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**ABSTRACT**

Six pamphlets provide the springboard for community discussion on constitutional history by summarizing the main themes of seminars sponsored by the League of Women Voters. The "Federalist Papers" were used as a point of departure to promote discussion on the continued efficacy of the political principles and structures established in our country two hundred years ago. The "Federalist Papers" were a series of articles addressed to the people of the state of New York by Alexander Hamilton, James Madison, and John Jay. They are important today because they contain perhaps the most complete and profound original record we have of the founders' thoughts on government and the American constitutional experiment. Each of the six seminars, attended by League participants, historians, journalists, lawyers, political scientists, and public officials, was loosely structured around a core reading list including the "Federalist Papers" and discussion questions sent to participants in advance. The Bill of Rights, Congressional performance, the American Presidency, judicial power, and American federalism were among the topics discussed. The pamphlets summarize the themes that emerged in the course of the discussions. The contents include edited seminar dialog, selected passages from "The Federalist," questions for further discussion, and bibliographies of additional readings. A community guide suggests ways to get communities around the country to reexamine the "Federalist Papers."  
 (Author/RM)

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# THE FEDERALIST PAPERS REEXAMINED

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Edited by Harold B. Lippman and Elena Van Meter

**League of Women Voters Education Fund**



**1**

**Past as Prologue:  
Present Perspectives**

**2**

**The Bill of Rights  
Then and Now:  
Perspectives on  
Individual Liberty**

**3**

**Perspectives on Congress:  
Performance & Prospects**

**4**

**Achieving "Due Responsibility":  
Perspectives on  
the American Presidency**

**5**

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# Ways to Get "The Federalist Papers Reexamined" in Your Community

## Work with the Media

- Make the pamphlets the basis for a local radio or TV series. Those who are familiar with the *Great Decisions* program, with its audience participation and newspaper tie-in, may want to use it as a model.
- Plan a 2-to-5 minute dramatization (the voice of Madison . . . a voice from today) linking current headlines with the timeless constitutional issues. Could you work out a series of these brief dramas?
- Tape a high school group discussion for cable TV.
- Offer to work out a reprint plan with your newspaper for a course or feature series based on the pamphlets (write to the LWVEF for needed permission).
- Use your own media—your organization's newsletter. Perhaps brief quotes would help to pique interest in the pamphlets or participation in whatever activity you arrange.

## Put the Pamphlets to Work as Study Tools

- Encourage their use in existing study groups or create new ones—within your organization or through others. Groups can use the discussion questions and recommended readings in each pamphlet to get started. Pamphlet sections can be tied to the related portions of THE FEDERALIST PAPERS.
- Encourage their use in high school, college or community courses in American government. Work through individual instructors; social studies, political science or history departments; and teachers' associations.

## Distribute the Pamphlets

Likely users include:

- colleges and universities;
- high school government teachers—as a resource or for class use;

special-interest groups—state legislators and other elected officials might be especially interested in those on Congress and the executive branch, for example;

- local newspapers;
- local civic groups—service clubs, Rotary, League of Women Voters, American Association of University Women, unions, Jaycees, Chamber of Commerce, parent-teacher organizations, professional associations, etc;
- local businesses and corporations—some large companies conduct programs on American government for employees.

Most of these potential users expect to buy publications. Schools and libraries, in particular, have budgets for that purpose—as do many businesses. However, some judicious distributing of sample copies is often a wise first step.

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## Sponsor Workshops

You might consider holding a workshop for your organization's members or for the public. Better still, cosponsor one with other local groups. A joint committee will help your organization make or renew beneficial community ties, and the broader participation will add varied perspectives. For instance, your local bar association might team up with you in running a workshop based on the judiciary pamphlet.

## Organize Small-Group Discussions

The essentials for a good small-group discussion are a small area such as a living room, 12 to 15 people and a thorough reading of the pamphlet(s) by the participants.

With some skillful organizing, you can multiply the sessions, the number of participants or the topics. You might schedule numerous groups at different sites or in different rooms in a school or church facility . . . schedule a series, based on several or all of the pamphlet topics in one session by having different groups each take one subject, then convene to report to one another . . . spread the discussion of one pamphlet over several sessions . . . tie all these to a TV or radio presentation.

