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The Constitution's Congress

Gary Lawson

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THE CONSTITUTION'S CONGRESS

GARY LAWSON*

In order to know whether Congress is (as the title of this panel wonders)¹ “the broken branch,”² one needs a baseline describing how a normally-functioning Congress would look.³ Congress is a creation of the Constitution, and so the Constitution seems to be the obvious place to look for this baseline: what sort of people does the Constitution expect to serve in Congress and how does it expect those people to behave once they arrive?

The first clues come in the opening sentence of Article I: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”⁴ Contrast this sentence with the opening provisions of Article II: “The executive Power shall be vested in a President of the United States of America”;⁵ and Article III: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁶ Not only is Congress divided into two bodies with distinct constituencies, but unlike the federal executive and judiciary, which are vested with *everything* falling within the conceptual categories of “executive Power” and “judicial Power,”⁷ Congress is given only those legislative powers “herein

* Professor of Law, Boston University School of Law. I am grateful to the Abraham and Lillian Benton Fund for support.

¹ This Essay builds upon my presentation at the panel “Is Congress ‘the Broken Branch?’” at the *Boston University Law Review* conference on “The Most Disparaged Branch: The Role of Congress in the 21st Century.”

² Technically speaking, one ought to query whether Congress is “the broken department,” as the founding generation typically used the word “department” to describe the federal legislature, executive, and judiciary and used the term “branch” to describe the two Houses of Congress. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1156 n.6 (1992).

³ I say “normally-functioning” rather than “well-functioning” because I am only making descriptive, rather than normative, claims. I express no opinion about what an ideal Congress would look like.

⁴ U.S. CONST. art. I, § 1.

⁵ *Id.* at art. II, § 1, cl. 1.

⁶ *Id.* at art. III, § 1, cl. 1.

⁷ This is a cavalier assertion of what is sometimes called “the Vesting Clause thesis,” which maintains that the first sentences of Articles II and III grant power to the President and the federal courts. This thesis is wildly contested, but since I and others have defended the thesis at great length elsewhere, I will rest for now on the cavalier assertion. See, e.g.,

granted," meaning it is granted only a subset of the powers that a legislative body might conceivably have. The Constitution thus seems to begin with some degree of skepticism about the Congress it had just created.

This impression is strongly reinforced when we come to the Constitution's lawmaking provisions. Article I, Section 7 describes the mechanism by which Congress makes laws, and it includes the requirement that virtually any action calling for the concurrence of both Houses shall "be presented to the President of the United States,"⁸ who has a qualified veto subject to a super-majority override. None of the other institutions of government faces this kind of direct interference from another department. Congress can, of course, pass laws "necessary and proper for carrying into Execution" the powers vested in executive or judicial actors,⁹ but those laws must aid rather than hinder the exercise of those powers,¹⁰ and must be consistent with the Constitution's separation of powers.¹¹ The presidential veto, by contrast, can be exercised for the express purpose of interfering with congressional business.¹² Moreover, the Constitution makes the Vice President the President of the Senate and gives the Vice President a tie-breaking vote in the Senate.¹³ No other federal institution has an actor from another department so blatantly thrust into its day-

Steven G. Calabresi, *The Vesting Clauses As Power Grants*, 88 NW. U. L. REV. 1377, 1389-400 (1994); Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 22-43.

⁸ U.S. CONST. art. I, § 7, cl. 2 (requiring presentment for bills); *id.* at cl. 3 (requiring presentment for an "Order, Resolution, or Vote"). On the independent scope of the Orders, Resolutions, and Votes (ORV) Clause of Article 1, Section 7, see Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1364-67 (2005) (arguing that the ORV Clause requires presentment to the President of any power delegated by Congress to one of its Houses); see also Gary Lawson, Comment, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373, 1375 (2005) (agreeing with Mr. Tillman's general analysis of the ORV Clause but limiting its application to legislative subpoenas); Seth Barrett Tillman, Reply, *The Domain of Constitutional Delegations Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1389, 1389 (2005) (sticking to his guns).

⁹ U.S. CONST. art. I, § 8, cl. 18.

¹⁰ To aid rather than hinder is what it means for laws to be "for carrying into Execution" vested powers. See Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1014 (2007); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 102-03.

¹¹ For an in-depth discussion of the meaning of the "Necessary and Proper" (or "Sweeping") Clause and its implications for the separation of powers, see Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 291-314, 333-34 (1993).

¹² U.S. CONST. art. I, § 7, cl. 2.

