

Rethinking the American Constitution

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Introduction

It is legitimate to ask whether the federal government works any more.

In my own field of research, the management of federally owned lands, by the early 1990s expert groups were warning of dangerous buildups of wood accumulating on western national forests managed by the US Forest Service. In 1998, the General Accounting Office cautioned that, without corrective action, “catastrophic wildfires” were almost certain. Only after the West in 2000 experienced one of its worst outbreaks of forest fire in decades, however, did federal officials finally act, and with limited effectiveness.

The national security arena exhibits even larger failures in the federal government—evidenced by such events as September 11, 2001 and the decision to go to war in Iraq based on poor intelligence—leading the *Washington Post* to assert that “the US intelligence agencies failed catastrophically not once but twice in this decade.” And while the Bush administration brought in a new director for the CIA and created a national intelligence director, these actions have not significantly improved US intelligence capacity—on which more than \$30 billion is spent annually. The newly-created (in 2003) Department of Homeland Security offers another example of government failure: its ineffective response to Hurricane Katrina led to doubts about the Department’s efficacy in dealing with the much more complex task for which it was constituted—combating terrorism and the potential consequences of an attack.

Hurricane Katrina also brought to wider public attention the dismal administrative record of yet another federal agency, the US Army Corps of Engineers, responsible for levee failures in New Orleans. As one expert report found, the levees “were built in a disjointed fashion using outdated data;” yet another report described the entire Army Corps organization as “dysfunctional and unreliable.” The chief of the Army Corps, Lt. Gen. Carl Strock, acknowledged “catastrophic failure” of his agency.

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failings of the Bush administration. While those might have been contributing factors, and while agencies such as the Forest Service, FBI, CIA, Army Corps of Engineers, and Department of Homeland Security receive much public visibility when administrative failures have catastrophic consequences, many other federal agencies routinely fail in smaller, more conventional ways, thereby never coming under intense public scrutiny.

Destroying the Army Corps

How have things come to this state of affairs? In 2000, the problems of the Army Corps of Engineers were documented in a comprehensive exposé published in the *Washington Post* by reporter Michael Grunwald. His analysis was readily available to all of official Washington; at the time, as additional installments appeared, congressional leaders demanded reform of the Army Corps. Yet, little happened and the same dysfunctional Army Corps was allowed to fail in its core

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responsibilities, leading Grunwald to conclude post-Katrina that in New Orleans “a useless Corps shipping canal intensified Katrina’s surge, . . . poorly designed Corps floodwalls collapsed just a few feet from an unnecessary \$750 million Corps navigation project. . . .” Yet, rather than penalize the agency for its misdeeds, Congress in 2006 was still determined to advance a “new multibillion-dollar potpourri of Corps projects.”

In his earlier 2000 series in the *Post*, Grunwald had also explored the wider institutional factors in Washington and the federal system responsible for such unfortunate results for the nation. The leading culprit, as he found, was the US Congress. When Grunwald had investigated the role of the Army Corps of Engineers in Mississippi, he found that the

Army Corps did “generally, whatever Senate Majority Leader Trent Lott and Senate Agriculture Committee Chairman Thad Cochran want it to do.” This was no exception. In theory, the Army Corps subjected its projects to rigorous technical analysis but, as Sen. George Voinovich (R-Ohio), chairman of a subcommittee overseeing the Army Corps, confessed, “We don’t care what the Corps cost-benefit is” because “we’re going to build it anyhow because Congress says it’s going to be built. Somebody’s in charge of some appropriations committee, or another committee, and jams it through.”

Although various Presidents, including Jimmy Carter, Ronald Reagan, and Bill Clinton, attempted to rein in the Army Corps, none has succeeded. As Grunwald learned, the agency was filled with qualified professionals who at the same time understood that their own survival depended on pleasing Congress, whose motive in turn was to send money and projects to favored parties at home. Since it is federal money being spent—considered “free” to constituents—Congress typically pressed for as much as it could get.

Political scientists for decades had been writing about “the iron triangle” of Washington politics. Grunwald’s portrayal, however, exhaustively detailed the failures of the Army Corps, which were now fully revealed to the general public. Nonetheless, business as usual continued.

