated a far more rigorous—and far more costly—standard for acceptable levels of cleanliness in cleaned-up sites. This approach was strongly supported by environmental advocacy groups, always more fearful of compromises than of costs. It was also strongly supported by companies that contract with the EPA and with local governments to undertake such cleanup work.

Sometimes congressional committees can be even more particular in demanding favorable regulatory treatment for "friends" with credentials as reformers. Take the case of Thomas Galloway, former staff assistant on the House Committee on Interior and Insular Affairs chaired by Rep. Morris Udall. Among other pro-

grams, this committee oversees the Department of the Interior's Office of Surface Mining (OSM), which is responsible for enforcing the Surface Mining Control and Reclamation Act. This 1977 act includes a provision for "citizen suits" against the Interior Department for failure to discharge its mandatory duties under the act. The act also includes a provision for reimbursing the attorney fees of plaintiffs in successful citizen suits. In the early 1980s, citizen Galloway, acting through an organization called "Save Our Cumberland Mountains," sued Interior for issuing new mining permits to companies that had not yet corrected past safety violations cited by the OSM. Initially rebuffed in court, Galloway succeeded (with help from Udall's committee) in pressuring the Interior Department to settle the case; he eventually collected $1.5 million in attorney fees for his troubles, then the largest such fee award ever signed by the federal government.

In response to Galloway's suit, the Interior Department agreed to improve its tracking of the safety records of new permit applicants by establishing a computerized "Applicant Violator System"—a system that Galloway designed. And the House Interior Committee held successive hearings to goad the OSM into expanding and refining this tracking system in ways desired by Galloway. At the beginning of 1989, the General Accounting Office issued a report, commissioned by the committee, that still found fault with the system. Two months later, former committee staffer Galloway returned to court to demand further improvements in the system in line with this report.

While no one disputes that genuine abuses in surface mining ought to be regulated, there is little reason to think that Interior's expanded tracking system will help the OSM focus on the most serious abuses, since it has proved to have little value in the past. Indeed, in an era of tight OSM budgets the elaboration of this tracking system has diverted resources from field inspectors to computer specialists. Its main value seems to be in helping the United Mineworkers Union (with which Galloway, a former general counsel, has close ties) in tracking ownership links among different mines to enhance its leverage in labor disputes.

Similar patterns can be observed in many other areas. In 1977 Congress enacted the Community Reinvestment Act (CRA). The measure directed the Federal Reserve and other financial regulatory agencies, before approving any proposed expansion or acquisition of a regulated bank, to "assess the [bank's] record of meeting

the credit needs of its entire community, including low- and moderate-income neighborhoods" and to "take such record into account" in evaluating expansion plans. A moribund measure in its first several years, the CRA suddenly became prominent in the mid-1980s, when so-called "community activists" began filing protests with the Federal Reserve against the approval of new merger or acquisition proposals by banks that they claimed had failed to serve "community needs." Banks then began offering payments to activist organizations to deter such protests, though a number of bankers openly admitted that they regarded this practice as a form of extortion. Congressional banking committees held hearings on the matter—and demanded that regulatory officials pay more heed to the activists. A rider to the latest S&L bailout legislation stipulates that regulatory agencies must make their CRA assessments public, a provision that helps community activists target banks for pressure. A vague statutory directive about "meeting the needs of the community" has come to mean, in practice, that private banks must help fund the projects and the operations of self-styled community activists.

In other cases as well, Congress has pressed for regulatory standards that help favored constituencies without worrying about the benefits to society. A notorious example is the system of racial preferences developed by the Federal Communications Commission in awarding broadcast licenses. The FCC favors "minority owned" broadcasting ventures without requiring any assurance that such ventures will hire more minority workers or offer programming tailored to minority audiences. The various FCC regulations that support this scheme were not developed under particular legislative standards, but particular congressional factions have certainly kept an eye on FCC policy in this area since the early 1970s. When Reagan appointees sought to scale back the range of such preferences in the late 1980s, Congress quickly appended riders on successive appropriations bills to force the retention of existing policies.

In the past decade, in fact, Congress has become so ready to invoke its power of the purse to protect regulatory constituencies that it often does not even feel obliged to wait until the constituencies come forward with reformist allies. In the early 1980s, for example, the Office of Management and Budget sought to examine marketing orders approved by the Department of Agriculture. These orders were essentially cartel measures, by which the gov-

ernment authorized the producers of basic commodities to restrict their output so as to force up their prices. But Congress was swift to block any serious examination of the marketing orders. It enacted an appropriations rider forbidding the OMB to spend any money to review them, and it has reenacted this restriction every year since.

In an era when the reach of federal regulation presents vast new opportunities to extend favors to specialized constituencies, Congress has squarely faced the temptations—and refined its techniques for pursuing them.

Constitutional conflict, constitutional cynicism

The increasing prevalence of such restrictions on operating budgets has greatly aggravated the problem of micromanagement. As recently as 1979, an article in the *Yale Law Journal* could point to the use of appropriations riders to veto particular executive operations as a new, disturbing, and possibly unconstitutional phenomenon. In the 1980s this tactic became quite routine, and it was used to advance the pettiest congressional concerns at the expense of quite serious policy matters. In 1989, for example, Congress appended a rider to the Department of Justice's appropriation forbidding the department to undertake any internal reorganization or transfer of personnel—all to prevent Justice from closing down a two-person FBI office in Butte, Montana. In the meantime, as Attorney General Thornburgh has recently complained, the department was forbidden to reorganize its strike force against organized crime.

Not all such actions raise constitutional questions. But it is fair to say that in the past decade Congress has thrown off almost all constitutional inhibitions that might have restrained it from imposing its will on executive operations. Thus in the mid-1980s, another rider to a Justice Department appropriation forbade the department to argue its position on a complex antitrust question before the Supreme Court—because factions in Congress disagreed with this position. Another rider prohibited the Federal Trade Commission from spending any funds to study or investigate the same issue. In 1989 Congress adopted an appropriations rider forbidding the Interior Department to keep any record of inquiries or communications received from individual congressmen or their staffs.

Congressional determination to manage executive decision-making does not even seem to be restrained by contrary Supreme

Court rulings. In its 1983 ruling in *INS* v. *Chadha*, the Supreme Court held that Congress could not veto executive actions outside the normal legislative process. Congress responded by creating new "veto" provisions that go into effect upon the vote of an individual committee or subcommittee. This practice was defended on the grounds that the committee vetoes would not be legally binding—though in practice agencies dare not defy them. But by the fall of 1989, Congress had shaken off even these inhibitions. It enacted a rider to the appropriation for the Executive Office of the President specifying that no funds from the appropriation "shall be used to implement, administer or enforce any regulation which has been disapproved pursuant to a resolution" of Congress. Since such resolutions are not subject to presidential veto, this was the very sort of scheme that the Supreme Court had condemned as unconstitutional.

One can find isolated precedents for some of these efforts in the nineteenth century, and lawyers can certainly argue the merits of individual cases. But most of the historical precedents come from the era after the Civil War, when Congress sought to impeach a president, to insulate its actions from judicial review, and generally to assert its authority over all aspects of federal policy. Precedents from this era are not generally considered sound. Still, congressmen and prominent lawyers now openly assert that Congress can use its power of the purse to impose any limitation whatsoever on the president and the executive branch, since no money can be expended without congressional approval and virtually any executive action—even an initial investigation of facts or a consultation with third parties—must be sustained by salary payments and other expenditures.

How can we account for this trend, so at odds with the expectations of the Framers? Part of the new congressional assertiveness doubtless stems, as has often been argued, from the past two decades of partisan tensions between a Democratic Congress and a Republican White House. But the pattern of congressional interventions by no means disappeared under the Carter administration. Similarly, it is often argued that Congress was provoked into greater intervention by the high-handedness of the Nixon and Reagan administrations. Yet the pattern has not weakened under the far more conciliatory Bush administration.

One factor that should perhaps be given more weight in explaining the erosion of Congress's constitutional scruples is the influ-

ence and example of the federal judiciary. In principle, the most extreme formulations of congressional authority are as threatening to the independence of the judiciary as to the independence of the executive. If Congress can micromanage the executive through its power of the purse, why not also the courts? In fact, Congress has already come close to doing so. In the 1988 omnibus budget resolution, Senator Shelby of Alabama inserted a rider forbidding the Justice Department to enforce a judicial writ in a particular case, a move that assisted a Shelby contributor who was facing a $20-million court judgment. Some inkling of the threat that congressional overreaching poses to judicial independence seems to be reflected in the handful of Supreme Court decisions over the last fifteen years that adhere to a strict understanding of the separation of powers.

