

Effective lobbyists understand both the formal organization and procedures of the legislative bodies and also the informal network of relationships that determine how decisions are made. They comprehend the decision-making process and know who key decision-makers are at different stages. They look for legislators who will take the lead on their issues, both publicly and in the inner workings. They are well acquainted with legislators' personal staff and committee staff who are influential in getting legislation through the maze.

Successful lobbyists realize that good timing is essential for achieving influence along the legislative roadway. They know both the electoral and legislative calendars and seek to exert their influence at appropriate times.

PROLOGUE

Chapter One

Thesis: Continuous, Interactive Consent

Consent of the governed in the United States in the 1990s is a continuous, interactive process. Consent occurs in a governmental system that is primarily a representative democracy. But the system also has elements of direct democracy.

American democracy is basically representative because citizens directly and indirectly choose legislators, executive officials, and judges to serve in their behalf. But direct democracy enters the picture through voting on ballot issues and, in some locales, through town meetings in which all may participate.

All citizens of the United States age 18 and older, except for some

convicted felons, may vote for candidates for elected offices. They may also vote on diverse ballot issues. After the ballots are counted the citizenry has multiple opportunities to interact with more than half million officials they elect and also with numerous appointed officials who are delegated decision-making authority. These public officials, therefore, carry out their responsibilities with the consent of the governed.

In American democracy consent comes about not merely through intermittent elections but also occurs through a variety of ongoing activities: election campaigns stretching out over months and years before culminating in voting; ballot issue campaigns taking weeks and months to complete; lengthy consideration and debate preceding enactment of legislation; extensive deliberation and negotiation in the adoption of executive policy.

These varied consent-giving activities can be envisioned as happening along election pathways, legislative pathways, and pathways of executive policy-making. Journeying together along these pathways are candidates

for public office, elected officials, and citizens in various capacities. As this happens, consent becomes a continuous process, occurring over periods of time.

The time factor brings in past, present, and future. The past consists of tradition, established values, psychic memory, habitual attitudes, previously adopted laws, and past relationships among various participants.

The present is "now", moving steadily ahead. The future consists of anticipated events and vision of hoped-for outcome.

Americans use two primary sets of instruments to facilitate their involvement in consent activities: political parties and interest groups.

Political parties are prominent in election campaigns, and interest groups are heavily involved in legislative and executive decision-making. But interest groups also pay attention to elections, and political parties seek to influence policy-making.

Consent-giving activities involve millions of participants engaged in

complex relationships. Among the myriad participants are citizens with diverse opinions and interests, persons positioning themselves to run for office, announced candidates for office and reelection, political party officials, issue advocates, campaign workers for candidates and ballot issues, legislators, elected and appointed executive officials, interest group leaders, lobbyists, grassroots organizers. Consent, therefore, is highly interactive.

Each set of consent activities tends to commence with a few participants and then draws in many more as the process moves along. A handful of candidates and their supporters start the journey along the election pathway. They are joined by persons who want to influence them, then convention delegates or primary election voters, and finally all who vote in the general election. Issue advocates obtain petition signatures and then appeal for broader support when their issue is placed on the ballot.

One or a few legislators (ofttimes with outside assistance) draft a bill, which must garner broader support within the legislature to become law.

The chief executive's staff starts working on a policy proposal, brings in departmental personnel and selected persons from the outside government, and then the broader public. Thus, participation grows along the election and policy-making pathways.

Although consent activities are continuous, a majority of the citizenry is active only intermittently. However, numerous political party leaders, interest group representatives, and citizen activists are continuously involved in matters that concern them. They interact with public officials and candidates for office who themselves are engaged full time.

In the United States a kind of representative participation occurs in conjunction with representative government. This happens because many of the most active participants are chosen through the democratic processes of political parties, citizen associations, and other interest groups. Moreover, self-selected activists tend to represent the views of others who remain on the sidelines. Nevertheless, some portions of the population are

inadequately represented in the ongoing consent process.

In its totality consent of the governed in contemporary America is an accumulation of innumerable bits and pieces of interaction. From the seemingly randomness of highly diversified activities, overall patterns emerge and define the outcome of consent of the governed in elections, votes on ballot issues, legislative enactment, and adoption of executive policies.

As a result, consent of the governed in the United States nowadays is substantial and meaningful, though there is always room for improvement.

November 1996

PART ONE. HISTORICAL FOUNDATION

Chapter Two

Origins of Concept of Consent

We hold these truths to be self-evident,

That all men are created equal,

that they are endowed by their Creator

with certain unalienable Rights,

that among these are Life, Liberty,

and the pursuit of Happiness.

That to secure these rights,

Governments are institute among Men,

deriving their just powers

from the consent of the governed.

American Declaration of Independence (1776)

Views of the Founders

In 1776 when Thomas Jefferson and his colleagues at the Second Continental Congress enshrined "consent of the governed" in the Declaration of Independence, they were using a phrase from their common political vocabulary. Nearly 50 years later Jefferson recalled:

Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it [the Declaration] was intended to be an expression of the American mind (Rossiter 1953, 356).

Clearly the idea of consent was imbedded in the American mind at the time of the Revolution. Thus, in the years preceding the Declaration, American colonists dissatisfied with British rule made repeated references to consent as a basic political principle.

In 1765 when representatives from nine of the thirteen colonies met

in New York to protest the Stamp Act, a revenue measure imposed on them by the British Parliament, they stated:

That it is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally or by their representatives (Commager 1973, 58).

Pamphleteers shortened it to "no taxation without representation."

The First Continental Congress in a "Letter to the Inhabitants of the Province of Quebec", drafted by John Dickinson and adopted on October 26, 1774, maintained that:

the first grand right, is that of the people having a share in their own government by their representatives chosen by themselves, and, in consequence, of being ruled by laws, which they themselves approve, not by edicts of men over whom they have no control (Continental Congress 1:107).

On June 12, 1776 the Virginia House of Burgess adopted a Declaration of Rights, written by George Mason, which included this statement:

That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them (Commager 1973, 103).

The importance of consent, so powerfully expressed by political activists in the 1760s and 1770s, was not a new idea for the American colonists. During the period of initial settlement, for instance, Thomas Hooker, who helped develop the Fundamental Orders of Connecticut in 1639, explained that when men covenant with one another and join together in civil society, "it is by their own free consent and mutual engagement on both sides" (Rossiter 1953, 172-3). Five years later Roger Williams brought the colony of Rhode Island into formal existence under a grant of authority to the settlers to establish whatever "form of

civil government, as by voluntary consent of all, or the great part of them, they shall find most suitable to their estate and condition" (Rossiter 1953, 189). Thus, early in colonial history the idea of majority rule was attached to the concept of consent.

Historical Roots

These early colonists inherited 2,000 years of inquiry by Mediterranean and West European thinkers on the origin of government and their speculation on why people are willing to accept the authority of the state. Much of this stream of thought was rooted in a belief in the law of nature -- a higher, universal law, applicable at all times in all places. Over the course of centuries the idea of consent kept appearing in different guises, as George H. Sabine showed in *A History of Political Philosophy* (1937).

In Greece in the third century B.C.E. Epicureans maintained that "the state and the law came into existence as a contract to facilitate intercourse

between men" (Sabine 1937, 134). Subsequently other political philosophers offered many variations of the contract theory.

Around 50 B.C.E. Marcus Tullius Cicero, famous orator of the Roman republic, argued that the state is "the people's affair,...the coming together of a considerable number of men who are united by a common agreement about law and rights and by the desire to participate in mutual activities" (*Republic*, I, 25; quoted in Sabine 1937, 166). Even the authority of the most powerful ruler is derived from the people and must be exercised according to law. A tyrannical regime violates the principles of right and justice, which are based upon natural law.

In Northern Europe the Germanic people "conceived the law as belonging to the folk, or the people, or the tribe" (Sabine 1937, 200). Such laws were at first customs, handed along by word of mouth and later attained written expression. The power of rulers derived from the folk.

As kingdoms formed during medieval times, kings salted their edicts

with such phrases as "consent and council" and "by the advise and assent".

In practice this usually meant consultation with bishops, barons, and other elite, not the people directly (Sabine 1937, 204-5).

This was the case with the Magna Carta of 1215 in which King John of England promised to hold "a common council of the kingdom" before assessing taxes. Initially this involved representatives of the nobility and top church leaders meeting with the king in "parliament", as these gatherings became known. Over the years other segments gained representation: knights (first in 1254), representatives of cities and boroughs (1265), commoners and inferior clergy (1295). In 1297 a parliament used its leverage with King Edward I, who was seeking support for new taxes, to force him to sign the Confirmation of Charters, which incorporated major provisions of the Magna Carta and stated specifically that no taxes would be levied "but by the common assent of the realm", that is, by parliament (Perry 1959, 14, 24-25, 31).

Although this established a useful precedent, the contest over royal prerogatives continued in England and on the European continent as kings claimed divine right to rule and succession by inheritance rather by selection. Among others resisting these claims, French Huguenots in the middle of the 16th century, insisted that "the power of the ruler is delegated by the people and continues only with their consent" (Sabine 1937, 381).

Johannes Althusius, a Dutch Calvinist, in a book published in 1603 reinforced this idea by insisting that the sovereign power of the state resides in the people as a corporate body. They bestow power by consent or contract, expressed or tacit. When administrative officers of the state misuse their power, it reverts to the people (Sabine 1937, 416-20).

This was the heritage that the early American colonists drew upon. And it was in this tradition that the Englishman John Locke wrote his *Second Treatise of Government*. Published in 1690 to justify displacement

of an English king, it had strong appeal 75 years later to Americans engaged in their own dispute with another English monarch.

Locke postulated that men (in the generic sense) lived originally in a state of nature, "all free, equal, and independent." With their own consent, they agreed with

other men to join and unite into a community, for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it....When any number of men have so consented make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest ([1690] 1965, Book II, §95).

It was a two-stage process. People form a civil society and then create a government, achieved through a pair of "social contracts", entered

into by tacit or expressed consent. Summing up the ends of political society and government, Locke indicated that people "unite for the mutual preservation of their lives, liberties and estates, which I call by the general name, property" (Book II, §123).

The Declaration of Independence took this a step further, insisting that "the Laws of Nature and Nature's God" establish a set of basic human rights.

Among these, the Declaration stated, are "life, liberty, and the pursuit of happiness", changing Locke's list to add a social dimension. Men and women institute government to secure these rights. But the powers of government are just only if they are derived from the consent of the governed (Continental Congress 5:510).

In this manner consent became a founding principle of the American republic. But what did it mean? How is consent achieved?

Locke wasn't very specific, nor were most of the other political philosophers. The people in the North American colonies, though, were

pragmatists much more than theorists. So over a period of 160 years they worked out ways to achieve a measure of consent within the structure of colonial government. How they did this, described in the next chapter, was as important in shaping the American mind as the thoughts of the political philosophers.

November 1996

Chapter Three

Achieving Consent in the American Colonies

European Settlement

When European settlers began to arrive in North America in the 17th century, the land was already populated by the First Settlers, who had migrated from Asia through Alaska many centuries earlier. In 1600 a million or more First Settlers lived north of the present US-Mexican boundary. They constituted 250 or so tribal groups, each with a distinct language and its own government (Waldman 1985). The Europeans called them Indians, but each tribe had its own name for itself, rendered into English as Powhattan, Cherokee, Susquehanna, Delaware, Mohican, Narraganset, Massachusetts, and many more (Waldman 1988). Considering themselves separate nations, they sometimes entered into treaties with one another. Some tribes formed confederations, such as the

five-nation Haudenasaunee, who French explorers called the Iroquois (Barreiro 1992).