Systemic Failure

Some skeptics might suggest that the Army Corps is merely Washington at its worst, and that its dismal record and full congressional complicity are exceptions. In 2003, however, the National Commission on

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the Public Service, chaired by former Federal Reserve Board chair, Paul Volcker, offered this harsh and sweeping indictment: “Those who enter public service often find themselves at sea in an archipelago of agencies and departments that have grown without logical structure, deterring intelligent policymaking. The organization and operations of the federal government are a mixture of the outdated, the outmoded, and the outworn.” The Volcker Report summarized its findings as follows:

In this technological age, the government’s widening span of interests inevitably leads to complications as organizations

need to coordinate policy implementation. But as things stand, it takes too long to get even the clearest policies implemented. There are too many decisionmakers, too much central clearance, too many bases to touch, and too many overseers with conflicting agendas. Leadership responsibilities often fall into the awkward gap between inexperienced political appointees and unsupported career managers. Accountability is hard to discern and harder still to enforce. Policy change has become so difficult that federal employees themselves often come to share the cynicism about government that afflicts many of our citizens.

Even though this prominent commission urgently called for remedial actions, no one heeded the Volcker Report or the similar diagnoses of other groups, such as the Government Accountability Office. The Congress did little or nothing. Compared with the coverage given to lobbying scandals and other political gossip, the response of the national media was minimal. The executive branch was largely indifferent—in

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fact, no one in Washington showed much concern. The administrative capacity of the federal government might be in a state of crisis but the response was a collective yawn. This recalled the story of the Army Corps of Engineers, as Grunwald had related it. A basic failure of national leadership, extending across official and unofficial policymaking bodies, was increasingly the norm for Washington.

Indeed, it now seemed to be the case that the central purpose of the federal government—the actual “mission” behind all the high school civics shibboleths trotted out for speeches and other public occasions—might no longer be to deliver services to the citizens of the nation. Rather, based on the accumulating evidence, the federal system increasingly worked to serve the direct participants—to create jobs for government employees, reelect Congressmen (another form of job), and pay off voters and political contributors as necessary to sustain these arrangements. Perhaps most distressing, and given the internal dynamics of this system, one could see no way of altering the results within any form of American politics as usual.

Rethinking the Constitution

One option that many are reluctant to consider is a change in the American Constitution. This reluctance is in some ways surprising, since the Constitution was written over 200 years ago in much different circumstances and when the federal government was far

smaller and with few responsibilities. Revision in the Constitution has occurred, occasionally by formal amendment, more often by Supreme Court reinterpretation, but the basic political structure and in particular the constitutional role and operation of Congress, have remained unchanged. Perhaps it is time to take Thomas Jefferson's advice that each new generation should revisit the Constitution.

The recent prominent failures of the federal system may be the visible symptoms of deeper and more fundamental structural problems that have attracted the

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attention of leading scholars. Writing in the *Columbia Law Review* in 1998, two Columbia law school professors, Michael Dorf and Charles Sabel, have proposed a framework of a brand new American "constitution of democratic experimentalism." According to them, "the defining and revolutionary features of American constitutionalism—separation of powers, federalism, and the very idea of a written Constitution that constraints government—are losing their vitality as organizing principles of our democracy. None functions as originally intended; it is debatable whether any functions at all."

The Constitution had never been designed for the large and complex task of administering the American government of the late twentieth century. The separation of powers, including three independent branches, was inevitably cumbersome. Progressive-era political theorists had jury rigged an outmoded Constitution with new political institutions such as the Federal Trade Commission, the Interstate Commerce Commission, and other expert "independent commissions" that had the effect of combining legislative and executive functions. At the time, the Supreme Court effectively ignored the traditional constitutional requirement for a separation of powers. With the exception of the Federal Reserve System, however, no one believes any longer in the model of the independent commission.

We are left, however, with the original problem. According to Dorf and Sabel, the affairs of the modern administrative state "are too complex, diverse, and volatile to be governed by lapidary expressions of the public will—laws of Congress, administrative rules, judicial judgments—that [attempt to] indicate precisely how to dispose of most of the cases to which they will eventually be applied." In many areas, Congress merely pretends to write laws that have any real content in controlling the administrative actions of the

government; the reality is a grant of wide administrative discretion. In the Clean Air Act, for example, Congress directed the Environmental Protection Agency (EPA) to require American industries to install "best available control technology," involving diverse applications to potentially tens of thousands of individual businesses across the US. This congressional language amounted in practice to a directive to EPA to both write and administer a main part of the clean air law of the US. Given the complexities of air quality, to be sure, Congress could not have done otherwise—a reality that the formal constitutional framework of the US today simply ignores.

