

# **1. Introduction**

The electoral controversy in Florida has brought into focus some fundamental issues facing our constitutional republic, and facing the Congress of the United States especially. Within two days after the election, Senator-elect Hillary Rodham Clinton and others had called for abolition of the Electoral College. A more partisan observer might snipe that those critics had not been very vocal a few days before the election, when it looked like George W. Bush might win the national popular vote but lose the electoral vote. But we take Senator Clinton and her allies at their word. They genuinely believe that the Electoral College is a relic of our federalist past not well suited for our modern national democracy.

We disagree.

The battle over the Electoral College encapsulates a fundamental issue that the nation must debate: Will we remain a federal constitutional republic with a government of limited powers or continue our drift toward a centralized, national plebiscitary democracy with an essentially unconstrained national government?

The Electoral College reflects several compromises made by the members of the Constitutional Convention in 1787. It is by no means a perfect electoral system, and it would be difficult to translate directly to the constitution of a different country. But it has several essential strengths. It reminds us that the United States is a federal republic, not merely a unitary nation-state. It encourages political parties and candidates to pay attention to all parts of the country, not just a few population centers. It reflects our intention to be a constitutional republic under representative government, not a direct democracy.

Those who want the national government to run everything from our health care system to our local schools are quite consistent in wanting to replace the Electoral College. A national government unlimited in size and scope, committed to feeling the pain of every voter and responding to every whim of every voting bloc, should quite reasonably be selected by a single national electorate in a single national plebiscite.

By the same token, the case for the Electoral College is a central part of the case for a constitutional republic. Those who appreciate that the Constitution establishes a government of delegated, enumerated, and thus limited powers; those who believe that most political decisions should be made in the states and communities; those who believe in liberty and federalism—what Thomas Jefferson called the “principles of ’76”—understand that the Electoral College is a key element of our federalist system.

During the long count in Florida, Vice President Gore’s supporters emphasized the need to divine and implement “the will of the people.” Particularly notable was the statement of William Daley, of the Chicago Daleys, that “if the will of the people is to prevail, Al Gore should be awarded a victory in Florida and be our next president.” No matter what the actual vote count, Daley and his allies said, what was most important was “the will of the people.” If a voter’s intention could be divined, whether or not he or she had actually cast an official vote, then that intention was part of the national will. Of course, the usual way we choose leaders in a republic is to hold an election, at a specified time, according to rules specified in advance. We count the votes of those who were eligible to vote, and registered, and went to the polling place (or obtained an absentee ballot), and filled out the ballot in a specified manner.

But after November 7, 2000, some argued that that system was too constricting and did not reveal the true intent of the voters—or “the vote of all people who attempted to exercise that vote,” as a lawyer argued before the Florida Supreme Court. A group of prominent scholars and thoughtful actors took out an ad in the *New York Times* three days after the election to proclaim that there was “good reason to believe that Vice President Gore has been elected President by a clear constitutional majority of the popular vote and the Electoral College.” But of course there is no such thing as a “constitutional majority of the popular vote.” Vice President Gore himself declared it a “constitutional principle” that “the will of the people should prevail.” Such statements reveal a fundamental ignorance of, or indifference to, the actual Constitution of the United States.

It would be wrong to see such claims as mere partisan posturing. They represent something more. Fundamentally, they reflect the ideas of the illiberal philosopher Rousseau, who posited a “general will” that was separate from and above the combined wills of individual citizens, a will that could be divined and implemented by a wise and benevolent legislator.

That philosophy, so alien to the American Founding and heritage, underlies much of contemporary politics. Who, it is asked, can best compre-

hend the general will? Why, the national government, of course, specifically the one official elected by all the people—the president of the United States. Unlike Congress, it is said, he represents the national interest, not just the parochial interests of states and vested interests. If Congress refuses to do the general will, then presidents increasingly claim the power to rule by decree, through executive orders.

At a practical level, of course, this exaltation of the president's mandate is unconvincing: both parties are made up of voting blocs and interest groups, and no president is elected without the support of many of those interests. At a deeper level, such an idea is dangerous. It would replace the constitutional safeguards against majoritarianism with a president virtually unconstrained in his ability to do good, as he sees it, for the people. It is odd, to say the least, that those who claim the mantle of liberalism would be so quick to toss aside federalism and constitutionalism, since divided powers protect minorities against the whims of the majority. We constrain our government precisely because we know that any of us might be the minority in some dispute and also because we know that—when we're in the majority—we might be tempted to abuse our power. We seek to keep governance close to the people, in the states and communities, partly because local government is more responsive but even more because it gives individuals the chance to leave, to vote with their feet, and to find communities that better reflect their individual needs and preferences. About 50 years ago, the need to confront the problem of racist laws in some states led to an increase in the exercise of power by the federal government. The lingering effects of that struggle discredited "states' rights" and federalism, and federal power continued to grow beyond its necessary use to guarantee individual rights in the states. With that period behind us, centralizing the government of 270 million people in a distant capital is a tragic reversal of our liberal Founding.