But on the whole, courts have been willing and eager partners in the expansion of congressional power to help specialized constituencies. The Supreme Court, for instance, has never seriously attended to the constitutional problems raised by the citizen-suit provisions scattered through most of the environmental and safety legislation of the past two decades. Similarly, courts in the past two decades have become extremely attentive to directives in committee reports when interpreting laws, though the committee reports—unlike the actual statutes—have not been voted on by the entire Congress and often represent the views of particular factions, eager to accommodate constituencies. Indeed, the courts have anticipated and improved on congressional provisions, liberalizing the law of standing and the availability of intrusive remedies in the 1970s even when not directed to do so by Congress. Despite some rhetoric to the contrary—mostly in dissenting opinions—the general trend continued in the 1980s. In an era when courts have assumed the power to impose taxes, to manage the details of school districts and prisons, and to intervene on an unparalleled scale in the internal affairs of executive agencies, is it any wonder that Congress has little regard for constitutional boundaries?

Keeping executive power from the executive

Whatever the reason, Congress now recognizes few or no constitutional obstacles to forcing its preferred arrangements on the rest of the government. Thus it not only resorts to funding restrictions, but it also establishes programs on very strange bases to ensure that the results favor its chosen constituencies.

In several measures adopted at the end of the Reagan administration, for example, Congress put federal executive decisions under the control of officials not appointed by or accountable to the President. In one such measure, the Columbia Gorge National Scenic Area Act, Congress authorized the Secretary of Agriculture to acquire private land to protect a threatened scenic area. But at the same time it directed that the Secretary's decisions could be overruled by a commission appointed by state and local officials, and even by a single state governor. Needless to say, the President was given no means to protect the Secretary's decision from these administrative interventions. In a similar ploy, Congress authorized a commission of state officials to compel the Secretaries of Commerce and Interior to impose a moratorium on the harvesting of Atlantic striped bass.

In some cases, Congress has gone to extraordinary lengths to deprive executive agencies of executive power. In the mid-1980s, to cite one of the most bizarre and instructive examples, Congress was faced with a threat that drug companies would stop selling major immunization vaccines unless the companies were protected from ruinous tort damages in those rare cases in which vaccines provoke adverse (and sometimes even fatal) reactions. Rather than deal with tort law in any general way, Congress created a special fund to compensate victims in this one area. It was not an unreasonable response, but Congress then refused to let the Department of Health and Human Services administer this fund—even though it manages most other health-related injury-compensation programs. Instead Congress directed that compensation claims should be filed as suits against the government in the U.S. Court of Claims, to be heard by court-appointed special masters with no executive-branch involvement at all. Congress is already considering proposals to expand this very strange program—establishing court "cases" without a real defendant—to cover victims of radiation injuries and obstetric injuries, and those with other complex tort claims now clogging the civil courts.

In some ways, the vaccine-compensation program nicely illustrates the general impulses behind congressional micromanagement. Congress wants to have large programs, but it doesn't want to yield significant managerial authority to the executive bureaucracies that are often the most efficient means of implementing such programs. Nor in most matters does Congress trust state governments to make their own arrangements. Aware that it can no

longer make all the decisions on its own, Congress still wants to pull the strings so as to ensure that executive bureaucracies do not work against favored interests.

Congress will always be pulled in different directions by diverse constituencies. That is its chief claim to respect as a legislative body. So long as it retains power to initiate legislation and to alter budgets, Congress will also retain considerable influence on administrative undertakings. Congressional committees can even make useful contributions in spotlighting intolerable administrative abuses, like the recently exposed patterns of cronyism in the distribution of HUD grants or the bribery scandals in the EPA's administration of Superfund in the early 1980s. But Congress need not be so preoccupied with narrow interests as it has become in the past two decades.

Two generations of political scientists have been taught to scoff at the public-administration texts of the first decades of this century, with their repeated exhortations to remove "politics" from "administration." Yet whatever their blind spots, the high-minded reformers of the Progressive era at least were consistent in recognizing that a more ambitious government has to be a better-managed government. They took it for granted that the congressional patronage politics of the nineteenth century could not sustain a respectable, effective administration adequate to the tasks that they wanted government to assume. In this they were surely correct. The Congresses of recent decades have reached far beyond the ambitions of the early twentieth century, but they have forgotten earlier anxieties about petty congressional politics. If the willfulness of congressional factions is to be curbed, Congress must be taught again to distinguish politics from payouts.

Micromanaging the defense budget

MACKUBIN THOMAS OWENS

IN 1982 GENERAL Edward C. Meyer, then Chief of Staff of the U.S. Army, stated that in America "the explosion of lawmaking and regulation-writing in the '70s has greatly complicated the development of a coherent defense posture"; he suggested that the individual chiefs had to spend too much time dealing with Congress and too little time directing their services. The problem raised by General Meyer has become even more pronounced now, and affects more than the services. The impact is felt throughout the Department of Defense (DoD) as a whole.

In particular, the congressional defense-budget process is sadly deficient. It is costly and inefficient, to the extent that it undermines the national defense. Everyone, including most members of Congress, knows this, but—because any change would mean that some individual members and some committees and subcommittees would have to give up power—little has been done.

No one denies that Congress has substantial constitutional powers in the area of national security. The Constitution states that

Congress shall have the power to raise funds to "provide for the common Defence"; to raise and support armies, and the militia when in federal service; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to "exercise exclusive legislation ... over all places purchased ... for the erection of forts, magazines, arsenals, dockyards, and other needful buildings"; and to make all laws necessary and proper for carrying out the other powers. In addition, since Congress has traditionally delegated some of its powers to the executive branch, and since it shares with the President the power of appointment, the legislative branch has some power to oversee the departments of the executive branch.

The Constitution's delegation of congressional powers is not at fault; instead the problem is that Congress currently lacks the self-discipline needed to deal effectively with defense issues. Ironically, although Congress criticizes the Pentagon for lacking a defense strategy, it is Congress that prevents it from having one. Anything approaching a strategy is simply precluded by congressional micromanagement of the defense budget. Let me be clear: Congress *does* micromanage the defense budget, to a degree not appreciated by most citizens. And the United States is the weaker for it.

The evolution of the problem

Defense outlays currently constitute approximately 5 percent of the Gross National Product. Meanwhile, the House and Senate Armed Services Committees annually authorize every item in the defense budget, and some thirty committees and seventy-seven subcommittees claim some degree of oversight over defense. In 1988 fourteen full committees and forty-three subcommittees or panels held hearings concerning the Pentagon. This much congressional oversight of the defense budget is not the historical norm; in 1960, when defense constituted 9.5 percent of the Gross National Product, only two committees in each chamber—Armed Services and Appropriations—oversaw the defense budget.

In his classic study "The Changing Role of Congress in Defense Policy-Making" (*Journal of Conflict Resolution*, June 1976), Edward J. Laurance showed how the nature of congressional participation in defense matters changed significantly from 1968 to 1974. Between 1947 and 1967, according to Laurance, congressional involvement in defense matters focused on what Samuel Huntington has called "structural" as opposed to "strategic" issues. (The former refers to financial, personnel, material, and organizational decisions; the latter to program or use decisions.) Congress did not play a major role in strategic issues because it was not organized to do so. The executive branch monopolized defense intelligence, and Congress had no independent sources of information upon which to base alternative policies. Staffs were small; some would say that they were inadequate to process the information generated by the executive branch. But this imbalance did not matter because the public generally supported executive dominance of defense policy-making.

During this period the legislative process was controlled by the executive. What legislative action there was on questions of defense policy occurred mainly in the defense subcommittees of the Appropriations Committees. The military committees relied solely on executive-branch witnesses, and since there was a fundamental consensus on defense issues, executive-formulated defense policies usually raised very little opposition. With few debates on defense issues, decisions made by the military committees were always accepted by their respective chambers as a whole.

Congress's role in defense matters began to change substantially in 1968, mainly as a result of the Vietnam War, decreased public perception of the external threat, perceived changes in national priorities, and the emergence of a permanent antidefense bloc in Congress. Many of the problems that beset the current congressional defense process originated between 1969 and 1974. In that period, the number of committees that held defense-related hearings rose, as did the number and length of these hearings and the number of DoD reports required by Congress. In addition, congressional hearings began to rely more on non-DoD witnesses and opponents of defense spending. The chambers as a whole, moreover, ended their deference to the decisions of the military committees; this change was reflected in, among other things, an increase in the number of floor amendments to defense bills.