To the extent that checks on EPA exist, they come in the form of two extra-constitutional inventions of the twentieth century. The American judiciary has assumed the role of an executive-branch ombudsman, effectively empowered to overrule EPA and other executive decisions in cases of serious mistakes. Individual Congressmen and members of their staffs also frequently second guess agency decisions and often have the clout to compel agencies to comply with their wishes. In some cases, such as the Army Corps of Engineers, congressional micromanagement has become so widespread as to supplant the formal administrative structure, substituting congressional control in place of the traditional executive role.

Democracy versus Good Government

Dorf and Sabel find that, when Congress employs general language in its legislation, the vague laws that result "open the way to divergent, often self-interested, interpretations" in practice. In fact, "whatever government does, including efforts to correct defects of preceding enactments or police its own boundaries, contributes to its undoing." In the current constitutional confusion, one option might be to move towards a libertarian outcome—to drastically reduce the scope of the federal government, limiting its functions to those things that can be administered effectively within the constitutional rules established in 1787 (such as defense of the nation, maintenance of internal law and order, printing of the US currency, and so forth).

Alternatively, if the goal is to save the administrative state, then Dorf and Sabel suggest that "much less" democratic control of the details of governance is necessary. Tight new curbs on congressional interventions in executive affairs might have to be imposed, limiting the legitimate legislative role to broad determinations of national values and policy. Some judicial checks would remain, but the judicial role of final arbiter for the executive decisions of federal agencies would be eliminated.

There is yet a third alternative. Under a better constitutional design, it might be possible to achieve a

more successful balancing of the requirements for democratic decision making and the imperatives of administrative efficiency. I agree with Dorf and Sabel on the need to “rethink American constitutionalism and the design of our representative democracy in the light of those urgent doubts about the possibilities of democratic government in an age of complexity, and with the attention to the principles of constitutional design that inform our democratic traditions.” I suggest that a rethinking of the American Constitution should begin with the source of much of our current governing malaise—the workings of the US Congress. The nation needs a legislative body that would not lead the Army Corps of Engineers to one day allow the destruction of New Orleans.

A Constitutional Alternative

At the very least, writing and adopting a new American Constitution is a daunting task and there is little possibility of this happening any time soon. But practical feasibility is not my concern here. I suggest below some specific provisions of a possible new American Constitution. I recognize full well that many of them would represent radical changes in American governance. However, while some are complementary and would need to be adopted jointly, others could be adopted as single constitutional changes. I offer them

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here not as a final prescription but to invite debate and in hopes of stimulating greater public discussion of a much wider range of constitutional options in the future. Given the urgency of the federal government's problems at present, our thinking has been much too constricted by familiarity and the habits of the past.

The National Legislature

As the most democratic branch of government, the national legislature decides basic questions of national values and sets broad policy directions. But with 100 members of the Senate, and 435 members of the House of Representatives, the US Congress is poorly suited to executing policy details. Further, Congress frequently fails to set overall national policies—the war making power, the most critical policy decision a nation can make, has been largely delegated to the President. At the same time, Congress intervenes routinely in details of administrative decision making, for instance rou-

tinely blocking cancellation of wasteful and outmoded military technology.

Congress at the same time has become less democratic. Gerrymandering of districts, along with other barriers to “political entry,” have severely limited the number of competitive seats in the House of Representatives. Omnibus budget bills are worked out by the congressional leadership and rammed through at the end of a session; many provisions are unknown to most Congressmen and their staffs. Negotiations between the House and Senate that seem intended to resolve differences in legislation often become the occasion for determining the final contents of the legislation, leaving most legislators out of the picture. In the Senate, the filibuster rule has effectively substituted a 60 percent voting requirement for passage of many important pieces of legislation—a basic constitutional change that, assuming it is desirable, should be adopted instead by explicit constitutional amendment.

