New American

Written by **Charles Scaliger** on November 7, 2016

Published in the November 7, 2016 issue of the New American magazine. Vol. 32, No. 21

Taking Back Presidential Power

Every four years, Americans are treated to a tawdry, months-long spectacle pitting two typically (but not always) establishment-anointed candidates against one another for the ultimate prize: a four-year stint as the "most powerful person on Earth." That, at least, is the establishment media's term for the president of the United States. And it would have appalled the Founding Fathers and framers of the Constitution, who never intended to create in the office of the U.S. presidency a magistracy far more powerful than the English monarchy they had only recently shaken off.

But the de facto reality of modern America is that the executive branch of the U.S. government has usurped an enormous portion of government powers reserved by the Constitution in its original form to other branches of the federal government or to state governments. The president, for example, now sends U.S. troops into war at his personal whim, completely ignoring the constitutional stipulation that Congress issue a declaration of war first. A huge percentage of federal laws that control virtually every activity are issued in the form of federal regulations — which are created not by the legislative but by the executive branch of government, under the direction of the president.

The president also wields tremendous power with his authority to nominate Supreme Court justices — since the Supreme Court is regarded as a body whose decisions cannot be appealed or overturned. Presidents from FDR to the present have tried to customize the court to their preferred ideology, and the court has responded by issuing a range of unpopular decisions, from abortion on demand to the recent vindication of ObamaCare, that have left ordinary Americans frustrated and angry. By all accounts, the will of the people is systematically ignored by Washington, and there appears to be nothing that can change this state of affairs. This is the reason that every presidential race has become the ultimate high-stakes battle of partisan wills; the winner — and his party — will wield enormous de facto (if not de jure) power over the affairs of the nation and the world, and has the ability, via Supreme Court appointments, executive orders, involvement in foreign wars, regulations, and many other powers now accorded to him, to shape the destiny of the nation decades after his term in office ends.

In recent decades, most of the power in government has migrated from Congress — the only part of the government truly elected by the people — to the two unelected branches of government, the executive branch and the Supreme Court. In particular, the power to legislate has largely been usurped by the executive branch via a noxious system of federal regulatory agencies staffed by unelected bureaucrats wielding enormous, unaccountable power, and by an unelected Supreme Court that does not hesitate to legislate from the bench. The sheer volume and scope of federal regulations promulgated every year far surpasses the number of laws passed by Congress.

In its original form, things were far different. The Founders intended Congress to be the most powerful

branch of government, with the Senate representing the interests of the states and the House of Representatives those of the people. The president was largely a caretaker. Bereft of any "bully pulpit," "big stick," or other tools of modern American autocracy, he largely acted under the direction of Congress, which, in turn, carried out the will of the people and of the state legislatures. The executive branch as a whole was primarily concerned with foreign affairs and with adjudicating disputes between the states. Few Americans prior to the early 20th century had any contact with the federal government other than at the post office, and many would not have recognized the president had they passed him on the street.

Today, of course, the U.S. president is the superstar of superstars, an elected Caesar who controls the destinies of billions, thanks to his ascendency over the U.S. military and economy. Small wonder that Americans focus all their combative energies on getting "their man" elected. In the modern American game of thrones, the presidency has become the ultimate spoils.

But there are constitutional remedies for all of this. The Constitution has not yet been repealed or amended beyond recognition — though there are many who are pushing to do just that, via a modern constitutional convention. And the Constitution provides a series of ingenious remedies, some of them all but forgotten, for the disfigurement of our original checks and balances that generations of unscrupulous political elites have created. Here are a few of them.

Cut the Purse Strings

No federal program can operate without funding, and on paper at least, the House of Representatives still holds the purse strings for the entire government, as the Founders intended it to. As the first clause in the Constitution, Article 1, Section 7, clearly stipulates, "All bills for raising revenue must originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills." The House of Representatives, be it remembered, was designed to represent the voice of the people directly; this is why House members are reelected more often than any other officials in the federal government (every two years), and also why House members have the smallest constituencies. To change the direction of the federal government, it is first necessary to change the House, and it just happens that it is the House where turnover is the highest and candidacy the easiest. The House being the largest elected body in government, it is impossible for all House races to be controlled by special interests (although many of them certainly are).

All this being the case, the House is the first line of defense against an abusive and overweening executive branch. If the House refuses to authorize spending for a given bill, program, initiative, or policy, it will not be funded.

What if the president ignores Congress, and uses unauthorized funds, as the Clinton administration did in the 1995 bailout of the Mexican government? In 1995, President Clinton, frustrated by Congress' refusal to authorize an emergency bailout of the Mexican economy to the tune of tens of billions of dollars in loan guarantees, went ahead and did it anyway. These funds were taken from a then little-known fund controlled by the Treasury Department, the Exchange Stabilization Fund (ESF), which was created in 1934 as part of the Gold Reserve Act, to provide emergency funds to shore up the dollar in the event of severe foreign exchange fluctuations. The ESF was made necessary by the United States' departure from the gold standard, along with most other countries, during the 1930s. Absent the discipline and stability imposed by a precious-metal standard, currency values are prone to wild swings

as governments engage in various inflationary policies. With the passage of decades, the central banks of the world have learned to coordinate their inflationary policies in secret, but the ESF remains, and as of 2009, held more than $100 billion — enough to fund a significant amount of presidential financial and economic priorities, should Congress demur.