Even before 1968, the power of the Armed Services Committees had been expanding, reflecting increased congressional activism in defense matters. Up until 1959, Congress did not authorize weapons and forces on an annual basis. Instead, the two Armed Services Committees authorized defense activities by type, and the two Appropriations Committees determined the specific amounts to be spent. But in 1959, as a result of the hearings held on the so-called "missile gap" by the Senate's Preparedness Inves-

tigating Subcommittee, a rider to the Military Construction Authorization Act stipulated that, beginning in 1961, annual authorization was required for all funds appropriated for the procurement of aircraft, missiles, or naval vessels.

Once begun, the expansion of detailed congressional oversight was inexorable. In 1962, at the behest of the House Armed Services Committee, Congress required annual authorization of all research, development, test, and evaluation (RDT&E) associated with aircraft, missiles, and naval vessels. In 1964 Congress included all other RDT&E carried out by the Defense Department, and the following year it mandated annual authorization for the procurement of all tracked combat vehicles. Congress also increased its control over reprogramming—the process by which the Pentagon changes its funding priorities by reallocating previously earmarked funds within an appropriation account.

In 1967 Congress required annual authorization of the personnel strengths of each service's Selected Reserve. In 1969, as a result of publicity over problems with the M-16 rifle, Congress began to require that it authorize appropriations for all weapons systems. Torpedoes were added in 1970. Additional control over both civilian and military personnel was established in 1972 and 1973. Authorization for the final two accounts—for operations and maintenance and for ammunition—began to be determined annually effective in fiscal years 1982 and 1983, respectively.

As they expanded their authorization processes, the Armed Services Committees started focusing less on the general military posture, instead getting caught up in examining each item of the annual defense bill. Sam Nunn, Chairman of the Senate Armed Services Committee, has described the harmful effects of this shift:

> [T]he extent to which we have wrapped ourselves around the budget axle is exacerbated by the growing tendency to examine budget proposals in even finer, almost microscopic, detail. The Armed Services Committee now authorizes almost every element of the defense budget each year, down to almost the last screw and bolt.... At its worst this tendency has spurred not unreasonable charges of congressional "micromanagement".... But even more troublesome, this trend to micromanagement has the staff and members focusing on the beach while we should be looking over the broad ocean and beyond the horizon.

Congressional oversight is far more detailed now than it was even after the changes of 1968-1974. Its harmful consequences

have been summarized by Secretary of Defense Dick Cheney in a "White Paper on the Department of Defense and Congress" that was sent to the President in January. According to Secretary Cheney, "The current congressional defense process is characterized by a multiplicity of actors, frequent decisions, lack of finality, disintegration and lack of accountability." The result, observes the *Wall Street Journal*, is that "Dick Cheney is Gulliver in Capitol Hill's Lilliput."

Testifying before everyone's committee

In 1961 twenty-seven witnesses, all from the DoD, testified during hearings on military procurement before the Senate Armed Services Committee. From a low of ten witnesses in 1967, the number expanded to 102 (including eighteen non-DoD) in 1969, and to 394 in 1973. At the same time, nonmilitary committees began to hold more hearings on defense matters.

The situation is even worse today. According to defense expert John Kester, in 1984 DoD witnesses testified 1,306 times for a total of 2,160 hours (not including preparation time, or time consumed answering questions "for the record") before ninety-six committees or subcommittees. Secretary Cheney's white paper proves the continuing validity of Kester's observation: "At times it seems as if Congress' goal is to keep senior defense officials at a witness table so that they have no way of doing their jobs."

The Secretary of Defense himself spends a great deal of time testifying before congressional committees. As former Secretary of Defense Caspar Weinberger remarks in his recently released memoirs *Fighting for Peace*, there are always six committees (the Armed Services Committee, the Defense Appropriations Subcommittee, and the Budget Committee of each chamber), and often two more (the House Foreign Affairs and the Senate Foreign Relations Committees), "to which the same testimony has to be given and many of the same questions have to be answered." The Secretary's subordinates spend even more time on the Hill. Assistant Secretary of Defense Rich Armitage testified 154 times during his seven years in the Reagan administration.

To make matters worse, more and more committees are claiming jurisdiction over defense matters. The Veterans' Affairs, Governmental Operations, Commerce, Small Business, and Banking Committees of the Senate and their counterparts in the House all claim to oversee some aspect of national security. The House

Energy and Commerce Committee has been particularly aggressive in asserting its claims over the nuclear-weapons programs of the Department of Energy and the classified programs of the DoD.

The budget gauntlet

The budget process has become a gauntlet that the Pentagon must run yearly. First the Budget Committees of both houses establish overall spending levels. Then every item in the defense budget is authorized by the Armed Services Committees. Finally, money for defense must be approved by the Appropriations Committees. Excluding the separate Budget Committee hearings but counting the floor votes on the conference-approved bill, there are sixteen separate points at which Congress can modify a single program.

As an authorization bill works its way through both houses, any program submitted by the DoD may first be modified by the subcommittees of the two Armed Services Committees. Once the subcommittees have had their say, the authorization bill is considered by the full committees of both houses. Then the bill goes to the floor, where a program may be changed again. Finally, it must go to conference, where disagreements between the two chambers are resolved. Since the bill must pass both houses in the same form, it then returns to each floor for a final vote. In short, in the authorization process alone, a given program can be altered at eight separate points each year. And once authorized, programs face ample opportunities to be changed yet again by the Appropriations Committees. Defense-subcommittee markups, full-committee markups, floor debates, and conferences between House and Senate combine to provide eight more occasions on which programs can be modified.

According to the February 1984 issue of the *Armed Forces Journal*, the Senate Appropriations Committee changed 63 percent of the 1,129 line items of the Fiscal Year 1984 defense budget, and the House Appropriations Committee changed 68 percent. The Armed Services Committees meddled only slightly less, altering 62 percent in the Senate and 58 percent in the House. Secretary Cheney's white paper points out that congressional micromanagement of the defense budget through line-item changes peaked in FY1987, when a total of 2,100 line-item changes were made to the defense-appropriations bill and more than 1,200 were made to the defense-authorization bill.

Line-item changes declined from FY1987 to FY1989, after an agreement between Congress and the President on defense spending that resulted in the department's first two-year budget. But the trend is back up. In November 1989 the *Armed Forces Journal* reported that the Senate made 456 changes to the 1,535 line items in the procurement account of the FY1990 authorization bill.

The history of the recent debate over ICBM modernization illustrates the impact of the congressional budget process on the stability of any given defense program. The MX missile was first proposed in 1976 as a highly capable counterforce weapon designed to adapt to improvements that the Soviets had made during the 1970s in their strategic arsenal.

Opponents of the MX argued that it was "destabilizing" and that it lacked a viable basing mode; they immediately took advantage of the committee system and budget process to attack the program. Endless battles were fought at each point in the authorization process. When the opponents were defeated they could try again. If the missile was authorized, its appropriation could still be contested; if the missile's advocates prevailed one year, its opponents could freely return to the fray the next. Repeated assaults called into question every conceivable basing mode, and cut the number of proposed missiles from two hundred in 1976 to fifty in 1986.

The FY1986 defense authorization bill was a particularly egregious case in point. The Reagan administration requested forty-eight missiles, which both the House and Senate Armed Services Committees reduced to twenty-one. On the floor, the authorization was reduced to twelve by the Senate and to zero by the House. Even though the Senate-House conference restored funding for twelve missiles, a subsequent unsuccessful attempt was made in both chambers to eliminate the program again when the conference bill was brought to the floor. A similar struggle ensued during the appropriations process.

Opponents of the MX often touted the "small" ICBM—a mobile, single-warhead missile—as an alternative. Yet despite initial congressional enthusiasm for this "Midgetman" missile (when it could be used as a means to kill the MX), by the end of 1987 Rep. Norman Dicks, a strong supporter of the program, observed that the Midgetman was now "on life support." The missile now faces exactly the same type of opposition that confronted the MX in the early 1980s. Is it any wonder that there have been over three hundred separate votes on the MX and the Midgetman since 1981?

Another measure of the growth in detailed congressional review of defense spending is provided by the budget-justification books sent to the Armed Services and Appropriations Committees. In 1977 the budget justification ran 12,350 pages; in 1988 it reached 30,114. "The fact that no one person can comprehend this material in total," states the white paper, "contributes to a myopic and disjointed review process"; it also points to another problem, the growth in congressional staff.