¹³ See *id.* § 3, cl. 4.

to-day operations.¹⁴ As we delve into the Constitution, it appears to be increasingly suspicious of this “Congress of the United States, which shall consist of a Senate and House of Representatives.”¹⁵

Indeed, not only is Congress left without any direct role in executive or judicial decision-making comparable to the roles given to the President or Vice President in legislative affairs, but Congress is *specifically denied* any such role in the Incompatibility Clause, which provides that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”¹⁶ Thus, Congress cannot use the Senate’s power of advice and consent under the Appointments Clause¹⁷ or its control over appropriations¹⁸ to compel the President to appoint members of Congress to key executive positions, which effectively prevents the emergence of parliamentary government in the United States.¹⁹

One might say to the Constitution: “Oh, come on! Do you really think Congress, which already has a substantial portfolio of legislative power, would also try to force itself into the executive or judicial departments to boot (or readily fall prey to presidentially-proffered temptation)? Is this a serious enough risk to justify an entire clause in a Constitution generally noted for its brevity? What sort of power-mad scoundrels do you expect to end up serving in Congress?”

At least part of the answer can be found in the two Salary Clauses: the President shall receive “a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected”²⁰ and

¹⁴ The Senate, of course, gets an important role in the appointments process and the ratification of treaties, *id.* at art. II, § 2, cl. 2, and Congress controls the architecture of the executive and judicial departments through the Sweeping Clause, *id.* at art. I, § 8, cl. 18, but their involvement in these matters is a full step removed from the Constitution’s interposition of the executive into core legislative affairs.

¹⁵ *Id.* at art. I, § 1.

¹⁶ *Id.* § 6, cl. 2.

¹⁷ See *id.* at art. II, § 2, cl. 2 (providing that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint” federal officers unless Congress authorizes the appointment of inferior officers by the President alone, department heads, or courts).

¹⁸ See *id.* at art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).

¹⁹ By the same token, the Incompatibility Clause prevents the President from initiating efforts to corrupt Congress by offering positions. Cf. THE FEDERALIST NO. 76, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing how the Incompatibility Clause provides important guards against the danger of executive influence upon the legislative body). For an elegant discussion of the Incompatibility Clause and its impact on American government, see generally Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994).

²⁰ U.S. CONST. art. II, § 1, cl. 7.

federal judges shall receive “a Compensation, which shall not be diminished during their Continuance in Office.”²¹ Again, one can imagine shouting out to the Constitution, “Oh, come on! Do you really believe Congress would be so petty and vindictive as to use its control over appropriations to punish executive and judicial officials for their decisions? Does this risk warrant not just one but two provisions in a Constitution noted for its brevity? What sort of people do you expect to end up serving in Congress?”

At least part of the answer can be found in the Emoluments Clause that accompanies the Incompatibility Clause. While the Incompatibility Clause prevents active members of Congress from simultaneously serving in the other departments,²² it does not prevent them from receiving appointments after (or in lieu of) their congressional service and it does not remove the leverage over appointments provided by the Senate’s Advice and Consent Clause power and Congress’s Appropriations Clause power. To prevent circumvention of the principles underlying the Incompatibility Clause, the Emoluments Clause thus declares: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time”²³

We cry once again to the Constitution: “Oh come on! Do you seriously think Congress would be so venal and corrupt as to create or pump up cushy, high-salaried offices just so Members of Congress could get appointed to those offices if the voters ever caught on to just how venal and corrupt they are? Is this a serious enough concern to warrant a clause in the Constitution? What sort of people do you expect to end up serving in Congress?”

At least part of the answer can be found in the Second Amendment – the *original* Second Amendment that had nothing at all to do with guns. The Emoluments Clause prevents Congress from creating or increasing the pay of federal offices and then getting its own members appointed to those offices,²⁴ but it says nothing about congressional pay itself. What is to prevent Congress from voting itself huge sums of money from the public till? Voters can always bounce the members in the next election, but for nearly two years the members can live high off the federal hog. With a big enough payday, the wrath of the voters (as long as it remains in the voting booth and does not extend to the hen

²¹ *Id.* at art. III, § 1.

²² See *supra* notes 16-19 and accompanying text.

²³ U.S. CONST. art. I, § 6, cl. 2.

²⁴ Or at least it tries to prevent it. Hugo Black, William Saxbe, Abner Mikva, and Hillary Clinton, among others, are testaments to James Madison’s prescience about the likely effectiveness of “parchment barriers.” See THE FEDERALIST NO. 48, at 308-09 (James Madison) (Clinton Rossiter ed., 1961) (“Will it be sufficient to mark . . . the boundaries of these departments . . . and to trust to these parchment barriers against the encroaching spirit of power? . . . But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary . . .”).

house and tar pits) might be worth it. The Bill of Rights sent to the states for ratification in 1791 accommodated this concern. This Bill of Rights contained twelve proposed amendments, the second of which read: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."²⁵ This amendment neatly closed the gap left by the Emoluments Clause for those worried about congressional greed. The amendment, however, failed to get the necessary votes for ratification,²⁶ – possibly because state legislators feared the consequences back home of putting such a precedent into the Federal Constitution.²⁷ Two-hundred-one years later, the original Second Amendment finally received the necessary ratification votes and now sits in the Constitution as the Twenty-seventh Amendment.²⁸ But for the votes of a few states, it could easily have been today's First Amendment.

