

Complications of American Democracy: Elections Are Not Enough

DEMETRIOS JAMES CARALEY

An elective despotism was not the government we fought for.
— Thomas Jefferson

The American democracy is a very complicated one. The Framers thought that three major features were critical to the working of our democratic institutions: free elections, separation of powers with checks and balances, and government limited by constitutional guarantees, especially those in the Bill of Rights. The aims of this essay are to remind the reader of how those complications were justified by the Framers, to raise implicitly the realization that exporting democracy to other lands is not just a matter of having one set of free elections, and to comment explicitly on whether some traditional characteristics of American democracy have come under serious threat. A pessimistic reading of developments would argue that we are already on the way to government by an elective tyranny of the majority that violates checks and balances and the rights of the minority. The more pessimistic reading is that this tyranny of the majority is even trying to impose the doctrines of religious conservatism on officials and on the public in direct violation of the First Amendment and of the constitutional provision barring religious tests for holding public office. And feeding that pessimism is the absence in 2005 of any major political or public leader with the courage and self-interest, as John F. Kennedy had in 1960, to take on this religious right head-on and say, as Kennedy did during his campaign, “I [do not] look with favor upon those who would work to subvert Article VI of the Constitution by requiring a religious test—even by indirection—for it. If they disagree with that safeguard they should be out openly working to repeal it.”¹

¹ Remarks of Senator John F. Kennedy on church and state delivered to the Greater Houston Ministerial Association, Houston, Texas; www.jfklibrary.org/j091260.htm. I have incorporated virtually the entire speech into an appendix because of its topicality and the forcefulness of its arguments.

DEMETRIOS JAMES CARALEY is Research Professor of Political Science at Barnard College, Professor of International and Public Affairs at Columbia University, and Editor of *Political Science Quarterly*. He has published extensively on different aspects of American politics, national security policy, and democratic political theory.

FUNCTIONS OF ELECTIONS

Elections have always been deemed important. According to the Founding Fathers—who did not claim to be democrats—elections were the main guarantee against oppressive government. In the Declaration of Independence, the Founders argued as a “self-evident” “truth” that governments derived “their just powers from the consent of the governed.” Even before the Revolutionary War, colonists had argued that the lack of opportunity to vote for representatives to Parliament made its laws illegitimate when applied to them. Moreover, the colonists had over a century of experience with elections; they had been voting for at least one house of the normally two-house colonial legislatures and thus had the experience of being voted in and out of office.

In the Constitution of 1787, the Founders provided for the direct election of the members of the House of Representatives by those eligible in each state to vote for the lower house of the state legislature, a large franchise for the time, although it excluded women and people of color. The Founders made members of the Senate appointive by their state legislatures, which contained representatives elected directly by the people. In the clumsy electoral vote system for choosing the president, the Founders did not make the president a popularly elective official.² But they also did not give the appointment of the president to Congress. If they had, the chances of Congress agreeing later to a constitutional amendment to provide for the almost direct election of the president that developed would have been zero.

The Founders deliberately left open for each state to decide how its presidential electors were to be selected. As early as Thomas Jefferson’s election in 1800, the electors did not act as sets of elites who, as the Founders intended, used independent judgment to cast their ballots for the person the electors felt best fit to become president. By 1800, the electors had become slates of party rubber stamps, who promised, if elected, to cast their electoral votes for one or the other party’s informal nominee—John Adams for the Federalists and Thomas Jefferson for the Jeffersonian-Republicans. By Andrew Jackson’s presidency, almost all state legislatures mandated that electors be chosen by essentially universal white, male suffrage.

Today we take the choosing of rulers in elections for granted, but this was not the case in 1787. The most “election-based” government of the time was that of the British. And while Britain had restricted its king to reigning rather than ruling and was governed by a cabinet and Parliament, the right to vote for members of Parliament was extended to only about one-fifth of the adult male population.

The Founders insisted that this was not enough and that it was “essential” that the right to vote be extended to:

² Hamilton had argued with his typical modesty that with respect to “the mode of selection of the Chief Magistrate, . . . I affirm that if the manner of it not be perfect, it is at least excellent.” *The Federalist Papers*, No. 68.

the great body of the society, not . . . an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic.³

The Founders were proud that in the House of Representatives they provided the strongest restraint to would-be oppressive rulers—frequent elections occurring every two years.⁴ As Alexander Hamilton asked in *The Federalist*, No. 35:

Is it not natural that a man who is a candidate for the favor of the people, and who is dependent on the suffrages of his fellow-citizens for the continuation of his public honors, should take care to inform himself of their dispositions and inclinations . . . ? This dependence [creates] strong chords of sympathy between the Representative and the constituent.⁵

The Founders never stated that they were building a “democracy.” To them, a “democracy” meant “direct democracy,” “a society consisting of a small number of citizens who assemble and administer the government in person,” and where there would be “nothing to check the inducements to sacrifice the weaker party or an obnoxious individual.”⁶ The Founders saw democracy, through the reading of Plato and Thucydides, as equivalent to a tyranny of the majority or even mob rule. They feared such a government would expropriate the rights and property of the minority of the better off and oppress unpopular individuals, as, for example, the Athenian democracy had done in executing Socrates.

The Founders preferred what they called a “republic,” because in a republic “the scheme of representation takes place,” and the government is delegated “to a small number of citizens.” This small number would be able “to refine and enlarge the public views” and their wisdom could “best discern the true interest of their country.”⁷ Since it was taken for granted that the legislative bodies would function by majority rule, they had set up the framework for the representative democracy that continues to exist.

There was, however, one built-in constitutional exception to representative majority rule, and that was in the Senate, where senators representing states with great disparities in population were granted equal voting power. Members of the constitutional convention from states with small populations would not accept a constitution that allowed a small number of states with the largest populations to be able to prevail in a single legislative body, as the original Virginia Plan proposed. In 1790, the largest states, Virginia, Pennsylvania, and North

³ *The Federalist Papers*, No. 39 (Madison). Madison had also experienced what he considered tyranny of the majority in the Virginia state government.

⁴ *The Federalist Papers*, No. 37 (Madison).

⁵ *The Federalist Papers*, No. 35 (Hamilton).

⁶ *The Federalist Papers*, No. 10 (Madison).

⁷ *The Federalist Papers*, No. 10 (Madison).

Carolina, had populations of 691,737, 434,373, and 393,751, respectively, while the smallest states, Delaware, Rhode Island, and Georgia had populations of only 59,056, 68,825, and 82,548.⁸ Because the House of Representatives did reflect population, the granting of equal voting power in the Senate was “the price of union.”⁹ This disparity still exists today, where two senators each represent the populous states of California, Texas, and New York, with populations of 35,893,799, 22,490,022, and 19,227,088, and two senators each represent the least populous states, Wyoming, Vermont, and North Dakota, with populations of only 506,529, 621,394, and 634,366.¹⁰ As the price of union, the equal voting provision for the Senate was so important that the Constitution provides that it cannot even be changed by constitutional amendment unless the states being affected adversely each consent to it.¹¹ The electoral vote system for electing the president, which grants electoral votes to states equal to their number of representatives in the House plus their two senators, also dampens the majority rule principle, since the vote of voters from the small states counts somewhat more than that of voters from the larger states.

Do Elections Serve Any Purpose?

Because our top officials are chosen in free elections—because, as in the literal translation of democracy from the Greek, the *demos* or “people” *kratein* or “hold power”—what we have in our national government certainly is a democracy. But it is a democracy of a special kind and most emphatically not a direct, majority-rule democracy. The chief role of voters in federal elections is not to decide policy in a kind of continuing referendum, but to elect officials who make policy. And the top official elected—the president—may be chosen as the result of his party affiliation and personality characteristics, such as his likability and warmth relative to his opponent’s, rather than on the basis of his policy stances and, indeed, even despite policy stances that the voters dislike.

