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CONGRESSIONAL ETHICS AND THE ADMINISTRATIVE STATE

INTRODUCTION

Two leaders of the House of Representatives resigned in July, accused of using their public office for private gain. This sensational news soon was eclipsed by revelations of deepseated and longstanding corruption at the Department of Housing and Urban Development. Five senators, meanwhile, are under scrutiny for their role in the \$250 billion savings and loan scandal. And these and other related incidents, according to many veteran Washington observers, are just the tip of the iceberg.

Washington's ethics crisis is far more than the transgressions of individual members of Congress. It is systemic to the way the federal government operates today, the inevitable consequence of the modern administrative state, which has institutionalized favoritism and graft.

Complex and Secret. America's constitutional principles of federalism and separated powers have been eroded by a highly bureaucratic "administrative state." The result: What was once called the rule of law has given way, in many instances, to the complex and often secret interaction between congressmen, executive agencies, and special interest groups. Corruption and lawlessness necessarily follow, just as the framers of the Constitution predicted. Thomas Jefferson advised in 1823:

I believe the states can best govern our home concerns, and the general government our foreign ones. I wish, therefore, to see maintained that wholesome distribution of powers established by the Constitution for the limitation of both; and never see all the offices transferred to Washington, where further

withdrawn from the eyes of the people, they may be more secretly bought and sold at market.¹

The current ethics in government crisis is a challenge for George Bush. To meet it, he must chart a course between base partisanship and benign neglect. Public concern over ethics should not be used to continue or escalate the trend set by the congressional majority that criminalizes political differences for partisan gain, typically at the expense of the executive branch. But at the same time, it would be tragic to dismiss the ethics crisis as partisanship run amok or "mindless cannibalism," as former Speaker of the House Jim Wright put it. The reason: The Washington ethics crisis is a bipartisan scandal.

THE ROLE OF CONGRESSMEN IN THE ADMINISTRATIVE STATE

The administrative state is a highly centralized, heavily bureaucratic system of government. It defines current Washington, where decisions affecting virtually all aspects of Americans' everyday life are made by a centrally administered bureaucracy charged with redistributing fairly and wisely a massive largess of federal tax dollars. This has turned congressmen increasingly into ombudsmen for the administrative state. Today's legislators are engaged less in the traditional legislative functions of debating and voting on compelling national issues, and more in the details of administering the federal bureaucracy — intervening on behalf of constituents seeking benefits from the complex and often unresponsive bureaucracy.

As ombudsmen, congressmen have little interest in new policy directions that would alter the fundamental composition of the administrative state. Such a change could diminish their role as ombudsmen, one which exposes them to little political risk and serves them quite well in reelection campaigns. A scaling down of the administrative state would force congressmen to take on the politically more risky role of legislators who must propose innovative policies to help resolve national problems. The interest of the rational congressmen in the administrative state, therefore, is to protect and preserve the administrative state, while ensuring that it delivers benefits to his or her constituents.

Enormous Temptation. The administrative state, however, is beginning to crumble under the corruption inherent in any such system of massive funds controlled and distributed by bureaucrats and politicians far removed from the people they are supposed to serve. Notes University of Dallas Political Scientist Thomas West:

The current system is corrupting because when the government hands out such vast sums of money for local projects...not [according to] publicly voted-on

1 Albert Ellery Bergh, ed., *The Writings of Thomas Jefferson*, Vol. 15 (Washington, D.C.: Thomas Jefferson Memorial Association, 1907), pp. 450-451.

law but by *ad hoc* grants, regulations, and exceptions to regulations arrived at privately, the temptation is enormous, given the realities of human nature, for Congressmen to think that the public good is served by helping their local friends with government money or regulatory relief.²

Congressmen, it seems, are tempted to give the most help to those friends who can return the favor with large campaign contributions, personal honoraria, and other financial benefits. Take the case of former Speaker of the House Jim Wright, the Texas Democrat. In addition to his lucrative book publishing arrangement, Wright allegedly intervened on behalf of campaign contributors to pressure the Federal Home Loan Bank Board to allow certain Texas savings and loans (S&Ls) to remain open even though the Board had sought to shut them down as insolvent.³