Laurance reported that the staff of the Senate Armed Services Committee increased from five members in 1963 to fifteen in 1972, before falling back to thirteen in 1974. This tripling of committee staff reflected the increase in the number of defense-budget items that are authorized annually. Staff on the four military committees increased rather more gradually, from thirty-seven in 1964 to sixty in 1984. But in 1984 and 1985 there was another explosion, raising the four-committee total to ninety-nine. In addition, there are sixty-six staff associates who work for individual members of the military committees or for congressional-support agencies. As Secretary Cheney notes, "The growth of staff expands what Congress is able to do, greatly magnifying the level of detail in most of its work."

Proliferating reports

The increasing detail demanded of the DoD by Congress is also reflected in the growing number of required reports. Laurance shows that DoD reports to Congress almost doubled from 1967 to 1972, going from seventy-nine to 134. But compared with the increase in the 1980s, that is insubstantial. In 1980 the Pentagon sent approximately 170 reports to the legislative branch; by 1988 the number was about 550. Reporting required by annual legislation tripled between 1982 and 1987, and after a decline in 1989, it increased with the 1990 budget cycle to a new high of 861. Two hundred and eleven of these are recurring reports; most of the others reflect one-time reporting requirements.

A cursory examination of some of the one-time reports required for FY1988 gives some indication of the absurd requirements imposed by Congress on the DoD. Among other things, various reports:

- presented DoD plans for manning and operating its tugboats;
- proposed survey questions pertaining to parental and family-leave policies;
- presented a concept plan and procedures to comply with congressional guidance on funding for morale, welfare, and recreation;
- accounted for the number of military bands;
- demonstrated the training of machine technicians in a production facility; and
- compared the goods-moving benefits available to civil-service households and those available to military households.†

The workload imposed by these detailed and often redundant reporting requirements levies a real financial cost on the Pentagon, while also reducing its efficiency. Secretary Cheney argues that the average report takes about a thousand hours to prepare and costs about $50,000. The total cost of these reports for FY1989 was over $50 million, and represented five hundred man-years.

Perhaps some relief is at hand. On May 3 the House Armed Services Committee introduced legislation to eliminate fifty-nine of the 211 annually required reports. Some of these reports are required as often as every other month. The goal, said Chairman Les Aspin, was to allow the Pentagon to concentrate on the more useful reports.

Floor debate on defense bills

Before 1968, floor debate on defense bills was normally brief, since the chambers as a whole deferred to the military committees. From 1957 to 1967 annual floor debate on the defense-authorization bill averaged one day in each chamber; on the defense-appropriations bill, it averaged less than two days. According to Laurance, floor debate on the Senate Defense Authorization Bill expanded dramatically in 1968, averaging twenty-five days a year from 1968 to 1971; debate on the authorization bill expanded somewhat in the House as well, though in neither chamber did debate increase on the defense-appropriations bill. From 1972 to 1974 Senate debate on the authorization bill fell back to an average of eight days, still considerably longer than it was before 1968.

After 1968 the number of floor amendments also increased substantially. While from 1957 to 1967 a total of only five amend-

†See the essay by Herman A. Mellor (a pseudonymous DoD official) titled "Congressional Micromanagement: National Defense," in Gordon S. Jones and John A. Marini, eds., *The Imperial Congress* (New York: Pharos Books, 1988), pp. 115-116.

ments had been offered to the Senate authorization bills, eighty-three were proposed from 1968 to 1971, including twenty-four by senators not on the military committees. But the 1968-1971 figures pale in comparison with those of the last decade. Each year the House commonly spends more than fifty hours of debate—spread over five to ten days—on the defense-authorization bill, and the Senate's debates are longer still; each chamber adopts, out of many more offered, a hundred amendments. In FY1986 the chambers adopted a combined total of 250 amendments to the authorization and appropriations bills.

What kind of amendments are typically offered? According to the August 1989 *Armed Forces Journal*, the House Rules Committee listed 218 proposed amendments to the FY1990 authorization bill. Ninety were expected to reach the floor in the three days of debate allotted by the House Democratic leadership. A majority of these would, if adopted, have added funds to the defense budget, although some would have cut major programs such as the B-2 bomber and SDI. The *Journal* argued that sixty-three, or about one-fourth of the total, qualified as "pure pork"—for example, a sense-of-the-Congress amendment asking the DoD to spend a fair share of its procurement dollars in rural counties, even though few major systems are built in such areas.

Secretary Cheney's white paper refers to the congressional imposition of specific requirements on individual programs as "program intervention," which

> often occurs in report language or in non-codified statutes such as general provisions, provisos and limitations. Intervention can also be exercised through budget adjustments, particularly those attributed to management or technical concerns, or additions which do not address valid military requirements.

Although the usual justification for congressional intervention is poor program management, specific directions usually have more to do with funding allocations than with management issues.

According to the defense white paper, the most comprehensive measure of specific congressional directions to the Pentagon is a report called "Actions on Recommendations in Congressional Committee Reports and Related Authorization and Appropriation Acts." The most recent report was prepared in 1986 and lists 1,024 specific requests, almost none of which relate to general policy. This total excludes program-specific limitations included in the main text of the authorization and appropriations bills.

Examples of congressional program intervention include required reports, earmarked funds, and structural requirements imposed on programs, including detailed directions to management, minimum-employment levels, and technology limitations. In addition, Congress enforces compliance by such measures as mandating outside audits, establishing review periods, and "fencing" funds pending compliance with provisions.

Why does Congress micromanage?

Since the Constitution has existed for some two hundred years, why has micromanagement become such a pervasive problem only recently? Two factors account for most of the current situation. First, Congress itself has changed. The Founders envisioned a body dedicated primarily to deliberation—reasoned debate on issues of broad policy. But Congress has come to focus instead on *administration*, the detailed management of the regulatory bureaucracy of an increasingly centralized state. Such a change in focus means that no detail is too small to escape the notice of members of Congress and their staffs. This has been reflected in the expansion of the Armed Services Committees' power to authorize every detail of the defense budget.

Accordingly, since 1970 Congress has reorganized itself by committees and subcommittees so that members can better oversee the federal bureaucracy and intervene in the details and day-to-day operations of executive and independent agencies. This diffusion of power has been accompanied by a breakdown in party discipline.

Second, the post-World War II consensus on national security broke down beginning with the Vietnam War, and a permanent antidefense bloc emerged in Congress. The result has been a continuing ideological conflict between the Democrats, controlling Congress, and the Republicans, with their recent lock on the presidency. As more and more members of the congressional antidefense bloc rise to positions of seniority, both within the military committees and without, they are better able to influence defense policy. When combined with the unique nature of the defense budget and the changing character of Congress, these developments contribute mightily to undermining the effectiveness of U.S. national security.

Defense spending is unique because it is largely discretionary, and therefore subject to annual review. Indeed, defense accounts

for nearly 60 percent of the federal government's discretionary spending. In addition, given the long production times for many defense items, there is a significant gap between money appropriated in a particular year for the DoD (budget authority) and the actual expenditure of that money (outlays). Most agencies spend money in the same year that commitments are made. In fact, most departments in the executive branch spend more than 90 percent of their funds in the same fiscal year in which they are appropriated. For the DoD, the figure is only about 50 percent, which goes mainly to pay salaries and operating expenses.

This factor creates a major problem for the Pentagon: the congressional budget process focuses on *outlays*, and while all of the DoD's budget authority for a given year is "controllable," only half of its outlays are. In order to obtain savings in outlays for the first year of a defense budget, it is necessary to cut budget authority severely, since cutting a dollar of budget authority saves only fifty cents in outlays rather than ninety cents.

House Budget Committee Chairman Leon Panetta, for example, has called for saving $8-$10 billion in defense outlays for FY1991, and Senate Budget Chairman James Sasser has spoken of a $20-billion cut. In a letter sent to Panetta in March, Armed Services Committee Chairman Aspin argued that such cuts cannot be achieved "without decimating the fast-spending personnel and readiness accounts—the very essence of the U.S. military."

According to Aspin, completely cutting the Rail Garrison MX, the small ICBM, the B-2, and the Advanced Tactical Fighter would save $8.2 billion in budget authority in FY1991, but only $1.8 billion in outlays for the first year. Indeed, Bill Dickinson, the ranking Republican on Aspin's committee, has observed that "Congress could eliminate the entire DoD procurement account for FY91, and the first-year outlay savings would amount to only $12 billion."

The incentives that govern the behavior of congressmen also account for micromanagement. Members must cater to the perceived needs of their constituents, and they do so in two ways that adversely affect the defense budget. On the one hand, individual lawmakers are understandably strong supporters of programs or installations that contribute to jobs in their states or districts. As a result, while they may argue for cuts in defense spending in general, legislators seldom oppose programs at home, no matter how wasteful they may be. The dynamics of Congress create an incentive for

the antidefense bloc to join forces with members motivated primarily by parochial constituent concerns.