On the whole, the US Congress—the part of government supposed to be closest to the people—is no longer working. A new constitutional arrangement that clarifies and simplifies the governing role of the national legislature could be achieved with these amendments:

Amendment 1—Abolish the Senate. The state of Delaware in 1790 had the smallest population, with 59,000 people; the largest state was Virginia, with 748,000—a factor of 13. Today, this gap is much greater. Wyoming is the smallest state, with 509,000 people, and California is the largest, with 36 million—a factor of 71. Until 1913 senators were chosen by state legislatures, giving senators the distinctive role of “ambassadors” for their states. But today senators from smaller states take advantage of their disproportionate political leverage to win pork barrel projects and capture other large “political rents” for their home states. Yet with the current ease of national transportation and communications, wide internal migration among the states, and the rise of federal governing responsibility, the states now play a smaller role in the life of the nation. The Senate is no longer needed.

Amendment 2—Vote by electronic means. Current voting is antiquated. In the internet age, if it is possible to transfer bank funds securely from one person to another by personal computer, it is also possible to develop a secure and reliable system of individual electronic voting (with “hard system” backups for people lacking or unable to use internet access). Electronic voting will greatly reduce the cost of voting and allow for new constitutional options.

Amendment 3—The House of Representatives will be the one national legislative body; in effect, a new “national parliament” of the US. Establishing a single national legislative body is a key step in overcoming

the excessive management and policy fragmentation resulting from the extreme separation of powers under the current US constitutional system. A single body would clarify legislative responsibility and establish greater accountability. The House of Representatives is the most nationally representative body and could readily be adapted to become a new “national parliament.”

Amendment 4—The population size of House districts will be determined by the number of people living in the smallest state. Every state should have at least one representative, and other states should then have proportionally more. Hence, the size of election districts would be determined by the smallest state in population—as noted above, at present Wyoming with 509,000. Wyoming and those other states with up to 1.5 times the population of Wyoming would each have one member of the new House of Representatives. Other states would have proportionately more representatives—California, with 36 million people, would have 71 House representatives. Reapportionment would occur, as at present, every 10 years.

Amendment 5—Members of the new House of Representatives will serve for five years, limited to one term. Two years is not enough time to learn about the leading policy issues facing the nation. Although they need more time, the members of the House of Representatives should not become professional national politicians. They should not devote large parts of their time and effort raising campaign funds and otherwise working for reelection. Members of the House should be citizen legislators who serve a single five-year term.

Amendment 6—Members of the House will be subject to recall after three years by 60 percent vote of their district. In the case of a recall, a replacement for the remaining two years of the term will be selected by popular majority vote within two months. Given the longer term of five years, it is possible that shifting trends of national opinion will leave the House radically out of touch with prevailing public views, or that some individual members will prove particularly unfit. In order not to be burdened with seriously flawed representatives for all of five years, voters in a House district can recall their representative. In order to avoid recalls for less serious reasons, a vote of 60 percent should be required. Excessive cost would be avoided by conducting all recall votes at one time and via electronic voting

Amendment 7—Voting for the House of Representatives will be by a system of transferable votes, and the winner must receive more than 50 percent of the total votes. The current system of plurality voting (under which the winner is simply the candidate receiving the largest total number of votes) dis-

courages minority candidates and limits the diversity of views expressed in the electoral process and in the national legislature. It has been strongly criticized by many political scientists and other experts in voting methods. A system of transferable voting would be more accurate and offer a superior way of revealing true voter preferences. Under a system of transferable votes, each voter lists more than one candidate on his or her ballot, ranked in order of preference. In the initial round, the candidate with the fewest votes is eliminated. Votes for the losing candidate are then transferred to the second choices indicated on the ballot. This process continues through additional rounds until one candidate has received more than 50 percent of the total votes (including transfers). Transferable

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voting has been employed successfully in Australia for many years and in several other nations. Under such a system, for example, voters for Ralph Nader in the 2000 presidential election would not have been “sacrificing” their vote in Florida (and other states); instead, once Nader had been eliminated from contention, his votes would have been transferred to an indicated second choice—in most cases probably Al Gore, and if that had happened, Gore would have won Florida.

Amendment 8—No law (including spending bills and tax provisions) enacted by the House of Representatives will specify individual projects or otherwise include individual provisions that create identifiable spending items or benefits limited to one individual, one business firm, one House district, or one state. Individual projects in legislation—often now described as “earmarks”—undermine public confidence in the legislature and encourage political corruption in both official and unofficial forms. Constituents and other participants in the current American political system in effect “pay for” individual projects and other narrowly targeted legislative provisions with votes and campaign contributions. The Congress shows no inclination to impose discipline on its own behavior. Hence, the new House of Representatives should be constitutionally prohibited from enacting earmarks and other narrowly targeted spending provisions.

