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HAS CONGRESS ABDICATED ITS LEGISLATIVE AUTHORITY TO ITS STAFF?

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The submissions to this program examine the current status of Madison's plan for the preservation of republican government against the forces of faction and the threat of tyranny.¹ To assure the preservation of liberty, the executive, legislative, and judicial powers were distributed in a way that kept power from dangerous concentration in the hands of one branch.² To assure that law is made "with the consent of the governed,"³ and the activity of legislation was conducted "consonant to the public good,"⁴ free from domination by faction, the legislative power was conferred on a representative assembly, the Congress of the United States. The constituency of each member of this congress is so populous that the influence of faction is drowned in the numbers of voters who select each member of Congress. Even if some faction took control in one or more constituencies, that faction would be made ineffective by the large number of elected members in either house of Congress.⁵ If legislative power accrues to the executive branch, protection against tyranny provided by the separation of powers is weakened. If legislative power is exercised by other than persons elected by the people of the United States, the legitimacy conferred on legislation by its having been consented to by the people's representatives in Congress, is called into question. The focus in this program has been on the first concern — the separation of powers. This paper raises the second question, whether law making today is truly "with the consent of the governed"⁶ when much of the legislative activity leading up to the official act of a member of Congress with respect to that legislation, is carried out primarily by the legislative staff. Has Congress abdicated substantial legislative authority to its own staff? If it has ceded power to the staff by reliance on it for information and the execution of primary legislative

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1. THE FEDERALIST NO. 47 (James Madison).
2. *Id.*
3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
4. THE FEDERALIST NO. 10 (James Madison).
5. *Id.*
6. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

functions,⁷ it has done so in part in defense of the separation of powers. Without such staff, Congress would depend even more than it does on the Executive branch (and on lobbyists representing private interests) for most of its information, and the initiation of a substantial part of Congress's legislative solutions for current problems of the Union.

As has been noted in other contributions to this program, abdication of legislative function differs from delegation of function to another branch of government. The latter is made, at least in theory, by design, which includes the possibility that it can be regulated or reversed by later legislative action. Abdication of legislative authority is inadvertent, compelled by the circumstances of legislation and the multiplicity of problems taken up by the federal government for treatment, if not cure. Abdication of legislative function to unelected participants in the legislative process, is in furtherance of the legislative function. If Congress did not need it, the conferral of power over the legislative product upon staff would not have been made.

In terms of the quality of the legislative product, the conferral, whether by design or abdication, may not be a bad thing. Indeed, this arrangement of legislative function might enhance the degree to which law making responds to national needs. If the legislative result is of good quality, why does it matter that much of the process of finding and formulating issues and fashioning the legislative response to them is in the hands of unelected but intelligent and talented staff members who are, after all, under the supervisory control of a member of Congress? Still, if legislation is to retain its democratic cachet, there must be a line beyond which delegation cannot go. That is, there may be non-delegable legislative functions — functions that must be exercised by legislators authorized to legislate under Article I if legislative product is truly consented to by the governed. If there are such functions, what are they? If they are not properly delegable and not properly exercised by other than an elected member of Congress, to what extent can the exercise of these functions be aided by persons other than the one who is to perform them?⁸

The working life of a Senator or Representative in the Congress of the United States is taken up primarily with three kinds of activities. They provide services to constituents, mainly by aiding these constituents in their struggles

7. By "primary legislative functions" I mean all those steps from gathering information and formulating issues to the drafting of legislative proposals and the decision as to how to proceed with respect to proposed legislation.

8. The question raised in this paper is different from the question of delegability of duties by agents, or the related question of whether a lawyer delegates so much responsibility in a matter to a person who is not a member of the relevant bar as to be chargeable with aiding in the unauthorized practice of law. The issue is not one of liability to a principal or prevention of harm to a client from incompetent or disloyal activities by subagents. Raised in this paper is the legitimacy of a demand on the people of the United States that they act in conformity with statutes enacted by the federal government.