Last year's defense-authorization bill exemplifies this contradictory behavior, and shows how it makes defense spending less coherent. While some may disagree with his funding priorities, Secretary Cheney did what many of his predecessors had been reluctant to do; he proposed wholesale cuts in programs rather than trying to save money in the short run by stretching programs out over a longer procurement period, which raises their unit prices and increases their costs in the long run.

Arguing that it was most important in a period of transition to maintain an effective nuclear deterrent, the Secretary advocated funding the B-2 bomber, two ICBMs (the Rail Garrison MX and the small ICBM), and SDI. Among other systems and programs, he wanted to cut the Marine Corps's V-22 tilt-rotor Osprey, the Navy's F-14D, the Air Force's F-15E, and the Army's AH-64 Apache attack helicopter. Despite praise for Cheney's efforts, the House voted to slash the big-ticket strategic programs and rechannel the money into the programs that the DoD had wanted to cut. In effect, the House version of the FY1990 defense bill was produced by the permanent antidefense bloc (which wanted to cut the strategic systems) allied with individual members who wanted to preserve systems such as the V-22 and the F-14D out of concern for their constituents.

The costs of congressional micromanagement

Congressional micromanagement imposes real costs, beyond the obvious ones that result from the Pentagon's increased workload. According to the defense white paper, the specific management requirements resulting from the forty-two most significant congressional interventions called for in the 1989 budget cycle "increased costs in 75% of the programs, at a cost (combined with the costs of similar requirements on the same programs in prior years) of over half a billion dollars over the life of the affected programs. In only one instance was a schedule accelerated and savings realized as a result of the congressional requirements."

Congress's tendency to allow members to protect constituents by never killing programs encourages stretch-outs and other forms of program delays. A 1987 Congressional Budget Office report called "Effects of Weapons Procurement Stretch-Outs on Costs and Schedules" shows that decreasing production rates by 50 percent

increases the real unit cost of most weapons systems by anywhere from 7 to 60 percent.

The worst effect of congressional micromanagement of the defense budget is to increase program instability. Not only do the authorizing and appropriating committees change as many as 60 percent of the line items in the defense budget; in addition, committees sometimes sharply cut or eliminate a program in one year only to restore and even expand it in the next.

Uncertainty created by the instabilities that Congress introduces into defense programs ripples throughout the military-industrial complex, making it difficult for defense contractors to operate efficiently and further increasing the cost of defense. As I observed in a 1985 article in the *Armed Forces Journal*, efficiency demands that contractors—and their suppliers and subcontractors—have some idea of what they will be asked to produce each year. The uncertainties and delays caused by congressional micromanagement block efficient planning, and encourage contractors at every level to pad their prices in order to make enough money to keep operating while they await congressional action. Is it surprising that a 1989 study by the Center for Strategic and International Studies found that the defense industrial base lost access to 80,000 firms between 1982 and 1987, in a period when defense budgets were going up? Some of these firms went out of business, but most simply gave up on the Pentagon and sought other customers.

We cannot ignore another type of uncertainty: the kind fostered by Congress's political power plays in its ongoing struggle with the executive branch. Last year, for example, a Gramm-Rudman sequester led to across-the-board cuts in the defense budget, including military manpower accounts. The Pentagon has asked to reprogram funds from procurement accounts into manpower to prevent massive reductions in force and delays in promotion and recruitment, and the Senate Armed Services Committee agreed in April to go along with most of this request. The House, however, has adamantly refused even to consider the reprogramming request. Chairman Aspin said, "Putting weapons before people was [the administration's] decision and now they're stuck with it." According to the Pentagon, if the House does not permit reprogramming, 32,000 members of the armed services—including both officers and enlisted men and women—would have to be released. Promotion delays would affect 67,000 others, and there would be 115,900 fewer recruits this year.

What is to be done?

The current congressional defense-budget process places unnecessary burdens on the Department of Defense. The key to repairing the process is to change the incentive structure so that Congress does not identify its interests with detailed oversight of every aspect of the defense budget. This can best be done by shifting the focus of congressional debate; Congress should concentrate not on programmatic details, but on broad policy issues.

A useful first step would be to lengthen the budget cycle. Congress has already experimented with a two-year budget authorization (although appropriation remains on an annual basis), which the Pentagon believes has increased program stability. Two-year budgets and authorizations should become standard, with an eye toward an eventual five-year authorization process.

A second step would be to revise the budget process in order to fund entire forces (outputs) rather than individual items of input, such as aircraft, tracked vehicles, and the rest. By focusing on outputs, such as tactical-fighter wings, carrier-battle groups, or armored divisions, Congress and the Pentagon could examine the broad force-planning tradeoffs necessary to achieve national-security goals.

Similarly, Congress should fund whole missions rather than the separate programs that accomplish each mission. Currently a service may have only one funded program to meet a particular mission requirement; if the service loses the program, in effect it becomes unable to carry out the mission. Thus services tend to shield even their defective programs, fixing and patching as they proceed. They have no incentive to scrap a marginal or defective program, and to propose an alternative approach that would meet the mission requirements.

Institutional changes would also help improve the congressional budget process. As the defense white paper argues,

> Authorizing committees should leave line-item budgeting to the appropriators. In turn, the appropriations committees should adhere to major resource allocation and force design ... decisions made in the authorization process. The executive branch should be given greater flexibility in executing budget and policy decisions.

Such changes would allow all parties to concentrate on what they do best, and would help achieve the stability essential to true strategic planning.

As Caspar Weinberger said in his 1987 annual report to Congress:

> Members of Congress, especially members of the committees most concerned with defense, should act as an informed board of directors for the nation's shareholders—reviewing DoD's plans, programs, and performance. But boards of directors reach conclusions and either authorize management to proceed, or demand presentation of new proposals for quick decision. Endless debate is not a strength.

Congress could also take many other less radical steps to improve its oversight of defense issues, while reducing the unnecessary burden that the current process places on the Pentagon. The most important of these is to reduce the reporting and budget-justifying requirements that Congress imposes on the DoD.

Congress's constitutional mandate gives it a legitimate interest in the proper management of defense spending. But the evidence is overwhelming that Congress does not best carry out its constitutional responsibility by micromanaging the DoD. Unfortunately, the incentives created by the current budget process and the imperatives of congressional response to constituents make micromanagement inevitable. The very security of America requires that the congressional defense-budget process be reformed as quickly as possible.

Locke and the legislative principle

WALTER BERNS

***Woodrow Wilson*: Congressional Government.** *Originally published 1885; Meridian ed. 1956. 222 pp.*

***James Burnham*: Congress and the American Tradition.** *Henry Regnery, 1959. 363 pp.*

***Arthur Maass*: Congress and the Common Good.** *Basic Books, 1983. 273 pp.*

WHAT IS THE ROLE of Congress in our system of constitutional government and how well does it perform that role? To begin with, Congress is not Parliament, which means that ours is a system of constitutional—not parliamentary—supremacy. Accordingly, we speak of three coordinate branches of government, each deriving its powers from the Constitution (and each capable of violating it). Still, it is not unreasonable to look upon the legislative as the first among equals. After all, the first article of the Constitution deals with the legislative power, and that is not the result of chance: we pride ourselves on being a government of laws, and Congress makes the laws.

Like so many of our political principles, this idea of legislative superiority (but not supremacy) derives from John Locke's *Second*

Treatise of Government. Locke began, as did his predecessor Thomas Hobbes, with an analysis of the condition in which men find themselves naturally, or before government is instituted. According to Hobbes, this state of nature is indistinguishable from the state of war, where—because there is no government and because everyone has an absolute right not only to preserve himself but, as well, to whatever means are required to preserve himself—"the life of man [is] solitary, poor, nasty, brutish, and short."

Locke's analysis was essentially the same. "To avoid this state of war," he wrote, "is one great reason of men's putting themselves into society and quitting the state of nature." True, "the state of nature has a law of nature to govern it," and this law of nature obliges everyone "to preserve himself and ... when his own preservation comes not in competition ... to preserve the rest of mankind." But in the absence of any governing authority, everyone is himself the "*executioner of the law of nature*," which means, of course, that everyone is entitled to decide when self-preservation comes into competition with preserving "the rest of mankind." The consequence, again, is war, or at least the strong possibility of war.

Hobbes found the means to peace in a contract according to which everyone surrenders his absolute rights to a sovereign, the Leviathan, whose job is to keep the peace. But as the custodian of everyone's absolute rights, Hobbes's sovereign becomes, in principle, absolute himself. Hobbes left it to those who followed him to solve this problem, by discovering a way of keeping the sovereign's powers, at least in practice, from being absolute. As Locke put it, to avoid the mischiefs done them in the state of nature by "polecats or foxes," men should not be thought so foolish as to enter a society in which they will be "devoured by lions."

