

*Note: This issues discussed in this article are from the 1970s and may be unfamiliar. But Cutler does a very nice job of contrasting the US system with parliamentary systems and raises reform issues that are relevant today*

### **TO FORM A GOVERNMENT**

Lloyd N. Cutler,

**Foreign Affairs** 59 (1): 126-143, Fall 1980. ©

[On May 10, 1940, Winston Churchill was summoned to Buckingham Palace.]

*His Majesty received me most graciously and bade me sit down. He looked at me searchingly and quizzically for some moments, and then said: "I suppose you don't know why I have sent for you?" Adopting his mood, I replied: "Sir, I simply couldn't imagine why." He laughed and said: "I want to ask you to form a Government." I said I would certainly do so.*

- *Winston S. Churchill*

*The Gathering Storm* (1948)

Our society was one of the first to write a Constitution. This reflected the confident conviction of the Enlightenment that explicit written arrangements could be devised to structure a government that would be neither tyrannical nor impotent in its time, and to allow for future amendment as experience and change might require.

We are all children of this faith in a rational written arrangement for governing. Our faith should encourage us to consider changes in our Constitution - for which the framers explicitly allowed - that would assist us in adjusting to the changes in the world in which the Constitution must function. Yet we tend to resist suggestions that amendments to our existing constitutional framework are needed to govern our portion of the interdependent world society we have become, and to cope with the resulting problems that all contemporary

governments must resolve. A particular shortcoming in need of a remedy is the structural

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

We elect one presidential candidate over another on the basis of our judgment of the overall program he presents, his ability to carry it out, and his capacity to adapt his program to new developments as they arise. We elected President Carter, whose program included, as one of its most important elements, the successful completion of the SALT II negotiations that his two predecessors had been conducting since 1972. President Carter did complete and sign a SALT II Treaty, in June 1979, which he and his Cabinet regarded as very much in the national security interests of the United States. Notwithstanding recent events, the President and his Cabinet still hold that view - indeed they believe the mounting intensity of our confrontation with the Soviet Union makes it even more important for the two superpowers to adopt and abide by explicit rules as to the size and quality of each side's strategic nuclear arsenal, and as to how each side can verify what the other side is doing.

But because we do not "form a Government," it has not been possible for President Carter to carry out this major part of his program.

Of course the constitutional requirement of Senate advice and consent to treaties presents a special situation. The case for the two-thirds rule was much stronger in 1793, when events abroad rarely affected this isolated continent, and when "entangling foreign alliances" were viewed with a skeptical eye. Whether it should be maintained in an age when most treaties deal with such subjects as taxation and trade is open to question. No parliamentary regime anywhere in the world has a similar provision. But in the American case - at least for major issues like SALT - there is merit to the view that treaties should indeed require the careful bipartisan consultation essential to win a two-thirds

majority. This is the principle that Woodrow Wilson fatally neglected in 1919. But it has been carefully observed by recent Presidents, including President Carter for the Panama Canal Treaties and the SALT II Treaty. In each of these cases there was a clear prior record of support by previous Republican Administrations, and there would surely have been enough votes for fairly rapid ratification if the President could have counted on the total or near- total support of his own party - if, in short, he had truly formed a Government, with a legislative majority which takes the responsibility for governing.

Treaties may indeed present special cases, and I do not argue here for any change in the historic two-thirds requirement. But our inability to "form a Government" able to ratify SALT II is replicated regularly over the whole range of legislation required to carry out any President's overall program, foreign and domestic. Although the enactment of legislation takes only a simple majority of both Houses, that majority is very difficult to achieve. Any part of the President's legislative program may be defeated, or amended into an entirely different measure, so that the legislative record of any presidency may bear little resemblance to the overall program the President wanted to carry out. Energy and the budget provide two current and critical examples. Indeed, SALT II itself could have been presented for approval by a simple majority of each House under existing arms control legislation, but the Administration deemed this task even more difficult than achieving a two-thirds vote in the Senate. And this difficulty is of course compounded when the President's party does not even hold the majority of the seats in both Houses, as was the case from 1946 to 1948, from 1954 to 1960 and from 1968 to 1976 - or almost half the duration of the last seven Administrations.