By choosing a president, voters also do have a major, albeit unpredictable, impact on policy. Given the president’s Article II powers of appointment,¹² the election of one candidate instead of the other means the appointment of one rather than another set of high-level presidential appointees (some needing but almost always receiving senatorial confirmation): departmental cabinet and subcabinet heads; White House staff members, including a chief of staff and the national security adviser; a council of economic advisers; ambassadors; federal reserve board members and the chairman; and especially District Court, Court

⁸ Bureau of the Census, Table 16, *Population: 1790 to 1990*, United States Summary: Population and Housing Counts, 1993.

⁹ See Herbert Agar, *The Price of Union* (Boston: Houghton-Mifflin, 1966).

¹⁰ Bureau of the Census, *United States, Regions, States and Puerto Rico Population Estimates and Population Change*, Press Release, 22 December 2004.

¹¹ U.S. Const. art. I, sec. 3.

¹² U.S. Const. art. II, sec. 2.

of Appeals, and Supreme Court judges with lifetime terms. The substantial discretion that top executive branch officials and members of the judiciary have in making executive and judicial decisions allows changes in policy even without the president and voting majorities in Congress acting through legislation.

Elections, finally, do serve another important policy function, even though it is neither much discussed nor much appreciated. Some policy departures are not made or even attempted because of the anticipated reaction of the voters in the next election. If there were no elections, even imperfectly conducted as they are, the preferences of the citizenry could be largely disregarded because the public would lose its chief sanction. As A. D. Lindsay once put it, the voters know if the “shoes pinch” and if they didn’t have the power to remove those who make bad shoes, the incumbent shoemakers could stay in power forever with the claim that the shoes pinch not because the shoes were badly made but because the voters have crooked feet.¹³

Today, as a result of constitutional provisions and the 15th, 17th, 19th, and 26th Amendments, plus the Voting Rights Act of 1965, presidential electors, senators, and representatives are directly chosen by the people in all states and the suffrage for all offices has essentially been extended to every citizen over the age of eighteen, regardless of race or gender. There is, however, the antidemocratic proviso in the election of the president that formally persists: After the 2000 presidential election, the electoral vote majority hinged on how the popular vote would come out after recounts in Florida. The Supreme Court took jurisdiction in the case of *Bush v. Gore*,¹⁴ and stopped the recounts. The Court reminded us that there is no constitutional right for voters to choose electors, and under provisions of Article II, the state legislatures are empowered to decide whether the electors can be chosen by methods other than the voters, including by the legislatures themselves.¹⁵ According to the majority of the Court, this means of appointment could be mandated even after the popular vote has taken place,¹⁶ so that in the leading democracy of the world, its citizens still do not have a constitutional right to vote directly or even indirectly for its president.¹⁷ As the Supreme Court majority opinion in *Bush v. Gore* reminded us:

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. . . . When the state legislature vests the right to vote for the President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting

¹³ A. D. Lindsay, *The Modern Democratic State* (New York: Oxford University Press, 1962).

¹⁴ *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁵ U.S. Const. art. II, sec. 1.

¹⁶ *Bush v. Gore*.

¹⁷ Demetrios James Caraley, “Why Americans Need a Constitutional Right to Vote for Presidential Electors,” *Political Science Quarterly*, 116 (Spring 2001): 1–3.

the franchise in the special context of Article II, can take back the power to appoint electors.¹⁸

SEPARATION OF POWERS AND CHECKS AND BALANCES

Elections were not the only features that were built into American representative democracy by the Founders. The Founding Fathers saw elections as essential protection against oppressive rulers and, at the extreme, against tyranny, but not as sufficient protection. Jefferson wrote in his “Notes on the State of Virginia” that if “all the powers of government, legislative, executive, and judiciary” were given to the legislative body, which Jefferson assumed would be elective:

it will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. . . . An elective despotism was not the government we fought for.¹⁹

The Founders felt the same way about an all-powerful chief executive, who they feared would be the equivalent of an elective king.

To prevent this kind of “elective despotism” or “tyranny,” they resorted to “auxiliary precautions.” In the new national government, they separated constitutionally—as a matter of supreme constitutional law not subject to change by ordinary legislation passed by congressional majorities and signed by the president—they separated governmental powers among the executive, the legislative, and the judiciary. This way they gave “to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” As Madison phrased it:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people [that is, elections] is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.²⁰

The Founders were particularly specific about separating the power to declare war from the power to conduct a war as commander in chief. Alexander

¹⁸ *Bush v. Gore*.

¹⁹ Quoted in *The Federalist Papers, No. 51* (Madison).

²⁰ *The Federalist Papers, No. 51* (Madison).

Hamilton explained in *The Federalist, No. 69*, the clear distinction between the presidential position of commander in chief and the congressional power to declare war:

The President is to be commander-in-chief of the army and navy of the United States. . . . In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *DECLARING* of war and to the *RAISING* and *REGULATING* of fleets and armies, all [of] which, by the Constitution under consideration, would appertain to the legislature.²¹

The Framers thus specifically insisted that the president as commander in chief, a single person, would not possess the power to make war, because that was akin to the monarchical power of a king, and that was not the form of government for which they had fought.

CONSTITUTIONALLY LIMITED GOVERNMENT AND JUDICIAL REVIEW

Over and above trying to protect the people against oppression and tyranny by means of elections and separation of powers, the Founders also bequeathed to us a government that as a whole was constitutionally limited. Certain kinds of individual activity and belief and certain procedures in criminal trials, the Founders believed, were so important that they had to be protected even against voting majorities working through elections and with the support of a particular president and majorities in a particular Congress.

The Constitution written by the Founders contained, as Hamilton put it, “certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like.”²² The Founders also mandated in the Constitution, under the powers of Congress, that “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it.”²³ Further limitations were to be those protective of civil liberties and procedural due process in criminal trials that everyone agreed would be added to the Constitution as soon as the first Congress met and had the opportunity to propose the necessary amendments, and the states had the opportunity to ratify them. These protections now constitute the Bill of Rights.

But these limitations could be preserved, according to the Founders, “no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this all the reservations of particular rights or privileges would amount to

²¹ *The Federalist Papers, No. 69* (Hamilton).

²² *The Federalist Papers, No. 78* (Hamilton).

²³ U.S. Const. art. I, sec. 9.

nothing.”²⁴ Justice Robert Jackson, speaking for the Supreme Court when it declared unconstitutional in 1943, in the middle of World War II, the requiring of schoolchildren to say the Pledge of Allegiance and salute the flag every morning, probably put it best:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . .

If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, in nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances that permit an exception, they do not now occur to us.²⁵

Constitutional safeguards of free speech, free press, freedom of assembly, and freedom of religion for those who become at odds with majority thinking, and also constitutional procedural due process in criminal trials for individuals accused of crimes, have historically been perceived as not being in the interests of liberals only, or of conservatives only, but in the interests of all. This is because no one can know in advance when he or she will be in the minority in terms of party or ideological viewpoint or be unjustly accused of a crime and, therefore, will need constitutional protections to escape oppression of the weak and innocent by the strong.

But equally important, these constitutional limits on majorities are also essential for maintaining our political system as a democratic government. Constitutional limitations, beyond the reach of majorities to change, ensure that losers in a particular election will be allowed to survive as the “outs.” Not only will the losers be allowed just to survive, they will also not be arrested or imprisoned, and they will be allowed to compete for office unhindered by the majority-supported “ins,” whom they will be trying to displace in the next election.

