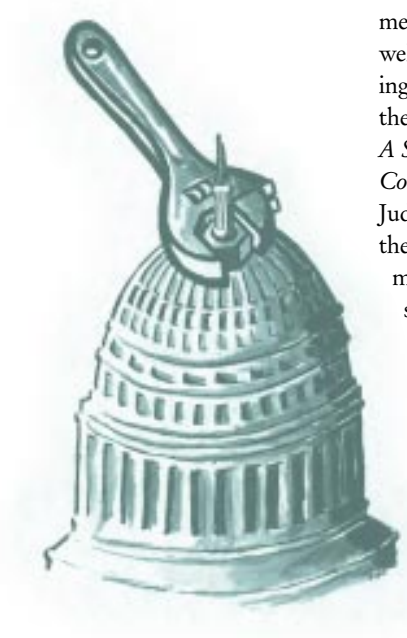
# If It Is Broken, Fix It

## by Kevin J. Worthen, Professor of Law

A REVIEW OF JUDGE MALCOLM R. WILKEY'S *Is It Time for a Second Constitutional Convention?* THE NATIONAL CENTER FOR THE PUBLIC INTEREST, 1995 ▪



The American system of government is broken. At least it is if you believe many thoughtful persons involved with the system, such as Bill Bradley and Warren Rudman. Other, less-experienced people are arriving at that same conclusion as they see repeated government shutdowns due to congressional and presidential squabbling over continuing budget resolutions and airplane seat assignments, and popular, well-qualified candidates refusing to seek high office. With the publication of *Is It Time for A Second Constitutional Convention?* we can now add Judge Malcolm R. Wilkey to the list of those whose governmental experience and seasoned observations lead them to believe that serious change is in order.

The BYU Law School played an important role in the coming forth of this intriguing book. In November 1993, Judge Wilkey visited the school as a scholar in residence. During that time, he gave a series of lectures about constitutional reform, the last of which summarized "Why the Founding Fathers Would Call Another Constitutional Convention Now." This concluding lecture was published in *Clark Memorandum* in 1994. The entire series of lectures, expanded and reorganized, are in this book, which should be of great interest to anyone interested in the current state and future course of government in America—an audience one hopes is quite large.

The main message of the book is that our duty as heirs of the Framers of the Constitution is to assume the same responsibilities that they did: to address our current political and social problems with imagination and courage. This course requires that we discover, discuss, and seriously consider the nature of the fundamental problems with our current system and all potential solutions that might address those problems. The book provides an excellent starting point for that important process.

The book is divided into two parts. The first contains the expanded text of the "Wilkey lectures." The second consists of commentary by what one author calls "a variety of conservatives . . . a pair of think-tank denizens [Walter Berns of the American Enterprise Institute and Terry Eastland of the Ethics and Public Policy Center], . . . a pair of conservative activists [former U.S. Attorney General Edwin Meese, a Fellow at the Heritage Foundation, and Phyllis Schlafly of the Eagle Forum], and finally three academics [Michael DeBow of the Cumberland School of Law at Samford University, Dwight Lee from the University of Georgia Economics Department, and Michael Stokes Paulson of the University of Minnesota Law School]." The diverse nature of the responses from this somewhat politically homogeneous group testifies to the provocative nature of the ideas Wilkey sets forth. Wilkey has clearly touched on subjects about which people feel strongly, and the ideas he addresses are wide-ranging enough to draw praise and criticism from almost every direction.

Wilkey begins the book by briefly outlining fundamental premises held by the Framers of the Constitution (about the need for the executive to resist legislative encroachments on his power, the sorts of persons who would serve in the presidency and Congress, and the limited role of the federal government), changes that have occurred since that document was drafted in 1787 (the enormous infrastructure and technological changes), and what has not changed (the fundamental structure of the government). It is this last factor, the limited number of structural changes to the federal government despite changes in the shared premises and other transformations in American and global society over the past 200 years, that Wilkey finds most surprising and most telling. That Americans have not more frequently availed themselves of the amendment process to make necessary structural adjustments is evidence to Wilkey that something is amiss. That something, he postulates, is that "the people who would be most affected by changes, who would have their powers altered, are precisely those who can most easily originate constitutional amendments, namely, members of Congress" (p. 17). Thus, the book's recurring theme is introduced: It is time for the American people to circumvent Congress, as Article V permits them to do, and make the necessary structural changes themselves.