The Constitution does not require or even permit in such a case the holding of a new election, in which those who oppose the President can seek office to carry out their own overall program. Indeed, the opponents of each element of the President's overall program usually have a different makeup from one element to another. They would probably be unable to get together on any overall program of their own, or to obtain the congressional votes to carry it out. As a result the stalemate continues, and because we do not form a Government, we have no overall program at all. We cannot fairly hold the President accountable for the success or failure of his overall program, because he lacks the constitutional power to put that program into effect.

Compare this with the structure of parliamentary governments. A parliamentary government may have no written constitution, as in the United Kingdom. Or it may have a written constitution, as in West Germany, Japan and Ireland, that in other respects - such as an independent judiciary and an entrenched Bill of Rights - closely resembles our own. But while there may be a ceremonial President or, as in Japan, an Emperor, the executive consists of those members of the legislature chosen by the elected legislative majority. The majority elects a Premier or Prime Minister from among its number, and he

selects other leading members of the majority as the members of his Cabinet. The majority as a whole is responsible for forming and conducting the "government." If any key part of its overall program is rejected by the legislature, or if a vote of "no confidence" is carried, the "Government" must resign and either a new "Government" must be formed out of the existing legislature or a new legislative election must be held. If the program is legislated, the public can Judge the results, and can decide at the next regular election whether to reelect the majority or turn it out. At all times the voting public knows who is in charge, and whom to hold account- able for success or failure.

Operating under a parliamentary system, Chancellor Helmut Schmidt formed the present West German Government with a majority of only four, but he has succeeded in carrying out his overall program these past five years. Last year Mrs. Thatcher won a majority of some 30 to 40 in the British Parliament. She has a very radical program, one that can make fundamental changes in the economy, social fabric and foreign policy of the United Kingdom. There is room for legitimate doubt as to whether her overall program will achieve its objectives and, even if it does, whether it will prove popular enough to reelect her Government at the next election. But there is not the slightest doubt that she will be able to legislate her entire program, including any modifications she makes to meet new problems. In a parliamentary system, it is the duty of each majority member of the legislature to vote for each element of the Government's program, and the Government possesses the means to punish members if they do not. In a very real sense, each member's political and electoral future is tied to the fate of the Government his majority has formed. Politically speaking, he lives or dies by whether that Government lives or dies.

President Carter's party has a much larger majority percentage in both Houses of Congress than Chancellor Schmidt or Mrs. Thatcher. But this comfortable majority does not even begin to assure that President Carter or any other President can rely on that majority to vote for each element of his program. No member of that majority has the constitutional duty or the practical political need to vote for each element of the President's program. Neither the President nor the leaders of the legislative majority have the means to punish him if he does not. In the famous phrase of Joe Jacobs, the fight manager, "it's every man for themselves."

Let me cite one example. In the British House of Commons, just as in our own House, some of the majority leaders are called the Whips. In the Commons, the Whips do just what their title implies. If the Government cares about the pending vote, they "whip" <sup>33</sup> the fellow members of the majority into compliance, under pain of party discipline if a member disobeys. On the most important votes, the leaders invoke what is called a three-line whip, which must be obeyed on pain of resignation or expulsion from the party.

In our House, the Majority Whip, who happens to be one of our very best Democratic legislators, can himself feel free to leave his Democratic President and the rest of the House Democratic leadership on a crucial vote, if he believes it important to his constituency and his conscience to vote the other way. When he does so, he is not expected or required to resign his leadership post; indeed he is back a few hours later "whipping" his fellow members of the majority to vote with the President and the leadership on some other issue. But all other members are equally free to vote against the President and the leadership when they feel it important to do so. The President and the leaders have a few sticks and carrots they can use to punish or reward, but nothing even approaching the power that Mrs. Thatcher's Government or Chancellor Schmidt's Government can wield against any errant member of the majority.

I am hardly the first to notice this fault. As Judge Carl McGowan has reminded us, that "young and rising academic star in the field of political science, Woodrow Wilson - happily unaware of what the future held for him in terms of successive domination of, and defeat by, the Congress - despaired in the late 19th century of the weakness of the Executive Branch vis-a-vis the Legislative, so much so that he concluded that a coalescence of the two in the style of English parliamentary government was the only hope."<sup>i</sup> As Wilson put it, "power and strict accountability for its use are the essential constituents of good Government."<sup>ii</sup> Our separation of executive and legislative power fractions power and pre-vents accountability.

