

1986

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Recommended Citation

Sorauf, Frank J., "Book Review: Constitutional Reform and Effective Government. by James L. Sundquist." (1986). *Constitutional Commentary*. 339.

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Book Reviews

CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT. By James L. Sundquist.¹ Washington, D.C.: The Brookings Institution. 1986. Pp. x, 262. Cloth, \$29.95; paper, \$9.95.

*Frank Sorauf*²

As the American Constitution approaches its 200th birthday—its framers signed it on September 17, 1787—we are reminded once again of its striking vitality and longevity. It is by any standard the lively granddaddy of them all. And yet any birthday in the advancing years is in part a cause for taking stock and planning. Amid all the anniversary celebrations we will naturally wonder how well a constitution drafted in the eighteenth century performs in the twentieth, and how well it will serve in the twenty-first. With the bicentennial not far off, James Sundquist is (to the best of my knowledge) the first scholar of the American polity to address those sobering questions at book length.

In the best of an old literary tradition, Sundquist's title promises considerably greater scope than the book delivers. It is not a book that addresses the full range of possible constitutional reforms, nor even the most popular proposals. Sundquist pays no attention, for instance, to the electoral college. Nor is there any reconsideration of the federal bargain or the structure of rights the document created. The book is entirely about the legislative and executive branches and especially the relations between them. The titles of the five central chapters are indicative: *Forestalling Divided Government*, *Lengthening Terms of Office*, *Reconstituting a Failed Government*, *Fostering Interbranch Collaboration*, and *Altering the Checks and Balances*. In a word, the book is a reconsideration of the constitutional separation of powers and an examination of proposals to alter it. The problem with the separation of powers is clear:

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It is a truism . . . that the power to prevent bad acts can also be employed to prevent good ones, however those two adjectives may be defined by any individual. The system of checks and balances that has been so secure a safeguard against tyranny has also given rise to the problem with which this book deals. For government to function effectively, the legislative and executive branches that are so well endowed with veto powers to thwart each other must somehow be induced to rise above their conflicting political ambitions and move in concert on essential matters.

More generally, the entire structure of the separation of powers—replete with political conflict, overlapping powers, assorted checks and vetoes, overlapping terms of office, and fixed terms of office—does not provide the kind of unified, coordinated, and responsive government we need. The obsession of the framers with limiting power and authority produced institutions of government that do not provide effective government. Indeed the problem can very largely be summed up in three words: conflict, deadlock, and stalemate. And so Sundquist sets out to evaluate reforms advanced “on the assumption that the effectiveness of government can be impaired when the bargaining and rivalry between the executive and legislative branches degenerate, as they often do, into conflict and stalemate. The object must be to bring the branches to collaborate in greater harmony without subordinating either.”

After an opening chapter that outlines the problem and then two very useful chapters on the writing of the Constitution and the history of constitutional reform, Sundquist turns to his chief task, the consideration of reforms. The possibilities range from the banal to the bizarre, from minor palliatives to radical surgery. Should we make it impossible for the voter to split a ticket, to vote for one party's candidate for President and another's for Congress, or should we merely redesign the ballot (i.e., the fifty ballots) to facilitate straight-ticket voting? Should we lengthen the terms of office, especially for the House and the Presidency, and if we do, how do we mesh the lengthened terms for House, Senate, and President (e.g., 4-8-4 or 6-6-3)? How best to cope with the “failed” government (read “failed Presidency”)—most especially do we need some way of holding special elections before the end of a presidential term? (And how indeed do we call them, schedule them, and select candidates for them?) And how more specifically to modify the separation of powers—put Congressmen in the Cabinet, the Cabinet in the Congress, recreate the political parties as a grand bridge across the separation, give the President an item veto, strengthen the congressional hand in the use of military force, resort to national referenda on legislative or constitutional proposals?

Sundquist always considers these and other proposals in their full context. He discusses the particular part or manifestation of the

central problem—conflict, deadlock, and stalemate—and then brings reform solutions to bear on the specific symptom or syndrome. Many of the proposals have histories (hearings before a congressional committee, for instance), and Sundquist sets them out. And everywhere he analyzes both the problem and the proposal with impressive shrewdness. He understands the workings of the two branches, and the book is peppered with his insights into the likely consequences of any institutional reform. This grasp of the interaction of institutional structure and governmental performance is the book's greatest virtue.

Sundquist's understanding, however, is pretty much that of the capital city and its insiders. It reflects a world preoccupied with the visible institutions of government and the most visible public officials. The central problem and the possible solutions are largely drawn in terms of Washington activity. The causes of deadlock thus are largely institutional, the result of all the sharing and countervailing of power the framers devised. It then follows logically that solutions will also be institutional.

This institutional approach suffers from two basic flaws. First, it neglects the political and social causes of ineffective government. What of the roots that our governmental institutions have in democratic politics and participation? If one looks for the causes of conflict and deadlock, one can examine the lengthening of the nation's political agenda, the increasing role of active minorities in our politics, the proliferation of political groups and their representatives, the greater salience of issues (for some, even a single issue), the proliferation of political information carried to every part of the land. To be sure our eighteenth-century political institutions exacerbate the difficulties. But we have worked out problems within those institutions before, even within the most confining of them. We have after all achieved something very close to direct popular election of the President within an exceptionally unpromising institutional arrangement.

It is within the last twenty-five years or so that we have added so much to the American political agenda: gender and ethnic equality, the environment, energy policy, abortion, an assortment of life-style issues, and immigration policies have all been added to our politics in that time. And it has been the last generation that has seen the explosion of group politics, whether one talks of powerful neighborhood associations, of political action committees, or of lobbyists and "political representatives" in the country's capitals. In short it is the sharp rise in the politicization of at least part of the American electorate that marks our recent years and that certainly

has increased the demands and burdens on governments. At the same time we have witnessed twenty-five years of decline in the ability of the two major parties to organize the American electorate into cohesive aggregates. In short, Sundquist's crisis in effective government is in considerable part a reflection of the remarkable changes and volatility in American politics since the 1950's.