Some may be tempted to dismiss the book as another right-wing tract advocating the return of the Constitution to

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its original pristine form from whence it has been wrested by evil conspirators. However, Wilkey's argument is much different and more complex than that. He advocates not that we readopt the specific constitutional remedies the Framers found applicable to their 18th-century problems, but that we consider ways to adapt the Constitution, as its Framers intended it to be, to the new challenges. If any part of the Constitution has been wrongly ignored, Wilkey seems to contend, it is Article v, whose provisions outline two separate ways in which the document can be amended—evidence that the Framers themselves foresaw the need for updating and adapting the document. In our zest to attribute near perfection to the Framers, we may be missing their main message to us and frustrating their efforts. "We will fritter away, or have destroyed overnight, what the Framers gave us," Wilkey asserts, "unless we confront our current problems with the same imagination, practicality, courage, and selflessness they displayed in 1787. And that requires us to acknowledge that our world is dramatically different from theirs" (p. 15).

Having sounded the basic theme, Wilkey then describes three manifestations of the current woeful state of national politics: legislative "gridlock" (the inability to enact constructive legislation that a vast majority support), "perpetual incumbency" (even during the "Republican Revolution" of 1994, 90 percent of the members of Congress who sought reelection were successful), and "total unaccountability" (evidenced by the budget crisis in which Congress blames the president and vice versa) (pp. 19–37). Following a short chapter contending that judicial activism (another "example of systemic failure under the Constitution") is itself attributable, at least in part, to the three legislative failures noted above (pp. 39–46), Wilkey then turns to a lengthy chapter discussing "Needed Reforms" (pp. 47–110).

This chapter is the heart and most interesting feature of the Wilkey lectures. The possible reforms discussed are wide-ranging, extending from such well-known suggestions as term limits for Congress, line-item veto power for the president, and a balanced-budget amendment to changes familiar more to students of political science than the general public: longer terms for the president and members of the House and changes even more novel, such as having the president elected first and then Congress elected a few weeks later.

Two novel specific proposals seem particularly timely in light of recent events and provide examples of the kind of analysis Wilkey provides for each possible reform. First, Wilkey suggests that

*on every ballot for federal office there be a line and an opportunity to vote for "None of the above."*

*. . . If "None of the above" received a plurality for the office, there would be another election in thirty to sixty days. The salutary effects would be obvious. If "None of the above" won, which would be rare, it would be clear that the major parties nominated obviously unacceptable candidates. The citizens would deserve better, and "None of the above" would force the parties–or the independents–to come up with better. . . . Even if "None of the above" never won, it would have an important salutary effect under many circumstances. For example, if a candidate for Congress won 40% of the vote, "none of the above" received 35%, and the second major party 25%, then the 40% winner has a warning.*

*. . . A "None of the above" choice would give an officially recorded protest vote, much more authentic than polling. It might even increase voter turnout. The discontented voter would have something better to do than stay home.* [pp. 108–109]

Although this is not one of Wilkey's major proposals, one wonders how the current Republican presidential primaries would have been different, or how the upcoming presidential election would vary, if such a system were in place.

Similarly, with the recent spate of Washington budget, with federal workers being furloughed while Congress and the president battle over the details of the budget, one of Wilkey's other minor, yet novel, proposals becomes particularly intriguing. Responding to the charge that a balanced-budget amendment could never be effectively enforced, Wilkey advises:

*Simply provide that, unless a balanced budget is submitted by Congress to the President and approved by him x months after Congress convenes, then all Members' and staff salaries are suspended (the proviso requiring presidential approval is to prevent Congress from submitting an outlandish budget, getting a veto, then taking its time revising). This type of amendment would produce purposeful action.* [p. 77]

If nothing else, the sight of members of Congress losing their paychecks because of budget gridlock would be more appealing to most than would the current system under which congressmen are the only ones who get paid while the squabble continues.

Wilkey does not advocate that all these changes be made. He even acknowledges that some contradict others. He does make clear, however, that

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## LAW SCHOOL RANKS HIGH

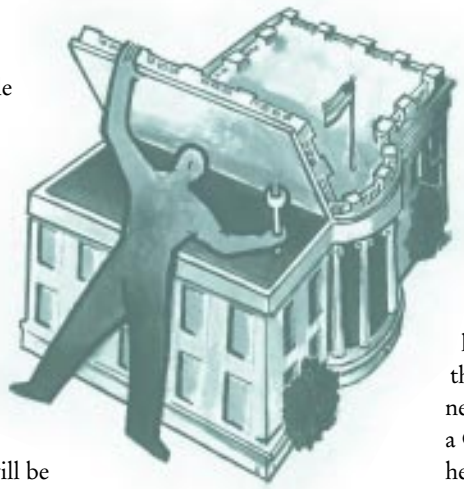
**The J. Reuben Clark Law School faired well in two recent national rankings. The U.S. News & World Report in the "1996 America's Best Graduate Schools" guide ranked the BYU Law School 32 of the 178 law schools accredited by the American Bar Association. Judging student satisfaction, The National Jurist, April/May 1996, published by the Princeton Review ranked the Law School 11th of 170.**

we need to consider all options, and he provides a comprehensible and succinct analysis of the pros and cons of each proposal and the potential impact.