In sum, the Constitution is very worried that Congress will be full of power-mad, petty, vindictive, venal, greedy, corrupt gasbags who, unless constitutionally constrained, will abuse their power, punish anyone who tries to stop them, force themselves into positions in the other departments, create lucrative offices to which they will get themselves appointed, and vote themselves largesse from the public till.²⁹

Eighteenth-century Congresses lived up to those "expectations." To be sure, those bodies were capable (on occasion) of high-minded, sophisticated constitutional discourse that puts the modern academy, much less modern Congresses, to shame,³⁰ but it was also capable of being exactly what the Constitution feared it to be.

Congress set a grand tone by beginning its fledgling lawmaking career with a flagrantly unconstitutional enactment. The Constitution requires all federal

²⁵ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 18 (1998).

²⁶ The original First Amendment setting minimum and maximum sizes for the House of Representatives also failed to get enough votes for ratification. *Id.* at 16.

²⁷ *See id.* at 18-19.

²⁸ U.S. CONST. amend. XXVII.

²⁹ A broader look at the Constitution's context, drafting, ratification, and history provides, if anything, an even starker picture of the late eighteenth-century expectations regarding Congress. The concern with corruption was so pervasive that it has led one author to posit that the Constitution contains an "anti-corruption principle" that can and should serve as an independent interpretative guide in constitutional adjudication. *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009). One can reject (as I do) the interpretative conclusion while still appreciating (as I do) Ms. Teachout's impressive documentation of the founding generation's obsession with corrupt government. *Id.* at 346-72.

³⁰ The debates in the House concerning the removal power, for example, could be the product of an academic conference. For an elegant account of those elegant debates, see generally Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006).

and state officials to swear an oath to the Constitution,³¹ but it only specifies the precise form of the oath for the President.³² Because people in those days actually took oaths seriously, the First Congress sought to determine what those oaths would say and how they would be administered. Indeed, the very first statute enacted by the First Congress (even before the protectionist tariff that came second)³³ was “An act to regulate the Time and Manner of administering certain Oaths.”³⁴ Although no clause in the Constitution specifically empowers Congress to prescribe oaths, it seems clear Congress has the authority to prescribe oaths for itself and for federal executive and judicial officials under its enumerated power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³⁵ Section 3 of the legislation, however, prescribed the form of oath for *state* officials.³⁶ Representative Elbridge Gerry pointed out that Congress has no power to regulate state oaths; the Necessary and Proper Clause only lets Congress carry into effect constitutional powers vested in *federal*, not state, officials.³⁷ No less a scholar than the late David Currie observed that this objection was “a good one,”³⁸ and no reported comment by anyone in 1789 seriously answered it. Representative Bland weakly responded that “if the State Legislatures were to be left to

³¹ See U.S. CONST. art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”).

³² See *id.* at art. II, § 1, cl. 8 (“Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: – ‘I do solemnly swear (or affirm) 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 of the United States.’”).

³³ Act of July 4, 1789, ch. 2, 1 Stat. 24, 24 (“An Act for laying a Duty on Goods, Wares, and Merchandises imported into the United States.”).

³⁴ Act of June 1, 1789, ch. 1, § 1, 1 Stat. 23, 23.

³⁵ U.S. CONST. art. I, § 8, cl. 18. Each House of Congress could also prescribe its own oath under its internal rulemaking power, *id.* § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”), but that would not justify a *statute* that purports to cover both Houses. The Senate’s rulemaking power, for example, surely does not authorize it to prescribe the oath for the House of Representatives. The first statute enacted by the First Congress cannot be validated by the Rules of Proceedings Clause but only by the Necessary and Proper Clause.

³⁶ Act of June 1, 1789, ch. 1, § 3, 1 Stat. at 23-24.

³⁷ 1 ANNALS OF CONG. 277-78 (Joseph Gales ed., 1834) (statement of Rep. Gerry). State legislatures are in fact given some power by the Constitution – at the very least the power to propose and ratify amendments, see U.S. CONST. art. V – but the plain terms of the Necessary and Proper Clause do not give Congress power to implement those powers.