This appeal to the Constitution reflects more than simply a commitment to the acts of the Founding generation, as important as that is. It also reflects an understanding of *why* the Founders were right to reserve most subjects to state, local, or private endeavor. The Founders feared the concentration of power. They believed that the best way to protect individual freedom and civil society was to limit and divide power. Thus it was much better to have decisions made independently by 13—or 50—states, each able to innovate and to observe and copy successful innovations in other states, than to have one decision made for the entire country. As the country gets more populous and more complex, and especially as

government amasses more power, the advantages of decentralization and divided power become even greater.

## ***The Role of Congress***

In all of this, Congress has an important role to play, as many of the chapters of this *Handbook* point out. Too often we assume that only the Supreme Court has the duty to uphold the law and the Constitution. In fact, every person elected or appointed to office takes an oath to “support and defend the Constitution of the United States.” The first duty of every official is to act within the authority of the Constitution and to ensure that other officials do so as well. Recent presidents, most especially President Clinton, have blithely exceeded the powers granted to them under the Constitution. They should be held accountable for those abuses of power. But Congress should be primarily responsible for holding them accountable; thanks to its negligence, Congress bears a significant part of the blame for presidential excesses. To live up to their oath of office, members of Congress should turn their attention to four tasks:

### *Rein in the President’s War Powers*

In affairs of state, no more momentous decision can be made than the decision to go to war. For that reason, in a democratic republic it is essential that that decision be made by the most broadly representative body: the legislature. That is where our Constitution lodges the power to declare war. As James Madison put it, “In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department.” As Gene Healy points out in Chapter 7, the Clinton administration espoused a view of executive war-making authority that was as unconditional and unconstrained as that claimed by any president in American history. In fact, presidents from Johnson and Nixon through Bush and Clinton asserted their authority to put American troops in harm’s way without the consent of Congress. To ensure that we remain a constitutional republic, not a presidential empire, Congress must reclaim its power under the Constitution to make such momentous decisions and its obligation to debate and vote on war measures.

### *Stop the Abuse of Executive Orders*

Lawmaking by the president, through executive orders, is a clear usurpation of both the legislative powers granted to Congress and the powers

reserved to the states. The president's principal duty under the Constitution is to "take care that the laws be faithfully executed"—not to make law, as presidents increasingly have done. Like so many other threats to the rule of law, the problem did not begin with but was exacerbated by the Clinton administration. More so than previous presidents, Clinton often employed executive orders to make law without any citation of specific constitutional or statutory authority—yet another example of using executive power to implement "the will of the people" outside the rule of law. A Clinton political consultant, Paul Begala, explained the attraction of executive orders with his usual color and conciseness: "Stroke of the pen, law of the land. Kind of cool." A new president, with a divided electorate and a divided Congress, will be tempted to legislate by fiat. He should resist that illegitimate temptation. And no matter what agenda the president seeks to impose by executive order, Congress should stop him. The body to which the Constitution delegates "all legislative powers herein granted" must assert its authority.

### *Stop Delegating Lawmaking Authority to the Federal Bureaucracy*

The Constitution clearly grants to Congress the power to make laws and to the executive branch the power to execute the laws. That separation of powers is a key element of the constitutional design. The Founders feared nothing more than the concentration of powers in one set of hands. But since the 1930s Congress has gotten into the habit of passing broad laws and leaving the details up to administrative agencies. Congress likes to proclaim noble goals, promise good results, and leave it to unelected bureaucrats to deal with the inevitable tradeoffs and costs of such goals. But as Jerry Taylor and David Schoenbrod write in Chapter 8: "The concern over congressional delegation of power is not simply theoretical and abstract, for delegation does violence, not only to the ideal construct of a free society, but also to the day-to-day practice of democracy itself. Ironically, delegation does not help to secure 'good government'; it helps to destroy it." Congress cannot constitutionally delegate its lawmaking authority to any other body, nor should it want to do so. Congress should accept its responsibility for making law and cease delegating legislation to the bureaucracy. By accepting its constitutional responsibility, Congress will have the effect, as intended, of limiting that bureaucracy.

### *Consider the Constitutionality of Every Proposed Law*

Ours is a government of delegated, enumerated, and thus limited powers. If a power is not granted to Congress in the Constitution, then Congress

lacks the authority to legislate in that area. For too long we have drifted toward the idea that everything from our retirement insurance to our local schools to our marriage law is a proper subject for federal legislation. In the past six years the Supreme Court has commendably begun to strike down laws that exceed the powers granted to Congress in the Constitution. But members of Congress must not leave it to the Supreme Court to decide whether laws are constitutional. Every member of Congress must live up to his or her oath of office by considering the constitutionality of every proposed law. Before voting for any bill, each member of Congress should ask, “Where in the Constitution is the authority to pass this law?” If the authority cannot be found, members of Congress should not vote for the bill. And then, if the president or federal regulatory officials should attempt to legislate on the matter extraconstitutionally, Congress should strike down the executive order or regulation.