The Constitution makes no provision for political parties. According to nineteenth-century journalist Henry Jones Ford, it was the “great unconscious achievement” of Jefferson to take advantage of these “open constitutional channels of political agitation,” and create a party as early as 1796.²⁶ Jefferson and his allies thus channeled and organized the forces of discontent against the Washington-Adams Federalists through elections, so that by the election of 1800, change “became possible without destruction.”²⁷

An even more crucial element in preserving democracy was the noninterference with Jefferson’s election campaign by the Federalists and the acquies-

²⁴ *The Federalist Papers*, No. 78 (Hamilton).

²⁵ *West Virginia Board of Education v. Barnett*, 319 U.S. 624 (1943).

²⁶ Henry Jones Ford, *The Rise and Growth of American Politics* (New York: Macmillan, 1898), 126.

²⁷ *Ibid.*

cent, peaceful, and voluntary leaving of presidential power by John Adams after Jefferson won the 1800 election. This voluntary relinquishing of the presidency and control of Congress in 1801 by the Federalists to the victorious Jeffersonian-Republicans established the precedent that fundamental change in personnel and policies could be accomplished by free elections protected by constitutional guarantees without the violence of a war, revolution, or coup d'état.

In only one American election, that of 1860, did the losers refuse to accept the election returns peacefully and chose instead to resist them by the use of force. The result was the Civil War and the greatest loss of life of any war in which the United States has participated.

Constitutional limits obviously put a damper on the ability of a newly elected majority to enact its programs if they contain infringements of civil liberties and procedural due process as most recently defined by the Supreme Court by justices with lifetime tenure. This doesn't mean that majorities can be frustrated forever and that here is, finally, the fatal dilemma in our democracy. It does mean that to prevail, those majorities need to be extraordinarily large—two-thirds majorities in the House and Senate to propose constitutional amendments—and must be sustained long enough to secure separate ratification by additional majorities in three-fourths of the states. The Founding Fathers saw the conundrum; Hamilton wrote that he trusted that:

the friends of the Constitution [will never question] that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness. [But] until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding.²⁸

Had Hamilton lived long enough, he would also have explained that sustained majorities that continuously elect presidents with their overall constitutional point of view can count on those presidents appointing enough new justices to the Supreme Court to redefine the views of the Court on the constitutionality of some burning issues, and even sitting justices have been known to change their positions when very much out of sync with the policy positions of the electorate. The voters who oppose constitutional freedom of choice to have an abortion, oppose gay marriage, oppose due process in criminal trials that is highly protective of accused criminals, and who want schoolchildren to be required to recite the Pledge of Allegiance and participate in school prayers have not yet been numerous enough or present long enough to impose their definition of what is constitutionally permissible on the remainder of the population.

The Founding Fathers gladly sacrificed government that could provide speedy, effective, cohesive, and internally consistent policies. They opted for one that had a maximum number of veto points and checks and balances and

²⁸ *The Federalist Papers*, No. 78 (Hamilton).

protections against tyranny by particular officials or tyranny by selfish majorities. These veto points and checks and balances have also prevented radical changes in policy from administration to administration and have kept voters and public opinion from becoming polarized at opposite ends of the policy and ideological spectrum.

WHAT IN THE EQUILIBRIUM IS BEING THREATENED?

The preceding discussion argues that the American democracy is certainly a democracy by virtue of the citizenry electing their rulers in free elections and the citizenry having some influence on policy, albeit indirectly and mostly retrospectively. It is also a constitutional democracy, in that there are limits to what the government has the right to do in restricting civil liberties or abridging constitutional due process guarantees in criminal trials. But, especially in the last decade, a number of these tenets protecting our constitutionally limited, elected democracy have become threatened.

The Perceived Legitimacy of Presidential Elections

The Electoral Vote System of Choosing. The perceived legitimacy of the formal means for choosing the president has eroded since the 2000 presidential election. Although it did not happen in the entire twentieth century, in the 2000 election, George W. Bush became the president despite having had 539,947 fewer popular votes than Albert Gore.²⁹ Then in the 2004 election, if 59,229 Ohio voters had voted for John Kerry rather than George W. Bush,³⁰ Kerry would have been elected president despite an approximately 3 million vote deficit recorded by the popular vote. If these close elections continue in the future, and especially if candidates winning only a minority of the voters are elected president due to the electoral vote system, the sense of democratic legitimacy surrounding the presidential electoral system will begin to dissipate. It has also, for example, allowed Russian President Vladimir Putin, when criticized about his regime not being sufficiently democratic, to point out that different nations have different democratic systems, and that in Russia, a candidate not having the most votes could not be elected president. Changing the electoral vote system would, however, require a constitutional amendment, something that senators from the least populous states would almost certainly block.

Winner-Take-All. The legitimacy of presidential elections is also being strained by the state-imposed rule, in all but two of the states, that the winner of the popular vote in a state receives all of the electoral votes allocated to that

²⁹ David Stout, "The 43rd President: The Final Tally," *New York Times*, 30 December 2000.

³⁰ Albert Salvato, "Ohio Recount Gives a Smaller Margin to Bush," *New York Times*, 29 December 2004.

state regardless of the margin of victory. The winner-take-all system was from the beginning intended to be anti-democratic by disenfranchising party minorities in a state. It was originated in 1800 by Thomas Jefferson to ensure that all of the electoral votes from Virginia went to Jefferson and none to Adams, because Jefferson knew the electoral vote contest would be close. Once news of Jefferson's move reached Adams's home state of Massachusetts, the legislature there too instituted a winner-take-all rule so as to equally ensure that no electoral votes from Massachusetts would go to Jefferson. The winner-take-all system and polarization between the "red" and "blue" states now results in the de facto disenfranchisement of minority party-inclined voters in non-battleground states. Presidential candidates have directed their appeals to the interests of only a dozen or so battleground states that early polls predict may go in either direction, even though those states are not representative of the nation as a whole. Thus, the candidates ignore the rest of the country, both in the "ground war" and in the "air war." This is because it is of no consequence to a candidate if he/she wins the non-battleground states by 55 percent or 75 percent or loses by 10 percent or 25 percent. It would not require a constitutional amendment to eliminate the winner-take-all proviso and allot electoral votes proportionately to reflect the division of the popular vote. If this were done, the presidential candidates would have to campaign in almost all states and every voter would feel his vote counted.

The Buying of Presidential Elections. The absolutely colossal amount of spending for presidential nominating and general election campaigns gives a feeling of corruption to the entire process. In the 2003–2004 election cycle, George W. Bush raised \$260.6 million for his presidential reelection campaign, and his opponent, John Kerry, raised a total of \$233.4 million,³¹ which clearly demonstrates the astronomical sums of money that come into play in U.S. elections at this point. Congress, in a bipartisan move after long study, did seriously limit spending by individuals and campaigns in 1971 with the Federal Election Campaign Act. But in 1976, in *Buckley v. Valeo*,³² the Supreme Court ruled with a variety of opinions and rationales that a central part of that measure was unconstitutional. All the justices essentially equated the nonverbal spending of millions or hundreds of millions of dollars to a citizen's First Amendment rights to free speech and free association. When the Framers crafted the Bill of Rights, free speech consisted of actual speaking with a voice that had only lung power to reach an immediate audience; could they come back and speak, it is very doubtful that these realistic politicians would equate freedom of speech with the use of money to buy professionally crafted commercials that can reach hundreds of millions at a time. Indeed, without the spending limitations, the

³¹ FEC Candidate Summary Reports, Presented by the Federal Elections Commission 2003–2004 Cycle, accessed at http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_04+P80000235 and http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_04+P800003335, 14 April 2005.