The Second Settlers did not include the First Settlers within the scope of the governments they established. Usually the colonists built on unoccupied land but within territory claimed by various tribes. Sometimes the Europeans negotiated treaties to take over the land, with or without compensation. Sometimes they used the force of arms. In either case the effect was displacement of the First Settlers, rather than commingling.

The initial colonists usually arrived with their framework of government already determined by the trading company or proprietor who sponsored the settlement. However, in November 1620 the ship *Mayflower* arrived unexpectedly off the coast of Cape Cod where no colonial government existed. Before going ashore, the 41 male adults on the *Mayflower* signed a compact to "covenant & combine ourselves together into a civil body politick", just as contract theory taught them they should

(Commager 1973, 16).

Although Dutch and Swedish trading companies founded settlements on the east coast of North America, the thirteen colonies that became the United States of America were all under British control at the time of independence. Accordingly, laws and governmental structure evolved mostly from the British tradition, though William Penn, Benjamin Franklin, and others picked up useful ideas from the Iroquois confederation (Barreiro 1992).

There was considerable diversity among these colonies, derived from character and orientation of initial European settlers, type of colonial regime, time of settlement, terrain, and climate. This yielded varying forms of colonial government with different degrees of self-government and differing expressions of consent.

Colonial Government

In their quest for self-government the Second Settlers had to contend

with British control of colonial government. Eight of the 13 colonies were under direct control of the British crown: New Hampshire, Massachusetts, New York, New Jersey, Virginia, North Carolina, South Carolina, and Georgia. Of these only Massachusetts had a written charter specifying rights and governmental framework. Three colonies were proprietary with power delegated by the crown to the proprietor: Pennsylvania and Delaware under the Penn family and Maryland, the domain of the Calverts. (North Carolina also had a period of proprietary rule from 1663 to 1729). The other two colonies, Connecticut and Rhode Island, operated under corporate charters which granted them substantial authority for self-government (Nevins 1927, 2).

In this setting consent gained two expressions. First, through the election of some, but not all, officers of the colonies and local government. Second, through direct participation in town meetings in New England and a few locales in New York and New Jersey.

Consent in this manner was significant from the beginning in Connecticut and Rhode Island and in town meetings in the other New England colonies. Elsewhere practices of consent developed gradually over the course of decades.

Governors and Councils. Governors headed the colonial regimes. Only in the two corporate colonies did citizens chose their own governors. In the three proprietary colonies the proprietor himself served as governor or designated a deputy. In the eight royal colonies the British monarch appointed the governor (Rossiter 1953, 14).

In eleven colonies governors had councils of leading citizens to advise them. In Connecticut and Rhode Island freeholders (that is, property owners and taxpayers) elected council members. In Massachusetts the elected assembly, sitting annually with the old council, chose the new council, subject to approval by the governor. In the other seven royal colonies the crown appointed council members upon recommendation of the

governor. The governor appointed the council in Maryland, but the Penn proprietary colonies, Pennsylvania and Delaware, had no councils except for one brief period in Pennsylvania (Nevins 1927, 3-11).

Legislatures. The Second Settlers developed elected assemblies in all 13 colonies as a means of achieving a measure of consent to the policies of colonial government. The first one met in Jamestown, Virginia in 1619, a dozen years after the founding of this first permanent English settlement in North America. It subsequently evolved into the Virginia House of Burgess.

By 1683 ten other colonies had their own elected assemblies (Kammen 1969, 11-16). The two least populated colonies, North Carolina and Georgia, did not establish elected assemblies until 17xx and 1751.

Members of these assemblies were elected by freeholders, voting by ballot or at town meetings in New England. Among their responsibilities the assemblies approved the levying of taxes to support the colonial government in the tradition of the Magna Carta and the Confirmation of

Charters. This gave them leverage in dealing with the governors (Nevins 1927, 3-11).

The elected assemblies joined with the mostly appointed councils to form bicameral legislatures in eleven colonies. This followed the pattern of the British Parliament with its House of Commons and House of Lords. Lacking councils, Pennsylvania and Delaware had unicameral legislatures (Rossiter 1953, 15).

Local Government. There was considerable variation in the form of local government and the extent of citizen control (Barck and Lefler 1964, 247-9; Rossiter 1953, 24-27). The New England colonies (New Hampshire, Massachusetts, Rhode Island, and Connecticut) divided their territories into towns, usually with a village or small city at the center, surrounded by rural area. Each town was governed by a town meeting in which all freeholders could participate. This was the fullest development of direct democracy in colonial America.

New England also had larger administrative and judicial units called counties with officers appointed by the governor. In the South counties and parishes were also administered by gubernatorial appointees, who in effect served as officers of the crown.

In contrast New York and Pennsylvania counties were governed by elected boards. These colonies also had townships, run by elected and appointed officials, except for a few town meetings in New York and New Jersey in which all freeholders could participate.. Other Mid-Atlantic colonies had counties, and some had townships with elected officers.

During the colonial period most cities in New England were governed by town meetings. Cities elsewhere had charters of incorporation and usually elected their own mayors, councilors, and aldermen, though in a few cities these officials were first appointed and then authorized to choose their own successors.

Thus, there were sectional differences in the extent of local

self-government in colonial America.

Suffrage

In determining who could vote, the colonies looked to persons with a stake in the community. Seven of them required possession of land, while the other six considered possession of personal property or payment of taxes to be sufficient. These eligible freeholders were overwhelmingly white males although here and there some women and Negro freemen who met property or taxpaying requirements could vote. But according to Clinton Rossiter (1953, 19), "almost everywhere additional restrictions kept women, youth, Catholics, Jews, infidels, Negroes, Indians, mulattoes, indentured servants, and other 'inferior' persons from the polls."

On top of this some of the colonies added more stringent property requirements on who could hold public office.

Congresses

In the 1760s when American relationships with the British

government began to sour, the elected colonial assemblies served as the principal vehicle for calling inter-colonial congresses and providing representation to them.

To respond to the British Stamp Act, Massachusetts' assembly, the General Court, in June 1765 invited the other assemblies to send representatives to New York in October. Of the nine delegations which attended, six were officially chosen by their colonial assemblies. For the other three, members of the assemblies, blocked by their governors from holding a special session for this purpose, found other ways to pick their delegates (Weslager 1976).

Nine years later, as the British Parliament tightened its grip on the colonies, the Massachusetts General Court, with strong encouragement from members of the Virginia House of Burgess, took the lead in inviting the other assemblies to send delegations to meet together to coordinate colonial strategy for dealing with the British. All the colonies except Georgia were

represented when the First Continental Congress convened in Philadelphia in September 1774.

The credentials of delegates, formally presented to the Continental Congress and recorded in its *Journal*, verified that they were selected in a manner to assure that they truly represented their colonies (*Continental Congress 1:15-24, 30*).

The assemblies in Rhode Island and Pennsylvania elected their delegates in regular sessions. The Connecticut assembly delegated the choice to committees of correspondence, previously established as vehicles for inter-colony communication.

Elsewhere the assemblies were not in session and the royal governors would not call special sessions. The Massachusetts General Court, defying the governor, met in secret session to choose its delegates, excluding Tories, who were British loyalists. Elsewhere, as Lynn Montross (1950, 26-27) has summarized:

Provisional assemblies under various designations were called for that purpose in Maryland, Delaware, New Jersey, New Hampshire and North Carolina. Appointments in South Carolina were made at a "general meeting of the inhabitants" at Charleston, and in Virginia a "convention" was summoned by the radical group of the House of Burgess.

....New York, ridden by the largest and most aggressive Tory faction in America, did not achieve enough unity for a central assembly.

Delegates were chosen by the city and five counties in any manner which suited their convenience.

Before adjourning in October the delegates made plans to hold a Second Congress in May 1775. For the most part the delegations stayed intact -- with some additions and some subtractions. Three more assemblies gave their official blessing to their colony's delegation, for a total of five. Before 1775 ended a Georgia delegation appeared. Thus, all 13

colonies were represented as the Continental Congress moved toward its fateful decision for independence in July 1776.

So it was that the consent of the governed played a role in instituting the Continental Congresses. They were called by elected colonial assemblies, which either appointed delegates directly or made arrangements for extralegal selection. Where that was not possible, delegates were chosen through some kind of electoral process. It was consent through a pyramid of representation.

As of 1776

If someone had asked the signers of the Declaration of Independence to be more specific about what they meant by "consent of the governed", most of them probably would have emphasized consent through representation in legislative bodies. Some might have mentioned the desirability of directly electing governors, but their troublesome experience in dealing with royal and proprietary governors inclined them to favor legislative dominance.

The Declaration does not mention democracy. The signers were inclined to think of democracy as government by the masses, and therefore unstable and unpredictable. Rather they favored "republican" government, or what today we call representative democracy (Rossiter 1953, 446).

New England had a form of direct democracy in their town meetings in which all freeholders could participate. But this was an exception to the general pattern of consent through representation.

Such was their heritage as leaders in the newly freed colonies set out to write state constitutions and to work together to design some kind of union government. So fast was this challenge upon them that by the time the Declaration of Independence was signed on July 4, 1776, four states had already adopted new constitutions and a committee was at work to produce a plan for a 13 state confederation. Now they had an opportunity to turn rhetoric into action by determining for themselves how consent of the governed would be achieved.

November 1996

Chapter Four

Consent in the New Nation

Armed conflict between the British army and American colonists erupted in Massachusetts on April 19, 1775. On May 10 the Second Continental Congress convened in Philadelphia. The delegates took on the task of organizing a continental army and on June 15 appointed George Washington as commander-in-chief.

Replacement Governments

As opposition to British rule widened and war spread, the colonial regimes collapsed. The elected assemblies remained and in most colonies served as the principal governing body. In a few instances where assemblies were dominated by conservative leaders, reluctant to break with Great Britain, elected conventions took their place (Nevins 1927, 75-97).

Several colonies turned to the Congress for guidance. In June 1775

the Congress advised Massachusetts to resume government based upon its 1691 charter, which the British had suspended. In November the Congress recommended to New Hampshire and South Carolina that they go ahead and set up their own governments and then offered the same advice to Virginia in December (Beer 1993, 201; Montross 1950, 99-100).

On May 10, 1776 the Congress passed a broader resolution on this matter:

That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such governments as shall, in the opinion of the representatives of the people, best conduce to the happiness of their constituents in particular, and America in general (Continental Congress 4:342).

This sequence of events led President Abraham Lincoln to claim in a message to Congress on July 4, 1861, "The Union is older than any of the

States, and, in fact, created them as States" (quoted in Beer 1993, 200).

This is true in the sense that the Continental Congress, as an instrument of Union, offered encouragement to the colonies to write their own constitutions, thereby giving tacit authorization to this process. But these new states for their part possessed the power to approve establishment of a new Union government under the Articles of Confederation. There was interdependency between the parts and the whole that showed the one could not exist without the other -- a preview of American federalism as it developed over the next two centuries.

Adopting State Constitutions

Having asked first, New Hampshire adopted its new constitution in January 1776. South Carolina followed in March. By the time the Declaration of Independence was signed on July 4, Virginia and New Jersey had done likewise. Other former colonies, now become independent states, took up this task, and by April 1777 six more had new constitutions.

Connecticut and Rhode Island, which already had representative government with an elected governor and an elected bicameral legislature, merely dropped royal references in their charters and kept them in operation. Massachusetts temporarily functioned within the framework of its royal charter (Wood 1969, 133).

In nine states the assemblies took charge of writing these new constitutions rather than setting up separate constitutional conventions. Six of them, though, held special elections for the assembly in contemplation of writing a constitution (Nevins 1927, 128-9). In Pennsylvania a balky assembly refused to act, so citizens by various means elected delegates to a separate constitutional convention, which then continued as the *de facto* legislature (Palmer 1959, 217). None of these first ten constitutions went to the people for approval.