In drawing this comparison, I am not blind to the proven weaknesses of parliamentary government, or to the virtues which our forefathers saw in separating the executive from the legislature. In particular, the parliamentary system lacks the ability of a separate and vigilant legislature to investigate and curb the abuse of power by an arbitrary or corrupt executive. Our own recent history has underscored this virtue of separating these two branches.

Moreover, our division of executive from legislative responsibility also means that a great many more voters are represented in positions of power, rather than as mere members of a "loyal opposition." If I am a Democrat in a Republican district, my vote in the presidential election may still give me a proportional impact. And if my party elects a President, I do not feel - as almost half the voters in a parliamentary constituency like Oxford must feel - wholly unrepresented. One result of this division is a sort of a permanent centrism. While this means that no extreme or Thatcher-like program can be legislated, it means also that there are fewer wild swings in statutory policy.

This is also a virtue of the constitutional division of responsibility. It is perhaps what John Adams had in mind when, at the end of his life, he wrote to his old friend and adversary, Thomas Jefferson, that "checks and ballances, Jefferson, . . . are our only Security, for the progress of Mind, as well as the Security of Body." <sup>iii</sup>

But these virtues of separation are not without their costs. I believe these costs have been mounting in the last half-century, and that it is time to examine whether we can reduce the costs of separation without losing its virtues.

During this century, other nations have adopted written constitutions, sometimes with our help, that blend the virtues of our system with those of the parliamentary system. The Irish Constitution contains a replica of our Bill of Rights, an independent Supreme Court that can declare acts of the government unconstitutional, a figurehead president, and a parliamentary system. The postwar German and Japanese Constitutions, which we helped to draft, are essentially the same. While the Gaullist French Constitution contains a Bill of Rights somewhat weaker than ours, it provides for a strong President who can dismiss the legislature and call for new elections. But it also retains the parliamentary system and its blend of executive and legislative power achieved by forming a Government out of the elected legislative majority. The President, however, appoints the Premier or First Minister.

## II

We are not about to revise our own Constitution so as to incorporate a true parliamentary system. But we do need to find a way of coming closer to the parliamentary concept of "forming a Government," under which the elected majority is able to carry out an overall program, and is held accountable for its success or failure.

There are several reasons why it is far more important in 1980 than it was in 1940, 1900 or 1800 for our government to have the capability to formulate and carry out an overall program.

1) The first reason is that government is now constantly required to make a different kind of choice than usually in the past, a kind for which it is difficult to obtain a broad consensus. That kind of choice, which one may call "allocative," has become the fundamental challenge to government today. As a recent newspaper article put it:

The domestic programs of the last two decades are no longer seen as broad campaigns to curb pollution or end poverty or improve health care. As these programs have filtered down through an expanding network of regulation, they single out winners and losers. The losers may be workers who blame a lost promotion on equal employment programs; a chemical plant fighting a tough pollution control order; a contractor who bids unsuccessfully for a government contract, or a gas station owner who wants a larger fuel allotment.<sup>iv</sup>

This is a way of recognizing that, in giving government great responsibilities, we have forced a series of choices among these responsibilities.

During the second half of this century, our government has adopted a wide variety of national goals. Many of these goals - checking inflation, spurring economic growth, reducing unemployment, protecting our national security, assuring equal opportunity, increasing social security, cleaning up the environment, improving energy efficiency - conflict with one another, and all of them compete for the same resources. There may have been a time when we could simultaneously pursue all of these goals to the utmost. But even in a country as rich as this one, that time is now past. One of the central tasks of modern government is to make wise balancing choices among courses of action that pursue one or more of our many conflicting and competing objectives.

Furthermore, as new economic or social problems are recognized, a responsible government must adjust these priorities. In the case of energy policy, the need to accept realistic oil prices has had to be balanced against the immediate impact of drastic price increases on consumers and affected industries, and on the overall rate of inflation. And to cope with the energy crisis, earlier objectives of policy have had to be accommodated along the way. Reconciling one goal with another is a continuous process. A critical regulatory goal of 1965 (auto safety) had to be reconciled with an equally critical regulatory goal of 1970 (clean air) long before the auto safety goal had been achieved, just as both these critical goals had to be reconciled with 1975's key goal (closing the energy gap) long before either auto safety or clean air had lost their importance. Reconciliation was needed because many auto safety regulations had the effect of increasing vehicle size and weight and therefore increasing gasoline consumption and undesirable emissions, and also because auto emission control devices tend to increase gasoline consumption. Moreover, throughout this 15-year period, we have had to reconcile all three of these goals with another critical national objective - wage and price stability - when in pursuit of these other goals we make vehicles more costly to purchase and operate.

