# Government for the Third American Century

Donald L. Robinsor

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### Donald L. Robinson

SMITH COLLEGE

Foreword by Lloyd N. Cutler, C. Douglas Dillon, and Nancy Landon Kassebaum, Committee on the Constitutional System

Westview Press
BOULDER, SAN FRANCISCO, & LONDON

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Published in 1989 in the United States of America by Westview Press, Inc., 5500 Central Avenue, Boulder, Colorado 80301, and in the United Kingdom by Westview Press, Inc., 13 Brunswick Centre, London WC1N 1AF, England

Library of Congress Cataloging-in-Publication Data Robinson, Donald L., 1936-

Government for the Third American Century/by Donald L. Robinson.

p. cm.

Includes bibliographical references.

ISBN 0-8133-0936-0. ISBN 0-8133-0935-2 (pbk.)

1. United States—Politics and government—1945— I. Title.

JK271.R5355 1989

320.973—dc20

89-36439 CIP

Printed and bound in the United States of America

The paper used in this publication meets the requirements of the American National Standard for Permanence of Paper for Printed Library Materials Z39.48-1984.

10 9 8 7 6 5 4 3 2 1

## Government for the Third American Century

To my students at Smith College, for demonstrating that citizens can recover the ability to think constitutionally

### **Foreword**

As the Constitution enters its third century, we are witnessing what appears to be a polar shift in how the constitutional system operates.

While the Constitution does not mention political parties, the framers promptly organized broadly based national parties in order to make the brave new system work. For most of our history the cohesive force of party loyalty usefully offset the centrifugal force of separate executive and legislative branches. The party that won the presidency also won a majority of both houses of Congress. In the second half of this century, however, voter loyalty to parties has declined. Now we usually elect a president of one party and a majority of the other party in one or both houses of Congress. In the resulting divided government, there is no counterforce to the centrifugal pull of the separate branches away from one another, and when we are governed poorly, neither party can fairly be held accountable.

The Committee on the Constitutional System was organized in 1982 as a nonpartisan, nonprofit organization of citizens concerned about this and other problems of national governance. Most of the members have served in either the Congress or the executive branch or both or have addressed the subject as scholars. Although not in full accord on the solutions to the problems of ineffective and unaccountable government, they are convinced that these problems demand widespread and intensive public discussion.

The Committee has sponsored two earlier books directed to this need. *Reforming American Government*, a compendium of basic papers on the strengths and weaknesses of our constitutional system, was edited by Professor Donald L. Robinson and published by Westview Press in 1985. *Constitutional Reform and Effective Government*, a detailed analysis and criticism of the government's institutional structure and of proposed remedies, by James L. Sundquist, was published by the Brookings Institution in 1986. And the Committee issued a summary report of its own conclusions and recommendations in 1987. (Copies

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of the 1987 report, entitled "A Bicentennial Analysis of the American Political Structure," are available from the Committee on the Constitutional System, Suite 410, 1755 Massachusetts Avenue NW, Washington, DC 20036.)

With the benefit of grants from the Ford, CBS, Rockefeller, Hewlett, MacArthur, and American Express foundations and the Dillon Fund, and with additional support from our members, 10,000 copies of each of these works have been distributed throughout the country and discussed in twenty regional gatherings as well as in the Committee's regular meetings in Washington.

Those discussions have indicated the need to update the presentation of the problem and potential solutions in a pro-and-con format designed to encourage broad debate and understanding. A further grant from the Dillon Fund has made this possible, and we are very pleased that Professor Robinson has taken on this new challenge.

The 1988 vote has once again (for the fifth time in the last six presidential elections) given the country a divided government. Looking ahead, the Committee has asked Lloyd Cutler and James Sundquist to join with other scholars and practitioners in examining the consequences of divided government during the first year of the Bush administration. A basic premise of the resulting coedited volume is that the nation must either find new institutional approaches and devices for making divided government work or devise reforms to reduce the risk of its recurrence. Westview will publish the work in the fall of 1990 as a companion to the present volume.

This sequence will bring needed attention to a profound public question: Can our government perform adequately in the third century of our national life?