Under a Cloud. And now five senators are being investigated for their role in the \$250 billion savings and loan scandal. The senators are said to have intervened with federal regulators at the request Charles H. Keating, a wealthy Phoenix businessman and former chairman of the failed Lincoln Savings and Loan of Irving, California. According to the *New York Times*, Keating and his friends donated a total of more than \$1 million to political organizations controlled by the five senators.⁴

Those now under the cloud of investigation well understand how Washington works. The system of government that has transformed congressmen from legislators to ombudsmen has spawned the corrupt favoritism that once defined New York's Tammany Hall, but now defines Washington and its emerging scandals. The framers of the Constitution understood the inevitable corruption of the administrative state, and had sought to avoid it with their constitutional prescriptions of federalism and separated powers.

THE FRAMERS' DESIGN: FEDERALISM AND SEPARATED POWERS

The Constitution gives the national government great and important powers, as it does to state and local governments. This scheme of distinct local and national powers is, of course, what Americans mean by "federalism."

Without some degree of centralized government, the United States would not have progressed beyond the paralysis of the Articles of Confederation period when the weak national Congress was incapable of defending against foreign threats or preventing state legislatures from violating property rights. Yet without decentralized administration, fair and effective government is im-

2 Thomas G. West, "President and Congress: A Bicentennial Perspective," *The Heritage Lectures*, No. 222, May 10, 1989.

3 See "Wright, Coelho, and the S&L Fiasco," *U.S. News and World Report*, June 12, 1989, pp. 21-22.

4 Richard L. Berke, "Constituent Service," *The New York Times*, November 5, 1989, p. 1.

possible because no central power can comprehend the myriad of changing circumstances and particular needs in different parts of the country and among diverse individuals. Under the Constitution, therefore, the framers granted to the national government extensive powers to conduct foreign policy and to regulate domestic commerce. Other powers – such as education and managing the day-to-day economic life of the nation – were left to the states and localities.

Within the national government, the separation of powers was meant to prevent tyrannical government by dividing the powers and providing checks and balances. The separation also was designed to make government work better. This it did by designing each power to fit its task. Example: Since execution of the law requires decision, secrecy, and dispatch, and since these are by nature the attributes of an individual rather than of a group of individuals, the executive power was placed in the hands of one person. The three separate branches of government, moreover, are distinguished by their different constituencies and modes of election.

THE RISE OF THE ADMINISTRATIVE STATE

Power began to be centralized in Washington during the New Deal and was accelerated by the National Mobilization during World War II. Centralization then increased enormously during the Great Society programs of the 1960s. After 1964, there seemed no limit on what the federal government might try to do. It became accepted virtually beyond debate, for example, that a “War on Poverty” required massive effort by the national government rather than by state or local governments.

This could not be accomplished in the old way, it was assumed, by passing general laws to be executed by a modest national bureaucracy. Instead, executive branch agencies with very broad regulatory powers were created and manned with the social technicians who flocked to Washington from American universities. The late John Wettergreen, a San Jose University political scientist, identified the Nixon years of 1970-1974 as the decisive period in which 70 percent of the bureaucratic apparatus now in place was created, including such agencies as the Environmental Protection Agency, the Equal Employment Opportunity Commission, the Federal Election Commission, and the Occupational Safety and Health Administration.⁵

Adversarial Relationship. As administering the details of everyday life replaced general legislation as the chief business of national government, oversight of the regulatory agencies in the executive branch replaced deliberation as the main business of Congress. From this transformation stemmed the increasingly adversarial relationship between Congress and the President.

⁵ See John A. Wettergreen, “The Regulatory Revolution and the New Bureaucratic State,” *The Heritage Lectures* No. 153, February 1988.

THE IRON TRIANGLE

After the Watergate scandal weakened the White House, executive power was partially eroded by what is called the "iron triangle"; its sides are Congress (or individual congressmen), the executive agencies controlled by Congress, and special interest groups. Together they determine national priorities and policies. By 1980, this governing arrangement had created a public sector so large that over 50 percent of American citizens were dependent in full or in part on public support. Though Ronald Reagan promised a return to constitutional forms and made some inroads against expanding government, his administration merely slowed the growth of the bureaucracy; no fundamental changes in the means or ends of government were effected.