And now, in 1980, we find our auto industry at a serious competitive disadvantage vis-a-vis Japanese and European imports, making it necessary to limit those regulatory burdens which aggravate the extent of the disadvantage. A responsible government must be able to adapt its programs to achieve the best balance among its conflicting goals as each new development arises.

For balancing choices like these, a kind of political triage, it is almost impossible to achieve a broad consensus. Every group will be against some part of the balance. If the "losers" on each item are given a veto on that part of the balance, a sensible balance cannot be struck.

2) The second reason is that we live in an increasingly inter-dependent world. What happens in distant places is now just as consequential for our security and our economy as what happens in Seattle or Miami. No one today would use the term "Afghanism," as the Opposition benches did in the British

Parliament a century ago, to deride the Government's preoccupation with a war in that distant land. No one would say today, as President Wilson said in 1914, that general European war could not affect us and is no concern of ours. We are now an integral part of a closely interconnected world economic and political system. We have to respond as quickly and decisively to what happens abroad as to what happens within the portion of this world system that is governed under our Constitution.

New problems requiring new adjustments come up even more frequently over the foreign horizon than the domestic one. Consider the rapid succession of events and crises since President Carter took up the relay baton for his leg of the SALT II negotiations back in 1977: the signing of the Egyptian-Israeli Peace Treaty over Soviet and Arab opposition, the Soviet-Cuban assistance to guerrilla forces in Africa and the Arabian peninsula, the recognition of the People's Republic of China, the final agreement on the SALT II terms and the signing of the Treaty in Vienna, the revolution in Iran and the later seizure of our hostages, the military coup in Korea, the Soviet-supported Vietnamese invasion of Kampuchea, our growing dependence on foreign oil from politically undependable sources, the affair of the Soviet brigade in Cuba, the polarization of rightist and leftist elements in Central America, and finally (that is, until the next crisis a month or two from now) the Soviet invasion of Afghanistan and the added threat it poses to the states of Southwest Asia and to the vital oil supplies of Europe, Japan and the United States.

Each of these portentous events required a prompt reaction and response from our Government, including in many cases a decision as to how it would affect our position on the SALT II Treaty. The government has to be able to adapt its overall program to deal with each such event as it arises, and it has to be able to execute the adapted program with reasonable dispatch. Many of these adaptations - such as changes in the levels and direction of military and economic assistance - require joint action by the President and the Congress, something that is far from automatic under our system. And when Congress does act, it is prone to impose statutory conditions or prohibitions that fetter the President's policy discretion to negotiate an appropriate assistance package or to adapt it to fit even later developments. The congressional bans on military assistance to Turkey, any form of assistance to the contending forces in Angola, and any aid to Argentina if it did not meet our human rights criteria by a deadline now past, are typical examples.

Indeed, the doubt that Congress will approve a presidential foreign policy initiative has seriously compromised our ability to make binding agreements with nations that "form a Government." Given the fate of SALT II and lesser treaties, and the frequent Congressional vetoes of other foreign policy actions, other nations now realize that our executive branch commitments are not as binding as theirs, that Congress may block any agreement at all, and that at



the very least they must hold something back for a subsequent round of bargaining with the Congress.

3) The third reason is the change in Congress and its relationship to the Executive. When the Federalist and Democratic Republican parties held power, a Hamilton or a Gallatin would serve in the Cabinet, but they continued to lead rather than report to their party colleagues in the Houses of Congress. Even when the locus of congressional leadership shifted from the Cabinet to the leaders of Congress itself, in the early nineteenth century, it was a congressional leadership capable of collaboration with the Executive. This was true until very recently. The Johnson-Rayburn collaboration with Eisenhower a generation ago is an instructive example. But now Congress itself has changed.