Lloyd N. Cutler
C. Douglas Dillon
Nancy Landon Kassebaum
Co-Chairs
Committee on the Constitutional System

### **Preface**

This book is a primer for debate about the fitness of the American political system as it moves toward the twenty-first century. It focuses on structural matters: the electoral process, the major institutions of the federal government and how they interact, and what we can do when they perform ineffectively or abuse their powers. This focus on structure has led us to exclude certain topics that come to mind when people discuss "constitutional reform." We do not, for example, consider an amendment to allow prayer in school or ban abortions. These are important questions, but they do not affect the structure of the government directly. They will be accomplished or blocked by the existing machinery. Nor do we devote attention to the judiciary. This choice is perhaps harder to justify, given our focus on institutions and their interactions. Our reasoning is that the courts are functioning well enough at the moment. The threats to the viability of our system in the twenty-first century arise not from the judiciary but from the political system. Nor do we address the federal system: questions of the distribution of functions between the federal and state governments. Again, these are important questions, and in this case they certainly do affect the structure of constitutional government. But they are separate from the focus I have chosen.

The Introduction (Chapter 1) notes that the framers set the example for bold action on structural reform and continued to innovate, even after the Constitution was ratified and put in operation. In fact, structural innovation has been an ongoing tradition in America.

Part 1 presents a survey of recent developments in three areas that arouse deep concern among political leaders, scholars, and ordinary citizens. Because we are, most fundamentally, a constitutional democracy, we turn first to the electoral system. Americans have always scorned politicians and heaped ridicule on the humbug of political campaigns. Recently, however, for many voters distaste has turned to disgust and finally to cynicism and apathy. In Chapter 2, we analyze these developments around that the concern area of the concern area of

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opments and relate them to the decline of our political parties. Next (Chapter 3), we look at the recent performance of the government as manager of a modern, national economy. We try to penetrate the political rhetoric that surrounds economic issues and to determine whether the structure of government has contributed to our difficulties in this area. The survey concludes in Chapter 4 with the troubled story of foreign relations and control of the war powers since World War II.

Part 2 begins the debate over the need for basic reform of the American political system. In Chapter 5, we present one side of the argument: the contention that structural reforms, including constitutional amendments, are necessary to preserve effective, accountable government into the twenty-first century. In Chapter 6, we outline the rebuttal: the argument that the flexibility and adaptability of the American system have been amply demonstrated over the past two hundred years and that the framers' Constitution embodies wisdom that we dare not abandon in these troubled times.

Part 3 proceeds on the assumption that structural reforms are at least worth considering. It presents a dozen separate proposals, under three headings: How We Choose Our Leaders; How Government Works Together; and What We Do When Government Fails.

The format for each proposal discussed in Part 3 is the same. We begin with a statement of "The Existing Situation," outlining the provisions of the Constitution and laws on the issue in question. Next, to frame the debate, we present "The Basic Proposal" in the form of a resolution that advocates the reform in question. We briefly discuss the implications of the resolution and, in some cases, show how the reform in question can be modified in various ways. The next section, called "Relevant Facts," gives the necessary background for considering each proposal. The core of each presentation is a pair of sections that outline the case for and against the proposed change. A concluding section ("You Decide") puts two or three questions that drive toward a decision on the resolution.

In Part 3, we look at electoral changes first, because the effective use of the ballot is fundamental to a democracy. Chapter 7 presents a discussion of six proposals to reform the electoral system. The first is a change in the length of terms for members of Congress, a constitutional amendment put forward in various forms through the years by many political leaders, including President Lyndon Johnson. The second is a device that could probably be put in place by federal statute: allowing voters in all federal elections to vote for a "team ticket," thereby casting a ballot for all candidates nominated by a given party. The third and fourth proposals are designed to reform campaign

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finance: one (requiring a constitutional amendment) would put a cap on campaign spending; the other (by statute or party rules) would provide public funds for television broadcasting of candidates' appeals. The fifth (requiring a constitutional amendment) is a proposal to eliminate the electoral college and provide for the direct election of presidents. The sixth and final proposal in this section (also requiring an amendment) would eliminate the office of vice-president and otherwise provide for succession to the presidency.

In Chapter 8, we consider four suggestions for improving the interaction of the government's parts. The first two proposals would enable the president (by constitutional amendment) to select members of Congress for his or her cabinet and clear the way for the president (by informal agreement) to appear regularly before Congress to answer questions about the administration's policies and actions. The final two proposals discuss methods of revising the War Powers Resolution and compelling a balanced budget.

Chapter 9 turns to measures for coping with stalemates and break-downs—when the system functions so badly that we need to resort to extraordinary procedures. The first would incorporate into the Constitution, by amendment, a means of dissolving the government and holding new elections before the full terms of office have expired. The other would introduce, by amendment, a means of enacting legislation by national referendum.

Chapter 10 concludes this series by asking whether reforms, if we want them at all, should be considered each on its own merits, one by one, or in packages. The Constitution is a complicated, delicately balanced whole. Changing one aspect will influence others. To achieve the desired effect and to keep the system balanced, we may wish to consider reforms in combination.