It took Massachusetts two tries to get a new constitution. In 1778 the elected assembly drafted one and submitted it to the electorate, who

defeated it five to one, partly on the grounds that they did not choose the drafters. Thereupon in 1780 the legislature established an elected constitutional convention, which sent a new draft to town meetings for discussion, vote, and referral back to the convention for final action. In New Hampshire from 1778 to 1783 four successive conventions referred proposed constitutions to town meetings for consideration until they finally approved the fourth version (Ketchum 1974, 101; Nevins 1927, 175-183).

Thus, Pennsylvania's innovation of a constitutional convention, specially elected for this task, was duplicated by Massachusetts and New Hampshire, which both added review by town meetings and popular vote on the state constitution before it could go into effect. Giving voters a direct voice in adopting the fundamental law of the state was an enlargement of consent of governed. It was a practice that spread widely during the 19th century.

In their constitutions all 13 states accepted the doctrine of separation of powers, as taught by the Frenchman Montesquieu in *The Spirit of the Laws* (1748), and established three branches of government: legislative, executive, and judicial. Of these, the legislature was by far the dominant branch.

Except for Pennsylvania and Georgia the legislatures were bicameral with both chambers elected by voters. When Georgia revised its constitution in 1788 it added a second house to the legislature, and Pennsylvania did likewise in 1790. In these bicameral legislatures the state senates, successors to the appointed councils, had fewer members than the houses of representatives. Initially most of the states with new constitutions provided for at-large election of state senators (Wood 1969, 163, 214).

Most of the new state constitutions contained a bill of rights. They maintained a property or tax-paying requirement for voting but not as

restrictive as before. Seven of the states had higher minimum property-owning requirements for members of the legislature than for voters, and six of them set a higher minimum for their governors than legislators (Eidelberg 1968, 263).

In nine states under these initial state constitutions the legislature chose the governor. Pennsylvania's first constitution had a 12-member executive council, chaired by a "president", instead of a governor but changed to a elected chief executive in the 1790 revision. None of the states gave their governor a final veto over legislation, although in three states the governor had partial veto power (Nevins 1927, 166, 200).

Forming a Confederation

The resolution to dissolve all political connection with Great Britain, introduced in the Second Continental Congress by Richard Henry Lee of Virginia on June 7, 1776, included a recommendation that "a plan of confederation be prepared and transmitted to the respective Colonies for

their consideration and approbation" (Continental Congress 4:425). A 13 member committee was appointed, and John Dickinson of Pennsylvania took the lead in writing a draft of a plan of confederation. With revisions by the committee, this draft was offered to the Congress in July and considered intermittently for about a month. But the Congress was concentrating mostly on the war with the British and put off consideration for more than a year (Rakove 1979, 139).

Finally on November 15, 1777 Congress agreed upon "Articles of Confederation and perpetual Union" between the 13 states (Continental Congress 9:907-25). They called this confederacy the "United States of America." Article II revealed an intent of the states to keep tight control over the confederation, stipulating:

Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the united states in Congress

assembled.

Article III spoke of "a firm league of friendship", a kind of treaty between sovereign states.

The Articles formalized the system of indirect representation developed by the Continental Congresses. The state legislatures appointed the delegates -- from two to seven per state -- and could recall them at any time. No person could served as a delegate for more than three years out of six. In Congress each state had one vote. There was no provision for a chief executive officer, elected or appointed.

Congress sent the Articles of Confederation to the state legislatures for ratification. All thirteen had to agree in order for the Confederation to go into effect. Until that was accomplished, the Continental Congress continued to serve as the interim government of the United States.

Twelve states ratified the Articles fairly promptly, but Maryland held out over objection to western land claims of several other states. When

these states agreed to turn over such land to the Congress of the Confederation, Maryland ratified on March 1, 1781. In this manner bargaining entered into the process of gaining unanimous consent of the state legislatures. The Articles then went into effect, almost five years after the Declaration of Independence.

As an instrument for national government, the Confederation had successes and failures. Among its accomplishments, as summarized by Clinton Rossiter (1968, 43):

The first government of the United States fought a successful war, made a viable peace, laid the foundation for a new order of diplomacy, established enough credit at home and abroad to pay its most pressing expenses, conducted a kind of political and social academy for the continental elite, created a functioning bureaucracy, and above all maintained itself as a symbol of American unity even in the most parochial times after 1783.

Congress settled the irksome dispute among the states over western land and took control of national expansion. Through the Northwest Ordinance of 1787 Congress established the principle that new states must have "republican" government prior to admission to the Union (Commager 1973, 132). On the negative side Congress, as the principal vehicle for governance, was not always able to maintain a quorum and was overly dependent upon the states for revenues. Although Congress patched together several executive departments, the Confederation was far too weak for the needs of the fledgling nation. Particularly vexing was Congress's insufficient authority to deal effectively with commercial matters involving two or more states. Moreover, the Confederation government was too far removed from the people to make consent of the governed truly meaningful (Rossiter 1968, 35-49).

Writing A New Constitution.

In pursuit of remedies of trade problems representatives from five

states met in Annapolis in 1786 (another four appointed delegates, who failed to appear). From this session came a call for a broader convention the following May for the purpose of devising provisions "necessary to render the constitution of the Federal Government adequate to the exigencies of the Union" (Tansill 1927, 43). In February 1787 Congress gave its blessing to such a convention "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions" (Continental Congress 32:74).

Twelve states sent delegates to a Convention in Philadelphia in May 1787 with Rhode Island declining to participate. Instead of abiding by instructions from the Congress to develop revisions to the Articles of Confederation, the Convention between May 14 and September 17, 1787 wrote a brand new Constitution for the United States of America (Collier and Collier 1986; Rossiter 1968; van Doren 1948).

The delegates to the Convention knew that they were exceeding their authority from the Congress of the Confederation, so they had to figure out how to get their work accepted. Therefore, they decided that ratification should occur in conventions in each state, called for this purpose with specially elected delegates. They agreed that ratification by nine states would be sufficient for establishing the Constitution for the ratifying states. This set up a kind of popular referendum on the new Constitution and brought consent of the governed into adoption of the basic law of the land.

Anticipatory Consent. The delegates met in secrecy, strictly observed, in order to be able to have frank discussion of difficult issues and to allow delegates to try out ideas, change their positions, and come up with compromises free from outside pressure. But never far from mind was the need to gain approval of the new Constitution from a broad and varied constituency: from both large and small states, from New England, the Mid-Atlantic states, and the South, from a sufficient majority of people

who favored a stronger national government.

In order even to have ratifying conventions organized within each state, the framers had to transmit the proposed Constitution through the Congress of the Confederation to the respective state legislatures. The latter in turn would call the ratification conventions and arrange for election of delegates to them. Thus, at least unconsciously, often implied, and perhaps sometimes directly, the framers asked themselves whether they were producing a document that could survive the transmittal process.

Were they proposing a Constitution which future delegates to state ratifying conventions would approve? This kind of anticipatory consent was a pattern that has since had abundant repetition in a variety of ways in American democracy.

Ratification. The framers' plan for ratification was imminently successful. On September 28, 1787, eleven days after the Constitutional Convention completed its work, the Congress of the Confederation,

condemned to oblivion, voted that the Constitution "be transmitted to the several state legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof" (Continental Congress 33:349). On December 7, 1787 Delaware's ratifying convention was first to approve the new Constitution. On June 21, 1788 the convention in New Hampshire was the ninth to approve, technically sufficient, but ratification by Virginia on June 26 and New York on July 26 were necessary to make the new Constitution politically viable.

Public Opinion. The campaign for and against the new Constitution revealed another aspect of the consent process: the impact of public opinion. Throughout the 13 states newspapers offered their editorial views and provided space for proponents and opponents. The pro-ratification essays later collected as *The Federalist* first appeared in New York newspapers (Madison, Hamilton, and Jay [1787-88] 1937). Anti-Federalist writings were published there and elsewhere (Storing 1981). They were trying to

influence voters who would choose delegates to the state ratifying conventions and then the delegates themselves. But they were also appealing to a broader public opinion on issues raised by the proposed Constitution but likely to continue as important matters to be taken up by the new government.

Affecting the Future. In particular, Anti-Federalists were concerned that the new Constitution contained no Bill of Rights, a feature specifically rejected by the Constitutional Convention but contained in many of the new state constitutions and a heritage dating back to the English Bill of Rights of 1689. Many Anti-Federalists also wanted a stronger guarantee that the states retained all powers not delegated to the federal government. As expression of these and other concerns, seven of the 13 state ratifying conventions in their resolutions of approval proposed a total of 124 amendments to the Constitution (Tansill 1927, 1009-59). In response George Washington and leading Federalists offered assurance that the First

Congress under the new Constitution would address these concerns (Small 1964, 840).

Therefore, as in ratifying the Articles of Confederation so also in ratifying the U.S. Constitution, bargaining and promise of future action entered into the consent process. This time the bargainers went beyond a narrow group of state legislators to elected members of ratifying conventions and a significant segment of the public whose articulated demands had to be dealt with.

Forming New Governments

Thus, by the time the new state governments and the new general government became operational, consent of the governed had gained a new expression in voter approval of the basic structure and powers of government. What the voters approved in the state and U.S. constitutions was a form of government they called a republic. James Madison described a republic as "a government which derives all its powers directly

or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior" (*The Federalist No. 39*, 243-44). Today we call this representative government.

In the new Federal Union the states determined voter qualifications. They continued limiting suffrage mostly to white males and maintained a property or tax-paying requirement for voting, though not as stringent as during the colonial period. They excluded Negro slaves and the First Settlers (Indians) still residing within the boundaries of the states. Seven of the states had higher minimum property-owning requirements for members of the legislature than for voters, and six of them set a higher minimum for their governors than legislators (Eidelberg 1968, 263).

According to the new U.S. Constitution, the population of states by which seats in the U.S. House of Representatives would be apportioned would consist of "free persons, including those bound to service for a term of

years [indentured servants], and excluding Indians not taxed, three fifths of all other persons [that is, Negro slaves]" (Article 1, Section 2). This meant that although slaves could not vote, they boosted the number of representatives in Congress for slave states.

Of the principal offices of these new governments, the U.S. House of Representatives, the state legislatures, and four governors were directed elected. The other nine governors and the U.S. Senate were elected by the state legislatures. The president and vice president of the United States were chosen by a small group of electors selected in a manner determined by the legislatures. This meant that consent expressed through elections was only partially direct.

As the framers conceived the system, responsibility for government would be delegated to "a chosen body of citizens, whose wisdom may best discern the true interest of their country" (*The Federalist No. 10*, 59). It would be representative government in an elitist mode.

New Instruments of Consent

Nevertheless, as these new governments became operational, the consent process began to broaden. For instance, in the first presidential election, six of the ten participating states provided for popular vote in the selection of presidential electors. (New York could not get its act together, so had no electors. North Carolina and Rhode Island had not yet ratified the Constitution). In the first contested election in 1796, eight of the by then 16 states allowed voters to choose electors (Paullin 1932, 89).

Moreover, two very significant instruments of consent emerged in the 1790s: political parties and interest groups. They added new features to the consent process and provided greater continuity of participation.

***Political Parties.** George Washington, first president of the United States, did not want political parties to form in the new federal union.*

Many other founders agreed, including Vice President John Adams.

Nevertheless, before Washington's first term was over, they were functioning

within Congress and in many states and localities. They were a strong factor in selection of Washington's successor in 1796 and were a dominant influence in the presidential election of 1800. Ever since parties have been a prominent feature of American democracy (Chambers 1963; Reichley 1992).

