

1. Introduction

Today our federal government faces a monumental task: responding to the serious threat of terrorism. That challenge requires that we reconsider the priorities of our vast federal bureaucracy, to redefine and refocus our government on responsibilities that are truly governmental and truly national. This *Handbook* offers much advice on how and how not to confront the terrorist threat. It also offers advice on the proper constitutional boundaries of the federal government and the policies that would reflect those boundaries and enhance the liberty and prosperity of the American people.

In particular, we urge Congress and the president to move firmly toward the “ownership society” that President Bush called for in his campaign. An ownership society empowers individuals by giving them ownership of and control over important aspects of their own lives, such as retirement, health care, and education. We would note that in three national elections now, the old claim that Social Security is the “third rail of American politics” has been disproved. Most recently, in 2004 President Bush consistently talked about Social Security reform in his campaign for reelection; so did several senatorial candidates, who were attacked by their opponents and won. And that’s no surprise, as numerous public opinion polls have shown support for private retirement accounts at anywhere from 56 to 70 percent. In Chapter 4 we offer a comprehensive plan for Social Security choice.

Social Security is not the only area where reform is needed. Congress and the president must reduce the burden of government on taxpayers and economic growth. They must deal with the unimaginably large fiscal imbalance in Medicare and allow more Americans to control their own health care dollars. They must learn to deal with homeland security within constitutional constraints, as the Supreme Court has recently reminded us in the *Padilla* and *Hamdi* cases. And they must find a way to extricate the United States from Iraq and confront the threat from Al Qaeda.

Defending the life, liberty, and property of Americans is the fundamental responsibility of the federal government. Clearly, that task requires a fairly

narrow focus on the part of the president, the federal agencies, and the Congress. A government that tries to do everything will do nothing well. It's remarkable that the president of the United States was in a Florida classroom reading to schoolchildren in a photo-op to promote more federal involvement in local education when Al Qaeda attacked America. Could there be a clearer example of essential vs. nonessential tasks for the federal government? Parents and teachers can read to schoolchildren. Only Congress and the president can guide the defense of the United States. Congress should read Article I, section 8, of the Constitution, which lays out the powers granted to the federal government, and resolve to begin shedding tasks that are inappropriate for the federal government. A good place to begin is by shedding responsibilities that more properly belong to the several states.

The Role of Federalism

Both the Bush and Clinton administrations have moved us away from our heritage as a federal constitutional republic with a government of limited powers and toward a centralized, national plebiscitary democracy with an essentially unconstrained national government.

Some people on both the left and the right, particularly when they view themselves as dominant in national politics, seem to want the national government to run everything from our health care system to our local schools. But many Americans still appreciate that the Constitution establishes a government of delegated, enumerated, and thus limited powers; that most political decisions should be made in the states and communities; that liberty and federalism are still the best foundation for freedom, prosperity, and social harmony.

The philosophy of centralized nationalism, so alien to the American Founding and heritage, underlies much of contemporary politics. Who, it is asked, can best comprehend the general will? Why, the national government, of course, and especially the one official elected by all the people—the president of the United States. Unlike Congress, it is said, he represents the national interest. The voters have chosen the president, we are told, and Congress should carry out his “mandate.” If Congress refuses to do the general will, then presidents increasingly claim the power to rule by decree, through executive orders. Such a theory would replace the constitutional safeguards against majoritarianism with a president virtually unconstrained in his ability to do good, as he sees it, for the people.

It is odd that those who claim the mantle of liberalism would be so quick to toss aside federalism and constitutionalism, since divided powers protect minorities against the whims of the majority. We constrain our government because we know that any of us might be the minority in some dispute and also because we know that—when we’re in the majority—we might be tempted to abuse our power. We seek to keep governance close to the people, partly because local government is more responsive and, even more important, because that gives individuals the chance to leave, to vote with their feet, and to find communities that better reflect their individual needs and preferences. About 50 years ago, the need to confront the problem of racist laws in some states led to an increase in the exercise of power by the federal government. The lingering effects of that struggle discredited “states’ rights” and federalism, and federal power grew beyond what was necessary to guarantee individual rights in the states. Continuing to centralize the government of 290 million people in a distant capital is a tragic reversal of our liberal Founding. We should remember that the states are “laboratories of democracy” and let them make their own decisions about a wide range of policies.