with the federal government and providing information about pending legislation. They engage in legislative and oversight activity. They gather money and support for the coming election and spend time in the home district mending political fences and reinforcing political support. The time spent on legislative and oversight activity is notoriously insufficient to assure even formal service to the image of a representative fully engaged in oversight of the government and the fashioning and enactment of legislation. Most of the legislative activity in either house of Congress is done in committee and subcommittee. The membership of these committees does not reflect the distribution of interests and political positions in the house as a whole, and the products of these committees are rarely considered in depth, if at all, by all members much less by nonmembers of the committees or their staffs.⁹ The more a member of Congress participates in committee work, the greater is that member's potential influence on legislation. On the other hand, the more committees on which the member serves, the less potential impact that member has on any one committee's work. The degree to which committee work takes the time of each member of Congress is strictly up to that member. Senators are members of three committees and several subcommittees. In the House of Representatives, some members serve on only one committee and no subcommittees,¹⁰ while others join many more.¹¹ Plainly, then, the picture of legislation as the result of collegial effort and consent by the representatives of all the nation assembled in Congress is false. The legitimacy of representative institutions in a democracy depends on the representative institutions' somehow "standing for" the people represented. But, even if the membership of Congress were the mirror of the nation, the committees are not mirrors of Congress in terms of ideology or the distribution of regional concerns. Finally, the votes of members of Congress in committee and on the floor of each house are not fully informed and often not informed at all except with respect to the broad outlines of the laws they are consenting to by their votes.¹² But, even if it were otherwise — even if each committee represented well the house it serves, and even if each committee's product was the result of the efforts of all

9. For a discussion of the scope and depth of participation by members of Congress, see RICHARD L. HALL, *PARTICIPATION IN CONGRESS* (1996).

10. Representative William Clay is one such member, available at <http://www.house.gov/clay/bio.htm> (last visited August 31, 2000).

11. Mary Bono, for example, serves on three committees and five subcommittees. She is also chair of the Congressional Salton Sea Task Force and co-chair of the Entertainment Task Force and Travel and Tourism Task Force, available at <http://www.house.gov/bono/bio.htm> (last visited August 31, 2000).

12. See, e.g., HALL, *supra* note 9, at 32. Because of the immense amount of information needed to think intelligently about all the matters before Congress, many members of Congress become "specialists" by limiting their efforts to particular areas of national concern — normally areas that are of concern to their constituencies. *Id.*

its members, it is not at all clear that the members know very much about the legislation they are producing, most of the time. The knowledge they have and the decisions they make with respect to legislation is the result of work by others, primarily staff members.

For each member of Congress and for each committee and subcommittee of either house of Congress there are employed a substantial number of staff, who manage the day-to-day legislative work of the members and committees, and care for the members political needs, with respect to both their constituencies and their status in the house in which they serve.¹³ The relative importance of legislative and political concerns vary with the member of Congress. The function of the staff is, among other things, to enable the member of Congress to obtain and react to information about matters that concern that member. This reduces dependence for such information and for legislative ideas on the Executive branch of the government and interest groups. As access to information increases, so does the amount of information obtained and the need for help in managing that information and reacting to it in terms of legislation.¹⁴ “The members [of Congress] cannot begin to control the workload their staffs collectively help to generate. Yet Congress could not function in today’s world without the staff on which it has come to depend.”¹⁵ The staff arranges hearings, drafts bills and engages in negotiation with respect to at least the initial form of legislative proposals. Indeed, the staff affects every step in the legislative process. They can run committee investigations, the results of which they can leak to the media thereby influencing what members of Congress decide is important enough for a legislative response. According to a respected observer of Congress,

Once a bill is on the agenda, the staff works to assemble a coalition behind it, arranging detailed amendments with other staff members and with interest group representatives to broaden support for the bill without sacrificing the goals the [relevant committee] chairman, often at their urging, has adopted. When conflicts cannot be resolved, the member may then learn enough about the details to weigh the political costs of compromise. But even then, the role of the member is clearly limited. As former Senator Dick Clark (D-Iowa) once

13. In 1999, there were 9,636 staff personnel in the House of Representatives, 6,391 in the Senate, and 104 serving joint committees. There are also staff in support agencies: General Accounting Office (3,275), Congressional Research Service (747), and Congressional Budget Office (232). NORMAN J. ORNSTEIN, ET AL., AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, VITAL STATISTICS ON CONGRESS 1999 – 2000, at 129-32 tbl. 5-1 (Congressional Quarterly, Inc.1999). See also *id.* at 132 figure 5-1 (indicating the dramatic change in number of staff since 1890, especially after 1970).

14. “Without its staff, Congress would quickly become the prisoner of outside sources of information in the executive branch and interest groups.” MICHAEL J. MALBIN, UNELECTED REPRESENTATIVES, CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT 5 (1980).