Interests Groups. Likewise many of the founders looked with disapproval upon interest groups. "Factions" they called them (*The Federalist No. 10*). Nevertheless, interest groups showed up in 1789 in New York where the First Congress was meeting (Herring 1929, 31-32). They have been hanging around the halls of government ever since. Not only do they seek to influence legislative and executive decisions, but they also try to affect public opinion on particular issues and sometimes mobilize specific blocs of voters in elections and ballot-issue campaigns.

By 1800 consent of the governed was considerably broadened from merely electing public officials and letting them run the government. The

people were taking a hand in adopting constitutions. They had formed political parties to extend their participation in the electoral process. They were functioning as interest groups to gain influence in the ongoing policy-making processes of government.

This was the beginning of continuous, interactive consent that characterizes American democracy today. Many aspects of the history of political development in the United States since then can be viewed as steady elaboration of sets of intertwined methods for achieving the consent of the governed. Part Two examines the myriad ways this complex consent process is manifested in the 1990s.

November 1996

PART TWO. CONTEMPORARY PRACTICES

Chapter Five

Framework for Consent

Government in the United States in the 1990s functions with the consent of the governed, just as the Declaration of Independence said it should. Consent occurs through elections, voting on ballot issues, town meetings, and a variety of processes that achieve continuous interaction between citizens and those they have chosen to govern.

Today's complex pattern of consent-giving has evolved from practices begun during the founding period of the American Republic (reviewed in the previous chapter). Consent takes place within the framework established in the years from 1776 to 1800: the federal system of national, state, and local governments and a pair of instruments for consent, political parties

and interest groups.

We need a basic understanding of this framework to prepare ourselves for comprehending the complexity of the consent process in the United States. We also should realize that consent occurs in two interrelated modes of democracy.

Two Modes of Democracy

American government functions primarily as representative democracy but also has elements of direct democracy.

Representative democracy in the United States today, in contrast with its elitist beginning, operates in a participatory mode. Extensive participation occurs first in the electoral process whereby citizens choose who shall represent them in the halls of government. Widespread participation continues as citizens interact with public officials in processes of governmental decision-making, especially legislative enactment and executive policy making.

Diverse participants fulfill a variety of roles: persons positioning themselves to seek public office, announced candidates, political party officials and campaign workers, voters, legislative and executive officials, judges in some jurisdictions, interest group representatives, and individual citizens seeking to influence decision makers. Molders of public opinion also play influential roles.

Two practices of direct democracy offer further opportunities for citizen participation. One is voting on ballot issues, including initiatives coming from the citizenry and referendums placed on the ballot by legislative bodies. Participants include issue advocates, their opponents, legislative and executive officials, opinion molders, and ultimately the citizens who decide by voting on the issues.

The other form of direct democracy in use is the town meeting, functioning as the official governing body of a local jurisdiction and open to participation by all citizens residing there. Its decision-making authority

distinguishes this kind of town meeting from gatherings called "town meetings" that are held mainly to facilitate communication between citizens and public officials.

These two practices of direct participation complement rather than displace representative government as the primary mode of democracy in the United States, as we'll explore more fully in chapter 10.

Numerous Elected Officials

Because representative government is the primary mode of American democracy, the election of public officials is the bedrock of consent.

Altogether there are 513,200 popularly elected officials in the United States, according to the latest Census of Governments (U.S. Bureau of the Census, 1995). This is approximately one for every 485 inhabitants.

They include:

- 16,243 chief executives of general purpose governments: president, governors, mayors, county executives.

- 356,636 members of the governing bodies for the 85,006 governmental units: Congress; state legislatures; county, municipal and town councils; school boards; and boards of special districts.
- 36,430 members of other elected boards.
- 103,891 other elective positions with state and local government, including 18,389 judges and 13,893 other law enforcement and judicial officials.

Consent of the governed begins when citizens elect these officials to public office, a process we'll trace in the next chapter. But it doesn't end there. The consent process continues as citizens interact with legislators engaged in enacting laws and ordinances and with executive officials and their appointees who develop, adopt, and carry out executive policies and regulatory actions. Chapters 7, 8, and 9 analyze how this occurs.

Many Governmental Jurisdictions

These numerous elected officials carry out their responsibilities within a

federal system containing one national government, 50 states, and 84,955 units of local government (U.S. Bureau of the Census 1994). The latter are arrayed as follows:

38,978 general purpose local governments, including

3,043 counties

19,279 municipalities

16,656 towns and townships

14,422 independent school districts

31,555 special districts

Citizens directly elect and deal with the public officials of these various jurisdictions. Conversely elected officials are directly responsible and relate to the citizens who elect them without going through a hierarchy of governments. But at the same time the governmental units of American federalism are connected to one another in complex patterns of relationships. Later in this chapter we'll have more to say about American

federalism.

Outside government but closely connected to it, two instruments of consent function as important features of American democracy: political parties and interest groups.

Political Parties¹

As instruments of consent, political parties in the United States make their greatest contribution in the electoral process. They also help shape the framework of legislative bodies and the executive branch, thereby having an impact on policy formulation and governmental operations.

Candidates run as nominees of political parties in elections for president and vice president of the United States, the U.S. Congress, all 50

¹ I write from the perspective of one who has observed American political parties for many years and participated in a number of election campaigns. I have sampled the enormous literature on political parties to gain a broader perspective, such as Key 1964; Sundquist 1983; Cotter, Gibson, Bibby, and Huckshorn 1984; Epstein 1986; Sabato 1988; Keefe 1991; and Reichley 1992.

governors, all state legislatures but one (Nebraska), most other state elected officials, 82 percent of the governing bodies of the nation's 3,043 counties, but in only 25 percent of the municipalities (Jones 1994, 105; DeSantis 1989, 64; Renner and DeSantis 1993, 67).

Almost all the winners in these partisan elections are members of the Democratic and Republican parties. Third party candidates and independents without party affiliation may run, but few win.

The two main parties, Democratic and Republican, are highly diversified institutions. They don't have formal membership requiring payment of dues or creedal adherence. The main indicator of party membership occurs in three-fourths of the states where individuals desirous of voting in a primary election must indicate a party preference either at the time voter registration or on election day at the primary polling place. But the remaining one-fourth of the states have no such requirements and allow individuals to vote in primary elections without publicly revealing

party preference (Council of State Governments 1994, 223).

More than anything else, party affiliation is a matter of personal identity (Epstein 1986, 239-271). This can range from strong (usually voting a straight ticket) to weak (frequently voting for independents or candidates of other parties).

Persons who have strong to moderate identity as Democrats and Republicans cluster together in different arenas -- local, state, national -- in order to contest elections and to govern. Party organizations function in precincts, wards, municipalities, counties, states, and the nation as a whole. Party units form in legislative bodies, ordinarily with separate clusters for each party in each house of bicameral legislatures. Clusters of Democrats and Republicans form around elected chief executives of their party (mayor, county executive, governor, president) and around candidates for office. Racial, ethnic, gender, and ideological groups make up other clusters within each party.

In their formal structure, the Democratic Party and the Republican Party are each composed of mostly autonomous local and state units which come together in a loose-knit, national federation. It is much more bottom-up than top-down.

Neither major party maintains ideological purity and consistency. Neither exercises strict party discipline over members and party units. For instance, the national committee cannot tell party members in the House of Representatives or Senate how to vote. Nor can the president order members of his own party in Congress to support his policies. The same pattern generally prevails with governors and state legislatures although sometimes a state or local party dominated by a close-knit oligarchy can exercise a measure of party discipline.

Thus, the two major American political parties are multi-nuclear in their organization and operations. They are more pragmatic than ideological. However, they generally display sufficient difference between

them to offer a choice to American voters. From time to time smaller parties function with purer ideology or focus upon particular issues. And from time to time, independent candidates run for office. But overall elections and governance are dominated by Democrats and Republicans.

In summation political parties play the following roles in American democracy:

Electoral

- *Facilitate nomination of candidates for public office.*
- *Organize, finance, and carry out campaigns in general election.*

Legislative

- *Provide basis for organizing legislative bodies and working out legislative policies of majority and minority blocs.*
- *Establish ties between elected chief executives (president, governor, mayor) and legislative delegations of their parties.*

Executive

- *Source for recruiting persons to fill top policy positions and in some jurisdictions many other governmental jobs ("patronage").*
- *Channel of influence on executive policies, regulatory matters, and awarding grants and contracts.*
- *Assistance to citizens in solving service-delivery problems.*

Judicial

- *Nominate candidates in jurisdictions with elected judges.*
- *Influence judicial appointments elsewhere.*

Public opinion

- *Reach out through news media to create support for party policies and candidates.*

In later chapters we'll encounter political parties as they fulfill different roles in the consent process.

Interest Groups²

A second significant instrument which American democracy uses in the consent process is the interest group. Their formation is natural and inevitable in a democracy.

Today virtually everyone in the land is part of one or more interest groups (often many). People form interest groups out of recognition that they share particular concerns with other persons. They realize that they can assert greater influence in the public policy arena by joining with others of similar persuasion.

Many interest groups consist of persons sharing common economic self-interest: farmers, commercial growers, industrial workers,

² Here, too, I write as a frequent participant in public policy advocacy and as an observer of others. Classic works on interest groups include Bentley 1908; Herring 1929; Truman 1951; Latham 1952; Key 1964. More recent works include Schlozman and Tierney 1986; Berry 1989; Walker 1991; Cigler and Loomis 1991; Salisbury 1992; Heinz, Laumann, Nelson, and Salisbury 1993.

manufacturers, retailers, consumers, importers, utilities, various professions, and many more. Other interest groups are organized around particular issues: civil rights, public education, health care, environment, campaign finance, tax reduction, defense, disarmament, and many other causes. Some focus on ideology, such as socialism, capitalism, populism, liberalism, conservatism, and libertarianism, occasionally taking the form of a political party but usually more interested in promoting their ideas than expecting to gain public office.

Organizations established for other purposes, such as churches, synagogues, social clubs, colleges and universities, hospitals and social service agencies, on occasion seek to influence governmental policy, thereby acting as interest groups in the public arena. Associations of local governmental officials function as interest groups in dealing with state government. They are joined by associations of state officials in addressing the national government on a wide variety of policy issues. Even governmental

employees organize as interest groups to influence policies of the governmental unit for which they work; for instance, employee unions, associations of teachers, and racial, ethnic, and women's caucuses.

A distinction is sometimes made between private interest and public interest groups. "Public-interest organizations," according to David Cohen (1978, 56-57), "are often defined as groups that seek 'common, collective, or public goods' that do not exclusively, materially, or selectively benefit their members....The diffused benefits of public-interest activities need to be contrasted to the benefits accruing to the special interests as a result of their activities."

Yet even among public interest groups a degree of self-interest sometimes enters in. For example, child welfare advocates, mayors, and governors all work for expansion of federal support for programs beneficial for children, but they compete among themselves in whether funds should go directly to community organizations, cities, or states. However, for

none of them is personal economic gain a strong a factor as it is for manufacturers, farmers, bankers, home builders, and other economic interest groups.

Whether private or public in orientation, interest groups give considerable attention to public decision making in the following ways:

Electoral

- *Make campaign contributions.*
- *Mobilize voters.*
- *Extract promises from candidates.*

Legislative

- *Participate in drafting bills and amendments.*
- *Lobby directly for and against specific legislation.*
- *Encourage grassroots lobbying.*

Executive

- *Push for appointment of top officials sympathetic to their*

viewpoints.