³² *Buckley v. Valeo*, 424 U.S. 1 (1976).

value of an average individual's free speech is actually diminished, because it will go nowhere unless the person is a celebrity or has millions of dollars with which to buy and run a television ad. Also, while having now a new Supreme Court membership that might uphold a limit on individual spending, we also have a president and Congress that were elected with even more massive spending than the politicians of the 1970s and, therefore, it is unlikely that they will think that the rules, which allowed for their successful election, should be changed.

Incomplete Media Coverage. A further threatening development in American presidential campaigns is the manner in which the current television, radio, and print media frequently provide incomplete, inaccurate, and differential coverage of facts and analyses to inform the voters in election campaigns. Voters rely on the media to provide them with the accurate information necessary to make informed judgments in elections. It is clear that voters receive a different set of facts on some major events and policy decisions depending on the source from which they get their political news. A report published by the Program on International Policy Attitudes (PIPA) in October 2004 shows the public's differential perception of the facts used to justify going to war in Iraq—a major issue in 2004:

Views about the decision to go to war are highly correlated with beliefs about pre-war Iraq. Among those who say that going to war was the right decision, 73% believe that Iraq had WMD (47%) or a major program for developing them (26%), and 75% believe that Iraq was providing substantial support to al Qaeda. Among those who say it was the wrong decision, only 29% believe that Iraq had WMD (10%) or a major program for developing them (19%), and 33% believe that Iraq was providing substantial support to al Qaeda.³³

This report links a person's choice to support a policy decision to their understanding or misunderstanding of the facts. In a previous analysis, PIPA discovered a widespread correlation between a person's misperceptions and their chosen media outlet. FOX viewers held the highest percentage of misperceptions, while PBS/NPR viewer/listeners maintained the fewest misperceptions regarding issues such as the presence of weapons of mass destruction in Iraq and a link between Saddam Hussein and al Qaeda.³⁴ A voter's misperceptions, strongly connected to their media provider, affect the policy decisions they are willing to support, such as the war in Iraq, and thus their willingness to vote or not vote for the candidate responsible for those policy decisions. If a presidential administration chooses to manipulate public opinion and if the media out-

³³ Excerpted from a report distributed by PIPA (Program on International Policy Attitudes), School of Public Affairs, University of Maryland, entitled "What's New: Three in Four Say If Iraq Did Not Have WMD or Support al Qaeda, US Should Not Have Gone to War," 28 October 2004.

³⁴ See Steven Kull, Clay Ramsay, and Evan Lewis, "Misperceptions, the Media, and the Iraq War," *Political Science Quarterly* 118 (Winter 2003–2004): 569–598.

lets serve as cheerleaders for a particular agenda or administration rather than as critical filters and analysts, the efficacy and legitimacy of elections come into doubt. American democracy relies on the transparency and integrity of elected government officials and critical media concerned with informing the public, especially in presenting facts and analyses about complex events that the voters cannot see or access directly for themselves. Without these two factors in place, elections cannot serve their original purpose of holding rulers accountable by knowledgeably rewarding or punishing for successes or failures in broad policy areas.

Congressional Abdication of War Powers

Congressional majorities have shown themselves to be largely indifferent to their constitutional prerogatives in war making, most egregiously when they granted President George W. Bush the discretionary authority to initiate and conduct the 2003 war in Iraq. But Congress also implicitly acquiesced to the trespassing on their authority when President Bill Clinton used military force during the conflicts in Bosnia and Kosovo.

In *The Federalist, No. 51*, Madison states that he expected “the private interest of every individual may be a sentinel over the public rights,”³⁵ and thus the interest of each member of Congress would protect the citizens of the nation from any rush to war or improper executive use of power. The Framers presumed that Congress’s desire for sharing power or their ambition to protect their constitutional duties by having the final say in major decisions involving the life and death of American military forces would cause Congress to prevent the executive branch from usurping their prerogatives.

The case made to Congress by the Bush administration for a resolution authorizing the use of force in Iraq has now been shown to have been based on an incorrect or misleading reading of intelligence reports that Iraq had weapons of mass destruction that could be given to terrorists to be used against the United States, that Saddam Hussein was connected with the September 11 attack on the United States, and that the Iraqis so hated their government that they would immediately welcome American forces as liberators. Majorities in both the House and Senate transferred to the president the power to decide both whether and when the United States would go to war in Iraq through a broadly worded joint resolution that authorized him “to use the U.S. military as he deems necessary and appropriate to defend U.S. national security against Iraq and enforce U.N. Security Council resolutions regarding Iraq.”³⁶ Not only did Congress abdicate its constitutional duties in the Iraq Resolution, but it did so in haste, without sufficient debate and deliberation, and against strong arguments to refrain because the case against Iraq had not been proven. The haste

³⁵ *The Federalist Papers, No. 51* (Madison).

³⁶ House Joint Resolution 114, Use of Force, 11 October 2002.

was the result of the President arguing that the danger from Saddam Hussein was increasing daily and of even the Democratic congressional leadership wanting to get the Iraq vote “out of the way” before the 2002 midterm elections, because they thought they would profit by having economic issues as the central agenda. It would have been inconceivable to our Framers that congressional leaders would have abdicated their constitutional powers to decide on war. The Founders were all ambitious politicians, jealously guarding their constitutional prerogatives, and they expected their successors to be likewise.

Not all members of Congress were willing to roll over. Senator Robert C. Byrd of West Virginia, the Senate’s constitutional expert, challenged both the wisdom and constitutionality of the resolution. In an op-ed piece for *The New York Times*, Senator Byrd declared:

We may not always be able to avoid war, particularly if it is thrust upon us, but Congress must not attempt to give away the authority to determine when war is to be declared. We must not allow any president to unleash the dogs of war at his own discretion and for an unlimited period of time.³⁷

Nevertheless, majorities in Congress, including Democratic ones in the Senate, did not heed the warnings. Both Senator John Kerry and Senator John Edwards—the Democratic ticket in 2004—voted for the resolution and later turned against the war, claiming that they were not given accurate information and intelligence reports. But other prominent Democratic Senators Edward Kennedy, Patrick Leahy, Paul Wellstone, Carl Levin, Barbara Boxer, Bob Graham, the Republican, Lincoln Chafee, and the sole Independent in the Senate, James Jeffords, felt they had enough information to justify their responsibly voting “no.”

By launching a war without really convincing majorities in Congress of the case’s merits, the President violated at least the spirit of the Constitution. But he also lost the opportunity to engage in an intellectual give-and-take with officials who were separately elected and therefore not beholden to him, from whom he could gain fresh perspectives to balance those generated and debated by his subordinates in the secret recesses of the Office of the Secretary of Defense, The National Security Council, the CIA, and the State Department. It was this failure of past presidents to consult more broadly and to rely instead on executive branch groupthink that played a large part in the 1961 Bay of Pigs fiasco and in the disastrous decisions, starting in 1964, to expand the war in Vietnam.³⁸ It appears that it was this kind of groupthink that prevented intelligence officers who had a different take on the danger of Iraq from getting their views to the top decision makers in the executive branch and in Congress.³⁹

³⁷ Robert C. Byrd, “Congress Must Resist the Rush to War,” *New York Times*, 10 October 2002.

³⁸ Irving Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes* (Boston: Houghton Mifflin, 1983).

³⁹ National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report: The Final Report of the National Commission on Terrorist Attacks upon the United States* (New York: Norton, 2004).

