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COMMENTARY

THE PRIMACY OF CONGRESS AND THE LEGAL SYSTEM

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When I was in law school, the catalogue listed no courses in legislation, either as a required course or as an elective. My law school training in the legislative process was very different from that at Dayton and the growing number of other progressive law schools that require a serious study of legislation early in the curriculum. My only exposure to legislative theory came from a distinguished teacher who spent a goodly portion of my basic "philosophy of the law" course demonstrating how foolish the legislative process and its participants can be. We had snippets of legislative hearings at the state and federal levels, which depicted perplexed legislators scratching their heads over such topics as the Rule Against Perpetuities and the Rule in Shelley's Case. We laughed at the antics of the Congress, which tried to legislate morality by passing the Mann Act[1] to prohibit "white slavery" (prostitution) and ended up catching every adulterous relationship in the country. Today, I am sure that we would derive similar pleasure from recounting the follies of RICO.[2]

I left law school believing that the only good law was the good old

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* Judge, United States Court of Appeals for the District of Columbia. Prior to his appointment to the bench, Judge Mikva served five terms in the United States House of Representatives. This article is a slightly revised version of a speech given at the University of Dayton School of Law on March 29, 1990. The notes accompanying this article cite only to authority and are not essential to comprehension of the text. *See* Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985).

1. 18 U.S.C. § 2421 (1988).
2. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (1988).

common law. The only good judges were the good old common law judges. We admired then-Judge Cardozo for modernizing the rules of tort liability to reach the manufacturer of defective products, even though there was no privity between the manufacturer and the consumer.[3] Surely that kind of modernizing was work for the judges, and not for those silly legislative bodies that did not even know the Rule in Shelley's Case. As law students, we frequently felt superior for having already forgotten more things than most legislators ever seemed to learn.

Has this supercilious attitude about the legislative process changed over the last forty years? I am afraid not. The critics of Congress abound. Public opinion polls rate members of Congress barely above used car salesmen in the affections of the body politic. It is paradoxical that Washington, D.C. is filled these days with political scientists and politicians from Eastern Europe and the Third World, all of them studying the Congress of the United States. They are trying to find ways to replicate that remarkable institution in their own countries. Czechs, Hungarians, Chileans, Argentineans, all are trying to understand how our Congress has been able to work so effectively, and how they can fashion a duplicate for themselves. If only Congress could be as beloved at home as it is abroad. Why is Congress so abused, in the law schools and out? Is Congress really as bad as we think? The answer, I propose, depends upon what we think Congress' function should be.

In the beginning, our founders wanted Congress to be the primary branch of government. They had some doubt about the executive branch—the concept of an "elected king" was unique. They did not think too much about the least dangerous branch, the courts, because courts were understood only to react to the actions of the political branches. But they knew and cared about Congress. Most of the delegates to the constitutional convention in Philadelphia had prior legislative experience in their colonial legislatures and in the Continental Congress. They knew the legislative process and they made it preeminent in the constitutional structure. The late Justice Hugo Black insisted that the first amendment in the Bill of Rights was not first by accident. The authors of the Bill of Rights, he maintained, believed that the freedoms of speech, the press and religion were the most essential foundations of a stable democracy. So too, I think, article I of the Constitution, establishing the Congress of the United States, was first by design rather than happenstance; its placement reflects the founders' intent and expectation that Congress would exercise the most power, that it would act as the first branch of government.

3. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

Some of you may be shocked by that statement. We learned in our earliest exposure to the Constitution that it established three branches of government, with separate, distinct, and *equal* powers. This well-known doctrine of separation of powers was popularized by Baron de Montesquieu in his treatise *Spirit of the Laws*.[4] He insisted that the way to avoid tyranny was to prevent the accumulation of all powers—legislative, executive, and judicial—in the same hands. The Montesquieu followers prevailed at the Philadelphia convention. They assured their colleagues that the separation of powers—under which Congress would manage the purse, the President would wield the sword, and the courts would review the damage that the other branches had done—would best protect individual liberties in the newly formed republic. Ambition would counteract ambition, and those who administered each branch would have the "necessary constitutional means, and personal motives, to resist encroachments of the others."[5]

In actuality, the framers of our Constitution never really expected or intended that the three branches would be truly equal. The popularity of Montesquieu's ideas stemmed mainly from the colonists' desire to make the legislative branch powerful, independent, and self-sufficient. Even among those who understood the doctrine in its broadest implications, the belief remained that the Congress would be the "first" among equals. As James Madison wrote, "[i]n republican government the legislative authority, necessarily, predominates."[6]

I do not mean to suggest that the final composition of the Congress under article I was uniformly admired, even by the delegates to the constitutional convention. The very traits that make the American Congress such a perfect instrument for representing collective will make it less than perfectly efficient. But the founders understood that the frustratingly deliberate and protracted pace of congressional action was precisely the feature that made it appropriate for Congress to have preeminent status.

The hazards of congressional deliberation have been exaggerated since its inception. Many have cited the famous parable used by Benjamin Franklin to criticize the bicameral nature of the Congress:

> Has not the famous political fable of the snake, with two heads and one body, some useful instruction contained in it? She was going to a brook to drink, and in her way was to pass through a hedge, a twig of which opposed her direct course; one head chose to go on the right side of the hedge, the other on the left; so that time was spent in the contest, and

4. B. DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151-62 (1900).
5. THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).
6. *Id.* at 324.

before the decision was completed, the poor snake died of thirst.[7]

Franklin's parable made the problem easy. In the House of Representatives, there are 435 men and women, representing every variety of political view, struggling each day for advantage. In the Senate, the number, 100, is smaller, but the power of each to delay and protract is vast.