Amendment 9—All spending commitments must be fully funded at the time of their enactment by the House of Representatives, either by current taxes in the case of current government spending, or by the issuance of bonds or other financial instruments to

meet capital and other long-run government obligations—except as may be approved by a two-thirds vote of the House for purposes of fiscal stimulus in times of economic recession. Given the limited tenure of many politicians in office, the politically expedient course is often to approve public benefits for the future, leaving other politicians then to pay the bill. Deficit funding of current expenditures (by issuing government bonds) and generous public pensions are common methods to transfer current spending burdens to future generations. Since political representatives are not inhibited by normative sanctions against such irresponsible behavior, new constitutional rules to limit “unsustainable” levels of public spending are therefore desirable.

Current spending should be funded by current taxes; long-run spending for capital projects (or other future commitments such as Social Security) should be funded by issuing financial instruments to raise the necessary funds to meet the future spending obligations. The issuance of a bond or other financial instrument by one part of the federal government that is purchased by another part of the federal government—as is the case under the current Social Security “trust fund”—will not count for the purposes of satisfying this requirement. (The Social Security trust fund is the public-sector equivalent of my issuing an IOU to pay myself in the long run.)

The Executive Branch

Too much responsibility is today constitutionally invested in one individual. The President is overburdened with the tasks of both serving as symbolic head of the nation as well as chief administrator of the federal government. The selection process for choosing the president, moreover, is broken. Given the arduous path to the presidency, many of the most qualified individuals in the US are not willing to pursue the office. In recent decades, the use of primary elections

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by the political parties creates confusion and at times yields weak candidates. The current presidential lottery is a luxury the nation can no longer afford.

The problems of the executive branch are compounded by the pervasive intervention of the judicial and legislative branches in executive decision making. The resulting fragmentation of administrative author-

ity leaves no one truly accountable for executive branch results. Because of the numerous legislative and judicial interventions and constraints, the executive branch frequently is blocked from taking actions required for effective and efficient government. In the current circumstances, even the most capable president cannot govern effectively. To repair the breakdown in the separation of powers, in short, I propose:

Amendment 10—The President will serve as the symbolic head of the nation. He or she will have the power to veto acts of the national legislature (subject to a two-thirds override), to submit treaties with foreign governments to the legislature, to submit nominations to the national judiciary, to submit nominations for the Federal Reserve System, and to propose declarations of war. Other executive functions of the national government will be the responsibility of a new Office of the Chief Administrator, as selected by the President. The President should be removed from routine partisan politics and administration; instead, his or her role should be limited to fundamental choices with longer run consequences for the nation. The daily administration of the government should be undertaken by a separate person, chosen by the President, and with suitable administrative experience and other qualifications for this task. Historically, too many American presidents have been unprepared—and perhaps also unsuited by temperament—for the demands of administration of an organization as large and as complex as the current federal government.

Amendment 11—A national presidential primary will be held 90 days prior to the presidential election, and the winners will be the top five candidates, as selected by a system of transferable voting. Involving many individual state primaries, the current primary system cannot identify the best qualified presidential candidates. The two major political parties give only two candidates any real chance of winning. Instead, there should be a single national presidential primary in which any American citizen could be listed on the ballot if he or she receives 100,000 petition signatures of registered voters anywhere in the US. Voting will be by transferable vote, and each voter can list up to five candidates, shown on the ballot in rank order of the voter’s preference. After all votes of losing candidates have been transferred to preferred candidates, the winners of the national presidential primary—held 90 days prior to the final presidential election—would be the five candidates receiving the highest total number of votes.