If the manner in which the United States went to war against Iraq in 2003 becomes accepted as a legitimate precedent, we run this risk: Any president, in what may be a perpetual “war on terrorism,” can find misleading and allegedly very confidential intelligence with which to scare Congress into giving him authority to use the military (or even worse, do so on his own, with the claim that it is within his inherent power as commander in chief) to forestall attacks from some alleged terrorist group or rogue nation.⁴⁰ Because the United States has an all-volunteer military force, there will be no objections from people concerned about themselves or their children being drafted to serve in the war. Also, funding a war entirely by issuance of debt, instead of by raising taxes to produce the necessary revenues, results in the broad general public not feeling any kind of monetary pinch. The Framers would probably have called this kind of institutional process for waging war an “elective despotism.”

Threats to Due Process Guarantees

Another weakening of our traditional constitutional democracy is the direct outcome of some of the broad power given to the executive branch after the September 11 terrorist attacks through the USA Patriot Act and a general deferring to the president, the military, FBI, CIA, and attorney general during wartime. The ability of the government to monitor phone and email communications of anyone at any time and to incarcerate even American citizens on American soil by designating them as enemy combatants is a shift from what has in the past been acceptable in American constitutional democracy. Clearly some of this authority is necessary in order to detect terrorists in the United States, thwart their plans to launch other terrorist attacks, and incapacitate those who might engage in terrorist actions. But holding American citizens indefinitely, without having filed charges against them, without their being given access to a lawyer, and without their being able to apply for a writ of habeas corpus is a major departure from the protections of the Bill of Rights.

In the first case on this issue to come before the Supreme Court, *Hamdi v. Rumsfeld*,⁴¹ the Supreme Court ruled on 28 June 2004 that detainees (in this case the actual detainee was an American citizen being held in a military installation within the United States after being picked up on the battlefield in Afghanistan in the war against the Taliban) had to at least be given the right to challenge the facts on the basis of which they were designated enemy combat-

⁴⁰ When in the House of Representatives Abraham Lincoln argued during “preventive” war with Mexico: “Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion . . . and you allow him to make war at pleasure. . . . If today he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You may say to him, ‘I see no probability of the British invading us’; but he will say to you, ‘Be silent: I see it, if you don’t.’” Arthur Schlesinger, Jr., “Eyeless in Iraq,” *New York Review of Books*, 23 October 2003, 24.

⁴¹ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

ants before an impartial hearing officer.⁴² During that hearing, the detainees would not be entitled to all the regular due process guarantees for criminal trials. What turned out to be the majority opinion had the support of only four justices: Chief Justice William H. Rehnquist, Justice Sandra Day O'Connor, Justice Anthony M. Kennedy, and Justice Stephen G. Breyer; in that opinion, written by Justice O'Connor, she spoke in broad protective language about rights for detainees:

It would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. . . .

We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens.

But Justice O'Connor further observed that:

We do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action.⁴³

The detainee in question, Yaser Hamdi, had already been detained for more than two years before the case was decided.⁴⁴

Justice David Hackett Souter and Justice Ruth Bader Ginsburg joined in the majority judgment in order to have six votes for a ruling that Hamdi had to be given a hearing, but dissented in part with the majority opinion because it did not stipulate additional protections they thought were owed to the detainees.⁴⁵

Justice Antonin Scalia and Justice John Paul Stevens dissented because they believed the government either needed to charge an American citizen with a crime and prosecute him or needed to release him. Justice Scalia warned:

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to

⁴² The issue of non-citizens incarcerated at Guantanamo Bay was not raised in this case.

⁴³ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650, (2004).

⁴⁴ Yaser Hamdi was finally released from U.S. custody in October of 2004 after nearly three years of detention. He was never charged with a crime.

⁴⁵ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2660, (2004). Justices Souter and Ginsburg wrote in their own separate opinion that “Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of eight members of the Court rejecting the Government’s position calls for me to join with the plurality in ordering remand on terms closest to those I would impose.”

meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.⁴⁶

Only a single justice, Clarence Thomas, dissented from the judgment and all the other opinions, arguing that the president, under his constitutional powers as commander in chief, has the right to designate any citizen as an enemy combatant and detain him without hearings or habeas corpus.

If another massive terrorist attack should come again from within the United States and perhaps involve chemical or biological weapons, it will be very difficult to prevent the wholesale detention of persons who have the same ethnic and religious affiliations as those associated with the September 11 terrorists.

Intrusion into Personal Behavior and Religious Beliefs

The attempt to use government to interfere with what has been seen as behavior within a citizen's right of privacy and to impose the religious beliefs of a minority of the electorate who are fundamentalist Protestants and conservative Catholics is an extremely disturbing evolution in American politics. This minority wishes to impose their stance on issues of private behavior and scientific research, such as birth control, when life begins, stem cell research, decriminalizing homosexuality, gay marriage/civil unions, the right to die, comprehensive sex education, the distribution of condoms to countries severely afflicted with AIDS, and the teaching of evolution versus Genesis⁴⁷ in public schools.

Many, primarily Republican, politicians placate this vocal minority of Protestant Evangelicals and conservative Roman Catholics because they consider the first a bedrock of their support and the second a way to garner the votes of a group that has traditionally voted Democratic.⁴⁸ This minority has also successfully demonized an ineptly led Democratic Party into being seen as a party for limitless abortion, gay marriage, the harvesting of stem cells from live fetuses, and other extreme positions that most Democrats do not, in fact, agree with, including the most recent Democratic president, Bill Clinton, and the Democratic nominees for president in 2000 and 2004, Al Gore and John Kerry.

A great many of the early American settlers emigrated from their various homelands in Europe in order to escape the frequent religious wars and killings between Catholics and Protestants, and even among different Protestant churches, and the persecution in trials for heresy or treason of those who did not share the beliefs of their religious and governmental leaders. The Founding

⁴⁶ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2674, (2004).

⁴⁷ President Bush still claims that the "jury is still out" on evolution. See Paul Krugman, "An Academic Question," *New York Times*, 5 April 2005.

⁴⁸ In the 2004 election, 52 percent of Catholics voted for President Bush and 47 percent voted for Senator Kerry. See James E. Campbell, "Why Bush Won the Presidential Election of 2004: Incumbency, Ideology, Terrorism, and Turnout," *Political Science Quarterly* 120 (Summer 2005): 219–241.

Fathers desired to create a government and society in which a person's religious beliefs would not affect politics or their standing in the political system. That is why they inserted into the Constitution the provision that "No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States"⁴⁹ and a bar from making any "law respecting an establishment of religion or prohibiting the free exercise thereof."⁵⁰

While the United States opposes theocracy abroad in Iraq and seeks the overthrow of the Mullahs in Iran, the Republican Party has embraced the ideology of the religious right to a frightening extent at home. In an op-ed for *The New York Times*, former Republican senator and ordained Episcopal priest John Danforth criticized the Republican Party as "a party that has gone so far in adopting a sectarian agenda that it has become the political extension of a religious movement."⁵¹ The congressional role in the Terri Schiavo case further demonstrates the extremes to which pleasing the religious right can drive the congressional leadership and even President Bush. In a congressional session called at night, Congress passed legislation to give jurisdiction to the federal courts of a case that had gone through the entire Florida court system and had been denied certiorari by the Supreme Court, and which allowed the withdrawal of a feeding tube from a forty-one-year-old woman who had been declared by her doctors to be in a persistent vegetative state for the previous seventeen years. In another extreme move, President Bush interrupted his Texas vacation (where he could have signed the legislation anyway) and flew to Washington to sign it in a media moment. The Federal District Court in Florida refused to consider the case anew, as did the Federal Court of Appeals by a 10–2 decision. Only one judge, Judge Stanley F. Birch, Jr., in the appeals court, was brave enough to issue an opinion that stated how wrong this procedure had been. He wrote that the legislation was:

Demonstrably at odds with our Founding Fathers' blueprint for the governance of a free people. . . . Legislative dictation of how a federal court should exercise its judicial functions invades the province of the judiciary and violates the separation of powers principle.⁵²

These warnings were from a self-proclaimed conservative judge who had been appointed by former President George H. W. Bush.