Locke's solution was a contract in which men yield the powers that they exercise by right in the state of nature not to a person, but rather to the legislative. He argued that this was the safer arrangement, for while the legislative is "supreme," it is bound to govern by "standing laws"; it speaks the language of laws, not of decrees. Furthermore, the legislative power can be exercised, and is best exercised, by an assembly whose proceedings can be subjected to rules or forms and whose members are themselves subject to the laws that they make. This, Locke said, "is a new and near tie upon them to take care that they make them for the public good." Finally, because the legislature is not always in session, and

there is need for "a power always in being which should see to the execution of the laws that are made and remain in force," Locke provided for an executive, separate from the legislature, thereby giving rise to the idea of a separation of powers. In this way—i.e., by means of certain institutions—Locke solves, or at least mitigates, the problem bequeathed him by Hobbes. Power could be rendered safe by constitutionalizing it, a point repeated and elaborated by Alexander Hamilton in *Federalist* 9.

By separating the executive and the legislative, however, Locke also originated the idea of the modern executive, an official with considerable powers of his own. Locke endowed him with the "prerogative," the power to act "according to discretion for the public good, without the prescription of the law and sometimes even against it." Such "extra-legal" discretion is needed especially in the exercise of what Locke called the "federative power," the power of deciding "what is to be done in reference to foreigners." Foreign affairs are "much less capable [of being] directed by antecedent, standing, positive laws." Here, as elsewhere, the Framers agreed with Locke: "With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense? If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed it might prudently chain the discretion of its own government and set bounds to the exertions for its own safety." The Framers seemingly followed Locke in this regard; but their creation of a constitutionally authorized presidency (which legalized what for Locke was an extra-legal power) meant that the separation of powers inevitably led to a contest between the executive and the legislative and to a never-ending dispute among constitutional authorities as to who was authorized to do what and when.

Woodrow Wilson and congressional supremacy

The three books under review share a common perspective: they look at Congress in its relation to the executive branch, differing only in their assessments of its place and powers.

Woodrow Wilson's 1885 book *Congressional Government* complains of Congress and deplores the weakness of the executive. "The balances of the Constitution are for the most part only ideal," Wilson wrote; despite or perhaps because of the Constitution, Congress became "predominant over its so-called coordinate branches[, ruling both executive and judiciary] with easy mastery

and a high hand." For example, the Senate, caring nothing for the "feelings" of foreign powers, rejected the carefully negotiated treaty with Denmark respecting the status of the island of St. Thomas, and then threw "every possible obstacle in the way of confirmation of the much more important treaty with Great Britain relative to the Alabama claims." But, Wilson goes on,

> it is not necessary to dwell at length upon these well-known incidents of our later history, inasmuch as these are only two of innumerable instances which make it safe to say that from whatever point we view the relations of the executive and the legislature, it is evident that the power of the latter has steadily increased at the expense of the prerogatives of the former, and that the degree in which the one of these great branches of government is balanced against the other is a very insignificant degree indeed.

The consequence of congressional supremacy is, Wilson argued, irresponsible government. How can we identify whom to praise and whom to blame for what is done by the government? Indeed, who can be said to govern when power is dispersed among the chairmen of the various standing committees (as it was in the House of Representatives), and when those chairmen do not consult each other or, worse, never think "of acting in concert"? The cure for this was constitutional change, with a view to establishing responsible party government on the British cabinet model.

In this respect, Wilson deliberately rejected the Framers' solution to the problem of democracy. Whereas they sought to prevent the formation of simple majorities—this with a view to securing the rights of minorities—Wilson wanted government by majority party. "The British system is perfected party government," he writes, and among the features that make it perfect is that no effort is made in the House of Commons "to give the minority a share in law-making." Nowhere does Wilson express any concern that a majority so organized and led might fit Madison's description of a faction—"an interested and overbearing majority ... adverse to the rights of other citizens [and] to the permanent and aggregate interests of the community."

James Burnham and the death of Congress

As is well known, Wilson eventually decided that his analysis had become "hopelessly out of date." Writing in 1900, in the preface to the fifteenth printing of *Congressional Government*, he acknowledged that formal constitutional change was not necessary

to make the presidency into a powerful office. He noted that after the war with Spain and the country's entrance into world politics, the office had in fact regained the authority it had enjoyed under Lincoln and during the early years of the republic. "The President of the United States is now, as of course, at the front of affairs" and capable of exercising, of right and necessity, "constructive statesmanship." This was the view that he took to the White House—and it is the view that disturbed James Burnham. Burnham called it the liberals' view, and charged Wilson with being "something of an ideologue"; Wilson, he said, was previously exaggerating the power of Congress, but "he was exaggerating a truth": at the time that he wrote, Congress was predominant, "supreme even."

And why should it not have been supreme at that time? Beyond "tak[ing] care that the laws be faithfully executed," what was there for the President to do in 1885? As the authors of the *Federalist* made abundantly clear, the executive power comes into its own (and is there to be used) when it is necessary to protect the country against "invasions of the public peace by foreign war or domestic convulsions"; especially compared with what preceded and what was to follow, the 1880s were singularly free of wars and convulsions, foreign or domestic. Wilson's mistake (as he was later to recognize) was in failing to take account of the conditions that prevailed when he wrote. Burnham's mistake was in failing to take account of the party controlling the White House.

According to Burnham, what Wilson saw as an aberration was intended to be the rule:

> The primacy of the legislature in the intent of the Constitution is plain on the face of that document, as it is in the deliberations of the Philadelphia Convention. It is the Constitution's first Article that defines the structure and powers of the legislature. The legislative Congress is to be the sole source of all laws (except the clauses of the Constitution itself). In the conduct of the general government, Congress alone can authorize the getting or spending of money. It is for Congress to support, regulate and govern the Army and Navy, and to declare war. Save for the bare existence of the Supreme Court, it is for Congress to establish and regulate the judicial system. All officers of both executive and judiciary are subject to congressional impeachment; but for their own official conduct the members of Congress are answerable only to themselves.

Burnham acknowledged that the equilibrium among the different branches of government had changed over the course of our

history—that the superiority of the executive during the Civil War period, for example, had been followed by the superiority of Congress in the succeeding period—but with the advent of President Franklin D. Roosevelt in 1933, Congress became (and remained) a junior partner. "To understand what is happening to the political structure of American society," he wrote, "we need to keep both facts in mind: that the legislature was, traditionally, predominant in theory and practice; and that it is no longer so."

The legislature is predominant in theory—by which Burnham meant the theory that informed the Constitution—because the Framers understood that personal liberty depended on legislative supremacy. Quite properly, he argued, they were more concerned with "the limits than with the powers of government," but with the rise of the modern executive, those limits had been ignored, rendered useless or, as Wilson might have put it, "only ideal." Rather than taking the lead in making the laws, Congress had been reduced to merely enacting the programs proposed by the president. For this, Theodore Roosevelt and Wilson—but especially Wilson—were to blame. It was Wilson who, with the coming of World War I, "carried presidential law-making in some instances close to what it was to become more frequently under the second Roosevelt during World War II: government by executive decree."

As Burnham saw it, the situation was only marginally different in peacetime. Congress, he thought, had lost control of the purse. "How often in the years since 1932 has Congress expressed an independent will, contrary to the will of the executive, on money matters of major importance?" The same was true of its treaty power. Although modern treaties—respecting the United Nations, the Organization of American States, and the North American Treaty Organization—were at least nominally made with the advice and consent of the Senate, they still effectively deprived Congress not only of its power over appropriations but also of its power to declare war.

The one power of Congress that had "freshened rather than withered during the past generation" was, ironically, one that is not mentioned in the text of the Constitution—the power to investigate. But the effectiveness of this power was threatened by an expanded notion of executive privilege:

> This earlier occasional practice—which like so much in the older American tradition commends itself to ordinary common sense—has now been blown up into a polished routine. By an administrative fiction, the "confidential" relation between President and subordinates—which in the past meant a literal personal relation between man and man—has been extended to the entire bureaucracy, so that the executive now claims a right to order any official or employee of the bureaucracy to refuse to testify to an investigating committee, or to withhold almost any sort of document or record pertaining to any department or agency.

Burnham concluded with a somber projection of the future. "Will Congress survive?" he asked. Perhaps, but probably not. "The trends, both national and world-wide, no longer episodic but holding over a number of decades, are against the survival of Congress (or any other representative assembly in any major nation) as an active, independent political institution." Nor was this all. "To ask whether Congress can survive is, in turn, equivalent to the question: Can constitutional government, can *liberty*, survive in the United States?"

