

1993

**Of the People, By the People, for the People : the Congress, the  
Presidency, and the Supreme Court in American History**

Richard B. Bernstein

Jerome Agel

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# OF THE PEOPLE, BY THE PEOPLE, FOR THE PEOPLE

The Congress, the Presidency, and the Supreme  
Court in American History

An Omnibus of three books  
*The Congress, The Presidency, and  
The Supreme Court*  
(Revised and Updated)

By  
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*and*  
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Wings Books  
New York • Avenel, New Jersey

JK  
31  
B45  
1993

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This edition presents updated and revised texts of the original editions, whose series title was *Into the Third Century*. They have been completely reset for this volume.

This edition is published by Wings Books,  
distributed by Outlet Book Company, Inc., a Random House Company,  
40 Engelhard Avenue, Avenel, New Jersey 07001,  
by arrangement with the authors.

Random House  
New York • Toronto • London • Sydney • Auckland

Printed and bound in the United States of America

Library of Congress Cataloging-in-Publication Data

Bernstein, Richard B., 1956–

Of the people, by the people, for the people: Congress, the Presidency, and the Supreme Court in American history / by Richard B. Bernstein and Jerome Agel.

p. cm.

"Contains the books *The Congress*, *The Presidency*, and *The Supreme Court*."

"This edition contains completely updated and revised texts of the original editions"—T.p. verso.

Includes index.

ISBN 0-517-09308-1

1. United States—Politics and government. I. Agel, Jerome. II. Title.

JK31.B45 1993

320.973—dc20

93-4628  
CIP

8 7 6 5 4 3 2 1

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# CHAPTER ONE

## INVENTING A LEGISLATURE

The system of government created in 1787 by the U.S. Constitution has three parts: the legislative branch, or Congress (composed of the House of Representatives and the Senate); the executive branch, directed by the President; and the judicial branch, headed by the Supreme Court.

Every American knows something about the Presidency, and more and more in recent years the Supreme Court has become part of our daily lives. But the Congress remains the unknown branch of our government. And most of the people who do know something about Congress do not see Congress in a flattering light. They are convinced that it is filled with politicians scheming to reward selfish interest groups and to keep themselves in office.

The problem is that most people do not appreciate the importance of the day-to-day grind of politics to the preservation of our liberties and the achievement of important national goals. The history of Congress shows the importance of politics in the development of our government and the nation it is to govern.

This part sketches the history of Congress, from its roots in the colonial and Revolutionary periods to our own time. It focuses on the place of Congress in our constitutional system. It also describes the

three major functions and responsibilities of Congress: to make laws, or *legislate*; to discuss major national issues, or *debate*; and to *investigate* national problems, the workings of government, and the need for new laws.

There is a reason that Congress comes first in the Constitution (in Article I). The delegates to the Federal Convention who drafted the Constitution in 1787 drew on their experience of government during the American Revolution and on their memories of colonial government before the Revolution. In both cases, they were most familiar with legislatures.

Nearly two centuries passed between the establishment of the first permanent English settlement at Jamestown, Virginia, in 1607, and the American declaration of independence from Great Britain in 1776. During that period the colonists relied on their representatives in the colonial legislatures to protect their rights and defend their interests with the mother country. The colonial legislatures had two houses. The lower house was made up of representatives of the people. (In those days, that meant white male property owners, the only people allowed to vote.) The upper house was elected by the lower house, appointed by the royal governor, or elected by the lower house from candidates named by the governor.

The colonial legislatures modeled themselves on the British Parliament. The colonists thought of themselves as Englishmen with the rights of Englishmen, and their heritage was the history and heritage of Great Britain. Parliament had two houses: the House of Commons, which represented the voters, and the House of Lords, where the nobility took part in government. The American colonists admired the many courageous battles for the rights of Englishmen fought by the House of Commons against the Crown. They also appreciated the important role of the House of Lords as a balance between the Commons and the Crown. This history influenced the leaders of the Revolutionary movement in shaping new governments after the declaration of independence from England.