Amendment 12—The President will be selected from among the five national primary winners, as determined by a system of transferable voting in the final presidential election. The current Electoral College for selecting the president will be abolished. Instead, the

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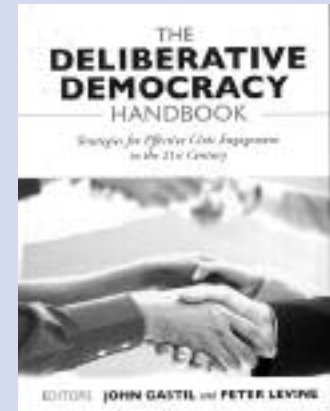
Edited by John Gastil and Peter Levine

"The Deliberative Democracy Handbook is a terrific resource for democratic practitioners and theorists alike. It combines rich case material from many cities and types of institutional settings with careful reflection on core principles. It generates hope for a renewed democracy, tempered with critical scholarship and political realism. Most important, this handbook opens a spacious window on the innovativeness of citizens in the US (and around the world) and shows how the varied practices of deliberative democracy are part of a larger civic renewal movement"

—Carmen Sirianni, professor of sociology and public policy, Brandeis University, and coauthor, *Civic Innovation in America*

"The Deliberative Democracy Handbook, edited by John Gastil and Peter Levine, is an important collection of readings for anyone interested in the role of citizen participation in the public policy process. It provides concrete examples of successful efforts to expand public input in decision-making at the local, state, and national levels. The book also grapples with emerging challenges to the continued development of these efforts in the future."

—Robert Mark Silverman, associate professor, Department of Urban and Regional Planning, University at Buffalo, the State University of New York



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final selection of the president will be by nationwide voting also based on a system of transferable votes. After votes have been cast for the five presidential candidates who have emerged from the primary, the candidate with the fewest votes will be eliminated first, and his or her votes will then be transferred to the remaining candidates, as shown by indicated voter preferences for a second choice. Vote counting will proceed in this manner until one candidate has received more than 50 percent of the total votes, resulting in a new president of the US.

Amendment 13—The President will serve for five years, limited to one term. I propose that the term of the President coincide with the five-year terms of members of the new unicameral House of Representatives, allowing the President full attention to the responsibilities of the office without distraction

by concerns of reelection. Both members of the House and the President will be limited to one five-year term and subject to recall after the third year by 60 percent vote (for any reason considered relevant by voters) and a new president would be elected within two months and serve for the remaining two years.

Amendment 14—The Chief Administrator of the executive branch will be appointed by and serve at the discretion of the President. If 60 percent of the House votes to remove the Chief Administrator, the current holder of this position will be removed and the President will appoint a new Chief Administrator. The Chief Administrator of the federal government will be chosen by the President, based on long administrative experience, political awareness, and other talents and skills needed in overseeing the daily administration of the executive

branch. If a Chief Administrator performs poorly, and the President refuses to remove him or her, the Chief Administrator could be removed by a 60 percent vote of disapproval in the House.

Amendment 15—Four federal departments—State, Defense, Treasury and Judiciary—will be designated as permanent. Consolidation, abolition or other large-scale changes in the organization and operation of these four departments will require the approval by majority vote of the House of Representatives. The organization and operation of other federal departments will be the responsibility of the Chief Administrator. These departments will be subject to reorganization, abolition, consolidation or other changes at the discretion of the Chief Administrator. The heads of these departments will be appointed by and serve at the discretion of the Chief Administrator. The US Congress at present exercises tight control over many details of federal administration—it “micromanages” the manner of organization and much else in the executive branch. Legislators are poorly equipped to organize the executive functions of government and even less equipped to make detailed executive decisions themselves. The Chief Administrator thus should bear responsibility for federal departments and be insulated from legislative micro-management. There would still be democratic accountability because, in circumstances of inadequate performance by the Chief Administrator, either the President or the House (by 60 percent vote) could dismiss him or her.

Amendment 16—The Chief Administrator will submit a proposed federal budget to the House of Representatives. The House will then determine upper spending limits for executive agencies by majority vote. The Chief Administrator will be prohibited from spending more (but may choose to spend less) than these amounts at his or her discretion. The House, however, could require the full expenditure of approved agency funds by a vote of 60 percent. Given the necessity of passing a budget for each agency for each year, a simple majority vote of approval for this budget will be sufficient. The logrolling and other political practices common to legislative decision making, however, often result in the funding of poorly conceived projects. The Chief Administrator, therefore, will have the authority not to spend funds approved by the legislature—a budgetary form of “line-item veto.” To protect against arbitrary actions by the Chief Administrator, the House will have the authority to require spending of funds by a vote of 60 percent.