Mutual Dependence. Harvard political scientist Morris Fiorina, in *Congress – Keystone of the Washington Establishment*,⁶ describes the "iron triangle" at work. The national regulatory power, he writes, resides in executive agencies created and funded by Congress. These agencies are empowered to deliver benefits and services to a congressman's constituents, relieving congressmen of the difficulties inherent in distant, impersonal, and unaccountable bureaucratic rule. In this way, congressmen are dependent on the agencies for keeping their constituents grateful to them, and the voters depend upon congressmen for acting as go-betweens. The agencies, however, are dependent upon Congress for their budgets. Together, as the current ethics in government crisis well illustrates, the mutual powers and dependencies create government by backroom dealmaking.

The "iron triangle" forms a three-sided system of dependency in which the driving force on all sides is special interest.

The effect upon the power of the President is obvious: He is neither needed nor included in the process.

The effect on congressmen: They are able to retain office, often regardless of their political views or actions, by acting and campaigning first and foremost as ombudsmen.

The effect on the bureaucracy: It prospers and grows, despite massive nationwide opposition to it as demonstrated in presidential elections.

From Master to Petitioner. And the effect on the citizen: He or she is encouraged to consider himself or herself a member of an interest or of various interests and to relate with the government not as its master, but as a dependent or a petitioner. This is why today, no business or professional interest or any sort of private association that wishes to succeed can afford not to have a Washington presence in order to lobby Congress and the bureaucracy.

6 Morris Fiorina, *Congress – Keystone of the Washington Establishment* (New Haven, Connecticut: Yale University Press, 1977).

From the Founding Fathers' point of view at least, the effect of this is that the nation is ill-served. Interests are neither moderated or molded to form a principled consensus. No conception of a common good concerns or drives the government. Government has become – to use James Madison's famous definition of a faction in *Federalist 10* – “united and actuated” by interests “adverse to the rights of other citizens, or of the permanent and aggregate interests of the community.” That this is the case was expressed clearly by Representative Jamie L. Whitten, the Mississippi Democrat, who in 1987 said: “Don't you see? All anyone ever wants is a special advantage over the next fellow. Understand that, and you've understood the intent of every law ever passed.”⁷

The Effect on Congress

The iron triangle makes incumbent congressmen virtually immune from electoral defeat. Today, 99 percent of the House incumbents who run are reelected. The reason: Congress has been depoliticized by its participation and interest in the administrative state. Most congressmen now customarily campaign in their home districts on the basis of their effective ombudsman-ship and their ability to deliver pork. There seems nothing more distasteful to them than having their voting records on the few controversial issues they do vote upon made prominently public. Example: George E. Brown, Jr., the California Democrat whose congressional tenure dates back to the Kennedy Administration, is remarkably open about the fact that he waffles when confronted with his liberal voting record on controversial issues like defense appropriations and capital punishment. “I'm not happy having to do this,” he told *The Wall Street Journal*, “but what can you do? That's the way politics is run these days.”⁸

More often than not, congressmen present themselves as equally opposed as their constituents to the burgeoning bureaucracy, even as they reap the benefits in safe elections, and vote to maintain and increase the bureaucratic burden on those they only nominally represent.

Congressional Micromanagement

One way that congressmen keep control over a bureaucracy that otherwise might be more responsive to the President is through micromanagement: congressional control of the minute details of executive branch operations. Attaching special riders to spending bills is one of Congress's preferred methods of micromanaging the executive branch. Such riders have included

7 John Hirom Caldwell, “Congressional Micromanagement: Domestic Policy,” in Gordon S. Jones and John A. Marini, eds., *The Imperial Congress: Crisis in the Separation of Powers* (New York: Pharos Books, 1988), p. 133.