15. *Id.* at 4.

said, “there is no question about our enormous dependency and their influence. In all legislation, they’re the ones that lay out the options”.¹⁶

In all cases, the staff usually sees itself as furthering the policy objectives of the members they serve.¹⁷

Speaking of a matter before a Senate committee, Malbin notes:

Only a few senators seemed to follow or care about the details of the bill, but they all seemed to know exactly how it might affect them politically . . . What the senators did not seem to know or care about, however, were the different substantive options the staff was considering when differences in substance had no political impact.¹⁸

The functioning unit of Congress is the “enterprise” rather than the elected member of Congress.¹⁹ The enterprise consists of the staff at the member’s disposal, with the member playing the role of chief executive. The member is the source of ideological bias for the staff’s work. The staff does the work of selecting issues, and fashioning legislative responses to those issues. The member whom the staff serves may play a decisive role at any stage of the process of developing legislation or a position with respect to legislation, or

16. *Id.* at 4-5 (footnote omitted).

17. The staff of a committee normally views itself as serving the Chairman of that committee. There are some differences between staff that view themselves as “professional” and those that consider their mission more “political.” The former see their function as laying out alternative options, leaving decision to the committee. According to Malbin, the more political seem more useful.

Our examination of nonpartisan staffs has uncovered a crucial distinction between professional staffs that confine themselves to laying out options or suggesting possible compromises and equally professional staffs that do independent policy analysis and, in some instances, make recommendations. The former have an easier time maintaining their nonpartisan credibility but, however useful they may be, they seem to be unable to serve Congress’s needs.

Id. at 204.

18. *Id.* at 74. As to another legislative matter, involving conflict between a bill passed in the Senate and one passed in the House, dealing with the same subject, Malbin noted:

Key staff people simply sat down for three days . . . and resolved the differences between the two bills. These differences went well beyond monetary questions to ones of policy, that the committee members saw as issues of principle. As a result, the staff level compromise was no simple split-the-difference affair. To find some common ground between the interests of the key members of the House and Senate, the staffs had to come up with imaginative new formulations significantly changing existing law. These formulations, some of which had never been discussed previously in either chamber, were ratified by key committee members and adopted unanimously, with virtually no debate . . .

Id. at 76. Richard L. Hall observed that legislative assistants attend subcommittee meetings for their bosses, and do the preparation work for most meetings. HALL, *supra* note 9, at 89.

19. See DAVID WHITEMAN, COMMUNICATION IN CONGRESS, MEMBERS, STAFF AND THE SEARCH FOR INFORMATION 3-6 (1995).

she may play merely a final, ratifying role with respect to legislation on which that member votes.²⁰

To the extent that the member of Congress serves as an agent of her constituency, the staff is quite helpful. It gathers information from the constituency and provides for the appropriate response. There is little discretion to be exercised here, except insofar as it relates to ignoring requests for help or refusing to provide particular help to the complaining constituent. I doubt that there is any fear that the staff usurps the legislator's function in this respect. Similarly, the role of staff in the search for campaign funding raises no signals warning of usurpation of essential functions. The question as to whether the staff usurps legislative function goes to the legislative and oversight functions. The only official act of a member of Congress is to vote, either in committee or on the floor. That function has not been delegated to staff. But a vote comes at the end of a process of legislating in which the member can be, but often is not involved directly. Such involvement as there is often occurs through the agency of staff, which gathers information, digests it and presents it to the member, and provides guidance with respect to the legislator's next move. The result is a decision by the elected member of Congress based mainly on a large number of previous decisions as to what is

20. MALBIN, *supra* note 14, at 28-36. According to Professor Hall:

[I]t is not so much the member per se, but the member's enterprise that acts in the legislative deliberations of Congress. Salisbury and Shepsle . . . correctly emphasize that in the contemporary Congress, members are akin to leaders of organized enterprises, which include not only the principal or CEO but numerous staff members who serve as their agents. Indeed, it is often one of the member's legislative assistants or the legislative director, not the member herself, who screens issues, alerts her to various legislative opportunities, briefs her on the 'upside' opportunities and the 'downside' risks, and otherwise helps determine the priorities of the office. Information the staff provide to their boss thus becomes an important basis for her perceptions of particular bills. The boss's reactions to staffers' recommendations, in turn, form the basis of staff perceptions of how the boss perceives her interests.