Two other musts for a good discussion

are a leader or facilitator who understands how to help a discussion along and participants who also "play the game" well.

### **A good discussion leader:**

- creates an atmosphere conducive to discussion;
- is impartial—sees that differing points of view are expressed;
- keeps the discussion on track, guiding the group to a constructive conclusion—though not necessarily a consensus;
- has read the material—in this case, THE FEDERALIST PAPERS and the relevant pamphlets—in order to make selective use of the questions presented and to maintain the focus of the group's discussion.

### **A good participant:**

- has prepared by reading the relevant materials;
- is willing to express views;
- listens thoughtfully to others;
- does not monopolize the conversation;
- disagrees in a friendly fashion.

### **Present Seminars or Panels**

Use the pamphlets as background for public seminars or panel discussions. The best discussions, especially for presentation to the general public, usually come about from a mix of different types of people and perspectives (young-old, liberal-conservative, a journalist who is also an academic, a member of Congress who is also a political scientist, and so on). Have high school government teachers recommend students to participate, along with members of your organization, other citizens, experts such as teachers, and individuals from government. In inviting experts for your session, remember that you need people who work well in a discussion format. Someone who finds it difficult to talk or stop talking before a group is probably not a good choice.

If you are unable to schedule an all-day session, use a very concentrated session to discuss one topic. For example, plan a luncheon panel, inviting a local dignitary to be the keynote speaker. Conclude with a question-and-answer period from partic-

Set up a series of panels in cooperation with other institutions—your library's community education program, your local community college, a church or temple's public affairs program, union's adult education series. A panel of citizens and professors could then respond to the issues raised. Give the audience opportunity to question and comment. Invite members of the press and state legislators and give them special seating and first chance to question.

### **More Ideas**

Try using ideas and passages from one of the pamphlets as a teaser for a regularly scheduled meeting or a membership meeting. For example, try a word association approach to the word "Federalist"; ask each person to respond to the word of the person ahead and see what emerges. Or ask each person to come to the meeting with a one-minute reaction to an idea from THE FEDERALIST PAPERS or from the pamphlets.

Use the pamphlets as a basis for discussing and reevaluating your city's charter or state's constitution—in preparation for reform or a constitutional convention.

Draw on the publications as content for a speakers bureau or a retreat.

Use them in a future-planning exercise: What will/should government be in the 21st century?

### **Beginnings/Continuings**

In 1787 Benjamin Rush, one of the signers of the Declaration of Independence, observed, "The American War is over, but this is far from the case with the American Revolution. On the contrary, only the first act of the great drama is at a close." Likewise, the Federalist Papers Reexamined project really has no formal end. Deeply rooted in the past, the pamphlets provide a jumping-off point from which Americans can evaluate and analyze our government far into the future. The pamphlets should be as valuable a tool in 1987—the bicentennial anniversary of THE FEDERALIST PAPERS—as they are today.

## Resources

### Some how to's . . .

These will help you plan a meeting, lead a discussion and get your message to the public. All are available from the League of Women Voters of the United States (LWVUS), 1730 M Street, N.W., Washington, D. C. 20036.

**MEANINGFUL MEETINGS** Contains a list of group participation techniques and information on setting up a resource committee. Lists several local League publications on the role of the discussion leader. Pub. #319, 40¢.

**MEDIA KIT** Contains five LWVUS public relations publications. Pub. #163, \$1.00/set. Or each can be purchased separately:

**BREAKING INTO BROADCASTING** Pub. #586, 25¢

**GETTING INTO PRINT** Pub. #484, 25¢

**REACHING THE PUBLIC** Pub. #491, 30¢

**SPEAKING OUT: SETTING UP A SPEAKERS BUREAU** Pub. #299, 15¢

**PROJECTING YOUR IMAGE: HOW TO PRODUCE A SLIDE SHOW** Pub. #296, 30¢

**EXPLORING AMERICAN FUTURES** A workbook for groups to discuss and organize their views and expectations for the future. Perfect tool for examining what will/should the American governmental system be in the year 2000. Pub. #592 (EF), \$1.00. A related Leader's Guide explains how to carry out a futures planning session. Pub. #566, 50¢

### Some fundraising sources for underwriting your project . . .

One possible source of funding is your state Humanities Committee. If you do not have an address, write the Office of State Programs, National Endowment for the Humanities, 806 15th Street, N.W., Washington, D. C. 20506.