It has come to a point where Democrats are chastised for not discussing their faith more openly and frequently with the public and attacked for purportedly opposing some conservative nominees for the federal courts because they are "against people of faith."⁵³ What we should abide by is the American tradi-

⁴⁹ U.S. Const. art. VI.

⁵⁰ U.S. Const. amend. I.

⁵¹ John C. Danforth, "In the Name of Politics," *New York Times*, 30 March 2005.

⁵² Abby Goodnough and William Yardley, "Federal Judge Condemns Intervention in Schiavo Case," *The New York Times*, 31 March 2005.

⁵³ David D. Kirkpatrick, "Frist Set to Use Religious Stage on Judicial Issue," *The New York Times*, 15 April 2005.

tion as it was expressed by John F. Kennedy in the presidential campaign of 1960 that would make him the first Catholic elected to the presidency:

I believe in an America that is officially neither Catholic, Protestant nor Jewish, where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source—*where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials*, and where religious liberty is so indivisible that an act against one church is treated as an act against all. . . .

I do not speak for my church on public matters and the church does not speak for me. Whatever issue may come before me as President, if I should be elected—on birth control, divorce, censorship, gambling, or any other subject—I will make my decision in accordance with these views, in accordance with what my conscience tells me to be in the national interest, and without regard to outside religious pressure or dictate. And no power or threat of punishment could cause me to decide otherwise. . . .

Neither do I look with favor upon those who would work to subvert Article VI of the Constitution by requiring a religious test—even by indirection—for it. *If they disagree with that safeguard they should be out openly working to repeal it.*⁵⁴

If the Catholic clergy had been threatening in 1960 to refuse communion to those Catholic officeholders who voted against the Church's preaching on a range of issues, Kennedy would never have been elected, because too many would have doubted that he could put Catholic doctrine aside when making presidential decisions. As it was, he won by only 110,000 votes, because many fundamentalist Protestants were still afraid that, if elected, Kennedy would do the Pope's bidding.⁵⁵

Polarization and the Tyranny of the Majority

Politics in Washington has taken on a particularly nasty air in recent years. There has been a departure from the political parties of the past, which contained significant overlap in policy positions. Civility between elected officials on opposing sides of the aisle has diminished as politicians have come to see their fellow elected officials of the opposing party almost as enemies to be destroyed rather than colleagues to be won over and, if not, then just as opponents to be defeated. And it must be said that the personalities of Bill Clinton and George W. Bush have had an unparalleled capacity to generate strong animosity from party activists and even voters who had opposed their candidacies.

The years since 2002 have resulted in significant changes in the manner in which Congress operates in the House of Representatives, with the majority monopolizing power traditionally shared with the minority party. In the House, legislation traditionally emerged from committee and carried a rule from the

⁵⁴ At www.jfklibrary.org/j091260.htm.

⁵⁵ White, *The Making of the President*.

Rules Committee to permit a certain amount of time for debate to be shared between the parties and provided for the offering of amendments from the floor. This process, by which both parties were permitted input into legislation, has been altered. The Republican majority in the House during the 108th and 109th Congresses has not allowed the Democrats in the minority the opportunity to offer debate or amendments to important Republican-crafted legislation that the majority leadership decides it does not want to be changed in any way. The House Democrats are reduced to simply registering a “no” vote to Republican legislation on final passage. This tyranny of the majority in the House has led to the disempowerment of the minority House members, who represent approximately 47 percent of the seats in the House.

The Republican majority leadership in the House has gone even to the extreme of stating that they will not bring up for debate legislation that has not been approved by the majority of their party’s representatives. The result is that a small section of the Republican party can block any legislation they don’t like unless amended to their point of view. In late November of 2004, the Bush administration and both parties in the Senate were supporting the new Intelligence Bill recommended by the 9/11 Commission to create an overall Director of National Intelligence, and it passed the Senate by a bipartisan vote of 96 to 2. After the elections, the bill came to the House, where it faced opposition by some conservative Republicans who argued the bill would take away too much control over intelligence from the Defense Department. There were clearly enough votes from the Democrats and a minority of Republicans to pass the bill on the House floor, but Speaker Dennis Hastert refused to allow it to come up. As his spokesman put it, “Mr. Hastert did not want to split his caucus, and did not want the bill to pass with less than a majority of the majority. What good is it to pass something where most of our members don’t like it?”⁵⁶ After a month of negotiations and the direct involvement of President Bush and Vice President Dick Cheney, several provisions were added, mostly to ensure that the power of the Secretary of Defense over the defense budget for intelligence was still completely intact.⁵⁷ But the logic of Speaker Hastert can be seen as instituting a “tyranny of the majority of a majority,” which really means a tyranny of a minority of the entire House, which the Framers certainly would have found even more disturbing than the “tyranny of the majority” to which they were so strongly opposed.

Historically, the Senate has been known for its sense of comity, bolstered by its tradition of allowing every senator the opportunity to speak without limit in support of or in opposition to a presidential nomination or a piece of legislation. Even as this is being written (in June of 2005), there is a threat by the

⁵⁶ Sheryl Gay Stolberg, “Republican Defiance on Intelligence Bill Is Surprising. Or Is It?” *New York Times*, 22 November 2004.

⁵⁷ Philip Shenon, “Senate Approves Intelligence Bill and Sends It to President,” *The New York Times*, 9 December 2004; and Philip Shenon, “House Approves Broad Overhaul of Intelligence,” *New York Times*, 8 December 2004.

Senate majority leader to use an unprecedented parliamentary maneuver to prevent use of the filibuster to block certain judicial nominees whom the Democrats deem unacceptable by a simple majority of fifty votes plus the Vice President's tie-breaking vote as presiding officer of the Senate. A filibuster means that, under the current rules of the Senate, a minority can try to block a nomination or a piece of legislation by extended debate unless there is a minimum of sixty Senators prepared to vote for cloture and end the debate.⁵⁸

A formal or de facto rules change that would allow cloture by simple majority vote, especially on presidential nominations, where the Senate has a constitutional obligation to give advice and to give or withhold consent, would very likely be extended to apply to all voting in the Senate and make that body susceptible to a tyranny of a simple majority. In addition, because of every state having two senators regardless of population, the majority of Republican senators that might change the Senate rules in fact represent fewer people—144,765,157 to 148,026,027—than the population represented by the Democrats plus the Independent Jeffords.⁵⁹

During the Clinton administration, Republicans blocked many of President Clinton's judicial nominees,⁶⁰ but because the Republicans were in the majority in the Senate, they did not need to filibuster. The majority in the Judiciary Committee simply refused to report the nominations out. The filibuster has been present in the Senate since 1806, and enlightened self interest should dictate keeping it in place as a seldom-used "gun behind the door" so that when the Republicans again become a minority, the Democratic leadership will not be able to ram through certain contentious and extreme judicial nominees or pieces of legislation.