- *Participate in policy formulation.*
- *Lobby executive decision makers.*
- *Try to influence regulatory actions.*

Judicial

- *Seek to influence who is elected and appointed to the judiciary.*
- *Get involved in litigation.*

Public opinion

- *Produce and distribute reports and video material.*
- *Stage events.*
- *Try to influence news media in behalf of particular interests.*

In sum, interest groups are very active participants in the consent process of American government, as we'll see in greater detail in subsequent chapters.

American Federalism

The federal system of government that operates in the United States shapes the consent process and in turn is shaped by consent giving. This system can be viewed from two perspectives, both supplied by James Madison in the founding period of the American republic.

In *The Federalist No. 46*, written during the ratification debate on the new U.S. Constitution, Madison observed:

The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other (1937, 304-5).

This view is consistent with the affirmation of the Declaration of

Independence that the just powers of government derive from consent of the governed. The people are sovereign. They choose to assign some powers to the federal government and other powers to the states, and also to local governments. The people select officials to serve in each governmental domain as their agents and trustees.

However, in *The Federalist No. 51* Madison's own sight of the people dimmed as he wrote:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself (1937, 339).

In this explanation the people, rather than being the common superior, surrender power to the national government and the states, which become

competing sovereigns. The people are protected, not by direct control through consent processes, but rather through rivalry between the states and the national government and rivalry among legislative, executive, and judicial officials within each of them.

At first the operations of the national government and the states were generally, but not totally, separate. By the early days of the 20th century this was changing. A growing number of federal financial grants-in-aid to the states were operating in response to nationwide needs. The national government was starting to regulate national business corporations. This trend accelerated in the 1930s as federal initiatives multiplied in response to the Great Depression. As a result, the workings of state and national governments became more and more interrelated, though each continued to draw its authority directly and separately from the people.

At the same time local government was increasing its scope of activities. Although legally creatures of the states, in practice local

governmental units operate as separate entities, run by officials directly elected by the citizenry. Accordingly, cities, counties, and other local units have become important participants in the federal system.

By the middle of the 20th century it was commonplace to speak of three-level federalism in the United States. By then the operations of national, state, and local governments were so intertwined that the older notion of clearly separated sovereignties was no longer valid (Corwin 1950).

As a result, scholars, in searching for alternative descriptions of American federalism, have produced an abundance of metaphors. They have described federalism as a marble cake (Grodzins 1966), a picket fence (Sanford 1967), a bamboo fence (Walker 1981), and a fruitcake (Wildavsky 1982). Many scholars have noted the increased power of the national government over state and local governments through the use of federal grants, regulations, mandates, and preemption. They have described the system as permissive federalism (Reagan and Sanzone 1981), pragmatic

federalism (Glendening 1984), regulatory federalism (ACIR 1984), cooptive federalism (Walker 1987), competitive federalism (Dye 1990), and coercive federalism (Kincaid 1990).

Almost all of this recent scholarship has worked from Madison's second definition of federalism: the compound republic with competing national and state sovereigns, exercising power "surrendered by the people". They have, therefore, concentrated mostly on intergovernmental relations.

However, during the past 35 years a few scholars have adhered to Madison's first definition, insisting that national and state governments (and also local governments) are "different agents and trustees of the people, constituted with different powers, and designed for different purposes".

Luther Gulick (1962), instead of speaking of levels within the federal system, identified three major "extensions" of government. The American scheme of government, he noted, "is made up of partially autonomous

governmental structures differing primarily with respect to the extent of the constituencies and boundaries on which they rest." The three extensions are "comprehensive" (national), "intermediate" (the states), and "limited, local extension".

Daniel Elazar (1975) rejected altogether the hierarchical notion of levels, maintaining that "there are no higher or lower power centers, only larger or small arenas of political decision-making and action." Each of these, he maintained, exists in its own right and is not part of a hierarchy of national-state-local.

This is the truer meaning of American federalism. The people, who are sovereign, directly elect local, state, and national officials. These officials may compete among themselves, but ultimately all of them are responsible to the same people who are simultaneously citizens of localities, states, and the nation.

The people, though, are not necessarily of one mind. They press their

elected representatives in Congress to address a wide variety of problems and fund numerous programs. At the same time they support their elected officials at city hall, county courthouse, and statehouse in resisting federal interference in local and state affairs.

The assignment of different powers for different purposes to these different agents and trustees of the people occurs more through temporal responses to felt needs than through a carefully developed and thoroughly debated long-term plan for federalism. Balance within federalism is determined through an accumulation of thousands, indeed millions of legislative, administrative, and electoral decisions that almost never directly consider the most appropriate division of responsibility.

In this manner American federalism is a kaleidoscope of every changing patterns.

Federalism and the Consent Process

Whatever the pattern of federalism, the ways Americans give their consent and participate in governance occur within the context of the federal system.

Electors chosen by people in each state formally choose the president, even though they are bound by custom to vote for the winning candidate in their state. Obtaining a electoral college majority shapes presidential campaigns.

States administer election laws, but a series of constitutional amendments and acts of Congress mandate broad eligibility to vote. At the same time states delegate aspects of voter registration and conduct of elections to local government, including administering the election of state and national officials. But on occasion federal agents monitor local polling places.

Political parties have units in precincts and wards, cities and counties, states, and the nation as a whole, interrelated and federated but with

considerable state and local autonomy. The majority of delegates to national party conventions are selected by geographic districts.

The career path for numerous politicians has a federal dimension as they move from local to state to national elective positions, and sometimes the other way, such as from Congress to becoming governor. Many state political party leaders get their start in local politics.

Some interest groups have centralized national organization with state and local chapters. Others take the form of national federations composed of mostly autonomous local and state organizations.

Associations of local officials act as interest groups in dealing with state and national governments. State officials likewise have associations that deal with federal agencies, Congress, and the president.

Federal laws facilitate organization and operation of advocacy organizations by granting income tax exemption (though with some restrictions on direct lobbying and electoral involvement). Federal agencies

sometimes directly or indirectly assist formation of advocacy organizations related to their domain.

In sum, we cannot fully comprehend the consent process of American democracy unless we realize that it functions within a federal system of government.

November 1996

Chapter Six

Choosing Public Officials

In American democracy the election of public officials holds a central place in obtaining the consent of the governed. Altogether voters elect 511,039 officials of local, state, and national government (U.S. Bureau of the Census 1994). This occurs through direct election except for the president and vice president of the United States, officially chosen by voter-selected electors, who, however, are committed to specific candidates.

Voting on election day is the decisive act of the electoral process. That's when citizens decided who will represent them in public office. This significant decision, however, is neither the beginning nor the end of consent-giving.

Interactive consent commences when individuals start positioning

themselves to run for public office and begin relating to segments of the electorate. The process continues as announced candidates campaign for political party nomination or a place on a nonpartisan ballot. Nomination is followed by more campaigning prior to the general election. Interaction between candidates and potential voters increases and broadens as these campaigns proceed.

After the election the consent process enters a new phase as winners prepare to take office but remain in touch with constituents and other interests. Interactive consent continues throughout their term in office as legislators and executive officials constantly relate to individual citizens and interest group representatives. In this manner the consent process moves from elections into governance.

THE ELECTORAL PATHWAY

A Journey through Time

Election of public officials occurs in a journey through time along an electoral pathway. The journey has stages demarcated by moments of decisions when gatekeepers determine who will proceed to the next stage.

This journey commences as individuals think about running for public office and start positioning themselves to run. These potential candidates are their own gatekeepers, along with family, mentors, and other advisers who help them decide whether to enter the fray.

If they decide to run, they announce their candidacy and move into the second stage: the nominating process. Gatekeepers for political party nomination are the participants in party caucuses, conventions, and primary elections. Gatekeepers in nonpartisan contests are primary election voters. For independent candidates gatekeepers are persons asked to sign petitions of candidacy. (More on these alternatives in a moment.)

Candidates gaining party nomination, the top vote-getters in nonpartisan primaries, and independent candidates then enter the third

stage: the general election campaign. The gatekeepers at the end are citizens who vote on election day or cast mail ballots in advance.

As candidates move through this three stage-journey, they find more and more persons accompanying them along the electoral pathway, or coming on and off at intervals. Their traveling companions include individual citizens, party officials, campaign volunteers, interest group representatives, job seekers, and many more. A candidate is challenged to gain sufficient support to emerge victorious at successive stages of the journey.

Infrastructure

Two factors affect the design of the electoral pathway: partisan or nonpartisan mode of election and type of nominating process.

Partisan or nonpartisan. In partisan elections the candidates' party affiliation (Democratic, Republican, some other party) is listed on the ballot.

This practice occurs for national offices, state government (with some

offices excepted), 83 percent of the counties, and 25 percent of the municipalities. The other counties and municipalities, most school boards and special districts have nonpartisan elections where party affiliation is not indicated. In many localities both partisan and nonpartisan offices appear on the same ballot.

Political parties play a central role in facilitating the nomination of candidates for partisan offices, and in some localities they make unofficial endorsements in nonpartisan elections. More commonly in nonpartisan elections candidates run independently, or sets of candidates voluntarily form slates for campaign purposes. Sometimes interest groups work together in coalitions supporting blocs of nonpartisan candidates, and in some places enduring alliances function as local parties not connected to the national parties.

Both partisan and nonpartisan modes of election are political in the competitive sense, but they produce different dynamics along the electoral

pathway.

Nominating process. Methods of nomination are determined by state law and political party rules. The primary election is the most common method and is used in all states for some or all elected offices. In some states political parties also conduct caucuses and hold conventions, usually in combination with a primary.

Primaries come in three varieties: closed, open, and blanket. To nominate state officials 35 states have closed primaries "in which voters receive only the ballot of their party choice". Twelve states (Vermont, Virginia, South Carolina, Tennessee, Missouri, Michigan, Wisconsin, Minnesota, Montana, Utah, Idaho, and Hawaii) have open primaries "in which voters receive a ballot for all parties and select the party of their choice in the privacy of the voting booth". Two states (Washington and Alaska) have a blanket primary in which the ballot contains the candidates of all parties, and a voter may choose among the parties but may indicate

only one choice for each office. Louisiana places all candidates of all parties on a single ballot. Candidates receiving over 50 percent of the vote are elected to office, but if no one receives a majority, the top two vote-getters compete in a runoff election (Council of State Governments 1990, 236).

In addition to primaries, 14 states provide for some permutation of a political party convention for some or all offices. They include Connecticut, New York, Delaware, Virginia, South Carolina, Alabama, Michigan, Indiana, Illinois, Iowa, Kansas, Colorado, New Mexico, and Utah.

Methods used to nominate candidates for state offices generally apply to nominating candidates for Congress and local offices. Party nominees for president of the United States are chosen through a succession of caucuses, primaries, and conventions in the various states, culminating in national party conventions.

In partisan elections the victorious candidates in party primaries and conventions appear on the general election ballot to compete against one

another. In nonpartisan elections the primary narrows the field to the two top vote-getters for each position to be filled in the general election. In addition, state law usually permits independent candidates to get on the general election ballot by petition.

Some states require runoff elections when no candidate receives a majority or a stated plurality (such as over 40 percent). This adds a fourth stage to the electoral pathway.

MAKING THE JOURNEY

Candidates move through these successive stages of the electoral pathway, continuously interacting with citizens who will ultimately determine who emerges victorious. In this manner the time dimension enters into consent-giving through elections.

Positioning

The initial decision to seek public office is a personal one, sometimes

made through consultation with family, friends, and political advisers. This is when the aspirant must choose which office to seek. Perhaps there is a succession of offices to a final goal. In partisan elections, the aspirant whose party identity is not already fixed must choose a political party or decide to run as an independent. Most of them choose to run as a Democrat or a Republican because that offers the greatest chance to be elected. Thus, in 1995 ninety-nine percent of state and national chief executives and legislators were Democrats and Republicans (Carle 1995; National Conference of State Legislatures 1995). And so were most other state and local officials elected on partisan ballots.