Check your local library for a foundation directory for your state. *The Foundation Directory* published by The Foundation Center in New York list addresses for state regional collection centers which have information on foundations in different states and regions.

**DOLLARS AND SENSE: THE ART OF RAISING MONEY** Offers tips on how to write proposals and how to go after grants and contracts. Includes a resource bibliography. Pub.

### Some substantive publications for background . . .

Each *Federalist Papers Reexamined* pamphlet contains suggestions for further reading. However, you might be especially interested in the pamphlet-size material that is a specialty of the League of Women Voters Education Fund. For example, **YOU AND YOUR NATIONAL GOVERNMENT** provides detailed information on how the system works. (Pub. #273, \$1.00.)

For additional League resources, send for free LWVUS publications catalogs. The *Members and Public Catalog* lists all LWVUS and LWVEF publications of general interest; the *Leaders Catalog* includes a list of many pertinent state and local League materials. Address above.

### Some films that can add to your discussion or seminar . . .

These films have been previewed and are recommended. They can be used in a variety of ways. The short ones make good discussion starters; longer ones can fit into an extended series. Check local libraries for film catalogs and university film centers for additional resources.

**SUDDENLY AN EAGLE** Why the American Revolution began - the key revolutionary events, ideas and people as each side perceived them. Three 20-minute films or one 60-minute film. Rent from Xerox Films, Middletown, CT 06457 Produced by ABC, Inc., 1976.

**THE FIRST AND ESSENTIAL FREEDOM** Examines the meaning of the First Amendment, past Presidents and their relationships with the press. Includes a discussion of Watergate by Bob Woodward and Carl Bernstein. 52 minutes. Rent from Xerox Films, address above. Produced by ABC News, 1974.

**PRIVACY: CAN YOU BUY IT?** Describes the technology that is used by government and private companies to invade our privacy. 20 minutes. Rent from Document Associates, Inc., 880 Third Avenue, New York, NY 10022, 1976.

**AMERICA: A PERSONAL HISTORY OF THE UNITED STATES** By Alistair Cooke Two episodes in the 13-part series are especially relevant: **MAKING A REVOLUTION** and **INVENTING A NATION: THE MAKING OF THE CONSTITUTION**. 52 minutes each. Rent from University of California, University Extension, 2223 Fulton St., Berkeley, CA 94720. 1972.

Thomas Paine, author of *Common Sense*, the pamphlet that helped spark the American Revolution, penned some advice for citizens that remains apt today: to go back constantly to first principles. "It is by tracing things to their origin that we learn to understand them," he said, and "it is by keeping that line and the origin always in view that we never forget them." Thomas Jefferson also foresaw this need to return to these founding principles when he said that they

*"... should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps to regain the road which alone leads to peace, liberty, safety."*

So much good advice from early leaders of the nation seems worth pursuing, and that's what the League of Women Voters Education Fund did in a project called "The Federalist Papers Reexamined." The aim was to catch some of that Revolutionary fire, by turning to the first principles enunciated in the Constitution and so ably defended in THE FEDERALIST PAPERS. The plan was to turn that exploration into tinder for citizens—to help them light some sparks of their own to illuminate the nation's future. Toward these ends, the project included:

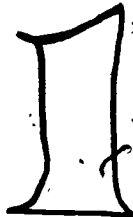
Six all-day sessions in which experts—politicians, historians, media professionals, political scientists, constitutional lawyers and philosophers—tackled big questions that were being worked out in the time of our national beginnings and that are still divisive issues today. They asked themselves and one another: Do the assumptions about human nature and about government on which the Constitution was based still hold true? Will the artful mix that the Founding Fathers created from those assumptions and from the political realities of the time work for the 21st century? Do the arguments the Federalists used to defend the new national charter remain persuasive today? Or do new times—a society 200 years older and infinitely more varied—require new assumptions, a new charter?