Part 4 accepts as its premise the idea that reforms are needed and asks how to proceed. Continuing with the pro-and-con format, Chapter 11 debates the merits of the traditional method of amending the Constitution (originating in Congress) versus the approach that originates in the states and proceeds to a national convention.

The book concludes with the text of the Constitution, Suggestions for Further Reading, and a listing of current members of the Board of Directors of the Committee on the Constitutional System.

Donald L. Robinson Ashfield, Massachusetts

### **Acknowledgments**

I have had a great deal of help in writing this book. The idea was initiated at a meeting in Washington in June 1988 by a group of people associated with the Committee on the Constitutional System. The anxieties of the American people about the condition of the political system, deepened by the Iran-contra affair, were already being inundated in the maelstrom of the presidential campaign. Those present at the June meeting anticipated that these concerns would resurface by late 1989, once the honeymoon of the new administration was over and the government began to settle into its familiar pattern of stalemate and evasion of difficult issues. Present at that meeting were Douglas Dillon, Lloyd Cutler, David Bartel (representing Senator Nancy Kassebaum), Jim Sundquist, Jim Burns, Douglass Cater, Henry Reuss, Dot Ridings, Steve Charnovitz, Susan McCone, Mary and Peter Schauffler, and a few others. We all agreed on the need for a "debate book," outlining the issues and providing materials for a thorough discussion of various reforms. The goal would be to equip a wider array of citizens to enter into discussions that were already attracting a good deal of attention among leaders of the Washington political community. I agreed to attempt such a volume. As the work progressed, I continued to have the valuable assistance of Messrs. Dillon, Cutler, Sundquist, Burns, and Schauffler. Particularly in light of this kind help, I must emphasize that the selection of items to discuss, the priority they are given, and all aspects of the way they are treated in this book represent judgments that I alone have made.

I especially want to thank Messrs. Dillon and Cutler and Senator Kassebaum for their encouragement and support of this project. For the decade of our association, they have always made plain their commitment to the widest possible investigation of alternatives. By their stature, they have lent legitimacy to such inquiries. When the history of these years of constitutional government in the United States is written, these three leaders will be honored for keeping alive the

belief that Americans do not have to accept things as they are, that we can admit the possibility that our ills are rooted in the structure of institutions, and that we can improve the performance of our political system.

Besides the continuing support and assistance of this group of friends in and around Washington, I have had other vital assistance. My principal community of learning for the past twenty years has consisted of students, colleagues, and alumnae of Smith College. I also want to thank Shep Forman, Charles Blitzer, and Fred and Ruth Friendly, again, for giving me opportunities to develop and present these ideas. As a visiting scholar for the Phi Beta Kappa Society this past academic year, I have had the privilege of sharing my thoughts with colleagues and students on several other campuses. The confidence and professionalism of Miriam Gilbert and Jennifer Knerr at Westview Press have also been of inestimable value.

I could not have completed the work on time without the help of Wendy Anderson. Word-processing reduces an author's need for a typist, but the author of a book like this still needs research assistance. He is doubly blessed if his assistant has an unblinking eye for awkward prose, combined with a kind heart and an unflappable temperament. And he has a treasure if his assistant is also adept with the issues involved in the study and is able to make valuable suggestions about the organization of the argument. Ms. Anderson will continue her studies next year at the Law School of the University of Virginia. I shall miss her sorely.

Ms. Anderson and I have had valuable assistance from Joan Mulloney and Djuna Perkins, who helped with research and proofreading. Janice Daily and others on the staff of Neilson Library at Smith College guided us to published materials.

On a personal level, the sacrifices demanded by this project were borne most heavily, and with unfailing sweetness and courage, by my dear wife, Molly.

For errors and misjudgments that have survived all these good efforts, I alone am responsible.

D.L.R.

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## 1 Introduction: Government from Reflection and Choice

Two centuries ago Alexander Hamilton, a leader of the drive for political reform in America, persuaded New Yorkers that the Constitution was worth a try. It was not perfect, he admitted, but its basic principles were sound. Above all, it would hold the Union together. Besides, he said, as experience revealed its flaws, we could amend it.<sup>1</sup>

Hamilton's practical wisdom was deeply American. The important thing was to stick together and to embrace our common commitment to independence, liberty and government by consent of the governed. The means we could work out and adjust as problems developed.

The founders themselves did not hesitate to alter the system of government which they had created. When the people refused to accept their assurances that the national government would respect civil liberties, they quickly drew up a Bill of Rights and added it to the Constitution. When the electoral college misfired in the election of 1800, they added the Twelfth Amendment, specifying separate votes for president and vice-president.