Depending upon state law and party practice, the party nomination will be formally determined at caucus, convention, or primary election. Each has a different set of gatekeepers: party members appearing at caucus meetings, delegates to the convention, eligible voters participating in the primary. There may also be recruitment or endorsement committees of

party leaders or blocs within the party. Sometimes particular interest groups are influential, such as chambers of commerce, labor unions, other economic interests, civil rights organizations, ideological groups, and others.

Newspaper endorsement might carry some weight. (For an illustration of this process in one congressional district, see Fowler and McClure 1989; also see Ehrenhalt 1991.)

Well before announcing their candidacy, newcomers to politics usually begin positioning themselves to run. They may do this by joining organizations, engaging in community service, making friends, currying favor with political leaders and party blocs, getting in touch with influential interest groups, forming alliances, sounding out potential financial supporters, seeking publicity, and gaining public recognition. This is the beginning of relationships with voters and with constituents to be served if elected. It is the initial stage of interactive consent.

In national politics aspirants for the presidency who have never held

elected office sometimes establish an independent organization to back their quest. Since the mid-1980s this was the case with Rev. Jesse Jackson and the National Rainbow Coalition, Rev. Pat Robinson and the Christian Coalition, and Ross Perot and United We Stand America, which became the Reform Party. All three have also used their organizations as a base for public policy advocacy.

Incumbents seeking reelection (a majority of current officeholders at any one time) start positioning themselves to run again as soon as the last election is over. By and large they do this in the course of carrying out their official duties: legislators representing their district on policy issues and helping their constituents in numerous ways; elected executives taking policy initiatives and running governmental operations in a manner that gains public support.

Incumbents continually communicate with their constituents and receive feedback from them. They issue news releases, send out

newsletters, grant interviews to journalists, appear on radio and television shows, speak at community meetings, appear at public events. For incumbents it is a matter of simultaneously serving as receptive public servants and getting in position to run for reelection. This intermingling of representation and electioneering contributes to continuity in the consent process. (For how members of Congress relate to their home districts, see Fenno 1978; for state legislators, see Jewell 1982 and Rosenthal 1981.)

Persons holding one elective office and aspiring for another position themselves by building support for the next office. This is most visible in the parade of governors, members of Congress, and former officeholders speaking at quadrennial Democratic and Republican conventions, looking ahead to the presidential nominating contest four or eight years later. Then they go to "cattle shows" around the country, speaking at state and local party gatherings and before influential interest groups and ideological organizations. They appear on television interview programs and radio

talk shows. They write books and magazine articles.

In similar ways city council members wanting to become mayor, state legislators desiring to run for governor, and other incumbents aspiring to other offices position themselves a year or two in advance. Often this affects their performance in their current office as they sponsor legislation or take executive initiatives that attract attention of potential supporters for the next office they are seeking.

Incumbents seeking reelection or desiring to run for another office use the positioning period as a time to raise future campaign funds from interest groups and other donors. This practice has many critics because of the advantage incumbents have in fundraising over their challengers and because of influence gained by donors. Campaign financing reform seeks to address this problem by such methods as restricting donations, public funding of election campaigns, or providing free television time for all candidates.

Campaigning

Candidates for public office move from positioning to active campaigning by formally announcing their candidacy and filing necessary papers with election officials. By then they have usually put together a campaign organization, developed a strategy, and begun fundraising. Their objective is clearcut: win more votes than any opponent to gain party nomination or become a top vote-getter in a nonpartisan election, and then win more votes than any other candidate in the general election.

Voters bring a different perspective to the campaign. They want to find and vote for candidates who can best represent them in the halls of government. Party officials want candidates who can win the general election. Interest groups look for candidates supportive of their viewpoints.

These desires intersect with candidates' desire to win and produce the dynamics of interactive consent in the course of the election campaign.

In partisan elections candidates calculate who will participate in party

caucuses, nominating conventions, and primaries and map out campaign tactics to garner the support they need to win their party's nomination.

In nonpartisan elections candidates seek enough support to win the primary or be a runner-up, thereby getting on the ballot in the general election.

Candidates in both modes sponsor polls and arrange for focus groups in order to find out the opinions of various segments of the population on key issues. They talk with personal and party advisers and sometimes hire campaign consultants. (For elaboration of how political campaigns are crafted, see Allen 1990, Beaudry and Schaeffer 1986, Grey 1994, Lansing 1991, and Schwartzman 1989.)

Candidates usually try to offer voters a clear picture of who they are, what they stand for, and why people should vote for them. Some try to define their opponent in a negative way. Candidates test their message in small meetings, news interviews, and conversations with groups of voters. They are likely to vary their message with different audiences but try to

retain overall consistency. They analyze feedback and study polling data.

They begin to make campaign promises of what they will do if elected.

The larger the election district the more candidates rely on mass media to get their message out.

Simultaneously party primary voters and convention delegates try to figure out which candidate they want to represent their party in the general election. Voters in nonpartisan elections try to determine who they will voter for. Persons representing interest groups and party blocs meet with candidates and seek commitments on various policy positions. Interest groups begin channeling financial contributions to the most promising candidates from their perspective. Highly motivated persons attend candidates forums and pose questions. Politically active individuals serve as volunteers in the campaigns of their favorite candidates.

This process is repeated on a larger scale during the general election campaign. Ordinarily candidates have their own campaign apparatus, but

the regular party organization also gets involved. Interest groups make additional campaign contributions and sometimes mobilize their members in behalf of favored candidates.

Candidates who gained party nomination through cohesive support of a highly motivated bloc of party members now have to find ways to appeal to a much broader electorate. The same is true for candidates emerging victorious from a nonpartisan primary because of strong support from a fairly narrow bloc. In the general election campaign many more interest groups press candidates to take positions on matters that did not come up during the primary election. In the process candidates may have to soften their position on certain issues but not become so mushy that they lose their core support.

Some voters habitually vote for the nominee of their party and stray away only in rare circumstance. Many other voters, although voting mostly for candidates of the party they identify with, are willing to split

their ticket. Some voters are deliberately independent. Candidates, therefore, have to figure how to retain the support of party members while appealing to independents in the middle and to ticket-splitters and straying members of the other party.

In these various ways interactive consent enters wholeheartedly into election campaigns. Political parties adopt party platforms. Candidates make campaign promises and put out position papers on a host of issues. Interest groups get involved. Voters build up expectations of what the victors will do when they take office. They develop notions of what they are consenting to. Although not all campaign promises are kept by the winners, they make commitments that will influence their conduct in office.

Voting

Campaigns culminate on election day when voters record their choices. They are the gatekeepers who give their consent to have particular persons represent them for a term in public office.

In American federalism the states have primary responsibility for determining voter qualification and for election administration. In the early days of the Republic the states limited suffrage mainly to white male property owners and taxpayers. Gradually during the first half of the 19th century states eliminated property-owning requirements. Then a success of amendments to the U.S. Constitution abolished restrictions due to race (1870), sex (1920), paying a poll tax (1964), and age (1971). Today virtually every U.S. citizen 18 years and older may vote.

The states remain in charge of elections, but many delegate certain aspects to local government. State statutes determine when and how citizens may register to vote, creating a differential around the nation on degree of ease or difficulty of participation. During the past 30 years the national government has entered the scene to assure nondiscrimination in voting registration practices and with the National Voter Registration Act of 1993 has imposed standards making it easier to vote.

Many citizens, though, do not exercise this opportunity. In 1992, the latest presidential election year, of the estimated 189,044,000 voting age population 72.4 percent were registered and 56 percent actually voted (77 percent of those registered) (Brace 1993, 3). For the 1994 congressional election 38.8 percent of the voting age population went to the polls (Washington Post, June 8, 1995:A12). In these elections turnout was greater for whites than blacks and Hispanics and greater for higher than lower income families.

A bundle of factors enter into voter choice, such as party identity, political philosophy, economic interest, agreement on some issues but not all, perhaps dislike for incumbents or candidates on the ballot, and sometimes race and gender.

[This section will be expanded.]

ANALYSIS

Time Factor

The time dimension enters into consent giving through elections in two ways.

First, electoral events take place at particular moments in time.

Elections are set for specific dates by constitutions, charters, statutes, and ordinances. Filing deadlines to become a candidate are specified.

Conventions are scheduled for particular dates, and delegates are chosen in advance. A majority of states have voter registration deadlines prior to election. Political parties have their own schedule for electing precinct leaders, and members of county and state committees and for holding meetings of these bodies.

This makes the calendar an essential tool of positioners, candidates, political party officials, and interest groups which want to influence candidates and election outcome.

Second, time flows through the successive stages of the electoral

process. Positioners and candidates develop campaign strategies that will unfold during weeks and months ahead. So do political party officials and interest groups. The give and take of the campaign occurs over the course of time. Accordingly a strong sense of timing is a valuable asset for campaigners as they seek to build peak support on election day.

In this manner continuous, interactive consent occurs throughout the electoral process rather than happening intermittently through disconnected elections.

Meaning of Election Outcome

When the votes are counted and the winners declared, what kind of consent has been given and by whom?

The winners receive the most votes but not necessarily support from a majority of people residing in their election districts. Given the level of voter turnout, it is quite likely that those voting for the victors constitute a minority of the adult population. Frequently they are a minority of

registered voters. Where the ballot contains three or more candidates, they are sometimes a minority of those voting unless there is a runoff election.

Therefore, in a narrow sense only persons voting for the winners have formally consented that these individuals will represent them in governance.

Persons who voted for losing candidates can claim that they did not give their consent to the winner. Hence the bumper sticker: "Don't blame me. I voted for [name of loser]." Those who did not vote at all can also assert that they did not consent.

But in a broader sense the entire citizenry consents to the electoral system that allows candidates receiving the most votes to take office and govern. The people accept the winners and allow them to exercise the powers of government. The people consent to the legitimacy of the electoral process even though some of them vote for losing candidates or do not vote at all.

The winners have their own views on the meaning of consent. After they are installed in office, they might claim that their election gave them a mandate to enact particular legislation or adopt specific executive policies. They explain that they stated their views during the campaign and that by electing them the voters consented to the policies they now seek to adopt.

However, rarely does the vast majority of voters perceive the election of public officials to be a referendum on detailed public policies. Most voters do not read party platforms or candidates' position papers and do not listen to campaign speeches. And even voters who study the issues carefully may disagree with some of the policy positions of the candidates they vote for. Moreover, voters may give their support to candidates for different offices, such as U.S. representative, U.S. senator, and president, who themselves disagree on particular issues.

So it is not clear who has the mandate. The election determines who shall govern, not a whole range of policies they will adopt and carry out.

These come later.

Accordingly citizens do not look upon elections as the only means of providing their consent. Rather they see the necessity of keeping in touch with their elected officials and seeking to influence their decisions during their term in office. Therefore, the consent process does not terminate on the election day but rather moves into the domain of legislative and executive decision making, which the following chapters will consider.

APPOINTING PUBLIC OFFICIALS

Government in the United States is a huge enterprise. To make it function the executive branch of national, state, and local government is organized into departments, boards, and commissions. In state and county government, and also in some municipalities, the heads of some agencies are directly elected by the citizens. The vast majority, though, are appointed by the chief executive.

In one variation counties (and a few municipalities) are governed by

commissions or boards that combine legislative and executive responsibility.

There the commission appoints department heads. In the manager form of local government the council chooses the manager who selects agency heads.