There have been the well-intended democratic reforms of Congress, and the enormous growth of the professional legislative staff. The former ability of the President to sit down with ten or fifteen leaders in each House, and to agree on a program which those leaders could carry through Congress, has virtually disappeared. The committee chairmen and the leaders no longer have the instruments of power that once enabled them to lead. A Lyndon Johnson would have a much harder time getting his way as Majority Leader today than when he did hold and pull these strings of power in the 1950s. When Senator Mansfield became Majority Leader in 1961, he changed the practice of awarding committee chairmanships on the basis of seniority. He declared that all Senators are created equal. He gave every Democratic Senator a major committee assignment and then a subcommittee chairmanship, adding to the sharing of power by reducing the leadership's control.

In the House the seniority system was scrapped. Now the House Majority Caucus - not the leadership - picks the committee chairmen and the subcommittee chairmen as well. The House Parliamentarian has lost the critical power to refer bills to a single committee selected by the Speaker. Now bills like the energy bills go to several committees which then report conflicting versions back to the floor. Now mark-up sessions take place in public; indeed, even the House-Senate joint conference committees, at which differing versions of the same measures are reconciled, must meet and barter in public.

The recent conference committees on the Synthetic Fuels Corporation and the Energy Mobilization Board, for example, were so big and their procedures so cumbersome that they took six months to reach agreement, and then the agreement on the Board was rejected by the House. All this means that there are no longer a few leaders with power who can collaborate with the President. Power is further diffused by the growth of legislative staffs, sometimes making it difficult for the members even to collaborate with each other. In the past five years, the Senate alone has hired 700 additional staff members, an average of seven per member.

There is also the decline of party discipline and the decline of the political party itself. Presidential candidates are no longer selected, as Adlai Stevenson was selected, by the leaders or bosses of their party. Who are the party leaders today? There are no such people. The party is no longer the instrument that selects the candidate. Indeed, the party today, as a practical matter, is no more than a neutral open forum that holds the primary or caucus in which candidates for President and for Congress may compete for favor and be elected. The party does not dispense most of the money needed for campaigning, the way the European and Japanese parties do. The candidates raise most of their own money. To the extent that money influences legislative votes, it comes not from a party with a balanced program, but from a variety of single-interest groups.

We now have a great many diverse and highly organized interest groups- not just broad-based agriculture, labor, business and ethnic groups interested in a wide variety of issues affecting their members. We now have single-issue groups- environmental, consumer, abortion, right to life, pro- and anti-, pro- and anti-nuclear, that stand ready to lobby for their single issue and to reward or punish legislators, both in cash and at the ballot box, according to how they respond on the single issue that is the group's *raison d'etre*. And on many specific foreign policy issues involving particular countries, there are exceptionally strong voting blocs in this wonderful melting pot of a nation that exert a great deal of influence on individual Senators and Congressmen.

### III

It is useful to compare this modern failure of our governmental structure with its earlier classic successes. There can be no structural fault, it might be said, so long as an FDR could put through an entire anti-depression program in 100 days, or an LBJ could enact a broad program for social justice three decades later. These infrequent exceptions, however, confirm the general rule of stale-mate.

If we look closely we will find that in this century the system has succeeded only on the rare occasions when there is an unusual event that brings us together, and creates substantial consensus throughout the country on the need for a whole new program. FDR had such a consensus in the early days of the New Deal, and from Pearl Harbor to the end of World War II. But we tend to forget that in 1937 his court-packing plan was justifiably rejected by Congress - a good point for those who favor complete separation of the executive from the legislature<sup>5</sup> - and that as late as August 1941, when President Roosevelt called on Congress to pass a renewal of the Selective Service Act, passage was gained by a single vote in the House. Lyndon Johnson had such a consensus for both his domestic and his Vietnam initiatives during the first three years after the shock of John Kennedy's assassination brought us together. But it was gone by 1968. Jimmy Carter has had it this past winter and spring for his responses to

the events in Iran and Afghanistan and to the belated realization of our need for greater energy self-sufficiency, but he may not hold it for long. Yet the consensus on Afghanistan was marred by the long congressional delay in appropriating the small amounts needed to register 19- and 20-year-olds under the Selective Service Act - a delay that at least blurred the intended impact of this signal to the world of our determination to oppose further Soviet aggression.<sup>6</sup>

When the great crisis and the resulting large consensus are not there - when the country is divided somewhere between 55-45 and 45-55 on each of a wide set of issues, and when the makeup of the majority is different on every issue - it has not been possible for any modern President to "form a Government" that could legislate and carry out his overall program.