The American Revolution began as a disagreement between politicians in London and the colonists over how much authority Parliament had to make laws for the colonies—specifically, tax laws. The colonists claimed that under the unwritten English constitution, they could be taxed only by legislatures that they had a direct voice in choosing. The colonists were not represented in Parliament; therefore, Parliament could not impose taxes on them. Parliament replied

that although the colonists could not elect anyone to Parliament, they were nevertheless represented because every member of Parliament had the duty to watch over the interests and defend the rights of every subject of the British Empire.

As disputes between the colonists and Great Britain increased, the colonists called meetings of delegates from all the colonies to discuss their common problems with Great Britain and what they should do about them. These meetings were called *congresses*. The Stamp Act Congress met in 1765, the First Continental Congress in 1774, and the Second Continental Congress beginning in May 1775.

It was the Second Continental Congress that took the critical steps leading to the Americans' decision to declare independence from Great Britain. In May 1776, that Congress adopted a resolution written by John Adams of Massachusetts calling on the colonies to adopt new forms of government—that is, to write new state constitutions. On July 2, 1776, that Congress adopted a resolution offered by Richard Henry Lee of Virginia declaring “that these united colonies are, and of right ought to be, free and independent States.” And two days later, on July 4, 1776, that Congress adopted the revised and edited Declaration of Independence, drafted by Thomas Jefferson of Virginia.

The Second Continental Congress was also responsible for the first charter of government of the United States of America. That summer and fall, the delegates wrangled over a draft prepared by John Dickinson of Pennsylvania. Not until a year later, in November 1777, did the delegates agree on a final version of this new charter: the Articles of Confederation. All thirteen states had to approve, or *ratify*, the proposed new charter to put it into effect; it was not until March 1781 that the last holdout, Maryland, ratified the Articles.

The Articles of Confederation created only one institution of government: the one-house Confederation Congress. The delegates did not create two houses for this new legislature of the United States because all previous congresses had had only one house. Also, as we shall see, the delegates kept most powers of government in the hands of the states. They did not see any need to establish a traditional form of government with checks and balances or separation of powers at the national level.

The delegates who drafted the Articles of Confederation were suspicious of strong central government, as most Americans were in this period. They believed that government should be placed as close to

the people as possible. For these reasons, the government created by the Articles of Confederation was extremely weak.

The Confederation Congress could propose, it could resolve, it could issue requisitions (that is, demands to the states for money and supplies). But it had no power to tax the people directly, no power to regulate trade across state lines, and no power to make the thirteen state governments comply with its requisitions. It could handle foreign affairs and negotiate treaties, such as the Treaty of Paris of 1783 that ended the Revolutionary War, but it could not make the state governments obey the requirements of that treaty. It could issue instructions on relations with the Indians, but it could not prevent the states from cheating, robbing, or waging war on the Indians if they felt like it.

On June 28, 1783, a detachment of soldiers from the Continental Army marched on the Confederation Congress and stuck their muskets through the windows of the building in Philadelphia where Congress was meeting. They demanded that Congress make good on the back pay the soldiers were owed. The crisis was resolved, but the delegates were humiliated and never forgot the experience.

It might seem natural that so weak a government would be amended, or changed, as soon as people realized that there was a problem. But all thirteen state legislatures had to agree to adopt an amendment, and there was always one or another holdout state to go against the will of the other twelve. By the mid-1780s, the Confederation Congress seemed to be little more than a bad joke.

General George Washington was appalled. He had had to put up with a divided, angry, and confused Congress throughout the long Revolutionary War. As the former Commander-in-Chief of the Continental Army watched anxiously from retirement at his Virginia plantation, Mount Vernon, he realized that the affairs of the United States in peacetime were even more tangled and uncertain than they had been during the war. He exclaimed in one of his many despairing letters during the 1780s: "We are fast verging to anarchy and confusion!"

Other American statesmen were also trading disgusted observations about American politics. One of them was John Jay of New York. The veteran diplomat had been a New York delegate to the Second Continental Congress and President of that body for one year, and since the end of 1784 was Secretary for Foreign Affairs to the United States in Congress Assembled—the Confederation Congress. As Secretary, he had tried bravely to keep the United States on the board in the game

of power politics, but the Confederation Congress seemed too divided, too distracted, and too weak to back him up. More than practically anyone else in American politics, Jay knew the strengths and weaknesses of the Articles of Confederation. In a letter to George Washington, he suggested that the Articles needed a thorough overhaul, if not a replacement, and he stated the basic principle that such an overhaul should follow: "Let Congress legislate—let others execute—let others judge."