ELECTIONS ARE NOT ENOUGH

Elections are not enough for sustaining American-style democracy because elections are episodic, and therefore between elections, a president has four

⁵⁸ Formally changing the rules to allow cloture by a simple majority vote would be subject to the existing cloture provisions as it was when the rules were changed to reduce the majority needed for cloture from two-thirds to three-fifths of the Senate, but it did not appear that the Majority Leader had sixty votes available to change the rules to eliminate the filibuster. The Majority Leader's maneuver would actually go around the rules by moving to close debate without a cloture motion but by a simple motion to close debate, having the Vice President rule that such a motion was in order, having the Minority Leader object or raise a point of order, and then having the Majority Leader move to table the objection or point of order, which is a non-debatable killing-motion that can be imposed by a simple majority.

⁵⁹ The numbers were reached through data obtained from United States Census Bureau population estimates as of 4 July 2004. To determine how much of the country was represented by Democratic senators versus Republican senators, for Republicans, the population of the state was multiplied by the number of Republican senators from that state and then each number was added together. The same was done for the Democrats. The numbers at that point added up to twice the population of the United States, so the totals for Democrats and Republicans were both divided by two.

⁶⁰ In his second term, Clinton nominated fifty-one candidates for the Court of Appeals, and thirty-five were confirmed. In his first term, Bush nominated fifty-two judges, and thirty-five were confirmed.

years and senators six years to make and implement policy before they are called to account in an election. As for House members—who Hamilton argued would be especially responsive to the public because they faced election every two years—they are almost all in gerrymandered or redistricted areas that are purposely made safe for the incumbent, and thus reelection is not a practical problem. In 2004, only seven incumbents were defeated, in contrast to the 394 who were reelected. In addition, four of the incumbent defeats were the result of the gerrymandering in Texas at Republican House Majority Leader Tom Delay’s direction—the Republican state legislature redrawing of the district lines for a second time after the 2002 census in order to almost ensure the defeat of Democratic congressmen.⁶¹ In the Senate, only a single incumbent, Tom Daschle of South Dakota, the Democratic leader, was defeated. The rest of the changes in the party ratio of the Senate were the result of Republicans winning more open seats than the Democrats.

To use the “shoes pinching” analogy once again, in the course of four years, the feet being forced to wear crooked shoes might become gangrenous and a later change in shoemakers would not be able to restore the foot that might have had to be amputated. Certainly in the twenty-first century, in an age of the spread of weapons of mass destruction and of terrorist attacks, the Internet, global economics, and massive air travel, a great deal of damage—even a great deal of irreversible damage—can be done between elections.⁶² The good will generated for Americans throughout the world after September 11 was destroyed by the decision to go ahead with the Iraq war despite almost worldwide opposition to it. Even in domestic policy, the elimination of massive budget deficits that had taken the hard work and courage of three presidents and majorities in twelve congresses to achieve was undone in four years, to produce the largest budget deficits in American history (see Figure 1).⁶³

If a president has the support of his own party majorities in both houses of Congress, and if a filibuster can successfully be limited by majority vote, or if the majority party contingent itself reaches sixty, the minority will become impotent in blocking appointments or amending legislation. Then the American democracy will be headed down a dangerous path toward precisely the kind of

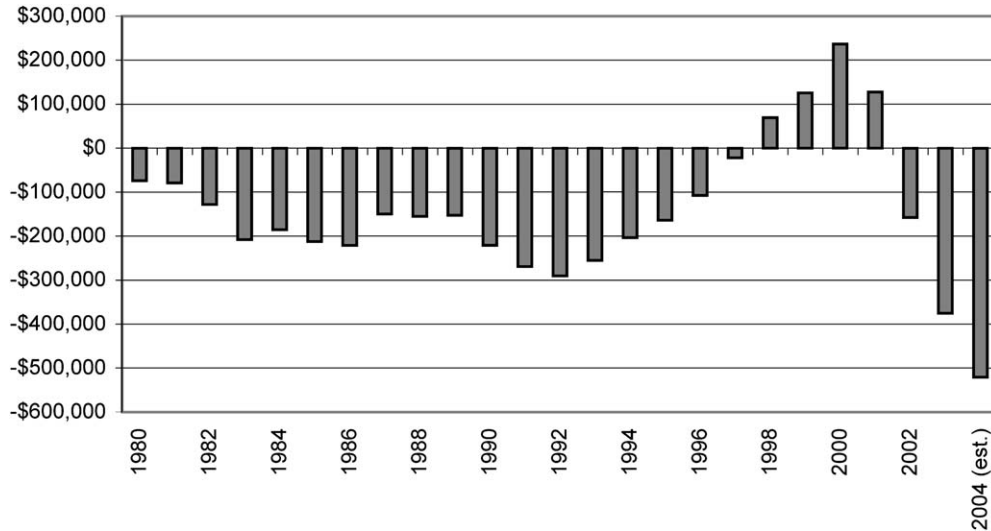
Jeffrey Toobin, “Blowing Up the Senate: Will Bush’s Judicial Nominees Win with the ‘Nuclear Option?’” *The New Yorker*, 7 March 2005.

⁶¹ See Gary Jacobson, “Polarized Politics and the 2004 Congressional Elections,” *Political Science Quarterly* 120 (Summer 2005): 199–218.

⁶² Lyndon B. Johnson felt he could not run for president again in 1968, despite his landslide victory in 1964, because of dissatisfaction with his conduct in escalating the Vietnam War and bringing about huge casualties. But that did not bring back the 35,751 lives lost between 1964 and 1968 or ease the civil discord that had spread across the nation and would exist for decades. See numbers of casualties at www.archives.gov/research_room/research_topics/vietnam_war_casualty_lists/statistics.htm.

⁶³ Presidents Reagan, George H. W. Bush, and Clinton all were forced to raise taxes to create a balanced budget, and finally, by 1998, the government produced a small surplus. See *The Budget for Fiscal Year 2005, Historical Tables*, Office of Management and Budget, Executive Office of the President of the United States.

FIGURE 1
Federal Surpluses and Deficits in Current Dollars (in millions)



Source: The Budget for Fiscal Year 2005, Historical Tables, Office of Management and Budget, Executive Office of the President of the United States.

government that will bring about extremism and abuse of power, becoming, to paraphrase Jefferson, a de facto elective despotism.

The spirit of civility and cooperation must be restored so that not just the party in the White House and bare majorities of the two chambers of Congress can create or change policy. First, the 49 percent of the population that did not vote to reelect President Bush, the population represented by the Democrats who hold 47 percent of the seats in the House of Representatives, the 50.5 percent of the population represented by Democratic senators, are still Americans who pay their taxes, do their work, serve in the military, and are therefore entitled to be represented in the House and the Senate. One way is for the majority leaderships to give the minority some opportunities to have the minority's legitimate points incorporated, or at least voted upon, before the final product. Second, engaging the minority in legislation will also give them some spirit of ownership of a policy and will therefore preclude their criticizing it if it goes poorly or repealing it once they become the majority.

Third, it must be conceded by the majority that it is the Constitution, and not some fringe group, that gives to the Senate the responsibility to advise and consent, or not consent, to presidential nominations for positions in the executive branch, as well as for all of the federal judges in the district courts, the courts of appeal in each circuit, and finally the Supreme Court. All federal judges, of course, have lifetime tenure and will therefore serve for decades beyond the elections that brought into power the president who nominated them

and claimed some mandate for appointing judges like them.⁶⁴ Recognizing the absolute legitimacy of Senate involvement in the appointing process means that Senate opposition to a relatively few appointees should be reacted to by giving the reasons why the objections are invalid and not by trying to de-legitimize the objections by calling them “just politics.” The Constitution simply gives a share of the appointment power to the Senate as well as to the president, and there is absolutely nothing in Madison’s diary of the constitutional convention or in *The Federalist Papers* even to suggest that the Senate should just be a rubber stamp. As Hamilton explained:

It will be the office of the president to *nominate*, and with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice, he may have made.⁶⁵

If a single oppressive majority dominates all the levers of power, including by new appointments over a few years of the majority of the members of the Supreme Court, we will have turned our government into an elective despotism, and, as Jefferson wrote, the fact that it will be elective brings no solace.