Another clever way that the executive branch has discovered for circumventing congressional checks on funding is via Department of Justice lawsuits. This trick has been used to particular effect by the Obama administration, and it works like this: The Justice Department launches a lawsuit for perceived violations of federal regulations (bank regulations, for example) against a well-heeled target or targets, and as part of the settlement, directs large payments to be made to selected special interests — for example, anti-bank activist groups. Hundreds of millions of off-budget dollars have been funneled to a wide panoply of leftist activist groups in this way, in return for their support of Obama's anti-business policies. Of particular notoriety is the Obama administration's recent disposal of hundreds of millions in settlement monies from the likes of Citigroup, Bank of America, and JP Morgan, of which an appreciable amount was permitted, under Justice's terms of settlement, to be "donated" to various activist groups that serve the Democratic Party's interests. This money all belongs, in theory, to the Treasury, and therefore cannot be disposed of without Congress' say-so. In fact, Article 1, Section 9 of the Constitution anticipated the potential for executive monkeyshines with Treasury funds, stipulating that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." But that hasn't stopped the Obama administration from using vast sums of extortion payments originating in legal settlements to finance many left-wing NGO (non-governmental organization) allies.

The executive branch has devised and continues to devise methods to circumvent constitutional prohibitions on executive authority to raise money. For as one congressman closely allied with President Grover Cleveland is alleged to have told a fellow congressman who criticized one of his initiatives as unconstitutional, "What's the Constitution between friends?"

But can Congress do anything about it? All executive expenditures, from the constitutionally dubious ESF to DOJ settlement monies, must originate with the Treasury — but, as the Constitution makes crystal clear, although the Treasury pertains to the executive branch, its funds cannot be disbursed without congressional authorization. It is this stipulation, even more than the "origination" clause in Article 1, Section 7, that assigns the purse strings ultimately and unavoidably to Congress.

All Congress needs to do in cases of executive innovation, such as the creative use of DOJ settlement monies, is to pass a law clarifying constitutional limits on Treasury spending. In the case of the Exchange Stabilization Fund, it could simply legislate the unneeded entity out of existence, for example. In the case of the DOJ settlement slush fund, legislation outlawing such practices is already working its way through Congress.

The framers of the Constitution anticipated that the executive branch would seek to raise funds by going around Congress. This is why the Constitution makes plain that measures for raising revenue must originate in the House, and that no money may be spent from the Treasury except by congressional authorization.

This congressional authorization applies not only to money raised by taxes, but to all other ways the

government has to raise money. In the latter category the most traditional way, of course, is borrowing money. Since the beginning of the Republic, this has been accomplished by the issuance of various "Treasuries," financial instruments such as Treasury bonds that can be purchased by anyone wishing to loan money to the U.S. government in the hope of achieving a modest return upon maturation. The Constitution delegates the authority to "borrow money on the credit of the United States" to Congress in Article 1, Section 8. Yet this power was quickly delegated to the secretary of the treasury upon ratification of the Constitution, in 1789, and has been carried out by the Treasury, ostensibly under congressional oversight, ever since. Today, all decisions made regarding the issuance of debt emanate from the Office of Debt Management (ODM) within the Treasury. Congress takes little notice of the day-to-day operations of this office, which has broad discretionary power to issue as much or as little debt as it sees fit, constrained only by the congressionally mandated debt limit — which Congress raises as frequently as political pressure, mostly orchestrated by the executive branch, demands. In other words, even though the Constitution assigns responsibility for the issuance of debt — as with all other fiscal powers — to Congress, the legislative body has delegated almost all of its authority over the creation of debt to the executive, reassuring itself that its authority remains supreme as long as the constantly rising debt ceiling limits are respected. Added to this is the fact that a large part of U.S. Treasury debt ends up being monetized by the Federal Reserve, an entity under neither presidential nor congressional control, whose financial activities are completely opaque to Congress and the president alike. In practice, though, the Fed is an ally of the executive branch, inasmuch as its "open market operations" (the purchase and sale of Treasury-issued debt on the secondary markets) has created a vast and constant demand for government debt that would not exist were private investors and foreign governments the Treasury Department's only customers.

Thus the executive branch may have little de facto authority to raise revenue directly, but it has come to enjoy — thanks to two centuries of congressional neglect — enormous and almost unchallenged de facto power over the issuance of debt, buttressed by the modern Federal Reserve System, and restrained only by occasional feeble congressional blandishments regarding the debt ceiling.

This is a much knottier problem than reining in executive abuse of Treasury funds. It will require nothing less than the repeal of the Federal Reserve Act of 1913 and the re-assertion of congressional responsibility for the issuance of debt. The transfer of the ODM and its operations to full and constant congressional oversight via the congressional Ways and Means Committee would be a good start in this regard, as would the instatement of a robust, long-term debt ceiling. But the best measure of all would be to begin shrinking the size and cost of government to within constitutionally mandated limits, and to pay down the massive debt that is now used as a political weapon to hold the entire country hostage — usually by ambitious, big-spending presidents and their allies in Congress.