As John Jay, George Washington, James Madison, Alexander Hamilton, and their colleagues were writing back and forth about the problems of the Confederation Congress and the United States, a process was taking shape to promote just such an overhaul.

The first step was the Mount Vernon Conference of 1785, at which Virginians and Marylanders amiably settled problems between the two states, such as navigation on the Potomac River. The Virginians were so pleased with the meeting that they suggested that all the states send delegates to Annapolis, Maryland, in September 1786 to discuss problems of trade and commerce under the Articles of Confederation.

The Annapolis Convention of 1786 did not fulfill the hopes of its organizers. Only twelve delegates from five states showed up. They were too few to make any serious proposals, but they did electrify the country with their report. Drafted by young, combative Alexander Hamilton, this report declared that the Articles of Confederation were too weak and fragile to work as a plan of government. Hamilton's report urged that a new convention be called to meet in Philadelphia, Pennsylvania, in May 1787 to make the government of the United States adequate to the needs of the Union. Several states responded immediately to this call for action. Others waited for the Confederation Congress to respond before acting.

Finally, on February 21, 1787, the Confederation Congress *did* authorize what we now know as the Federal Convention. The delegates voted, however, to give the Convention only the authority to propose amendments to the Articles of Confederation.

On May 25, 1787, the Federal Convention began its work in a stuffy room on the second floor of the Pennsylvania State House—the building we now call Independence Hall. The first action the delegates took was to scrap the Articles and start over, writing a totally new charter of government: the Constitution of the United States.

Most of the Convention's work focused on designing the new legislature of the United States. The delegates decided to keep the name

Congress. They had to face two more issues: how Congress should be constructed and what powers it should have.

The first issue had to do with *representation*. Who should be represented: the people or the states? Under the old Continental and Confederation Congresses, each state had an equal vote. The delegates from the large states, such as Pennsylvania, wanted each state to have representatives allotted based on population, or wealth, or size, or some other “fair” system. The delegates from the small states, such as Delaware and New Jersey, resisted this idea. They feared that they would be swallowed up by the large states unless they had an equal vote. The fight dragged on all through June and into July. Finally, a compromise proposed by the Connecticut delegates Roger Sherman, William Samuel Johnson, and Oliver Ellsworth was adopted. Their idea is still built into the Constitution today.

Congress has two houses:

1. In the House of Representatives, the people of each state are represented. Each state gets a certain number of Representatives based on its population. Its members are elected by the people of each state to serve for two years. The House has the sole power to propose *money bills*—that is, appropriations and taxation measures. The House elects a presiding officer, called the Speaker of the House (a term borrowed from the British Parliament).

2. The Senate has two Senators from each state, preserving an equal vote for the large and small states. The Senators serve six-year terms. The Senate has the sole power to approve or reject treaties made by the President and to approve or reject the President’s nominees for federal judgeships and executive offices. The Senate also works with the House in framing and revising proposals for laws, known as *bills*. The Vice President of the United States presides over the Senate’s meetings and has the power to vote to break ties of that body. (The first Vice President, John Adams, holds the record for breaking ties; he did it twenty-nine times.) Under the Constitution of 1787, Senators were to be chosen by the state legislatures, which were free to authorize popular elections or to choose the Senators themselves. (This system lasted for over a century, until the Seventeenth Amendment, calling for the election of Senators by the people, was adopted in 1913.)

Another compromise the delegates adopted set the formula for representation in the House of Representatives: Each state would receive representatives based on the number of free inhabitants plus three-fifths of “all other persons”—a tactful way of saying *slaves*. This com-

promise was a concession to the Southern slaveholding states. They had threatened to walk out of the Convention if their states were not protected by such a compromise.