8 Paul A. Gigot, “I, Dingell,” *The Wall Street Journal*, February 17, 1989, p. A14.

extraordinarily specific instructions on such matters as staff to be hired or fired, specific grants to be approved, and whether a particular agency or department may open or shut an office. Other congressional riders have prohibited agencies from even studying innovative reforms such as privatization or contracting out of government services. These detailed riders to legislation raise a constitutional concern: is the executive branch or the legislative branch "executing" the law?⁹

Congressional micromanagement of the executive branch manifests itself in other ways as well. Among them: 1) overlapping jurisdiction of congressional committees overseeing the bureaucracy; 2) onerous congressional reporting requirements imposed on the bureaucracy; 3) numerous phone calls and written requests for action levied at the bureaucracy by members of Congress and staff; 4) requirements that executive branch officials testify regularly before numerous congressional committees, and: 5) private lobbying by members of Congress and staff to pressure bureaucrats to execute the law to the benefit of a particular interest.

Pentagon Overkill. All of these elements of congressional micromanagement are pervasive at the Department of Defense, the largest executive branch department. In a study submitted this June 12 to the President, Secretary of Defense Richard Cheney, himself a former congressman, reported that 107 congressional committees and subcommittees oversee his department. Every day, the Pentagon is required to submit to Congress nearly three separate written reports — with preparation costs of more than 1,000 man-hours and \$50,000 for each report. Cheney notes that on every working day, the Defense Department receives 450 written inquiries and more than 2,500 telephone inquiries from Capitol Hill. Senior Pentagon officials, meanwhile, spend 40 hours preparing for the average 14 hours of congressional testimony they provide each day that Congress is in session.

Yet none of this congressional overkill prevented such scandals as the Defense Department procurement fraud discovered by the Federal Bureau of Investigation in 1988. The reason: The purpose of congressional micromanagement is not to improve the efficiency of the federal bureaucracy, but to deliver political benefits to congressmen, the most valuable of which are achieved by convincing bureaucrats to give special treatment to a congressman's favored constituent.

Curbing Micromanagement

One way to curb congressional micromanagement and the kind of high pressure congressional lobbying that has contributed to the Department of Housing and Urban Development and savings and loan industry scandals is to require executive branch officials to keep records of all their contacts with

⁹ Appropriation bill riders also restrict the President's constitutional duty to recommend legislation to Congress. See, e.g., J. Gregory Sidak, "The Recommendation Clause," *The Georgetown Law Journal*, Volume 77, Number 6, August 1989, p. 2079.

congressmen and staff, and to report such contacts to the public regularly. This would give the public an opportunity to distinguish between legitimate congressional oversight and politically motivated arm-twisting. An effort to compile such a list of contacts was undertaken at the Department of the Interior by Secretary Manuel Lujan, who had himself served in Congress for 20 years. Lujan's policy, however, was torpedoed by Congress, which attached a rider to the fiscal 1990 Interior appropriations bill that read: "None of the funds available under this [bill] may be used to prepare reports on contacts between employees of the Department of the Interior and Members and Committees of Congress and their staff."¹⁰ Thus, Congress used one of its favorite micromanagement tools — a rider to a funding bill — to prevent the executive branch from exposing congressional micromanagement.

THE ETHICS IN GOVERNMENT CRISIS

Whereas bureaucracy was supposed to eliminate political graft by placing a rational, objective, nonpartisan structure in charge, it has resulted instead in merely a different form of corruption. Not only is there more opportunity for graft with the direct participation by special interests in government, but corruption has effectively become institutionalized and even legitimized.

The HUD Scandal and Congressional Hypocrisy

Like the S&L scandal, the Housing and Urban Development scandal is rooted in the inherent corruption of the modern administrative state. Charles L. Dempsey, Inspector General at HUD from 1977 to 1985 writes that during the years that the scandal was occurring, "Congress was more interested in getting favors from HUD than in overseeing its operation."¹¹ Indeed, the record shows that Congress routinely ignored reports of long-time abuse at HUD. As Barbara Volbejda of the *Washington Post* reported last July: "Taken together, the department's Inspector General reports add up to a year-by-year chronicle of abuses beginning before the Reagan Administration took office."¹² But as former Inspector General Dempsey writes, "Through all these investigations, I never heard from Congress...From 1981 until I retired in 1985, I cannot recall *one* telephone call from our House oversight committee."¹³ This, although HUD records show that the department received thousands of inquiries from Capitol Hill during the same period. Obviously, the calls were more about "favors," as Dempsey notes, than about legitimate oversight.