Amendment 17—The Chief Administrator will have the authority to submit a “Proposed Federal Law” involving non-budgetary matters to the House of

Representatives. If the Chief Administrator so requests, the House will be required to act on this proposed legislation without any changes to it within 90 days. Approval will require a vote of 55 percent. If the legislature fails to vote on the request, the legislation will be approved. In many areas, legislators no longer have the knowledge and skills required to write laws adequate to the size and complexity of the modern national government. Current laws are frequently hundreds of pages long and filled with technical requirements, which few legislators actually read—and in many cases can understand even if they do read them. In practice, much of the detailed language of proposed legislation is now written by interest groups. Although legislation could originate in other ways, in many cases the writing of legislation should be the responsibility of the Office of the Chief Administrator, with the legislature approving or disapproving the proposed legislation. The requirement for passage of such bills should be by 55 percent majority.

The Judicial Branch

The role of the American judicial branch is unique in the world. In other nations, the judiciary is responsible for overseeing conventional matters of law—enforcing and interpreting contracts, conducting criminal trials, protecting citizens against arbitrary exercises of state power, for instance. In the United States, however, the Supreme Court is also a key participant in writing and implementing legislation and in setting national democratic priorities. The fierce current warfare over the process of judicial selection and confirmation reflects the recognition that the judiciary has increasingly

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become the most important branch of government in the resolution of national management and policy questions. The judiciary has become the final management and policy backstop, when other main elements of the American constitutional design are not working.

In some cases—such as campaign finance law in recent years—the Supreme Court strikes down important parts of enacted legislation, thus significantly altering the final contents of the law. More often, Congress enacts vague legislation without substantive content until interpreted by the judicial branch. In the process of interpretation, the courts then in effect write

much of the law. Another important current judicial role is the review of executive branch actions. Just as the separation of powers has broken down between the executive branch and the legislature, it has also broken down between the executive branch and the judiciary. Courts commonly review the details of agency rules and regulations, often requiring their modification, as well as frequently overturning specific administrative decisions. At times, this judicial role is explicitly acknowledged such as when a court determines that an executive action lacks any rational basis or is otherwise arbitrary and capricious; in many other cases, the judicial role is less explicit and yet substantively determines the administrative outcome. Under the guise of enforcing procedural rules—such as the requirement to follow the administrative procedures

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act, prepare an environmental impact statement, or develop a formal public plan as a guide to action—the judiciary becomes an active participant in crafting substantive federal rules and administrative decisions.

By long tradition, appointees to the judiciary are drawn exclusively from the legal profession. Given the unique role of the American judiciary in matters of national governance, however, this limitation is no longer necessary or desirable. Judges often are ill-equipped by training or experience to resolve substantive regulatory and administrative questions in technical areas. Moreover, the current judicial process can involve long appeals, and the initiative to bring legislative or administrative issues before the courts must be taken by outside parties. In general, judicial resolution of many of the most important substantive policy and administrative issues facing the federal government is a cumbersome arrangement, and I therefore propose a new constitutional design for the national judicial branch.

Amendment 18—The current responsibilities of the American judiciary will be reassigned among three independent review and appeal bodies. The existing Supreme Court, whose members will be limited to fixed terms of 15 years, along with members of the lower courts, will continue to address themselves the matters of “conventional law.” A new “House of National Legislative Review” will consider actions of the national legislature, and an “Office of National Administrative Appeal,” will review the rules and regulations and the administrative decisions of the executive branch. Many areas of law are well suited to the current qualifications of judges and to the methods

of operation of the existing Supreme Court and lower courts. This “conventional law” includes such legal issues as the application of past legal precedent and interpretation to current cases, and the protection of individual rights of Americans. I propose that members of the Supreme Court and the lower courts will be nominated by the President and confirmed by a vote of 60 percent by the House. Membership in the legal profession will be required for nomination to the Supreme Court or lower courts. In order to introduce new blood to the Supreme Court on a more frequent basis, the terms of Supreme Court justices should be limited to 15 years—in contrast to the 25 years or more of service, extending to the age of 80 or more, that has become increasingly common among the current members of the Court.