Congress, as he put it, is the principal "intermediate institution, the chief political organ of the people as distinguished from the masses, the one body to which the citizenry can now appeal for redress not merely from individual despotic acts ... but from large-scale despotic innovations, trends and principles." On the one hand, Congress, the rule of law, limited government, and liberty; on the other hand, bureaucracy, Caesarism, plebiscites, and big central government. The latter alternatives define what Burnham called "the managerial revolution," which he thought would usher in a regime reminiscent of Tocqueville's "soft despotism."

As it turned out, of course, the news of Congress's demise was, at best, premature: Congress remains the "intermediate institution" to which the citizenry—savings-and-loan bankers, sugar-cane and peanut growers, indeed, citizens (or their lobbyists) of every stripe and mission—can appeal for a lot more than the redress of grievances. Nor can it be said that the trend is against the legislative power. Congress has surely not lost control of the purse; on the contrary, presidents are no longer able to control expenditures by "impounding" funds, and their budgets, duly submitted to the Congress, are duly pronounced "dead on arrival." (It remains to be seen whether the same is not also true of their judicial nominations.) Rather than expanding, the "notion of executive privilege" has been contracted to the point that to invoke it is to risk criminal prosecution; and the fate of SALT II is sufficient to remind us that the Senate has not lost its power over treaties. To say the least, Congress has survived; in the process, it has begun to exercise

powers that were formerly understood to belong to the executive. Had he paid more attention to electoral developments, Burnham might have foreseen this, for, as someone once said, the powers of a republican president are not likely to survive the advent of a Republican president.

Arthur Maass and the modern Congress

Arthur Maass's is a different kind of book; rather than arguing for the superiority of one or the other of the two political branches of government, he is content to describe and explain their relationship. His focus is on congressional institutions and procedures. But as he is quick to point out, little or nothing of what Congress does can be described, let alone explained or evaluated, in isolation from the executive. Both bodies are engaged in the common enterprise of representing constituencies (albeit different ones); similarly, both play parts—different but complementary—in legislating and administering. In fulfilling these tasks, Maass says, the executive plays the role of leader, while the Congress plays that of controller and overseer. In the final section of the book, Maass provides a detailed account of the various institutions and procedures used by Congress to carry out its functions: the budget process, legislative vetoes, committee investigations, and the like. All of these involve the executive in one way or another, and all of them are much in the news these days. For anyone interested in learning what Congress does and how it does it, this is the book to read; for anyone interested in learning how well it does what it is supposed to do, the book leaves something to be desired.

This is somewhat surprising, for Maass begins by rejecting what might be called the behavioral-science model of political analysis. According to this model, members of Congress are primarily interested in being reelected; to that end, they simply represent their constituents and then, collectively, aggregate and adjust their interests. He prefers to believe that the common good or the public interest is something other than, and is distinct from, "the outcome of [this] process called partisan mutual adjustment." Hence he proposes to judge "both Congress and Executive ... by how well they represent, promote, and protect the public interest of the political community at large and how well they resist control by special and particular interests." Unfortunately, having defined (if only vaguely) the criterion by which he would judge, he does less judging than the facts that he uncovers would seem to justify.

For example, Maass knows very well what lay behind the Iran-*contra* affair, which did so much to strain congressional-executive relations. There is, he says, "a problem in connection with making secret data available to Congress, namely, if Congress cannot handle such data responsibly, the Executive will resist providing the data." He provides examples of congressional irresponsibility, but assures us that since 1976 both Houses have been more willing to face up to the problems. Maass then quotes, in their entirety, the procedures adopted for handling secret data.

He is far too cautious, however, in assessing their efficacy. Are the procedures adequate? Will they be enforced? Will offending members be disciplined? Maass says only that all of this "remains to be seen." Perhaps it does, but the record affords little reason for confidence. Thus Maass recounts the effort by Senator Mike Gravel to disclose the contents of a top-secret National Security Council memorandum, an effort blocked by a decision taken in a closed executive session. But Gravel, without advance notice, proceeded to read excerpts from the memorandum into the *Congressional Record*. Worse, he then gave a copy of the complete memorandum to Congressman Ronald Dellums who placed it in the *Record* "by simply asking unanimous consent to extend his remarks ... without giving any hint of their contents." The Senate responded only by creating an ad hoc committee to study the problem. Far clearer, by contrast, is Congress's zeal in taking action against members of the executive branch; under the law, they are subject to dismissal and sometimes—as in the case of Oliver North and John Poindexter—criminal prosecution.

But more seriously still, why should it be assumed that, unlike State Department officials—Alger Hiss, for example—and other federal employees, members of Congress are incapable of disloyalty? Popular election is surely not the equivalent of a loyalty and security check. Some congressional staff members are subject to these checks, but there is reason to wonder how thoroughly they are investigated. If, as happened a few years ago, a heroin addict could be appointed to the staff of the Senate Select Committee on Intelligence, how can we be sure that it is free of unfriendly communist "moles"?

In fact (although Maass says nothing about this), Congress exempts itself from many of the legal restrictions that it imposes on the rest of the country. Under the Independent Counsel provisions of the Ethics in Government Act, even the president and

vice president are subject to investigation, prosecution, and imprisonment, but members of Congress are not. Colleges, universities, and businesses of almost every description are subject to the civil-rights laws respecting the hiring of minorities, women, and (soon) the handicapped, but not Congress itself. The federal Office of Personnel Management is under court order to devise tests that will ensure hiring according to a quota system, but members of Congress are free to hire whom they please. Even the minimum-wage law does not apply to Congress. Former Attorney General William French Smith points out that Congress has exempted itself from the provisions "of every major piece of legislation since the National Labor Relations Act of 1935."

Although Maass says nothing about this, we have obviously come a long way since John Locke could place confidence in the legislative because its proceedings could be subjected to forms and rules and because its members are themselves subject to the laws they make. Today's Congress is adept at avoiding forms and rules. In *INS* v. *Chadha* (1983), for example, the Supreme Court declared the legislative veto unconstitutional as a violation of the separation of powers, but the decision had no practical effect; within three years, Congress had passed bills including an additional 102 legislative vetoes. Of course, there are good reasons for legislative vetoes; oddly enough, their use gives administrative agencies a good deal of discretion (to change rules, to move funds around, etc.), and as Maass points out, they are efficient means of providing congressional oversight. For Locke, however, the virtue of forms—especially constitutional forms such as the separation of powers—does not lie in their efficiency. On the contrary, forms are good because, in a sense, they impede efficiency; and this, as Tocqueville argued, makes them especially useful to democracies:

> [The] objection which men of democracies make to forms is the very thing which renders forms so useful to freedom; for their chief merit is to serve as a barrier between the strong and the weak, the ruler and the people, to retard the one and give the other time to look about him. Forms become more necessary in proportion as the government becomes more active and more powerful, while private persons are becoming more indolent and more feeble. Thus democratic nations naturally stand more in need of forms than other nations, and they naturally respect them less.

Burnham would have appreciated this, and Maass would have written a better book had he done so as well; it is, after all, a constitutional matter.

Maass would also have written a better book had he paid some attention to Congress's habit of exempting itself from the laws that it makes. Unlike the legislative that Locke had in mind, our Congress, in effect, never goes home; not only is it almost always in session, but its members also tend to serve almost forever. In 1988, for example, 99 percent of the House members who sought reelection were reelected. As a reward for having promoted the common good? Or, rather (as one congressman put it), as a reward for having shipped home "carloads of pork"? In exchange for this service, and not incidentally, they received substantial sums of money in the form of campaign contributions which they do not need, do not spend, and which they are permitted to take into retirement with them if they do decide to retire. Parting, as Shakespeare said, is such sweet sorrow.

Maass provides a wealth of detail about the workings of Congress, but by neglecting to discuss these matters, his account is by no means complete, and—like Wilson's and Burnham's—not completely satisfying.

A complete and satisfying account would begin where the Framers began. It would recognize, first, the importance of being governed by law (and, therefore, the importance of peace and the primacy of the legislative); second, the ever-present possibility of war and, precisely if rights are to be secured, the need to avoid it or to wage it successfully (and, therefore, the primacy of the executive); third—something we heard nothing about during the Iran-*contra* hearings—the tendency of the legislative to extend the sphere of its activity and draw "all power into its impetuous vortex"; and fourth, the role of money in allowing "unworthy candidates to practise with success the vicious arts by which elections are too often carried [and power too often exercised]."