Government grant-giving is a lucrative business, with billions of dollars each year going to localities for such general purposes as "cleaning up the en-

10 See Mark B. Liedl, "What Is Congress Trying to Hide?" *The Wall Street Journal*, August 15, 1989, p. A10.

11 Charles L. Dempsey, "Formula For Scandal," *Government Executive*, October 1989, p. 23.

12 *Ibid.*, p. 48.

13 *Ibid.*

vironment," "improving education," or "aiding low income areas." HUD alone is a huge source of largess, spending \$20 billion per year.

Selective Finger Pointing. Throughout its well publicized hearings on the HUD scandal, however, Congress ignored the root causes, including any scrutiny of the role that congressmen themselves may have played in funneling HUD dollars to friends and campaign contributors. Instead, the hearings chaired by Tom Lantos, the Ohio Democrat, who heads the House Government Operations Subcommittee on Employment and Housing, focused on influence peddling by Republicans during the Reagan Administration. The finger pointing was highly selective.

There is no doubt that prominent Republicans received inordinate "consulting fees" from developers for directing HUD grant money their way, nor that great amounts of tax money were wasted as a result. Example: One Republican consultant was responsible for a developer obtaining a \$47 million grant to remodel 326 housing units in New Jersey, despite the fact that the township neither wanted nor needed the housing. The consultant's actions are no less corrupt by virtue of his insistence that he "worked within the system."¹⁴ But there is also no doubt that if Congress is serious about stopping such bureaucratic waste and corruption, it could do so. It does not and will not because its members benefit from the way things work, and they have supported it for a long time.

Balking at Reform. HUD is a political pork barrel of long standing. Examples: The Carter Administration was expert at the use of HUD grants to raise campaign money. Some 70 percent of the money Carter raised in Massachusetts in 1979 for his presidential campaign came from developers who had benefited from HUD, and no developer who contributed failed to get a HUD grant.¹⁵ A 1976 *Reader's Digest* story on HUD, moreover, led to widespread public hand wringing over scandal and corruption there. But when the noise dimmed, nothing had changed, no funds had been slashed. Indeed, when Reagan's HUD chief Samuel Pierce attempted to shut down the very housing rehabilitation program now under attack for corruption, it was Congress that balked.

And congressmen now are objecting to HUD Secretary Jack Kemp's proposals to reform HUD programs by targeting directly to the poor funds that currently are "discretionary." Said Representative Mary Rose Oakar, the Ohio Democrat who had sought such discretionary funds to help build a \$48 million rock-n'-roll museum in Cleveland: "To stifle the certain degree of flexibility that [the program] has...would be absolutely outrageous to me. I don't want some guidelines changed to inhibit my city's opportunity to use that money."¹⁶

14 See William J. Eaton, "GOP Consultant Admits Using Influence to Obtain HUD Grant But Defends Action," *The Los Angeles Times*, June 29, 1989, p. A6.

15 Douglas Frantz and Dan Morain, "Playing Favorites at HUD: Latest Twist on Old Game," *The Los Angeles Times*, July 30, 1989, pp. 1, 8.

16 "Kemp's Reform Measures too Strict, Lawmakers Say," *The Washington Times*, October 13, 1989.

As powerful brokers, congressmen in the administrative state have much to gain in a system of influence peddling, and too much electoral security to lose should it be abandoned. Congress is the key to "the system" that leads to corruption in government today, yet Congress itself is not going to take steps to clean things up. The impetus to do so will have to come from the President, who the framers designated expressly to undertake just such great tasks in the defense of the national interest.

RESTORING ETHICAL GOVERNMENT

Returning to ethical, accountable, good government will require reviving the principles of separated powers and federalism. George Bush's first step toward doing so will require publicizing and severing the current relationship between Congress and the executive bureaucracy, which will compel Congress, and allow the executive, to return to fulfilling their proper constitutional roles. Bush should:

1) Expose for the American people the inherently corrupt way that Washington operates behind the scenes.