Ultimately, Wilkey asserts, any meaningful set of reforms must address the fundamental structural problem, a problem created by failure of the constitutional structure to keep up with changes in our society: "What we are now living in, and trying to make work, is a system designed for talented and capable part-time amateurs but filled with perpetual professional politicians—and without the responsibility provided by a parliamentary system which automatically generates a visible accountable majority" (pp. 13–14). Because he views this problem as the root of the current constitutional crises, Wilkey maintains that whatever specific reforms we adopt, we must first choose between two alternatives. Once the course is chosen, then it will be more clear which particular set of reforms will best advance us along the chosen path.

*The first [course] is to accept the desirability–if not inevitability–of a professional political class with consecutive terms in office (that is, career politicians), and move to make that political class more accountable to, more responsive to, and more representative of the people. The second is to recognize that career politicians and the political party system as currently constituted have failed the American people and move toward a government more like that which the Framers contemplated, namely a government filled by persons of demonstrated talent drawn from different walks of life, for specific terms, who will return relatively quickly to private life.* [p. 49]

Wilkey calls the first approach the "professional political class" model (which looks to the British parliamentary system for experience). He refers to the second as the "Cincinnatus" model—named after the "Society of Cincinnati, instituted by the officers of the Continental Army in 1783, [in] memory of Lucius Quinctius Cincinnatus, who left his



plough to save the republic, and then returned to his humble fields" (p. 1 n. 2).

The concluding chapter of the Wilkey lectures discusses the issues that would arise if "the People" followed the judge's advice and used their Article V power to call for a constitutional convention. Wilkey makes special effort to refute what he calls "the bugaboo of a 'runaway convention'" (p. 130). He begins by noting that contrary to the suggestion of many, the original Constitutional Convention of 1787 was not itself a runaway convention. Those who contend that the original Framers ignored the instructions given them by Congress to convene for "the sole and express purpose of revising the Articles of Incorporation" overlook the salient fact that this congressional resolution was not the legal document that authorized the convention to convene. Congressional action followed by several months the action of no less than eight state legislatures calling for a convention. "It was in the enabling legislation of the states that the source of the delegates' authority lay," Wilkey contends, and these instruments "with a single exception . . . were cast in general terms and did not impart specific instruction" (p. 131, quoting Julius Goebbels, Jr.'s *History of the Supreme Court of the United States,* 1:201–202 [1971]). Therefore, Wilkey asserts, "the Framers had *no binding* instruction on the scope of their action. This need not now be the case were a Constitutional Convention held" (p. 131). States calling for a constitutional convention today could well limit the scope of the convention, Wilkey maintains, although they chose not to in 1787.

Moreover, Wilkey argues, even an unlimited convention is not likely to cause the chaos predicted by some, because "a Constitutional Convention can only 'propose' amendments" (p. 131). If the convention were to adopt some outlandish provisions, Wilkey asks, "who would approve?" Unless three-fourths of the states agreed with them (something unlikely if they are truly outlandish), the proposals would remain just that—proposals. Wilkey acknowledges that the secrecy surrounding the original Constitution (which may have allowed the kinds of discussions and compromises needed to reach the best result), is unlikely today, but even that difficulty does not justify putting off the constitutional convention "any more than [it does] putting off day-by-day legislation just because of the distortions which may appear in the press."

The responses of the commentators (which range from three to 14 pages in length) each focus on particular reforms or aspects of Wilkey's arguments, some with disdain, others with praise. Walter Berns criticizes most of Wilkey's proposed reforms, because they "are designed to empower popular majorities" (p. 141), whereas the original Constitution was designed to guard against misrule by popular majorities (p. 141). Berns also questions whether the "very propitious circumstances" that permitted the original Constitution to achieve such stunning success can ever be recreated in our modern times.