Other Remedies

But what if the president starts another war? War is a powerful political distractor and disincentive for dissent. The laws, as Cicero once observed, have a tendency to fall silent in times of war. In our time, the very waging of war has become a lawless act, since no U.S. president since FDR, at the onset of World War II, has gone to war authorized by a congressional declaration. The Korean, Vietnam, Persian Gulf, Iraq, and Afghanistan wars have all been waged by presidential edict, as have countless smaller military actions from the former Yugoslavia to Haiti to Panama to Libya, among many others. The constitutional authority to declare war, delegated to Congress in Article 1, Section 8, has become all but

a dead letter, not by direct repeal but by decades of congressional spinelessness and public apathy. For 15 years, the United States has been engaged in a series of international wars under the banner of a "War on Terror," costing trillions of dollars and thousands of lives, without a constitutionally mandated declaration against any hostile power — and with no end in sight. Quite aside from the horrific human toll, the vaguely defined, open-ended War on Terror has created a constant rationale for more and more debt, mostly urged on a reluctant Congress and ever-more-hard-beset American people by an executive branch energized by the prospect of war without end.

The solution to the executive war card is simple, but will require considerable political will: restore the congressional declaration of war as a check on the war-making ambitions of the executive branch. This would include determining whether America's seemingly endless involvement in Middle Eastern broils is worthy of a declaration of war, and winding down our commitments in Iraq, Syria, Yemen, and Afghanistan once and for all if it isn't. Such would not lead to instant relief from our gargantuan war debts, but it would be a huge step in the right direction, reducing the likelihood of future foreign wars for our descendants to die in and pay for.

How can we stop the growth of federal regulations by unelected bureaucrats? The easiest way would be for Congress to legislatively shut down and defund the departments and agencies that produce them. For decades, conservatives have vowed to close various executive branch departments, with the Department of Education a perennial favorite. But because of public apathy, such promises have not been kept.

What about the Supreme Court? Another area in which the executive branch, bolstered by a sympathetic majority in Congress, might seem unstoppable is in the matter of Supreme Court appointees. One of the major self-justifications of the Trump campaign has been that a President Hillary Clinton will stack the Court with ultra-liberal justices who will roll back the gains of the Scalia/Roberts court, ensuring that abortion on demand continues and possibly overturning the recent ruling in favor of an expansive interpretation of the Second Amendment under the *District of Columbia v. Heller.* But the actions of the Republican-controlled Senate have already shown how such concerns can be exaggerated. The Senate notified President Obama after the untimely death of Justice Antonin Scalia that it would not consider any of his nominations so close to a presidential election. Despite withering pressure from Democrats and the kept media, Senate Republicans have been as good as their word — so far. Left out of the discussion, however, is that there is no constitutional stipulation on the number of Supreme Court justices, nor even that the number be odd to ensure a tiebreaker vote. The original Supreme Court had six justices, requiring that a tiebreaker be by a two-thirds majority (four out of six). Such a configuration was itself a powerful limit on the ability of the Supreme Court to impose its will. But there is nothing save perhaps an act of legislation that prevents the Supreme Court from returning to such an arrangement — or to any other number of judges Congress might deem appropriate.

But aside from the number of justices, Congress possesses an even more powerful check against the Supreme Court. One of official Washington's best-kept secrets is the fact that the Constitution provides, in Article 3, Section 2, for Congress to limit the appellate jurisdiction of the Supreme Court. The precise wording of this oft-overlooked provision is:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have *original Jurisdiction*. In all the other Cases before mentioned, the supreme Court shall have *appellate Jurisdiction*, both as to Law and Fact, *with such Exceptions, and*

under such Regulations as the Congress shall make. [Emphasis added.]

In other words, Congress may pass legislation instructing the Supreme Court that it has no jurisdiction over cases involving, for example, gun rights or abortion. In this way, a court deemed a threat to the body politic could be hamstrung. In practice, this option has seldom been used, and is almost never discussed in "respectable" Washington circles, because it poses a mortal threat to the legal hegemony the supremes have enjoyed for so long — usually to the advantage of Big Government and their cultural Marxist allies. Indeed, Congress might easily have gotten rid of ObamaCare by now if it had chosen this option instead of relying on the Supreme Court — which, of course, refused to find yet another Big Government program unconstitutional.

If All Else Fails?

From time to time, presidents (and Supreme Court justices) simply refuse to acknowledge limits on their power, and persist in defying the will of the people and the authority of Congress. In such cases, there is one final recourse: impeachment and removal from office. Congress has been reluctant to exercise this option, but were it used more freely, presidents and Supreme Court justices would be much more leery of abusing their powers.

In short, there is an array of options available to keep the executive and judicial branches from running roughshod over Congress and the American people. The only thing required is better understanding of the Constitution's intricate checks and balances and the political will to put them into effect.

Written by **Charles Scaliger** on November 7, 2016
Published in the November 7, 2016 issue of the New American magazine. Vol. 32, No. 21