The fallacy of institutional autonomy carries over to Sundquist's discussion of reforms. They too have a rootless, even apolitical quality about them, curiously removed from the tides and passions of mass democratic politics. One may well want to think of special presidential elections to end the life of a "failed government," for example, but quickly held presidential elections (with nominees chosen by some special process) fail to reckon with the consequences such an innovation would have for the parties, for electoral politics, even for the legitimacy of the presidency with the national public. Sundquist treats both the analysis of the problem and the consequences of proposed solutions almost entirely in "governmental" terms. It is a view from the top that pays too little attention to all of that political activity "down there."

The second weakness of the institutional approach is that institutional reforms are exceedingly difficult to achieve. In a final and decidedly anti-climatic chapter Sundquist confronts the political realities. The politics of reform are daunting, he admits. One needs very substantial majorities for most reforms (i.e., those that would require a constitutional amendment), and yet virtually all reforms would create political "losers," thereby generating the opposition that insures their own failure. As Sundquist notes, "If one institution or one political party or one ideological group gains, another loses. That, at bottom, is why there has not been a single amendment in two hundred years that redistributed governmental power."

In such circumstances reformers must search for packages with enough trade-offs to assure, at least, that there are few losers. That, Sundquist acknowledges, is easier said than done, and after exploring those possibilities he faces the inevitable conclusion:

All of the seemingly insurmountable obstacles to constitutional change could be overcome, of course, if the government were indeed to fail, palpably and for a sustained period. But the necessity to experience governmental failure, in order to prepare for it, is not a happy prospect. This book must end, then, on a pessimistic note. Nothing is likely to happen short of crisis—which is, of course, the case with all fundamental constitutional reform, in every country of the world and throughout history.

And so this survey of constitutional reform ends more with a whimper than a bang.

Such dark reflections bring us abruptly back to reality. We

cannot avoid what is perhaps the most fundamental reality in the whole question of constitutional reform: the amendment clause. Its requirement of extraordinary majorities at each stage of decision has sharply limited both the number of amendments and their subjects. As Sundquist points out, only two amendments have altered the institutions of government in close to 200 years: the seventeenth (direct election of senators) and the twenty-second (two terms for a President). (And only one since the Bill of Rights—the Income Tax Amendment—has directly altered the powers of any of the three branches.) We have, of course, achieved a degree of flexibility by relying on judicial interpretation of the Constitution. That avenue of change has worked well for recasting the meaning of terms like “equal protection,” “commerce . . . among the several states,” and “freedom of speech.” But even the most expansive judicial review cannot alter the Constitution’s concrete institutional arrangements. There is no interpretational leeway in phrases such as “every second year” or “two-thirds of the Senators.”

Short of constitutional amendment, other forms of change can, as Sundquist acknowledges, meet the challenge of constitutional reform. Among political scientists the rediscovery of the political party has long been a favored nostrum. The parties have been potent agents of fundamental change; for example they, more than anything else, turned the electoral college into a non-deliberating anachronism. Indeed, through much of American history the parties provided the bridges (or some of the bridges) across the separation of powers. But their decline in the last several generations has become a part of the problem Sundquist addresses. When party attachments and loyalties decline, voters more freely split their tickets and thus contribute to divided government. And at a time when candidates run their own campaigns for office with resources they raise, it is no wonder that parties in the Congress have increasing trouble getting the attention, not to mention the loyalty, of their members. The parties, in short, must be considered a part of the problem and not of the solution.

Is the situation hopeless? The challenge of effective government may indeed be too potent for us to meet while operating in some eighteenth-century institutions, but it is a little early to come to that conclusion. Congress has shown some capacity for devising new ways to organize governing majorities within the new politics; the legislative-executive commission that hammered out a bi-partisan, short-term “rescue” of the social security system may be one example. On the other hand, no new mechanisms may be necessary. The surprising success of sweeping tax reform in both houses

of the Congress in 1985-86 may simply suggest that the members of Congress are devising new rules for "counting" majorities and maintaining electoral support in the new fragmented politics.

Constitutional adaptation and flexibility—even informal change—is above all a question of the will and inventiveness of individuals. It is, quite simply, a matter of leadership. Men and women make government work, and they make constitutions work, too. By the same token, we are not apt to have much effective government with a President who does not like government, whether effective or not. Effective government in a democracy is at bottom a matter of organizing mass popular support behind public policy. For better or worse, American institutions of government are enormously responsive and sensitive to political opinion. That imperative transcends even the institutional arrangements of the Constitution.

GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY. By Laurence H. Tribe.¹ New York: Random House. 1985. Pp. xii, 171. \$17.95.

*Richard E. Morgan*²

Few would deny that Laurence H. Tribe is one of the most sophisticated defenders of judicial activism writing today. This little book is intended to convince the general reader that Ronald Reagan should not be allowed to place nominees of his choice on the Supreme Court without careful Senate inquiry into their views on contemporary constitutional issues. Fair enough. (Although one wonders whether Professor Tribe would be urging such vigilance on the Senators if another administration were seeking doctrinal clones for Justice Brennan.) And Tribe develops an excellent case for close senatorial scrutiny of the "constitutional visions" of Supreme Court nominees.

He begins by debunking the idea—which has wormed its way into the conventional wisdom of political scientists, historians, and other students of the Court over the past several decades—that Presidents cannot really do much to reshape the Supreme Court by nominating persons with views similar to their own. As Tribe effectively demonstrates, this is, at best, a half-truth.

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