There was little fuss about the other issue, the powers of Congress. Congress was given a set of specific powers in Article I, Section 8 of the new charter. These powers amounted to far more than the Confederation Congress ever had. They included the power “to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”; “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”; “to coin Money” and “to borrow Money on the credit of the United States”; “to establish Post Offices and post Roads”; to issue patents to inventors and copyrights to authors, composers, and artists to protect their rights to their works; “to raise and support Armies” and “to provide and maintain a Navy”; and so forth.

The delegates included a special clause at the end of Article I, Section 8: “To 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.” This clause has become known as the *elastic clause* because later Congresses and Presidents and the Supreme Court have found in it authority for all sorts of federal statutes, such as the civil rights laws, even though the statutes have no clear authorization in the listed powers of Congress.

The delegates intended Congress to play special roles in checking and balancing the two other branches of government, the Presidency and the Supreme Court. They provided that the President can name certain government officers and negotiate treaties with foreign nations “with the advice and consent of the Senate.” They provided that Congress has the power to establish federal courts below the Supreme Court and to define the kinds of cases that the federal courts could hear.

But Congress does not have the power to adopt laws all by itself. Following British precedent and the constitutions of the states of New York and Massachusetts, the Constitution provides that *both* houses of Congress must pass a bill. Any bill passed by the House and Senate then goes to the President. He may sign it into law or return it “with his Objections”—that is, *veto* the bill. A vetoed bill goes back to the chamber that proposed it. If the bill is passed again by at least two-thirds of *both* the House and the Senate, Congress has *overridden* the

President's veto, and the bill becomes law. The President may also veto a bill by a more complicated means—if he takes no action on a bill for ten days after getting it, and Congress adjourns before that ten-day period is up, he has carried out a *pocket veto* of the bill.

The Constitution sets forth a special process, known as the *impeachment* process, by which Congress can remove from office “the President, Vice President and all civil Officers of the United States” who have committed “Treason, Bribery, or other high Crimes and Misdemeanors.” In this process, the House *impeaches*, or accuses, the official in question, and the Senate conducts a trial of the official on the charges listed in the *articles of impeachment* adopted by the House. A two-thirds vote of the Senate is necessary to convict the official and remove him or her from office.

The delegates to the Federal Convention borrowed the impeachment process from British practice. Also, impeachment had been a favorite tool of the colonial legislatures to keep other government officials in line. Under the Constitution, if the President has been impeached, the Chief Justice of the United States presides over the Senate's trial; if anyone else has been impeached, the Vice President presides over the Senate's trial.

Finally, Congress has the principal responsibility for *amending* the Constitution. Under Article V, there are two ways to make formal changes in the Constitution. The more usual way is for Congress to propose an amendment to the states, by a two-thirds vote of both the House and the Senate. Three-fourths of the states must then ratify the proposed amendment to make it part of the Constitution. There is another way to amend the Constitution, also involving Congress, which has never been used: Two-thirds of the states must apply to Congress to call a special convention to propose amendments to the Constitution. Any amendments proposed by this convention must then be adopted by three-fourths of the states to become part of the Constitution.

On September 17, 1787, thirty-nine of the forty-two delegates to the Convention still present signed the Constitution and sent it by stagecoach to the Confederation Congress, which was sitting in New York City. After several days of argument and debate, Congress sent it on to the states on September 28. The states called special elections for *ratifying conventions*—bodies chosen by the voters for the sole purpose of voting to adopt or to reject the proposed Constitution.

The contending forces in the ratification controversy said and wrote surprisingly little about the proposed new Congress. The oppo-

nents of the Constitution—the Anti-Federalists—argued that the new Congress would be too small to ensure that all the people (about four million at that time) would be fairly represented. Some criticized the sweeping grants of power to Congress. Others denounced the compromises with slavery that gave “extra” representation to the slaveholding states. In *The Federalist*, a brilliant series of eighty-five newspaper essays written under the pen name Publius, Alexander Hamilton, James Madison, and John Jay defended the Constitution against these and other charges by the Anti-Federalists.

After ten months of often heated discussion, eleven state ratifying conventions voted to adopt the new Constitution. Unlike the Articles, the Constitution needed ratification by only nine states for it to go into effect. In October 1788, the dying Confederation Congress adopted procedures to help the new charter of government take effect.