Yet modern government has to respond promptly to a wide range of new challenges. Its responses cannot be limited to those for which there is a large consensus induced by some great crisis. Modern government also has to work in every presidency, not just

5 The mention of this historic example may strike some readers as sharply impairing the general thesis of this article in favor of disciplined party voting in the Congress. But one can readily envisage a category of issues - analogous to mutual defense treaties - where an Administration would not be entitled to apply party discipline. (In Britain, for example, votes on such issues as capital punishment have traditionally not been subject to the party whip.) Any measure amending the Constitution or affecting the separation of powers (as the 1937 Court Plan did) should probably be exempted, as well as any issue of religious conscience, such as legislation bearing on abortion.

6 Similarly, the belated consensus on energy self-sufficiency did not restrain the Congress from overriding, by one of the largest margins in history, the President's unpopular but necessary oil import fee order. in one presidency out of four, when a Wilson, an FDR or an LBJ comes along. It also has to work for the President's full time in office, as it did not even for Wilson and LBJ. When they needed congressional support for the most important issue of their presidencies, they could not get it.

When the President gets only "half a loaf" of his overall program, this half a loaf is not necessarily better than none, because it may lack the essential quality of balance. And half a loaf leaves both the President and the public in the worst of all possible worlds. The public - and the press - still expect the President to govern. But the President cannot achieve his overall program, and the public cannot fairly blame the President because he does not have the power to legislate and execute his program. Nor can the public fairly blame the individual members of Congress, because the Constitution allows them to

disclaim any responsibility for forming a Government and hence any accountability for its failures.

Of course the presidency always has been and will continue to be what Theodore Roosevelt called "a bully pulpit" - not a place from which to "bully" in the sense of intimidating the Congress and the public, but in the idiom of it's day a marvelous place from which to exhort and lift up Congress and the public. All Presidents have used the bully pulpit in this way, and this is one reason why the American people continue to revere the office and almost always revere its incumbent. Television has probably amplified the power of the bully pulpit, but it has also shortened the time span of power; few television performers can hold their audiences for four consecutive years. In any event, a bully pulpit, while a glorious thing to have and to employ, is not a Government, and it has not been enough to enable any postwar President to "form a Government" for his entire term.

Finally, the myth persists that the existing system can be made to work satisfactorily if only the President will take the trouble to consult closely with the Congress. If one looks back at the period between 1947 and 1965 there were indeed remarkable cases, at least in the field of foreign policy, where such consultation worked to great effect, even across party lines. The relationships between Senator Vandenberg and Secretaries Marshall and Acheson, and between Senator George and Secretary Dulles, come readily to mind. But these examples were in an era of strong leadership within the Congress, and of unusual national consensus on the overall objectives of foreign policy and the measures needed to carry it out.

Even when these elements have not been present, every President has indeed tried to work with the majority in Congress, and the majority in every Congress has tried to work with the President. Within this past year, when there has been a large consensus in response to the crises in Afghanistan and Iran, a notable achievement has been a daily private briefing of congressional leaders by the Secretary of State, and weekly private briefings with all Senate and House members who want to attend - a step that has helped to keep that consensus in being. Another achievement of recent times is the development of the congressional budget process, exemplified by the cooperation between the congressional leadership and the President in framing the 1981 budget.

But even on Iran, Afghanistan and the budget, the jury is still out on how long the large consensus will hold. And except on the rare issues where there is such a consensus, the structural problems usually prove too difficult to overcome. In each Administration, it becomes progressively more difficult to make the present system work effectively on the range of issues, both domestic and foreign, that the United States must now manage even though there is no large consensus.

## IV

If we decide we want the capability of forming a Government, the only way to do so is to amend the Constitution. Amending the Constitution, of course, is extremely difficult. Since 1793, when the Bill of Rights was added, we have amended the Constitution only 16 times. Some of these amendments were structural, such as the direct election of Senators, votes for women and 18 years olds, the two-term limit for Presidents, and the selection of a successor Vice President. But none has touched the basic separation of executive and legislative powers.