Conservatives rightly charge liberals with overriding federalism to achieve their policy goals. They ask why New York, Mississippi, and Wyoming have to have the same abortion laws, the same environmental regulations, the same special education rules. But in recent years conservatives, heady with the thrill of national power, have also used that power to impose their own policy preferences. In the name of accountability and choice, the No Child Left Behind Act further centralizes education. The Bush administration, like the Clinton administration, has used its administrative powers and the federal courts to block state initiatives on medical marijuana and assisted suicide. President Bush and congressional Republicans have proposed a constitutional amendment to override state marriage laws. Suddenly liberals are beginning to see the wisdom of federalism and diversity among the states.

Federalism is not a good idea just for the side that is currently in the minority in Washington. It’s the basis of the Constitution. The Founders feared concentrations of power. They believed that the best way to protect individual freedom and civil society was to limit and divide power. Thus it was much better to have decisions made independently by 13, or 50, states—each able to innovate or to copy successful innovations in other states—than to have one decision made for the entire country. As the country gets more complex, and especially as government amasses more

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

The Costs of Big Government

A popular desire for less government is always difficult to translate into substantive reform. It seems to be the nature of democracy that those who seek power and privilege from government are more energetic in the political arena than those who seek only to be left alone. Thomas Jefferson wrote, “The natural progress of things is for liberty to yield and government to gain ground.” Economists have explained how every government program provides benefits to a few people while diffusing the costs over all taxpayers or consumers. Congress is more likely to hear from those who receive the concentrated benefits than from those who pay the diffused costs.

But we must recognize the real costs of excessive government. One obvious cost of our gargantuan government is reduced economic growth. In a world of global markets and rapid technological progress, we struggle along with annual growth rates far below what we achieved from World War II until the mid-1970s. With less taxation and less regulation, we could be far wealthier.

Another cost is the loss of our freedom. We still live in one of the freest countries in the world, but each new government program takes away just a little more of that freedom—the freedom to spend our money as we choose, to go into the businesses we choose, to negotiate with our employers over compensation and benefits.

A related cost of big government, but one not often recognized, is the harm it does to morality and responsibility. Expansive government undermines the moral character necessary to civil society. The “bourgeois virtues” of work, thrift, sobriety, prudence, fidelity, self-reliance, and a concern for one’s reputation developed and endured because they are the virtues necessary in a world where wealth must be produced and people are responsible for their own flourishing. Government can’t do much to instill those virtues in people, but it can do much to undermine them. People should be free to make their own decisions and to bear the consequences of those choices. When we take away freedom and responsibility, we get a society characterized not by thrift, sobriety, diligence, self-reliance, and prudence but by profligacy, intemperance, indolence, dependence, and indifference to consequences.

By taking away money, liberty, and responsibility, the growth of government necessarily shrinks civil society, that whole network of relationships among people, from families to businesses to charities and nonprofit associations, that are formed on the basis of consent. Communitarians who deplore the decline of community and cooperation should look to big government for an explanation.

The Beltway Cocoon

There exists in Congress a systemic bias toward seeing the expansion of government as a solution to almost every problem. That bias is not a fluke but a direct consequence of the current structure of American electoral politics. Whereas the Founders of the American Republic envisioned a government of citizen legislators for whom public service would be a solemn but *temporary* charge, we now see a regime composed almost exclusively of professional politicians. It was not always this way: average congressional tenure has risen steeply over the past century. Chief among the culprits responsible for this change is the huge and growing advantage enjoyed by House incumbents, who in recent years have seen reelection rates rise above 98 percent. Outside Texas, only three members of the House were defeated in November 2004. As David Broder noted in the *Washington Post*, the body that was “given the shortest terms . . . to ensure that they would be sensitive to any shifts in public opinion” has instead become “more like an American House of Lords.”

In addition to all the traditional privileges afforded incumbents, sitting legislators are now protected by increasingly stringent campaign finance laws, which limit the ability of challengers to overcome those advantages through vigorous political speech. Even redistricting, which historically led to more competitive congressional races, has deteriorated into a bipartisan, computer-driven process of incumbent protection. In the 2001 redistricting, 30 of 32 incumbent Democratic representatives in California paid the legislatively appointed redistricting chief \$20,000 each to protect their seats. But, as California Democratic chairman Art Torres noted: “This really is a bipartisan effort. You maintain the 20 Republican seats.” Which tells us something about Golden State Republicans. They’d rather hold on to their own fiefdoms than advance Republican interests in Congress. Sadly, that is the norm in American politics today.