None of this is to say that members are somehow ciphers, as institutional critics sometimes charge. On the contrary, the agent's impulse to learn and then faithfully represent her principal's interests is exceedingly strong in the legislative context. Perhaps the first and most important job of the new legislative assistant is to absorb as much information as possible about the member's district and the member's policy interests. To unwittingly recommend some action that the boss recognizes as politically dangerous, for instance, is the surest way to lose credibility within the enterprise. To act in a way that ultimately causes electoral harm, legislative embarrassment, or a violation of the representative's policy interests is the surest way to lose one's job. In an attempt to anticipate and correctly represent their boss's interests, legislative staffers employ a number of information sources, including past speeches and statements; consultations with the legislative director, administrative assistant, or other staffers; and of course consultations with the member herself.

HALL, *supra* note 9, at 77-78.

important and relevant to the member's needs,²¹ the members own policy preferences, and the member's calculation of the political costs and benefits of the decision.

At what point does the work of the staff defeat the ideal of government with the consent of the governed, and become government primarily by unelected bureaucrats? This question is properly posed with respect to those making decisions in all three branches of the government. The courts have their law clerks, and the executive agencies have a thick layer of staff between the beginning and the end of administrative decision making, engaged in sorting and analyzing data and making preliminary decisions as to the shape and content of executive decisions. The question of abdication of function is dealt with here only with respect to legislation in Congress to the way in which legislation is consented to by the governed. What counts as that consent, which may be given only by the governed or their representatives? If that function is exhausted by a somewhat informed vote, then there is no difficulty at all with any assumption of the pre-vote processing of legislation by unelected staff. The resulting legislation has the required pedigree and its democratic cachet is preserved in its quality. But what if the vote is taken after much of the process of decision making that led to this vote was in the hands of the staff, which is responsible to, and responsive to, but not guided by the member whose vote is required? Moreover, what if this predominance of staff influence is the result, not of failure on the part of the member to do her job properly, but rather of the normal process of legislating for the Nation. It is not that the member will not, but rather that the member cannot do more.

In a way, assigning the preliminary work of legislation to the staff serves Madison's goal of eliminating faction and assuring a focus on the needs of the Union and its people. The personal and committee staffs in both houses are made up of people, most of whom live in and expect to make their fortunes in the Washington, DC area. They look forward to working in various capacities in both the Executive and Legislative branches, or as lobbyists based in the District of Columbia, dealing with friends and former associates serving Congress or the executive branch. Their outlook is partisan²² and national

21. There is an important distinction between two kinds of staff — that staff that pursues the ends of the member to whom their loyalty is due, and that staff which treats its task as simply working out the policy implications of various alternative approaches to particular issues, and presenting those alternatives in all their fullness. The former will present a product that is biased according to the assumed wishes of the member for whom the job is done. That will include only those alternatives that the member is likely to accept with recommendations as to which alternative is the best. The latter will present a product that is biased by the staff's own view of what is workable and appropriate, and includes no explicit recommendations of the best of the many alternatives presented. Both kinds of staff are discussed in MALBIN, *supra* note 14.

22. The staff is partisan in both senses — adherence to a political party and personal loyalty to the member whom the staff serves.

rather than local unless their role on the staff is to take note of and respond (or recommend a response) to matters of importance in a member's constituency. On the other hand, the disconnection between staff and the member's constituency must reduce the degree to which the preliminary decisions made by staff with respect to issues to be raised and the shape of legislation to be proposed or voted dilute the degree to which the enterprise made up of staff and member actually represents the constituency insofar as that constituency is different from other parts of the United States.

What, at minimum, is expected of a member of Congress by either those who vote in the member's constituency or by those who observe Congress in terms of its function in a democratic republic? If either minimum expectation is not met, then the adoption or rejection of legislation is not properly the "consent of the governed." Is more than the bare vote expected? Is it enough that a reasonably informed member be told enough about a legislative proposal to support a decision for or against it? Or must more than the final choice with respect to legislation be made by elected members, and with more than a passing understanding of what it is that the vote is about?

A representative is sent by a constituency to engage in the process of legislation in the name of the constituents. Whether the representative represents all the constituency or only those who voted for that agent is irrelevant to this inquiry. Is this agent sent to deal only with matters of direct concern to the constituency, or to the economic or other interests of the people who sent the member to Washington? Madison envisaged Congress as the People in microcosm, freed of the influence of faction. The people of the United States met by proxy on matters of national importance.²³ On such a view, a member's function was not limited to those matters in of direct concern to the member's constituents. It extended to consenting to all legislation not directly affecting his constituency — even legislation opposed by members representing a constituency that would be affected directly by it, so long as the legislator judged it desirable and "consonant to the public good."²⁴ On such a view the duties of a member must include being sufficiently informed to aid in the deliberations²⁵ and cast a thoughtful vote with respect to all legislation before the house. This vote to change (or not to change) the law, cast after deliberation and debate in which those opposed are heard by all who vote, is

23. See THE FEDERALIST NO. 10 (James Madison) (stating that legislators are similar to judges with respect to issues before them, comparing legislation to adjudication); THE FEDERALIST NO. 39 (James Madison) (It is essential that the members be derived from and elected directly or indirectly by the people.). There were 65 members of the first House of Representatives and 26 Senators. See U.S. CONST. art. I, §§ 2 - 3. That is, both houses were small enough for one to imagine general thoughtful discussion of issues before them.