The most one can hope for is a set of modest changes that would make our structure work somewhat more in the manner of a parliamentary system, with somewhat less separation between the executive and the legislature than now exists.

There are several candidate proposals. Here are some of the more interesting ideas:

1) We now vote for a presidential candidate and a vice-presidential candidate as an inseparable team. We could provide that in presidential election years, voters in each congressional district would be required to vote for a trio of candidates, as a team, for President, Vice President and the House of Representatives. This would tie the political fortunes of the party's presidential and congressional candidates to one another, and provide some incentive for sticking together after they are elected. Such a proposal could be combined with a four-year term for members of the House of Representatives. This would tie the presidential and congressional candidates even more closely, and has the added virtue of providing members with greater protection against the pressures of single-issue political groups. This combination is the brainchild of Congressman Jonathan Bingham of New York, and is now pending before the Congress.

In our bicameral legislature, the logic of the Bingham proposal would suggest that the inseparable trio of candidates for President, Vice President and Member of Congress be expanded to a quintet including the two Senators, who would also have the same four- year term. But no one has challenged the gods of the Olympian Senate by advancing such a proposal.

2) Another idea is to permit or require the President to select 50 percent of his Cabinet from among the members of his party in the Senate and House, who would retain their seats while serving in the Cabinet. This would be only a minor infringement on the constitutional principle of separation of powers, but it would require a change in Article I, Section 6, which provides that "no person holding any office under the United States shall be a member of either house during his continuance in office." It would tend to increase the intimacy

between the executive and the legislature, and add to their sense of collective responsibility. The 50-percent test would leave the President adequate room to bring other qualified persons into his Cabinet, even though they do not hold elective office.

3) A third intriguing suggestion is to provide the President with the power, to be exercised not more than once in his term, to dissolve Congress and call for new congressional elections. This is the power now vested in the President under the French Constitution. It would provide the opportunity that does not now exist to break an executive-legislative impasse, and to let the public decide whether it wishes to elect Senators and Congressmen who will legislate the President's overall program.

For obvious reasons, the President would invoke such a power only as a last resort, but his potential ability to do so could have a powerful influence on congressional responses to his initiatives. This would of course be a radical and highly controversial proposal, and it involves a number of technical difficulties relating to the timing and conduct of the new election, the staggering of senatorial terms and similar matters. But it would significantly enhance the President's power to form a Government.

On the other hand, the experience of Presidents - one recalls Nixon in 1970 - who sought to use the mid-term election as a referendum on their programs suggests that any such dissolution and new election would be equally as likely to continue the impasse as to break it. Perhaps any exercise of the power to dissolve Congress should automatically require a new presidential election as well. But even then, the American public might be perverse enough to reelect all the incumbents to office.

4) Another variant on the same idea is that in addition to empowering the President to call for new congressional elections, we might empower a majority or two-thirds of both Houses to call for new presidential elections. This variant has been scathingly attacked in a series of conversations between Professor Charles Black of the Yale Law School and Congressman Bob Eckhardt of Texas, published in 1975, because they think that such a measure would vitally diminish the President's capacity to lead.<sup>7</sup>

5) There are other proposals that deserve consideration. There could be a single six-year presidential term, an idea with many supporters, among them Presidents Eisenhower, Johnson and Carter, to say nothing of a great many political scientists. (The French Constitution provides a seven-year term for the President, but permits reelection.) Of course Presidents would like to be elected and then forget about politics and get to the high ground of saving the world. But if first-term Presidents did not have the leverage of reelection, we might institutionalize for every presidency the lame duck impotence we now see when a President is not running for reelection.

6) It may be that one combination involving elements of the third, fourth and fifth proposals would be worthy of further study. It would be roughly as follows:

A. The President, Vice President, Senators and Congressmen would all be elected for simultaneous six-year terms.

B. On one occasion each term, the President could dissolve Congress and call for new congressional elections for the remainder of the term. If he did so, Congress, by majority vote of both Houses within 30 days of the President's action, could call for simultaneous new elections for President and Vice President for the remainder of the term.