Amendment 19—A “House of National Legislative Review” will be established to consider the constitutional legitimacy and public benefit of the legislative actions of the House of Representatives. The House of National Legislative Review may strike down—with a required vote of two-thirds—a law enacted by the House of Representatives or may strike down selected portions of such a law. The House of National Legislative Review will have 27 members, who serve terms of ten years, as appointed by the President and confirmed by a vote of 60 percent by the House of Representatives. The members of the House of National Legislative Review will be American citizens of great demonstrated accomplishment and expertise and need not be members of the legal profession. With the abolition of the US Senate, it would then become desirable to have another national body that can serve as a check on the House of Representatives and prevent actions harmful to the nation. The US Supreme Court at present performs such a role but it is limited by its constitutional status and the public expectation that it merely “interpret the law.” A group of distinguished Americans—perhaps seen in some respects as a parallel to the House of Lords in the English system, but without any aristocratic pedigree of its members—should perform this review function. The President will select the members from all parts of American society, subject to a 60-percent vote of approval by the House of Representatives, based on their reputations for integrity, knowledge, and sound judgment. The House of National Legislative Review will have the authority to overturn all or part of actions of the House of Representatives, based on a criterion of the public good or the national interest. In order to ensure that this review authority is not exercised to excess, a vote of two-thirds will be required to alter an action of the House of Representatives—unlike the simple majority decision making of the current Supreme Court, under which a mere five justices in recent years, even when

strongly opposed by four others, have often decided the most fundamental of national questions. The House of Representatives could overturn an “upper House veto” by a two-thirds vote.

Amendment 20—An Office of National Administrative Appeal will be created to review actions of the executive branch. This Office will be empowered to overturn or modify by a vote of two-thirds actions of the executive branch. The members of the Office, who will serve for ten years, will be 15 distinguished individuals nominated by the President and confirmed by a 60 percent vote in the House of Representatives. The members of the Office of National Administrative Appeal will be American citizens of widely recognized integrity and accomplishment with significant experience in administrative matters and not necessarily members of the legal profession. A third basic task of the current Supreme Court and lower courts is to review the rules and regulations and other actions of the executive branch. The many other responsibilities of the Supreme Court prevent its review of many important administrative matters in a timely fashion. Often the Court’s members lack extensive knowledge and experience of a matter

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at hand. The current courts are at least formally limited to determining legality rather than the more appropriate questions of whether executive branch actions have a solid factual basis, are soundly reasoned, and otherwise serve the national interest. The Office of National Administrative Appeal would have the authority and funding to commission scientific and other expert studies and otherwise obtain the assistance of appropriate outside parties in forming its decisions. The materials presented in the deliberations of the Office would address administrative issues relating to national impacts and consequences. Again, in order to limit the use of this authority to cases of clear administrative problems, a vote of two-thirds of the members of the Office of National Administrative Appeal would be required to take any action.

Conclusion

The American constitutional status quo has the great merit of historical familiarity and public legitimacy. Reverence for the established constitutional order, however, should not result in denial of the dysfunc-

tional character of many outcomes of the federal system in recent decades, which demands consideration of radical change. The twenty amendments to the US Constitution proposed above would very significantly modify longstanding American governance arrangements at the federal level. Changes of such a magnitude would have to be the product of a full and no doubt lengthy public debate. Many other constitutional alternatives exist and would deserve consideration as well as part of this public discussion.

The point is to begin such a process. Veneration of a national governing regime established more than 200 years ago is no longer justified. The current federal system is failing. It is time to think more innovatively and bravely about the constitutional future of the United States.

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Sources: Robert H. Nelson, *A Burning Issue: A Case for Abolishing the US Forest Service* (Lanham, MD: Rowman & Littlefield, 2000); *Urgent Business for America: Revitalizing the Federal Government for the 21st Century*, Report of the National Commission on the Public Service (January 2003). In 2005, the US General Accountability Office (GAO) offered a broad survey of *21st Century Challenges: Reexamining the Base of the Federal Government*. GAO found that “the fiscal policies in place today will—absent unprecedented changes in tax and/or spending policies—result in large, escalating and persistent deficits that are economically unsustainable over the long term.” If there were not sharp changes in the policy directions of recent years, a continuation of business as usual will “gradually erode, if not suddenly damage, our economy, our standard of living, and ultimately our national security.” The redirection of national policy, GAO argued, would require meeting a “major transformational challenge” in American governance at the federal level. Yet, the GAO was able to offer little beyond the issuance of further such warnings and exhortations to reform—which had had little effect in the past—to explain how any major changes in the political practices of Washington could be expected. Michael C. Dorf and Charles F. Sabel, “A Constitution of Democratic Experimentalism,” *Columbia Law Review* (March 1998).