Reform during the founding generation came in other ways, too, besides constitutional amendments. When political leaders felt frustrated as their programs faced defeat in Congress, they overcame their prejudice against "factions" and formed political parties that bridged the separation of powers.

Subsequent generations made further changes, some of them absolutely fundamental. The Civil War generation abolished slavery and established that no person could be denied the right to vote on account of race. Progressives around the turn of the century fought for, and eventually won, the direct election of senators and suffrage for women. It took monumental efforts to accomplish these reforms, but the nation

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was determined to learn from its experience and to improve the system inherited from the founders.

Again, some of the most significant changes occurred without amending the Constitution at all. President Andrew Jackson and his allies developed the national party convention for nominating presidential candidates. Later in the century, as railroads crossed state lines and conditions in the marketplace became too complex and changed too rapidly for Congress to regulate them by statute, legislators created the Interstate Commerce Commission. The Constitution provided separate branches of government to perform different functions, but here was a body that made rules, enforced them and settled disputes about them, all by itself.

In the twentieth century, Congress began to use the I.C.C. model for many other problems: to regulate stock markets, to license radio and television stations, to protect the right of working people to organize into trade unions, and to keep watch over elections. Many citizens were troubled by this development, which appeared to violate the spirit of the constitutional separation of powers, and the Supreme Court heard several cases that challenged one or another of these agencies. But the Court decided that they did not conflict with the constitutional provisions. As long as the commissioners were appointed in the usual way (by the president, with Senate confirmation), and as long as Congress retained the power to set the framework for the agencies, and to amend the guidelines at its discretion, the Court thought they represented a permissible adaptation of the Constitution to modern demands.

The evolution of constitutional form has continued to our own time. A recent example is the special prosecutor. Traditionally, it has been one of the principal responsibilities of the executive branch to conduct investigations and prosecute people suspected of engaging in criminal acts. In the aftermath of the Watergate scandals, however, people began to mistrust the executive branch itself. Could a president's top aides be trusted to prosecute themselves? The Constitution expects voters to punish a corrupt administration, but the election of 1972 convinced many people that a president involved in corruption could distort the political process to an extent that threatened the integrity of the whole system. Congress decided that the situation called for innovative measures. In 1978 it adopted the Ethics in Government Act. In the event that the Attorney General found any member of the executive branch (including himself) plausibly accused of serious crimes, the act bound him to ask a panel of judges to name a special prosecutor, independent of the Justice Department, with full power to investigate the charges Introduction 3

and, if he or she deemed them sufficiently serious, to prosecute the officials in court.

There is no doubt that this procedure departs from the framers' design. Yet the Supreme Court has endorsed it, apparently convinced that experience in recent years justifies it.

What these developments show is that (as John Gardner has pointed out) a living nation is not a finished monument. The pharoahs built the pyramids, and they are still standing. We admire them, and we do our best to preserve them exactly as they were built. The pharoahs also built a form of government, but that has long since perished, because it could not adapt to changing demands.

A nation lives by the continuing efforts of a caring, believing people. Americans are united by a love for this land and by the challenge of creating a nation from the diverse people who have made their way here from all over the globe. (I include, of course, the so-called "native Americans," who came here earlier.) We are not of one "blood." Our national identity is bound up with the notion of *becoming* a people, by blending many racial and ethnic strains.

We are also united by the Constitution. We are a people of the covenant. The Constitution is our deepest bond. It is almost unthinkable for us to consider abandoning it or exchanging it for another model. It is far more than a mere form of government. It is the bedrock of our legitimacy as a nation.

At the same time, we are a practical people, and we are not afraid to consider our faults. That is why our political system has lasted for two centuries. We adhere to it, but not rigidly.

Our system has been under great strain recently. Many of the problems we confront seem to be rooted in the system itself. This book explores those problems and attempts to discern whether they arise from the usual stuff of politics (ignorance, haste, mischief, the clash of personalities), or from the tendency of the existing system to misdirect our efforts to govern ourselves fairly and effectively.

In testimony in 1982 before a congressional committee called to consider political reform, James MacGregor Burns offered two reasons for thinking boldly about such questions. "First," he said,

there may well be—in the tumultuous century that lies ahead of us, there undoubtedly will be—a series of national and worldwide crises in which the capacity of our system will be so sorely tested that many Americans—perhaps rather suddenly—will feel an urgent need for change. It's very important, if we come to a point of great debate in this country over alternative systems, that we have done our homework, that we have