Congress increasingly makes important decisions affecting millions of Americans and vast sums of taxpayer dollars not in an open legislative process, but secretly in behind-the-scenes interaction between federal bureaucrats and members of Congress and their staff. Ordinary Americans typically are excluded from and uniformed of such decision-making. This leads to the corruption that now is being uncovered in the HUD and S&L scandals.

Bush should instruct executive branch agencies and departments to compile and publicize examples of behind-the-scenes congressional lobbying and politically motivated congressional micromanagement, explaining how they make it impossible for the executive to do its work and corrupt the policy process. Examples should include:

- ◆ ◆ Overlapping and excessive jurisdiction of congressional committees over executive branch agencies and departments;
- ◆ ◆ Massive congressional reporting requirements imposed on executive branch agencies and departments;
- ◆ ◆ Numbers of hours of congressional testimony required of executive branch officials;
- ◆ ◆ Numbers of phone calls and written requests for action levied at executive branch agencies and departments by members of Congress and staff;
- ◆ ◆ Riders to appropriation bills and other legislation that instruct executive agencies and departments how to execute the law, and;
- ◆ ◆ Private lobbying by members of Congress and staff to pressure executive agencies and departments to execute the law in such a way as to benefit a particular congressman or his or her constituents.

2) Publicly invite Congress to join in a campaign to clean up government.

The President should welcome investigations of HUD and the agencies and departments, but make clear that the objective should be to expose all ethical lapses, including influence peddling by members of Congress.

3) Order all executive agencies and departments to begin making a contemporaneous record of all contacts with congressmen and their staffs.

Congressional lobbying and micromanagement of the executive branch contributes to waste, inefficiency, and corruption in the administration of federal programs. In order to begin correcting the problem, there needs to be a public record of the extent to which congressional lobbying and micromanagement occur. Such a record will help Congress, the President, and the public distinguish between legitimate congressional oversight over the federal bureaucracy and the self-serving favoritism apparent in the HUD and S&L scandals.

The President, therefore, should order all executive agencies and departments to record their contacts with Capitol Hill. Bush should require that such records be compiled and released to the public quarterly by the Office of Management and Budget or another appropriate agency.

4) Instruct executive branch officials to resist demands on behalf of private or special interests that contradict good policy, even if those demands come from Congress, and give personal public support to employees who follow such instructions.

Too often, executive branch employees who have challenged Congress and the special interests have been left unprotected by the President. Many, in fact, were publicly chastised, and some lost their jobs. If the President is to break the alliance between executive branch employees and Congress on the one hand, and the fear-based compliance of executive branch staff toward Congress on the other, he must set out his policy to do so unambiguously. And he must stand fully and visibly behind those who risk following his orders.

CONCLUSION

The essential quality of government in the administrative state is not the dominance of an imperial Congress over the executive, but rather what underlies that dominance: the extent to which factions or special interests dominate policy, and the extent to which pork-barrel government has ceased being the exception to the rule and has become the rule.

Given human nature, it is safe to say that human government will never be free of corruption. But in contemporary Washington corruption defines government. The reason: American government has departed from the principles of federalism and separation of powers bequeathed by the Framers of the Constitution.

In practical terms, overcoming this situation means first rejecting the resignation expressed in an editorial, written during the congressional pay raise controversy last February:

Of course it would be better if our political system could make these tough, detailed, politically divisive decisions by up-or-down congressional roll-call votes based on each member's view of the national interest. But that is a Civics 101 idea of how a modern democratic nation of 250 million people should govern itself.¹⁷

Fundamental Alternative. To the extent that the writer meant to ridicule a "Mr. Smith Goes to Washington" idealism about how politics does or should proceed, so be it. But to the extent that he meant to ridicule the realistic intention behind Article I of the Constitution — an intention that was put into practice quite well prior to the erection of the administrative state — his resigned defeatism embodies a rejection of the idea of representative democracy itself.

Many liberals as well as conservatives now sense that the interest group liberalism experiment has spawned corrupt and unaccountable government. Now they must be convinced that a fundamental alternative exists — employing the Framers' mechanisms of federalism and the separation of powers.

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¹⁷ Lloyd Cutler, "The Pay Raise: This Isn't Civics 101," *The Washington Post*, February 2, 1989, p. A15.