If a democracy is to remain real and stable, the majority must be humane and farsighted enough to take care of minorities who have serious objections to the majority’s point of view and who, because of lack of numbers, do not have the political strength to impose their own policy solutions through their own political power. Or, as one of the most brilliant students ever of American politics, V. O. Key, once put it:

Triumphant parties that advocate great causes or that come into power at moments of great stress must contrive and enact measures that may be thought, even widely, to be destructive of the principles of the Republic. Yet unless gradual acceptance of such innovation comes about, the cleavage between the parties would grow into a chasm unbridgeable by the compromises of party politics. Or alternations in party control, with the accompanying changes of policy, would jolt the social and economic system beyond the bounds of toleration.⁶⁶

In his 1858 campaign for the Senate, Lincoln argued that “a house divided against itself cannot stand.” Lincoln’s postulate is especially relevant again today. At the moment, the United States is in a perpetual war against invisible terrorists, many nations are out-competing the United States in economics, trade, and technological progress, the dollar is weakening relative to many major currencies, the United States is suffering unprecedented budget and trade

⁶⁴ See Robert A. Dahl, “The Myth of the Presidential Mandate,” *Political Science Quarterly* 105 (Autumn 1990): 355–372.

⁶⁵ *The Federalist Papers*, No. 66 (Hamilton).

⁶⁶ V. O. Key, Jr., *Politics, Parties, and Pressure Groups*, 5th ed. (New York: Thomas Crowell and Co., 1964), 223.

deficits, and the myth of American military omnipotence has been shattered. Is it in the national interest or even realistically viable that a slim majority—and a very small one in the President’s popular vote, in seats in the House of Representatives and an actual minority in population represented by the Republicans in the Senate—should just write off minority input and objections?^{67*}

APPENDIX

ADDRESS OF SENATOR JOHN F. KENNEDY TO
THE GREATER HOUSTON MINISTERIAL ASSOCIATION
Rice Hotel, Houston, Texas
September 12, 1960

Reverend Meza, Reverend Reck, I’m grateful for your generous invitation to speak my views.

While the so-called religious issue is necessarily and properly the chief topic here tonight, I want to emphasize from the outset that we have far more critical issues to face in the 1960 election; the spread of Communist influence, until it now festers 90 miles off the coast of Florida—the humiliating treatment of our President and Vice President by those who no longer respect our power—the hungry children I saw in West Virginia, the old people who cannot pay their doctor bills, the families forced to give up their farms—an America with too many slums, with too few schools, and too late to the moon and outer space.

These are the real issues which should decide this campaign. And they are not religious issues—for war and hunger and ignorance and despair know no religious barriers.

But because I am a Catholic, and no Catholic has ever been elected President, the real issues in this campaign have been obscured—perhaps deliberately, in some quarters less responsible than this. So it is apparently necessary for me to state once again—not what kind of church I believe in, for that should be important only to me—but what kind of America I believe in.

I believe in an America where the separation of church and state is absolute—where no Catholic prelate would tell the President (should he be Catholic) how to act, and no Protestant minister would tell his parishioners for whom to vote—where no church or church school is granted any public funds or political preference—and where no man is denied public office merely because his religion differs from the President who might appoint him or the people who might elect him.

I believe in an America that is officially neither Catholic, Protestant nor Jewish—where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source—where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials—and where religious liberty is so indivisible that an act against one church is treated as an act against all.

For while this year it may be a Catholic against whom the finger of suspicion is pointed, in other years it has been, and may someday be again, a Jew—or a Quaker—or a Unitarian—or a Baptist. It was Virginia’s harassment of Baptist preachers, for example, that helped lead to Jeffer-

⁶⁷ At www.historyplace.com/Lincoln/divided.htm.

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son's statute of religious freedom. Today I may be the victim—but tomorrow it may be you—until the whole fabric of our harmonious society is ripped at a time of great national peril.

Finally, I believe in an America where religious intolerance will someday end—where all men and all churches are treated as equal—where every man has the same right to attend or not attend the church of his choice—where there is no Catholic vote, no anti-Catholic vote, no bloc voting of any kind—and where Catholics, Protestants and Jews, at both the lay and pastoral level, will refrain from those attitudes of disdain and division which have so often marred their works in the past, and promote instead the American ideal of brotherhood.

That is the kind of America in which I believe. And it represents the kind of Presidency in which I believe—a great office that must neither be humbled by making it the instrument of any one religious group nor tarnished by arbitrarily withholding its occupancy from the members of any one religious group. I believe in a President whose religious views are his own private affair, neither imposed by him upon the nation or imposed by the nation upon him as a condition to holding that office.

I would not look with favor upon a President working to subvert the first amendment's guarantees of religious liberty. Nor would our system of checks and balances permit him to do so—and neither do I look with favor upon those who would work to subvert Article VI of the Constitution by requiring a religious test—even by indirection—for it. If they disagree with that safeguard they should be out openly working to repeal it.

I want a Chief Executive whose public acts are responsible to all groups and obligated to none—who can attend any ceremony, service or dinner his office may appropriately require of him—and whose fulfillment of his Presidential oath is not limited or conditioned by any religious oath, ritual or obligation.

This is the kind of America I believe in—and this is the kind I fought for in the South Pacific, and the kind my brother died for in Europe. No one suggested then that we may have a “divided loyalty,” that we did “not believe in liberty,” or that we belonged to a disloyal group that threatened the “freedoms for which our forefathers died.”

And in fact this is the kind of America for which our forefathers died—when they fled here to escape religious test oaths that denied office to members of less favored churches—when they fought for the Constitution, the Bill of Rights, and the Virginia Statute of Religious Freedom—and when they fought at the shrine I visited today, the Alamo. For side by side with Bowie and Crockett died McCafferty and Bailey and Carey—but no one knows whether they were Catholic or not. For there was no religious test at the Alamo. . . .

But let me stress again that these are my views—for contrary to common newspaper usage, I am not the Catholic candidate for President. I am the Democratic Party's candidate for President who happens also to be a Catholic. I do not speak for my church on public matters—and the church does not speak for me.

Whatever issue may come before me as President—on birth control, divorce, censorship, gambling or any other subject—I will make my decision in accordance with these views, in accordance with what my conscience tells me to be the national interest, and without regard to outside religious pressures or dictates. And no power or threat of punishment could cause me to decide otherwise.

But if the time should ever come—and I do not concede any conflict to be even remotely possible—when my office would require me to either violate my conscience or violate the national interest, then I would resign the office; and I hope any conscientious public servant would do the same.

But I do not intend to apologize for these views to my critics of either Catholic or Protestant faith—nor do I intend to disavow either my views or my church in order to win this election.

If I should lose on the real issues, I shall return to my seat in the Senate, satisfied that I had tried my best and was fairly judged. But if this election is decided on the basis that 40 million Americans lost their chance of being President on the day they were baptized, then it is the whole

nation that will be the loser, in the eyes of Catholics and non-Catholics around the world, in the eyes of history, and in the eyes of our own people.

But if, on the other hand, I should win the election, then I shall devote every effort of mind and spirit to fulfilling the oath of the Presidency—practically identical, I might add, to the oath I have taken for 14 years in the Congress. For without reservation, I can “solemnly swear that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution . . . so help me God.