Incumbent advantage leads to a vicious cycle, wherein the most competent potential challengers are deterred from entering contests, except those for open seats, further tightening the incumbent’s hold on power. As

incumbent protection drives up average tenure, the amount of time one must be willing to commit to politics in order to achieve power in Congress also increases. Decades of this process have transformed politics into a game worth playing only for those determined to make a career of it. Whatever their motives, those who find the prospect of spending their lives in government attractive are also likely to have an inflated view of the role and importance of the state in American life. An old story about the chess genius Bobby Fischer has him interrupting a conversation about politics between some fellow players with the demand, “What’s that got to do with chess?” Entrenched political classes are afflicted with a parallel sort of myopia. For them, discussion of any public benefit bubbling up from civil society or the private sector provokes the response, “What’s that got to do with a new federal program?” To promote real political leadership, it may be necessary to change the institutional constraints that give rise to that kind of tunnel vision. In the meantime, however, legislators who sincerely desire to serve the public trust must force themselves to notice this pervasive bias and to overcome it.

The Role of Congress

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

Rein in the President’s War Powers

In affairs of state, no more momentous decision can be made than the decision to go to war. For that reason, in a democratic republic it is essential that that decision be made by the most broadly representative body: the legislature. That is where our Constitution lodges the power to declare war. The Clinton administration espoused a view of executive war-making authority that was as unconditional and unconstrained as that claimed by any president in American history. In fact, presidents from

Johnson and Nixon through Bush and Clinton asserted their authority to put American troops in harm's way without the consent of Congress, and the congressional resolution after September 11 delegated sweeping powers to President Bush. To ensure that we remain a constitutional republic, not a presidential empire, Congress must reclaim its power under the Constitution to make such momentous decisions and its obligation to debate and vote on war measures.

Stop the Abuse of Executive Orders

Lawmaking by the president, through executive orders, is a clear usurpation of both the legislative powers granted to Congress and the powers reserved to the states. The president's principal duty under the Constitution is to "take care that the laws be faithfully executed"—not to make law, as presidents increasingly have done. Like so many other threats to the rule of law, the problem did not begin with but was exacerbated by the Clinton administration. More so than previous presidents, Clinton employed executive orders to make law without any citation of specific constitutional or statutory authority—yet another example of using executive power to implement "the will of the people" outside the rule of law. A Clinton aide, Paul Begala, explained the attraction of executive orders colorfully: "Stroke of the pen, law of the land. Kind of cool." President Bush has used executive orders to grant himself extraordinary powers to deal with terrorism. No matter what agenda the president seeks to impose by executive order, Congress should stop him. The body to which the Constitution delegates "all legislative powers herein granted" must assert its authority.

Stop Delegating Lawmaking Authority to the Federal Bureaucracy

The Constitution clearly grants to Congress the power to make laws and to the executive branch the power to execute the laws. That separation of powers is a key element of the constitutional design. The Founders feared nothing more than the concentration of power in one set of hands. But since the 1930s Congress has gotten into the habit of passing broad laws and leaving the details up to administrative agencies. Congress likes to proclaim noble goals, promise good results, and leave it to unelected bureaucrats to deal with the inevitable tradeoffs and costs of such goals. Congress cannot constitutionally delegate its lawmaking authority to any other body, nor should it want to do so. Congress should accept its responsibility for making law and cease delegating legislation to the bureaucracy.

Consider the Constitutionality of Every Proposed Law

Ours is a government of delegated, enumerated, and thus limited powers. If a power is not granted to Congress in the Constitution, then Congress lacks the authority to legislate in that area. For too long we have drifted toward the idea that everything from our retirement insurance to our local schools to our marriage law is a proper subject for federal legislation. Members of Congress must not leave it to the Supreme Court to decide whether laws are constitutional. Every member must live up to his or her oath of office by considering the constitutionality of every proposed law. Before voting on any bill, each member should ask, “Where in the Constitution is the authority to pass this law?” If the authority cannot be found, members should not vote for the bill. If Congress accepts its responsibility in these matters, it will begin the renaissance of constitutional government in the United States.

Conclusion

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

Suggested Readings

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—Prepared by Edward H. Crane and David Boaz