TO POTUS

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May 9, 1991 9 a.m.
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PRESIDENTIAL REMARKS: PRINCETON UNIVERSITY.
May 10, 1991
11 a.m.

[[Thank you, President Shapiro. Governor Florio; Members of Congress; Mrs. Shapiro; Board of Trustees Chairman Henderson; Dean Williamson; Associate Dean Morrow.]] I'm delighted to help dedicate this impressive complex. Though I must say I'm glad this is May, and not the first snowfall. I don't think Barbara would let me take part in your Olympics. //

Seriously, I'm delighted to receive an honorary degree from Princeton. After all, Washington said "no college has turned out better scholars or more estimable characters." Certainly, it's the only school that can claim as alumni the last two Secretaries of State. Both have been outstanding public servants. Both love this school. But only one has the tattoo to prove it.///

I'll always remember the first time I saw the globe inside the Woodrow Wilson School lobby. Anywhere you touch it, you set off vibrations across the rest of its surface. I can't think of a more appropriate symbol for this nation's role in the world. When we act, we do set off tremors across the globe.

I would like to talk today about an American achievement that has inspired men and women worldwide -- most recently, in Eastern Europe. I'm speaking of our Constitution -- and in particular, the separation of powers. In the interests of brevity, I will confine my remarks to the Constitutional

relationship between the two branches of government in which I have had the honor to serve, the legislative and executive departments.

Politicians in those branches of government face an unpleasant challenge these days. People have lost faith in government because government has become incomprehensible to them. The Washington of the civics textbook seems to bear little resemblance to the Washington we read about in newspapers or magazines, or see on the television screen. What in theory is a nicely orchestrated system of government, takes on the appearance in reality of a three-ring mud-wrestling match, in which behemoths struggle for superiority. The concept of separated powers has given way to the view that politicians struggle over a single, amorphous power.

We can restore faith in government by restoring the balance of powers that forms its core. Consider the President's role in this effort. Thomas Jefferson once noted that the President "commands a view of the whole ground," while Congress necessarily adopts the narrower views of its constituents. A number of important duties flow from the President's special status.

For instance, the President bears the unique burden for guiding and directing foreign policy. Our founders noted the necessity of his conducting foreign affairs with "secrecy and dispatch," when necessary. The President also serves as commander-in-chief -- as I did in the Persian Gulf.

This does not mean that the executive may conduct foreign business in a vacuum. Indeed, it makes sense to work cooperatively with Congress wherever possible. I solicited Congressional support before entering the Gulf War, and I am working now with members of both parties to obtain extension of our fast-track trade procedures. So while a President bears special foreign policy obligations, those obligations do not imply any liberty to keep Congress in the dark.

The president's view of the whole ground includes a second responsibility, which is to set a national domestic agenda. Presidents do this annually by submitting budgets to Congress. They carry this duty further by proposing legislation, developing policies, and mobilizing support for their programs.

This sort of leadership doesn't necessarily require new legislation or demands on taxpayers. Our Points of Light campaign, for instance, encourages private service. It exalts the selfless Americans who find new ways of serving their families, their neighbors, their friends -- or even strangers in need. Our policies recognize that a Great Society approach to government -- large programs with vast expenditures -- do not always achieve our goals. Often a Good Society, one in which people exercise their natural virtues, better strengthens our nation and builds a spirit of commitment and responsibility.

Similarly, our America 2000 education strategy involves dramatic reforms that don't make dramatic new claims on taxpayer earnings. It draws on people's common frustration with an

educational system that must do better. It encourages people to use their common sense and good old American ingenuity in creating better schools. It won't help build a new office building in Washington, but it very well may inspire people to build a better future for themselves and their children -- school by school, community by community.

Elsewhere, we have proposed turning programs back to states and localities. This enables people to craft the most appropriate solutions for the problems they confront.

For too long, pundits and special interests have equated vision with bureaucracy. This is irresponsible not only in terms of public policy, but also in terms of constitutional theory. The more a President defines his or her powers strictly in terms of legislation, the more likely it will be that our system of checks and balances will exist only in theory, not in practice.

The President shoulders a final unique obligation -- to "preserve, protect and defend" the Constitution. In this context, the President has an obligation to ensure that Congress stays within its own constitutional boundaries -- which is to say, that it conducts its business thoughtfully and deliberately.

The chief executive pursues this duty in several ways. The most powerful tool, of course, is the veto.

Six times in my presidency, I have vetoed bills that weaken the presidential powers. In each case, I wanted to preserve presidential powers, in accordance with my oath of office.

More often, however, vetoes encourage the legislature to

reconsider its actions. When I vetoed minimum-wage legislation, for instance, I sought to persuade Congress that a slightly lower rate would best serve the public interest -- and in time, Congress agreed.

And when Congress bundles up a series of unrelated measures and calls it a "bill," a president has the authority to veto separate measures. On many occasions during my presidency, I have reminded Congress that statutory provisions that violate the Constitution have no binding legal force.

But this phenomenon of bundled legislation has another consequence: It encourages cynicism about government.

Last year, when I asked for $800 million in aid for developing democracies in Panama and Nicaragua, some Senators tacked on a provision that would enable the District of Columbia government to use federal funds for abortions. Another Senator demanded child-care legislation.

In other cases, Congress has tried to slip restrictions on presidential powers into the fine print of large pieces of legislation. This seems not only unduly sly, but it is dangerous. The practice of bundling can leave members of Congress in the dark about the nature of the legislation they enact. It has become an annual sport for reporters to pull peculiarities out of vast spending bills -- such as a federal grant to study cow belches, or a Lawrence Welk Museum -- and ask Congress to defend them.

I have sought -- and will continue to seek -- a line-item

veto to prevent such embarrassments and protect the American people from injudicious Congressional legislation and appropriation.

Finally, a President must protect the powers of the presidency against predictable and perfectly natural incursions by Congress. Although our founders never envisioned a Congress that would churn out hundreds of thousands of pages worth of reports, hearings, documents, laws, rules and regulations each year, they did understand that legislators would try to accumulate power. James Madison, a Princeton graduate, warned that "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex... It is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all of their precautions."

Consider a few ways in which Congress has tried to weaken or usurp executive authority within the realm of domestic politics:

Start with the harassments that can waste the time and energy of the executive. Thirty years ago, we devoted nearly 9.5 percent of our gross national product to Pentagon expenditures. Today, Pentagon spending accounts for only 5 percent of our GNP. But Congressional oversight has grown wildly. One hundred seven committees and subcommittees oversee Defense programs and spending. For FY 1989, the Pentagon devoted 500 man-years and over $50 million just to write reports responding to Congressional queries on such items as plans for manning

tugboats, and accounting for the number of military bands. Defense staff has to respond yearly to more than 750,000 Congressional staff inquiries. ~~That's just one example.~~

In recent years, Congress also has taken aggressive action against specific presidential powers -- including the power to appoint or remove employees who serve at the president's pleasure, the power to execute the laws Congress writes, and even the power to maintain appropriate confidentiality. Congress also has tried to micromanage the executive branch by writing into law too-specific directions about the ways in which the executive is supposed to carry out a particular law.

A President has a duty to rebuff such attempts, not only to preserve the presidency -- but also to ensure the faithful operation of our government.

In closing, let me summarize my view of the presidency. Presidents define themselves through their exercise of presidential power. They must use their special authority to serve the whole nation, in matters of foreign and domestic policy. They must set a tone for governance -- at once leading the people and following their desires. They must preserve, protect and defend the Constitution. And they must encourage deliberative behavior on the part of Congress.

But the responsibility of the President is <u>national</u> not just federal. To be sure we have had our share of important legislative successes. They include a Clean Air Act that invokes the power of the market to help America breathe cleaner air, an

Amercians with Disabilities Act, landmark legislation that enhances the dignity of those with disabilities. A child care bill that puts more power and choice in the hands of parents when it comes to the care of their children.

But the real power of the Presidency lies in the President's ability to frame -- through action, through example, through encouragement -- what we as a nation must do: what is required of communities and institutions -- large and small -- in schools and factories, and the hundreds of daily acts of individuals.

The common thread of commitment -- individual commitment -- runs through all successful efforts to solve our most intractable problems. The individual who cares -- who is determined to change things for the better -- can and will make a difference.

The great joy and challenge of the office I occupy is that the President serves not just as the unitary executive, but also as the unifying executive -- the one promotes the values, goals, and purposes that bind us as Americans.

As President, I feel honor-bound to strengthen the marvelous system of government bequeathed to us, so that we may remain the freest, most moral, most prosperous land in history.

Thank you, and may God bless the United States of America.

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