³⁸ DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 14 (1997).

arrange and direct this business, they would pass different laws, and the officers might be bound in different degrees to support the constitution,"³⁹ which, even if true, is not a response to the lack of congressional power.⁴⁰ In a government of enumerated powers, it does not suffice to point out that it would be convenient for some institution of government to have a certain power. Representative Jackson then chimed in:

I believe this House, and the other branch of the Legislature, have the power, by the constitution, to pass a law, obliging the officers of the State Governments to take the oath required by the constitution that their States have adopted, and which has become the supreme law of the land. I believe the general opinion of the House inclines to favor this sentiment.⁴¹

That is the full extent of his reported argument, at least on the constitutionality of what Congress was proposing.⁴² While it is perhaps consistent with the expectations of Congress reflected in the Constitution that a member of Congress could regard his beliefs, or the beliefs of his colleagues, as sufficient to establish a proposition of constitutional law, the premises necessary to validate such an argument seem implausible. Representative Lawrence thought that "[o]nly a few words will be necessary to convince gentlemen that Congress have this power."⁴³ His few words were that Congress "have power to make all laws necessary or proper to carry the declarations of the constitution into effect."⁴⁴ Apart from the fact that the correct phrasing is "necessary *and* proper," not "necessary *or* proper,"⁴⁵ the Necessary and Proper Clause simply does not give Congress power to carry into execution any and all of the Constitution's "declarations." It gives Congress power to carry into execution *powers vested in Congress or other federal institutions*.⁴⁶ Not every clause in the Constitution vests power in a federal actor, and therefore not every clause in the Constitution provides fodder for the Necessary and Proper Clause. Perhaps I am no gentleman, but I am not convinced. The bottom line: Congress really has no plausible claim to be able to tell state officials precisely

³⁹ 1 ANNALS OF CONG. 278 (Joseph Gales ed., 1834) (statement of Rep. Bland).

⁴⁰ If the different degrees of support expressed by various state officials all met the minimum requirements of Article VI, then no one should care whether they are different. If some state oaths fell below the Article VI requirements, those states would be in violation of the Constitution, and presumably acts of those state officials would be null and void.

⁴¹ 1 ANNALS OF CONG. 278 (Joseph Gales ed., 1834) (statement of Rep. Jackson).

⁴² To be fair to Representative Jackson, that does not mean that it was the full extent of his actual argument. The reporting in the *Annals of Congress* is, to say the least, suspect. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 36 (1986).

⁴³ 1 ANNALS OF CONG. 280 (Joseph Gales ed., 1834) (statement of Rep. Lawrence).

⁴⁴ *Id.*

⁴⁵ U.S. CONST. art. I, § 8, cl. 18.

⁴⁶ *Id.*

what oath they need to take. This did not seem to bother the First Congress very much, even when the problem was pointed out to it.

The person who pointed out the constitutional problem was Elbridge Gerry, who has, of course, attained his own measure of fame in the annals of legislators.⁴⁷ But not even Representative Gerry, or Senators McCain and Feingold, or even the numerous members of Congress currently (as of late 2008) making noise about reviving the Fairness Doctrine⁴⁸ can top the Act of July 14, 1798, popularly known as the Sedition Act. Section 2 of the statute provided:

That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.⁴⁹

If the Constitution could speak in 1798, it surely would have been disappointed, but probably not surprised.

The Constitution does not expect Congress to be filled with good people. Its principal strategy for dealing with the likes of Congress is thus to *limit the jurisdiction of the Congress* through the doctrine of enumerated powers, which has the effect of limiting the amount of damage Congress can do. If the sandbox is small enough, the rowdy children cannot mess up the yard too badly.

The doctrine of enumerated powers, of course, is long gone: when Congress can regulate the kinds of plants you can grow on your farm⁵⁰ or in your kitchen window,⁵¹ we are as far from the Constitution of 1788 as was Dorothy from

⁴⁷ Representative Gerry approved a controversial redistricting plan designed to give his party an advantage in state senatorial elections, which was later mocked as the "Gerrymander." MARK O. HATFIELD, SENATE HISTORICAL OFFICE, VICE PRESIDENTS OF THE UNITED STATES: 1789-1993, at 66 (1997).

⁴⁸ The Fairness Doctrine is a Federal Communications Commission requirement on radio and television broadcasters which mandates "that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969). The upshot of the doctrine is to prescribe government regulation of the content, including (and even especially) the political speech, appearing on the airwaves.

⁴⁹ Act of July 14, 1798, ch. 74, § 2, 1 Stat. 596, 596-97.

⁵⁰ See *Wickard v. Filburn*, 317 U.S. 111, 132-33 (1942).

⁵¹ See *Gonzalez v. Raich*, 545 U.S. 1, 5, 9 (2005).

Kansas. And where Congress is concerned, to paraphrase the Amazing Spider-Man, “[w]ith great power comes great irresponsibility.”⁵² In other words, what is broken today is not Congress, as Congress performs more or less as the Constitution contemplated, but instead the constitutional structure surrounding Congress, which was supposed to contain the damage. Trying to fix Congress is a fool’s errand. Trying to fix the rest of the Constitution may be a fool’s errand as well, but the potential payoff from success is much larger.

⁵² Cf. AMAZING FANTASY NO. 15, at 12 (Marvel Comics 1962) (“With great power there must also come – great responsibility”).