Sitting in with the "experts" were citizen spokespersons whose job it was to keep the dialog real: to speak up when discussions became too theoretical... to ask for clarification... to prod about ambiguities... to point toward areas of friction between constitutional principles, between sectors of society... to tie the discussion firmly to Americans' concerns about the future.

Six counterpart pamphlets, which distill the choicest portions of the discussions, flag key points, focus the issues by means of provocative questions, and spread the reexamining process to citizens and groups across the country. Each pamphlet also includes a resource list for those who want to probe further.

This COMMUNITY GUIDE, to share with local groups ways to put this basic idea and these pamphlets to work in their communities.

The League of Women Voters Education Fund dedicates these publications to the memory of Professor Martin Diamond, who was a moving force and source of inspiration in the planning, development and implementation of the Federalist Papers Reexamined Project. The project was made possible by a grant from the National Endowment for the Humanities.



# THE FEDERALIST PAPERS REEXAMINED

Past as Prologue: Present  
Perspectives

Logan Women Voters Education Fund





# Preface

In May 1974, with the momentous events of Watergate serving as the catalyst, the 1,487 voting delegates to the League of Women Voters national convention engaged in a major debate on representative government, the separation of powers, checks and balances and the role of the executive branch. The essence of the concerns this debate reflected was perhaps best captured by Henry Steele Commager in an address delivered toward the convention's close:

*The great question that confronts us so implacably is whether the American Constitution and American political principles, which have served us so well and have weathered so many crises, can continue to function in the modern world. Does it still work; can it continue to work? Is a constitutional mechanism rooted in 17th century ideas of the relations of men to government and admirably adapted to the simple needs of the 18th and early 19th centuries adequate to the importunate exigencies of the 20th—and of the 21st? Or are the American people perhaps less mature politically than they were in the 18th century—less mature and less sophisticated and less resourceful?*

From this convention-inspired beginning, The Federalist Papers Retexamined project grew. In the ensuing weeks and months, the ideas discussed at the convention were broadened and refined in a formal proposal, culminating in a grant to the League of Women Voters Education Fund from the National Endowment for the Humanities.

The rationale for this undertaking is rooted in a question often heard as the United States observes its Bicentennial: Can our two-hundred-year-old constitutional democracy respond to the urgent demands and complex problems of the late 20th and 21st centuries? What better way to help answer this thorny question than to involve as many people as possible in the kind of broad public discussion that was a hallmark of 18th century political experience? Furthermore, to launch such an inquiry, why not use THE FEDERALIST PAPERS—a most illustrious example of this sort of dialog—since they were practical political documents that addressed many of the same kinds of problems and issues confronting us today. As George Washington put it:

*When the transient circumstances [of 1787-89] shall have disappeared, [THE FEDERALIST] will merit the notice of posterity, because in it are candidly and ably discussed the principles of freedom and the topics of government—which will be always interesting to mankind so long as they shall be connected in civil society.\**

More specifically, THE FEDERALIST PAPERS were a series of articles addressed "To the People of the State of New York" by Alexander Hamilton, James Madison, and John Jay, writing under the pseudonym "Publius." They appeared in the newspapers of New York City between October 1787 and August 1788 in

\*As quoted by Clinton Rossiter in his introduction to THE FEDERALIST PAPERS, Mentor paper-back edition, pp. vi-viii.

response to the vehement attacks on the new charter of government that had been adopted by the Constitutional Convention in Philadelphia. At issue was the question of whether or not the new Constitution would be ratified by the requisite nine states — and in this respect, New York's vote was critical. The New York convention did ultimately vote to ratify, although the extent of THE FEDERALIST's impact on the outcome remains a matter of conjecture

Their impact on the ratification vote notwithstanding, THE FEDERALIST PAPERS are important today because they contain perhaps the most complete and profound original record we have of the founders' thoughts on government and the American constitutional experiment. Indeed, it is because of their insightfulness and "horse's mouth" vantage point that they provide an ideal point of departure for this project's attempt to promote discussion on the continued efficacy of the political principles and structures established two hundred years ago □

The Federalist Papers Reexamined project was made possible by a grant from the National Endowment for the Humanities. The selection of material and explanations in the text are solely the responsibility of the author.