If Congress accepts its responsibility in these matters, then the 2000 election crisis will come to be recognized as the beginning of the renaissance of constitutional government in the United States, rather than as one more sign of its decline.

## ***Policy Agenda***

Moving from constitutional themes to specific issues, a close look at the election results suggests that the big winners were smaller government and Social Security privatization. A *Los Angeles Times* poll in September found that Americans preferred “smaller government with fewer services” to “larger government with many services” by a remarkable 59 to 26 percent.

The election-day exit polls asked, “Do you support or oppose a plan in which individuals could invest some of their Social Security taxes in the stock market?” By 57 to 39 percent, those polled said they favored such a plan. The exit poll actually showed lower support for private investment than have other polls, perhaps because it referred to “investing in the stock market,” which sounds risky to many people. Private investment need not involve stocks. People could earn more money than Social Security promises if they invested their retirement taxes in Treasury bonds, corporate bonds, a mixed portfolio of stocks and bonds, or guaranteed insurance products. If the exit poll had offered those safer options, no doubt it would have found even greater support for private investment. Other polls have found up to 70 percent support for full privatization of Social Security.

So there are at least two things more popular with voters than either George W. Bush or Al Gore: smaller government and Social Security privatization. That ought to point the way for the new administration and the new Congress to respond to voter demand.

One might also note a few other issues that fared better at the polls than Bush or Gore. In California and Oregon, initiatives to liberalize our punitive drug laws did better than Al Gore. In Utah, Nevada, and Colorado, drug law reform initiatives did better than George Bush. Six term-limits measures in 12 states received an average of 66 percent support. And voters in nearly a dozen states opted to trim, cap, or reform entirely their taxing and spending systems. Congress should listen to the voters.

### ***Revitalizing Congress***

Some observers will scoff at the notion that Congress will accept our advice to live by the Constitution and put forth a meaningful policy agenda. It's an entrenched, impregnable, and comfortable ruling class, they will say. After the votes were counted in the 2000 election, incumbent House members once again had a 98 percent reelection rate, far above the traditional rate but in keeping with the rate of recent years. For all the bitterness and partisanship, in terms of real change we don't have a Republican Party and a Democratic Party; we have an Incumbent Party. Why should an Incumbent Party with a 98 percent reelection rate want to change anything?

But we have a more hopeful view. We hope that most members of Congress will put the national interest above their personal or partisan interests and act as citizen legislators of a constitutional republic.

If they do, they will realize that, even in a time of relative peace and prosperity, our nation faces some real problems. Since government causes most of those problems, government can help to cure them. We should begin by recognizing that a 98 percent reelection rate for members of Congress is not healthy for republican government. Members of Congress should not be more secure than members of the former Soviet Central Committee or the Mexican parliament. Term limits would ensure rotation in office, a prime element of representative government. Reform of our campaign finance system would also help. We don't need more restrictive regulations; it was the restrictions of 1974 that sent reelection rates soaring and guaranteed that the only successful outsiders in politics would be multimillionaires. Instead, we need to eliminate contribution limits so that at least some challengers could raise enough money to wage serious campaigns. Self-interested politicians would not consider term limits or

liberalized campaign finance rules; citizen legislators dedicated to representative, constitutional government would.

And as we consider opening up our political system, we should take a hard look at the unresponsiveness of the Incumbent Party. The evidence is in: centralized, command-and-control, one-size-fits-all systems don't work. Businesses are becoming more competitive and responsive; all over the world, governments are moving toward markets and the rule of law. But here in the home of markets and the rule of law, the Incumbent Party resists the evidence. We know that our monopoly school system doesn't deliver quality education. We know that our pay-as-you-go Social Security system is robbing American workers of a comfortable retirement and an estate to leave to their children. We know that the war on drugs undermines our liberties without stopping drug use or abuse. We know that our tax system is incomprehensible, inefficient, and oppressive. Yet the Incumbent Party is comfortable with the tyranny of the status quo.

## **Conclusion**

For those who go into government to improve the lives of their fellow citizens, the hardest lesson to accept may be that Congress should often do nothing about a problem—such as education, crime, or the cost of prescription drugs. Doing nothing may seem negative. Critics will object, “Do you want the government to just stand there and do nothing while this problem continues?” Sometimes that is exactly what Congress should do. Remember the ancient wisdom imparted to physicians: First, do no harm. And have confidence that free people, left to their own devices, will address issues of concern to them more effectively outside a political environment.

Members of Congress must recognize, understand, and then defend the limited role of the federal government. To repeat, it isn't just the Supreme Court that is enjoined to enforce the Constitution; the president and members of Congress also take an oath to uphold the Constitution, and they should also take care to see that the government's actions are not just prudent but constitutional. We are all tempted from time to time to demand something of government—limits on speech we find offensive, a subsidy for our business, compensation for a failed investment, or whatever. That's why at the constitutional level we are forbidden to use government in that way. There is no higher duty for members of Congress than to remind us of the constitutional limits on government when we forget them.

### **Suggested Readings**

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