24. THE FEDERALIST NO. 10 (James Madison).

25. See WILLIAM N. ESKRIDGE, JR., ET AL., LEGISLATION AND STATUTORY INTERPRETATION 78-79 (2000) (noting that deliberation is an end in itself).

the desired consent of the governed. Can such consent be given by the participants in the federal legislative process?

However normatively attractive the vision of legislation in the preceding paragraph is, is it empirically accurate? If it is not, does that mean that the project of representative democracy has failed to provide a government whose powers are exercised by or with the consent of the governed? There is another view of the political process which sees legislation in terms of economics. If this approach is empirically accurate, does it leave us with the picture of a government which exercises its just powers with the consent of the governed?

What if a representative were most accurately seen as representing the economic interests (at least the dominant interests) in the constituency represented? Legislation would then be best understood as the result of bargains struck in behalf of interest groups by the people's representatives. That is, rather than avoiding the influence of factions, the legislative process may be entirely a matter of adjusting the competing claims of factions.²⁶ If this view is sound, then consent is given to the outcome of bargains, and all the consenting legislators need know is the actual effect of the proposed legislation on the various interest groups involved. It should not matter how the information is obtained, so long as it is reasonably accurate. Staff work, on this view, enhances the ability of members of Congress to develop legislation and cast their votes, so long as the member is reasonably certain that the information received from the staff is accurate and the groundwork provided by staff through drafting and negotiation is suitable to the bargain sought. Indeed, the most valuable information and work should come, not from staff, but from the representatives of organized interest groups. On the assumption that all relevant interests are represented in the bargaining process and the bargaining is fair, one can say that any legislative outcome is consented to by (in the name of) the governed, all of whom are parties by proxy to those bargains in which they are concerned.

The strong version of neither of these two views of the legislative process can give us an adequate picture of modern legislation. A weaker version of either, purporting to cover "most" rather than "all" of the legislative process is easier to accept but leaves us at sea as to the adequacy of the member's participation in that process to give the legislative product the seal of democratic approval.²⁷ Under either approach, there remains unanswered the question, when is representation adequate? Is it adequate when the elected member depends on staff, chosen without the participation of the member's constituents, for ideas as to goals to achieve, the formulation of legislative

26. Legislation as the outcome of interest group conflict is treated in ESKRIDGE, *supra* note 25, at 81-97.

27. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE, A CRITICAL INTRODUCTION* (1991) (discussing competing views of the political process).

solutions to promote, and information sufficient to enable the member of Congress to function intelligently with respect to the legislative material before him. If it is not, it is because it cannot be, given the scope and amount of work taken up by the federal government. Put slightly differently, it had better be adequate because there is no going back to the days in which members of congress were substantially in control of the fashioning of legislation.

CONCLUSION

In order to maintain its independence of the Executive Branch, and representatives of particular interests, Congress has come to depend on staff, hired by each house of Congress to serve the legislative needs of individual legislators and committees. Commentators have noted that the work done by staff affects whether and how issues are addressed to an increasing degree. Indeed, it is not unreasonable to assume that most matters before the Congress are better understood in terms of their content and supporting data by staff than by the members whom the staff serve and whose vote is necessary to the adoption or rejection of legislative proposals. The question arises whether the actual participation of the elected member in the legislative process is adequate in terms of the requirement of a representative democracy that government be with the consent of the governed. Is the bare act of voting enough—is it enough that a majority of members voting on a particular measure has voted to adopt or to reject it? Or must that vote be cast only after debate which is meaningful in terms of the final shape of the legislative proposal and informed by the informed arguments of those who support and those who oppose the proposal? The latter is the vision of Madison and those who love democracy but accept representative government as a reasonable (because necessary) second best option. That vision is not in no way correct unless one views the vote as having been cast by an enterprise, itself fulfilling the function of representation because it is led, but not controlled, by an elected member of Congress.