Terry Eastland agrees with Judge Wilkey that we need to relimit the federal government, and that term limitations, balanced budget reform, and a line-item veto would serve to further that end. He also agrees that "Congress now appears unlikely to propose to the states for ratification even one" of these proposals (p. 145). He is willing to wait, however, until the next election to see if the current political process can be used "not simply to stop but even to reverse the trend in our politics" (p. 150).

Phyllis Schlafly is Wilkey's most pointed critic, charging that Wilkey "just doesn't like the American form of govern-

ment created by the United States Constitution" (p. 151) and contending that his proposed "structural 'reforms' are virtually a carbon copy of those made by the Committee on the Constitutional System," a "'power' group," of Washington insiders, who want to "change our system of government and move us toward a parliamentary system" (p. 154). She also notes disparagingly that this Wilkey-ccs campaign to "totally restructur[e] our government" has been joined by Utah Governor Mike Leavitt and other advocates of the Conference on the States (pp. 161–162).

Edwin Meese disagrees with Schlafly about the merits of the Conference of the States, calling it "a new development with great promise" (p. 176). However, he does not think the time has yet come to convene another constitutional convention. While agreeing with much of Wilkey's analysis, Meese concludes that "because of recent events that demonstrate changes taking place within government [among them, the Republican electoral success using the Contract with America], as well as in the approach of the people toward their government, there may be alternative means [such as the Conference of the States] to achieve the same goals that the Judge sets forth, without resorting to the more drastic step of a Constitutional Convention" (p. 169).

Professors DeBow and Lee examine Wilkey's proposal using the insights of "public-choice" theory (a theory using "economic reasoning to analyze political and governmental processes," the basic premise of which is "that people in the political process act primarily to advance their own self-interest, in much the same way as they act in the marketplace" [p. 190 n. 2]). They share Wilkey's "preference for the Cincinnatus model over the status quo, but . . . do not agree that the professional political class model would be an improvement" (p. 188). They are also skeptical about the chances that a constitutional convention can fix the problems. Like many public-choice theorists, DeBow and Lee doubt the ability of any political body, including a constitutional convention, to come up with the right answers. (They assert that "[i]n virtually every instance, there is no 'correct' answer to a public policy question waiting to be discovered by well-meaning office holders" [p. 188]). Instead of the great statesmen that Wilkey believes would be attracted to a constitutional convention, DeBow and Lee "expect politicians to turn out in large numbers, with their eyes on, among other things, how the Convention's deliberations would affect their own future prospects, as well as the prospects of their political party" (p. 190). Their alternate solution is to revitalize the idea of limited government by requesting that members of Congress take a public pledge "not to vote for any governmental program or activity that cannot be squared with the enumerated powers of Congress set out in Article I, Section 8—*read as of the time of the Founding*" (p. 198). While the pledge would not be self-enforcing, DeBow and Lee believe that the voters would ultimately hold enough of the members accountable to make it meaningful.

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Michael Stokes Paulsen addresses Wilkey's concluding chapter on the procedural questions arising out of a constitutional convention, and he goes Wilkey one better in two respects. Whereas Wilkey expressed the belief that Congress had limited power to bind the convention delegates, Paulsen concludes that Congress has no power to do so (pp. 203–207). Similarly, while Wilkey urges states to force Congress to convene a convention by calling for a convention under Article V, Paulsen asserts that two-thirds of the states (the constitutionally requisite number) have already done so, noting that 45 states have in place some kind of unrestricted, unrepealed application for a convention (pp. 207–209). For Paulsen, the call has already gone forth.

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## BRUCE C. HAFEN CALLED TO FIRST QUORUM OF SEVENTY

Just when the Law School thought that Bruce C. Hafen would be returning, President Hinckley had other plans. On April 6, 1996, Provost Hafen was called to the First Quorum of the Seventy. As third dean of the Law School and law professor for 23 years, it would be ungrateful not to express our feeling of loss; however, knowing of Bruce and Marie Hafen's talents, it would also be ungrateful not to share them with Latter-day Saints throughout the world.

Service to the LDS Church has been a part of Provost Hafen's life since his mission to West Germany in 1960. He was in private practice in Salt Lake City for four years after graduating from Law School, but he and Marie have been intimately involved in the Church Education System since 1971 when he became assistant to the president of Brigham Young University. His work in creating the Law School and assembling the initial student body and his years as dean have left a significant mark on the Law School. Through his years of service as president of Ricks College and university provost, the Law School has maintained a place for Bruce. It is always hard to fill the place of an exemplary dean, scholar, and teacher; it is not possible to fill the place of a trusted friend.