It is possible, nonetheless, for concerted action to be taken fairly swiftly. When the congressional parties are strong, when the congressional leadership is effective, and when the congressional procedures are conducive to an efficient decisional process, consensus can emerge and Congress can act with great dispatch. The obstacles to such performance are, of course, significant, and no commentator on (or participant in) the political process can afford to understate them. But Congress is not nearly so unwieldy or incapable of swift, effective action as its critics would suggest.

Swift action, moreover, is not always positive action. Much of the time, what Congress does best is nothing. Every law is a rule that restricts our conduct under the threat of state force. A rule, then, ought not be adopted unless the people affected agree that there is a need for such a rule, and what its dimensions ought to be. In a free society, there is a premium on letting people make their own decisions about their conduct. The state ought to interfere only when the need is clear and a consensus exists among the people. When a rule is forced on people not willing to be ruled—even though that rule may be altogether wise and useful—it is not democratic and it will not be well-received. And so the inefficiency of Congress becomes a reflection of the unwillingness of the body politic to move in any specific direction. Frequently, ambiguous legislation is a necessary interim measure. The ambiguities in legislation often reflect the lack of perfect agreement on all the details of a rule even when there is an agreement to the rule in general.

This past year seems to have been a time for looking at the warts on the Congress, and for offering proposals to do something about that "ugly creature." One proposal that President Bush has been pushing, as have most of his predecessors of both parties, is the line-item veto: a proposal that would vastly diminish the power of Congress, especially (but not only) over the purse. At the present time, the Congress can load up an appropriations bill, or any other bill, with some items that the President wants, and some items that the President does not want. Under existing procedures, the President must either sign the whole bill or veto the whole bill—he cannot pick and choose. With a line-item veto, the President could veto those particular items he did not want,

7. A. NEVINS, AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789, 151 (1927) (quoting W. BRUCE, BENJAMIN FRANKLIN SELF-REVEALED 249).

and sign the rest of the bill into law. This usually sounds eminently fair and sensible to the uninitiated. But those items that the President may not like, and that may indeed be wasteful or unwise in a purist sense, may be the glue of the consensus that allowed the bill to pass in the first place. When the President removes some of the glue, what happens to our commonalty, to the acceptability of the compromise to those interests that the President has vetoed out? A line-item veto would not eliminate waste; it would stifle congressional action by deterring the compromise and accommodation essential to a functioning representative democracy.

A second reform that has been proposed would limit the number of terms members of Congress are allowed to serve. It is true, in my opinion, that some members stay far too long. I stayed five terms, and I thought that I was running out of gas. But the legitimacy of the system turns partly on the power of the people to choose their representatives. Obviously, the people can limit the tenure of members, and sometimes they do. That they do not do it more often, that incumbents get reelected so frequently, reflects something about how constituents feel about *their* congressman. In a free society, the people are entitled to elect Caligula if they want. It is only when we prevent Caligula from running or appoint Claudius to succeed him that the system breaks down.

Still a third idea whose time has not come, I hope, is the conversion of Congress into a parliamentary system. Under such a system, the President would control the Congress, because his election would be based on his control over the Congress. Those who advocate this change are a little vague on the details. I do not think that the President would come *from* the Congress, as does the Prime Minister in England or in other parliamentary systems. But clearly, the intent and appeal of the proposal is that the President would dominate the Congress. That idea is really a part of a broader notion that the President should be able to pick and choose what laws he will follow by deciding for himself when Congress has invaded his prerogatives. The War Powers Resolution,[8] which requires the President to report to Congress on foreign military adventures, is an example of the kind of law that the President could ignore under this theory. Most of these notions come from those theorists—whom I would call the New Monarchists—who think that the Congress is too grubby and too populist to be trusted with the power of government. It is Congress' triumph over those very impulses, however, that the Eastern Europeans so admire and want to emulate.

The last bad idea that I want to touch on which seeks to limit the

8. 50 U.S.C. §§ 1541-1548 (1982).

legislative power of Congress is one that has become very popular in some scholarly circles. One way to limit the mischief-making powers of Congress, say these self-styled reformers, would be to limit the breadth and application of the legislation that Congress passes. One of my colleagues on another federal court has proposed that we consider the "spirit" in which the legislation was passed. If a court finds that the legislation was passed as a result of log-rolling and compromise, or appeals solely to special interests, whoever they may be, then that legislation should be given a very crabbed interpretation.

This skeptical approach is already manifested by a reluctance among certain judges to consider *any* legislative history in interpreting the purposes of the legislation. Unless Congress spells out the breadth of a law by metes and bounds right in the text of the law, some courts would infer that the law has no breadth. These courts, then, would twist the plain-meaning rule, a useful and important rule of statutory interpretation, into a restraint which routinely frustrates Congress' actions.

There are examples, in construing civil rights laws, affirmative action laws, and housing laws, where the Supreme Court has narrowed the significance of statutes passed by Congress. In many of these instances, Congress has reiterated its broader remedial purpose by passing new statutes specifically overruling the Court. Some of that interplay between the Congress as the law-maker and the courts as the law-interpreters is inevitable and useful. Some critics think that it may be going to excess and sapping Congress' strained resources. In any event, such a begrudging attitude by one branch towards another is uncomfortable to behold.

Our founders knew that they did not form a perfect government. This was a system designed for mortals. As was said in the Federalist,

> As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust: So there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.[9]

Churchill put it another way: Democracy is a terrible form of government, except that every other form is worse. For all its faults, we ought to have a little more trust in the first branch of government. Our legal system and our democracy require it.

9. THE FEDERALIST No. 55, at 378 (J. Madison) (J. Cooke ed. 1961).