Because elected and appointed administrators have considerable decision-making authority, they can be considered to be governing officials. As such, the elected administrative officers are directly accountable to the citizenry. In contrast appointed administrators are accountable to the chief executive or the governing body which appoints them and only directly to the people. Nonetheless, citizens have two opportunities to influence who is appointed.

Some appointments require concurrence by the legislative body ("advice and consent of the Senate" is the phrase in the U.S. Constitution). As this occurs, citizens let their elected representatives know their views on chief executive nominees. Although legislative approval is mostly routine,

occasionally citizen organizations mount campaigns against particular nominees. The nominees' supporters then campaign for them, creating a contest which the legislative body must decide. Even though this rarely happens the potential of public opposition makes chief executives careful in who they appoint.

Where legislative confirmation isn't required, interest groups with a stake in particular governmental departments often put pressure on chief executives to appoint certain persons to top positions. Or they may offer objections to potential appointees considered unfriendly to their interests.

Individuals desiring appointment often campaign for these jobs. They position themselves by participating in election campaigns or by building support of strong interest groups. They may try to gain endorsement of party officials, influential legislators, or other persons having personal contact with the chief executive.

Although not as open and direct as election campaigns, the

appointment of top governmental officials is also a part of the continuous, interactive consent process.

REMOVAL

American democracy also has provisions for withdrawal of consent from officeholders. This can happen through recall by the voters, impeachment by the legislative body, and discharge by the appointing official..

Recall. Sixteen states permit citizens to petition for a vote to recall elected state officials (Council on State Governments 1994, 305-6).

Thirty-one states authorize procedures for recalling local elected officials.

(For further analysis of recall, see Cronin 1989, 125-156; Zimmerman 1986, 105-114).

Impeachment. The U.S. Constitution (Art.1, Sec. 2 & 3) and all of the state constitutions but one allow the legislative body to remove the chief executive and other elected officials through impeachment proceedings

(Council of State Governments 1994, 63-64). Congress, state legislatures, and local councils may expel their members under certain circumstances.

Discharge of Appointed Officials. Many top appointed officials serve at the pleasure of the chief executive or whoever else made the appointment.

That means they may be removed instantly by the appointing official.

Others, especially members of boards and commissions, served for specific terms and can be removed only for cause.

[This section will be slightly expanded.]

And so we see that continuous interactive consent occurs in many different ways in determining who governs. This happens directly throughout all stages of the electoral journey: positioning, campaigning, and voting. It involves potential and announced candidates, citizens with various degrees of participation, political parties, interest groups, and the news media. In a more indirect manner consent also enters into

appointment of policy-making officials. On occasion the consent of the people is withdrawn, occurring directly through recall and indirectly through impeachment and discharge of appointed officials.

In this manner American democracy meets the criterion specified by James Madison in *The Federalist No. 39* by achieving "government which derives all its powers directly or indirectly from the great body of the people" (1937, 243). That's the starting point. But there's much more. Today American democracy achieves much greater participation than the founders envisioned. Nowadays citizens and their numerous interest groups continuously seek to influence the outcome of governmental policies while they are being adopted and carried out by public officials. How this occurs is considered in the next three chapters.

November 1996

Chapter Seven

Influencing Legislation

After the votes are counted and the winners declared, consent of the governed enters into the processes of governance as citizens continuously interact with legislators and executive officials in order to influence policy decisions. In this chapter we examine the legislative process.

Variety of Legislative Bodies

American federalism has numerous legislative bodies acting in behalf of the people. For units of general government they include the U.S. Congress, 50 state legislatures, 5 territorial legislatures, and the governing bodies of 3,043 counties, 19,279 municipalities, and 16,656 towns and townships. In addition, 15,834 elected school boards and the elected boards of 31,555 special districts have policy-making authority (U.S. Bureau of the Census 1995).

Although the legislative bodies of general government differ in size of membership and scope of territory served, they have common features affecting the consent process.

- Members are elected and may be reelected unless they have reached a term limit applicable in some jurisdictions. This makes them directly accountable to the people.
- Legislative bodies work through established procedures for proposing, considering, and adopting legislation, budgets, and revenue measures. These actions occur in stages over the course of time.
- Legislative processes are generally open to public view, sometimes offer opportunities for public participation (such as hearings), and provide a flow of information in the form of bills, committee reports, and journals. This enhances citizen accessibility.

Where the legislature is bicameral (Congress, in 49 states, and a small

number of cities), legislation must pass both houses to become law. Where legislatures are chosen in partisan elections (Congress, 49 state legislatures, the governing bodies of 83 percent of the counties and 25 percent of the municipalities), they are organized into majority and minority blocs. These factors affect the way legislative bodies function and how citizens deal with them.

Legislative Pathway

Formal legislative procedures lay out a pathway for enactment of legislation.¹ At any one time numerous bills are moving along this pathway at different speeds.

In practice the trail begins during the election campaign as candidates interact with citizens and interest groups reveal their position on various

¹ In this chapter "legislation" is used as a generic term to refer to measures that are adopted as acts, statutes, ordinances, policy resolutions, budgets, appropriations, revenue actions. Terms vary among governmental unit.

issues. Contact continues between election day and the opening of the legislative session.

After the legislative body convenes each bill, proposed resolution, and ordinance moves through a regular sequence of steps, such as: drafting, introduction, referral to committee, public hearing, committee consideration, report to the whole body, and floor action. In bicameral bodies these steps are repeated in the second chamber; if necessary differences are reconciled by a conference committee, and both houses take final action. In small units of local government, school boards, and special district boards, the process usually isn't as complicated, but all of them have set procedures for considering and adopting official policy. (See Keefe 1991; National Conference of State Legislatures 1991; Olesek 1989; Scheier and Gross 1993.)

In jurisdictions of general government the chief executive usually signs the legislative enactment. The president, 49 governors, and many (but

not all) mayors and county executives have the right of veto. If that happens, the legislative body may override with an extraordinary majority (such as three-fifths or two-thirds).

The legislators themselves are the most important sojourners along this pathway, and how they relate to one another is the biggest factor in determining legislative outcome. But they rarely travel alone. They are accompanied by staff, influenced by officials from the executive branch, sometimes approached by political party leaders, and constantly lobbied by individual citizens and interest group representatives. Legislators in turn reach out to learn the views of their constituents and to explain their positions. It is a reciprocal process.

Lobbying

Numerous citizens individually contact legislators to offer their views on public issues and declare their support or opposition to specific legislation. Interest groups of many varieties also try to influence legislative

outcome. In short, citizens and organized interests lobby.

The term "lobbying" comes from the tactic of intercepting legislators in the lobby outside the legislative chamber, but the practice occurs in many other locations: in legislative and executive offices, in restaurants and hotel meeting rooms, at community meetings, on the street, and in any other place where public officials are found. Lobbyists press their views face-to-face, by telephone, telegram, fax, e-mail, and indirectly through the news media.

Lobbying takes place in two domains, inside and outside. Inside lobbying occurs in Washington, D.C., in state capitals, at county courthouses and city halls where lobbyists have direct contact with legislators, legislative staff, and officials of the executive branch. Outside lobbying takes place by mobilizing constituents in the legislators' home districts and sometimes beyond.

Numerous interest groups work in both domains. National

organizations function through state and local chapters. Grassroots organizations come together in state and national coalitions to gain a presence in state capitals and in Washington, D.C.

Although some persons view lobbying as a nefarious occupation, it is a quite legitimate practice in a democracy. In the United States lobbying serves as a facilitator of continuous interactive consent in the process of governance. **MOVING ALONG THE LEGISLATIVE PATHWAY**

Relationships between legislators and their constituents and interest groups begin along election and post-election trails and continue throughout the journey along the legislative pathway.

Before Session Begins

Efforts to influence legislation commence long before congressional and state legislative session open and before newly elected city and county councils convene. It starts during the election campaign as citizen and interest group representatives contact candidates in their home districts.

Lobbyists based in state capitals and Washington, D.C. keep in touch with incumbents running for reelection.

Positioning. During the positioning period when potential candidates are exploring the possibility of running for public office, interest group representatives make contact them. They present their group's positions on particular issues and seek to ascertain the positioners' views on these issues. On occasion interest groups promote their own candidates and help get them in a position to run.

Some interest groups make financial contributions to promising positioners to help them build up campaign funds prior to announcing their candidacy. Interest groups perceive that this helps gain current access to incumbents positioning themselves to run for reelection and future access to newcomers if they are elected.

At the state capital and in Washington lobbyists for interest groups with a membership base keep track of legislative votes and inform their

members. Grassroots organizations use their ties with lobbyists at the capital to obtain tabulation of key legislative votes. Legislators who want to be reelected (usually a majority of them) realize that they are being watched and position themselves for the next election campaign by the votes they cast during the current session of the legislative body.

Legislators also understand that responding promptly to citizen inquiries and assisting constituents in dealings with governmental agencies can help retain and expand support for reelection. Accordingly legislators spend considerable time in communicating with constituents and maintaining personal contact.

And so the positioning period fosters one set of relationships for current officeholders intending to seek reelection and another set for persons getting ready to challenge incumbents or run for open seats. All of this is part of the consent process.

Election Campaign. Some, but not all, interest groups become openly

involved in the nominating process as it occurs through party conventions and primary elections (partisan and nonpartisan). They circulate questionnaires to candidates, offer position papers, and sometimes hold candidate forums. They may even endorse particular candidates, make campaign contributions, and build support among their members.

Many interest groups become even more heavily involved during the general election campaign. Activities carried out during the nominating process are repeated and intensified, or may be undertaken for the first time. Some interest groups endorse specific candidates. Others prefer to press their views on all candidates and circulate information on policy positions of the candidates to their members, who will make their own choices.

Many grassroots organizations prefer to be nonpartisan, that is, to refrain from endorsing specific candidates or supporting a particular political party. This is especially the case with broad-based organizations

whose members agree on particular issues but are divided in their political party affiliation. So they contact all candidates, ask their positions on key issues, and share this information with their members.

Some grassroots organizations, though, choose to be more partisan, at least in support of particular candidates but not necessarily in affiliation with a political party. They may encourage one of their own members to run for office and throw their full support to her or his candidacy. Or they may interview all candidates, perhaps in the course of a public forum, and endorse the one most favorable to their interests. Members of the grassroots organization make campaign contributions to favored candidates and help in a variety of campaign chores.

Post-election Period. If the candidates who interest groups supported are victorious, organizational leaders are in an excellent position to gain access soon after the election and then when the winner takes office. But if their candidates lose, interest groups have to find ways to build

relationship with the winners, perhaps by making financial contributions to help pay off campaign debts or start building a nest egg for reelection.

Interest groups which didn't endorse candidates make fresh contacts with the winners during the transition period before the legislative body convenes. They lay out their expectations and establish relationships that will last throughout the winners' term in office.

Lobbyists, whether they have backed the winners or the losers or were nonpartisan, get in touch with the winners, both reelected incumbents and newcomers, to offer specific proposals for the upcoming legislative session and provide position papers. They get acquainted with newly appointed staff. Lobbying coalitions meet to plot their legislative strategy, share their knowledge of newcomers, develop briefing material, and organize joint visits to new legislators.

Grassroots organizations make their own contacts with newly elected and reelected legislators between the election and the opening of the

legislative session. They request a meeting with their legislators to discuss what is likely to be coming before the next session of the legislative body. At this meeting they offer their views on major issues and find out where their representative stands. They might suggest scheduling similar meetings periodically during the legislative session, especially at times when the representative has returned home for recess and has more time than during a hurried weekend visits.