C. All state primaries and state conventions for any required

7 Bob Eckhardt and Charles L. Black, Jr., *The Tides of Power: Conversations on the American Constitution*, New Haven: Yale University Press, 1976.

mid-term elections would be held 60 days after the first call for new elections. Any required national presidential nominating conventions would be held 30 days later. The national elections would be held 60 days after the state primary elections and state conventions. The entire cycle would take 120 days. The dissolved Congress would be free to remain in session for part or all of this period.

D. Presidents would be allowed to serve only one full six- year term. If a mid-term presidential election is called, the incumbent would be eligible to run and, if reelected, to serve the balance of his six-year term.

Limiting each President to one six-year term would enhance the objectivity and public acceptance of the measures he urges in the national interest. He would not be regarded as a lame duck because of his continuing power to dissolve Congress. Our capacity to "form a Government" would be enhanced if the President could break an impasse by calling for a new congressional election and by the power of Congress to respond by calling for a new presidential election.

Six-year terms for Senators and Congressmen would diminish the power of single-interest groups to veto balanced programs for governing. Because any mid-term elections would have to be held promptly, a single national primary, a shorter campaign cycle and public financing of congressional campaigns- three reforms with independent virtues of their own - would become a necessity for the mid-term election. Once tried in a mid-term election, they might well be adopted for regular elections as well.

7) One final proposal may be mentioned. It would be possible, through constitutional amendment, to revise the legislative process in the following way.

Congress would enact broad mandates first, declaring general policies and directions, leaving the precise allocative choices, within a congressionally approved budget, to the President. All agencies would be responsible to the President. By dividing up tasks among them, and making the difficult choices of fulfilling some congressional directions at the expense of others, the President would fill in the exact choices, the allocative decisions. Then any presidential action would be returned to Congress where it would await a two-house legislative veto. If not so vetoed within a specified period, the action would become law.

If the legislative veto could be overturned by a presidential veto - subject in turn to a two-thirds override - then this proposal would go a long way to enhance the President's ability to "form a Government." In any event, it should enable the elected President to carry out the program he ran on, subject to congressional oversight, and end the stalemate over whether to legislate the President's program in the first instance. It would let Congress and the President each do what they have shown they now do best.

Such a resequencing, of course, would turn the present process on its head. But it would bring much closer to reality the persisting myth that it is up to the President to govern - something he now lacks the constitutional power to do.

## V

How can these proposals be evaluated? How can better proposals be devised? Above all, how can the public be educated to understand the costs of the present separation between our executive and legislative branches, to weigh these costs against the benefits, and to decide whether a change is needed?

One obvious possibility is the widely feared constitutional convention - something for which the Constitution itself provides - to be called by Congress itself or two-thirds of the states. Jefferson expected one to occur every generation. Conventions are commonplace to revise state constitutions. But Congress has never even legislated the applicable rules for electing and conducting a national constitutional convention, even though more than 30 states have now called for one to adopt an amendment limiting federal taxes and expenditures. Because of the concern generated by this proposal, any idea of a national constitutional convention on the separation of powers is probably a non-starter.

A more practicable first step would be the appointment of a bipartisan presidential commission - perhaps an offshoot of President Carter's first-class Commission on the Eighties - to analyze the issues, compare how other constitutions work, hold public hearings, and make a full report. The presidential commission could include ranking members of the House and



Senate, or perhaps Congress could establish a parallel joint commission of its own.

The point of this article is not to persuade the reader of the virtue of any particular amendment. I am far from persuaded myself. But I am convinced of these propositions:

We need to do better than we have in "forming a Government" for this country, and this need is becoming more acute.

The structure of our Constitution prevents us from doing significantly better.

It is time to start thinking and debating about whether and how to correct this structural fault.

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<sup>i</sup> McGowan, "Congress, Court, and Control of Delegated Power," *Columbia Law Review*, Vol. 77, No. 8 (1977) pp. 1119-20.

<sup>ii</sup> *Congressional Government: A Study in American Politics*, Boston and New York: Houghton Mifflin, 1913, p. 284.

<sup>iii</sup> *The Adams Jefferson Letters*, Vol. 11, (Lester J. Cappon, ed.), Chapel Hill: University of North Carolina Press, 1959, p. 134.

<sup>iv</sup> Quoted from Carl P. Leubsdorf, "Contemporary Problems Leave U.S. Political System Straining to Cope," reprinted in the *Congressional Record*, October 31, 1979, pp. S15593-94.