During Legislative Session

Lobbying intensifies when the legislative body goes into session. Lobbyists know every step along the legislative pathway as bills are drafted and become law. They gear their tactics to the different phases of the legislative calendar. Grassroots organizations also get involved at particular moments, and individual citizens make contact.

The steps of the journey can be illustrated by reviewing the process typical for the U.S. Congress and state legislatures. The process of city and

county councils may not be quite so complicated but is likely to have most of the same steps.

Bill Drafting. A variety of authors draft bills: legislators themselves, their personal staff, legislative committee staffs, a bill-drafting office of the legislative body, staff of the elected chief executive, operating departments, and interest groups. In some instances a bill is a product of a triangular relationship of legislative committee staff, departmental staff, and an interest group or coalition.

Economic interest groups especially give attention to bill drafting because a word here, a clause there can be determinative of future regulation, lack of regulation, of economic gain or loss. Organizations of state and local officials get involved at least in formulating concepts of congressional legislation affecting their jurisdictions. Cause-oriented organizations with a sizable lobbying and research staff focus on matters of their concern. During the drafting stage these various lobbyists pay heed

to both executive officials and legislators and themselves become the third side of the triangle if they can.

Introduction. A bill may be introduced by a single legislator or a number of sponsors. The latter is especially the case for major legislation. Lobbyists may help to line up cosponsors, sometimes at the request of the initial sponsor, so that the bill will show support from a broad cross-section of legislators. Interest groups sometimes urge their grassroots members to contact their legislators, asking them to cosponsor particular legislation.

For bicameral bodies lobbyists work both houses during all stages of legislative process. Often similar bills will be introduced in each house, and sometimes even identical bills. This may come about through cooperation between representatives and senators, but frequently lobbyists play a role in orchestrating this cooperation. Where the two houses have different views on particular issues, lobbyists try to get a bill more favorable to their interest introduced in one house to offset a weaker bill under consideration

in the other house.

Many bills are introduced but only a fraction become law, perhaps only one out of ten. Thus, a legislator may show a response to interest group pressure by introducing a bill, knowing that it has no chance of final passage. At the same time lobbyists realize that some bills have a much greater chance than others. They focus their attention on building support for or against legislation that is most likely to clear committee and come up for consideration on the floor of the legislative body.

Committee Consideration. *The U.S. Congress, state legislatures, and most city and county councils function through committees and subcommittees. Committees hold hearings on bills, make amendments, approve or disapprove bills, and report the approved ones to the whole body for consideration. Because of the crucial role of committees, skilled lobbyists want their bills introduced and handled by a member of the committee with jurisdiction, preferably by the committee chair, a*

subcommittee chair, or some other high-ranking member of the majority party.

In conducting public hearings committees and subcommittees tend to concentrate on major legislation that has a strong chance for enactment in some form. They will almost always hold a hearing on bills pushed by the executive branch. Sometimes a loud public clamor forces them to conduct hearings on controversial legislation that they would like to block.

In Congress most hearings are held by subcommittees rather than the full committee. Subcommittees pick their own witnesses and almost never hold hearings to listen to anyone who shows up (though some field hearings are more open). Favored witnesses are executive branch officials, credentialed experts, and representatives of powerful interest groups. Citizen organizations, even those with a broad, grassroots membership are less frequently represented at congressional hearings.

Subcommittee chairs usually select the primary witnesses, but the

ranking minority member often is afforded an opportunity to propose witnesses. Other committee members can also make suggestions. This means that subcommittee majority and minority staff are crucial actors in developing lists of potential witnesses, so lobbyists offer suggestions to them.

They also work through other subcommittee members, who can propose witnesses to the chair.

State legislatures function in a similar fashion in calling witnesses to testify and holding public hearings, though many of them make less use of subcommittees. City and county councils likewise hold public hearings structured to hear from their chief executive, department heads, experts, and citizens. Local councils are more likely to hear from all who want to speak than are state legislatures.

Persons experienced in testifying at a legislative hearing prepare a written statement that will become part of the hearing record, but at the hearing they speak directly to committee members, maintaining eye-to-eye

contact, without reading their statement. They offer illustrations from their personal experience and address what they know to be concerns of key committee members. If a committee member asks a question that the witness cannot fully answer, the witness can offer to provide further information later for inclusion in the hearing record.

Beyond suggesting witnesses, lobbyists often write questions that committee members can ask at a hearing. They give them to staff of friendly members of the committee. Such questions can be addressed to the chief executive's representative and to expert witnesses, including those of an opposite viewpoint from the lobbyist.

After hearings on a bill are completed, the legislative committee or subcommittee meets to "mark up" the bill (as they say in Congress), that is, to rewrite it as deemed appropriate. These days legislative committees tend to have open meetings that the public can attend, though in some legislative bodies the work occurs out of sight in executive sessions. It is a

crucial moment in the life of a bill, for amendments on the one hand can yield compromises that broaden the support for the legislation or on the other hand can water down the legislation or even change its purpose.

Accordingly lobbyists devote a lot of attention to the mark-up process.

If the meeting is open, they appear early to get a front row seat. They talk with friendly legislators and their staffs during breaks in the proceedings. They may suggest language which the legislator can offer when the committee reconvenes. They may also provide data for the legislator to use in committee discussion. As appropriate, lobbyists mobilize grassroots pressure on particular committee members on crucial issues under consideration by the committee.

Floor Action. When a committee completes its work on a bill, it reports the bill for consideration on the floor of the legislative body. The timing for bringing up the legislation is usually determined by the legislative leadership: speaker of the house, majority leader of the senate, a policy

committee of the majority party, or by the Rules Committee in the case of the U.S. House of Representatives. Sometimes leaders of the minority party negotiate on the timing. Therefore, lobbyists get in touch with the leadership to press for floor action, or to delay consideration. If legislation is being blocked by a committee chair, lobbyists may encourage grassroots affiliates to flood the office of the speaker of the house or majority leader of the senate with letters and phone calls urging prompt action.

In anticipation of floor action on a bill, the sponsoring legislators and committee leaders line up support among their colleagues. Legislators in opposition seek out other legislators to vote against the bill or to support amendments that would dilute the bill's intent. Lobbyists join in this endeavor. They make their own contacts with legislators, share their information with the bill's sponsor, and work closely with the sponsor to put pressure on uncommitted legislators. In Washington lobbyists and lobbying coalitions commonly divide members of Congress into five

categories, based on their positions on particular issues. "1" is most supportive and "5" is least supportive. Lobbyists give particular attention on the "3's", the swing vote. They try to pick up some "4's" and keep in touch with the "2's" so that they don't stray from the fold. The "1's" they tend to take for granted and consider the "5's" as hopeless.

Lobbying offices in Washington organize their mailing lists by congressional districts, and lobbyists at the state capital maintain their lists by legislative districts. On major legislation they send out legislative alerts via U.S. mail, fax, and e-mail to their grassroots networks so that legislators will receive lots of mail, phone calls, faxes, and e-mail messages from the folks back home. They organize "phone trees" whereby the national or state office can call initial contacts, who call others, who in turn call more people in spreading branches of telephone contacts.

Numerous grassroots organizations on their own keep in touch with their legislators throughout the session. At climatic moments they send

delegation to the state capital and to Washington to push particular legislation. Sometimes this is part of a concerted campaign through which many local groups join together, have a joint briefing session, and then fan out to talk with their own representatives.

The day or days the bill is up for consideration on the floor, lobbyists sit in the gallery and patrol the lobby outside the chamber to shore up support (or opposition) and try to persuade the still-uncommitted. When amendments are offered, they will pass the word on whether they support or oppose it.

Conference Committees. In bicameral legislatures this process is repeated in the second chamber. If the two houses adopt different versions of the bill, it goes to a conference committee composed of members appointed by the two houses to work out a single version. The task for the lobbyist is similar to the mark-up session: find out what compromises are being considered, offer support or opposition, suggest alternative language.

Usually the process goes so fast and has so many nuances that it is difficult to muster grassroots pressure on the conferees.

The wording of the bill that the conference committee agrees on goes back to the two houses for approval or rejection but not further amendments. Although conference reports are almost always accepted, sometimes lobbyists press for disapproval with the hope that the legislation will die or that the bill will go back to conference for further change.

Executive Approval. The bill as enacted goes to the chief executive for approval or veto. If his or her position on the legislation is unclear or possibly in opposition, lobbyists will urge him or her to sign or veto the act and may encourage grassroots contacts to send a similar message to the chief executive. Even earlier in the legislative process, lobbyists may urge the chief executive to threaten a veto unless particular changes are made in committee, on the floor, or in conference committee.

Individual Citizen Contacts. All along the legislative pathway

individual citizens come and go as they feel moved to make contact with their legislators. They write letters and postcards, make phone calls, send telegrams, fax messages, and send e-mail. They talk to legislators personally by going to their office, meeting them on the street, attending meetings where they are speaking. This is more random than the work of lobbyists and grassroots organizations, but it is vital part of interactive consent.

RELATION TO CONSENT PROCESS

Lobbyists and grassroots advocates follow bills through every step of the way along the legislative pathway. Lacking a direct voice or a vote, they are totally dependent upon what legislators do. This puts a premium upon personal relationships with both legislators and legislative staff, established through physical presence and steady acquaintance at the capitol, courthouse, and city hall, and within members' districts. Although seldom do lobbyists and grassroots advocates change the vote of a legislator

who has announced her or his position on a bill, they exercise quiet influence and friendly persuasion at many points along the way. Their longitudinal relationships with legislators is part of continuous, interactive consent of the governed.

As this occurs, highly articulate and well-connected individuals and effectively-organized and well-financed interest groups have an advantage. They can maintain staff in Washington and in state capitals. They can keep in touch with legislators through daily or weekly contacts, oftentimes developing a friendly, informal relationship. They know the legislative process inside and out. They sustain and mobilize grassroots activists. They may offer financial contributions to election campaigns, thereby strengthening their ties with legislators and gaining easier access.

This is a competitive process. Interest groups contend against one another: labor versus management; commercial interests versus consumer advocates; creditors versus debtors; groups on opposite sides of social issues.

Furthermore, elected chief executives and operating departments are an important influence. Political party leaders get involved in some issues.

Molders and mobilizers of public opinion, such as editorial writers, columnists, TV commentators, and talk show hosts, are a factor.

There are winners and losers in the contest to determine legislative outcome. Some interest groups are stronger and more influential than others. Nevertheless, the competitive nature of lobbying prevents the seemingly most powerful interests from always getting their way with legislators (Heinz and others 1993; McFarland 1992; Salisbury 1992, 339-364). During the last 25 years, for instance, numerous public interest organizations have countered private economic interests and achieved notable victories (Pertschuk 1986). Moreover, although poor people are least represented and are rarely heard directly, religious organizations and other socially-conscious groups serve as advocates in their behalf.

In this manner, two expressions of representation come together in the legislative process: legislators, officially elected to represent citizens in geographic districts, and interest groups, self-organized to represent overlapping segments of the population. While a legislator votes on every bill, particular interest groups concentrate only on matters that concern them most. But cumulatively an array of interest groups and individual citizens are involved with all major bills considered by legislative bodies. The consent process in legislative enactment is manifested through the totality of this interaction.

Ultimately it is up to legislators to decide. Constantly they are under pressure to side with one interest and reject the views of another, or to seek a compromise. As the people's elected representatives, they are expected to make decisions. They cannot delegate this obligation to lobbyists or to their own staff. They are responsible and accountable.

But the continuous interaction legislators have with their constituents,

with a wide range of interest groups, and with executive officials influences their decisions. They may not always cast legislative votes as a majority in their district would prefer, but they tend to be cautious about straying too far from district opinion on most issues. In this manner interactive consent flows continuously around and within virtually every legislative body in American government.

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