# Introduction

**The Seminars:** The foundation on which this renewed public debate will rest is being established by means of six seminars, to each of which the League of Women Voters Education Fund has invited a group of 8-10 "discussants," in addition to a small number of League "participants." The discussants, a broad mix of historians, journalists, lawyers, political scientists and public officials, spend the day in a free-wheeling, informal dialog with each other and with the League participants. The latter identify points that are not clear and raise additional questions to make sure that a citizen perspective is present both in the seminars and in the community discussion materials being developed from them.

Although each seminar will have a distinct focus and flavor, there are a few features they share. Each one is loosely structured around a core reading list and discussion questions that are sent to the discussants and participants in advance. The only prepared remarks are those offered by the discussants in a brief opening statement. Thus, the seminar dialog evolves from the combined interaction of readings, discussion questions, and introductory statements. The seminars, in sum, are the research forum upon which the community discussion materials are based.

**The Pamphlet:** This pamphlet - the first of the project publications - summarizes the main themes that emerged in the course of the discussion at the stage-setting seminar. The contents, which contain a minimum of narrative text, consist of edited seminar dialog, selected passages from THE FEDERALIST, questions for further discussion, and a bibliographical resource section. The pamphlet will serve two purposes: it is the means by which the seminar results are made available to the Leagues; and it provides a springboard for community discussion.

**Stage-setting:** "Stage-setting" embodied two distinct, but interrelated themes. As the first of the six project seminars it served to "set the stage" for the remaining five. The stage was set, also, in the sense that the seminar focused on a comparison of 18th and 20th century thinking about government in general and the American constitutional system in particular.

## League of Women Voters Participants:

Dale Balfour (Maryland)  
Rita Cohen (New Jersey)  
Lola Kauffelt (West Virginia)  
Lulu McEese (Virginia)  
Ruth Mary Meyer (North Carolina)  
Barbara Moxon (South Carolina)  
Kathy Murray (Pennsylvania)  
Sue Panzer (Washington, D. C.)  
Marjorie Purcell (Delaware)

Dorothy Tracy (Georgia)

Madelyn Bonsignore (national staff, director, Editorial division)

Keller Bumgardner (national board)

Judith Heimann (national board)

Harold B. Lippman (project director)

Susan Mogilnicki (project assistant)

Carol Toussaint (project chairman and moderator)

Nan Waterman (national board)

**The Discussants:**

James Banner, professor of history, Princeton University

Andrew Billingsley, president, Morgan State University\*

M. Caldwell Butler, congressman (R-Virginia)

Martin Diamond, professor of political science, Northern Illinois University

John Gardner, chairman, Common Cause

Linwood Holton, former governor of Virginia

Haynes Johnson, assistant managing editor, *The Washington Post*

George Kennedy, professor of classics, University of North Carolina

Pauline Maier, professor of American history, University of Massachusetts,  
Boston.

\*Dr. Billingsley was unable to participate for the entire seminar

# The American Political System: Historical Perspectives

To a significant degree, 20th century constitutional issues embody historical precedents of which most of us are unaware or only fuzzily understand. For example, do terms we take for granted, such as "republican" or "democratic," mean the same thing now that they did in 1787? Discussing such fundamental questions of definition is an ideal way to set the stage for an in-depth examination of present issues in light of the past that spawned them.

**Sue Panzer:** I would like to know more about certain 18th century ideas; about the concept of faction; about whether the founding fathers in fact thought they were divinely inspired; about the difference, as they saw it, between a democratic and republican form of government.

**James Banner:** I wonder if a good starting point might not be with the concept of republicanism with a small "r."

*"... we may define a republic to be, or at least may bestow that name on, 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. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it. . . ."*

James Madison, FEDERALIST #39

Republicanism meant many things. First of all, it had to do with a form of government. Republicanism meant adherence to a government springing from the sovereign powers of the people and managed by representatives of the people. So, formally, it meant the absence of monarchy and in its place the establishment of representative government. Democracy,

THE FEDERALIST PAPERS passages cited herein are intended to be illustrative rather than conclusive, i.e. they are neither necessarily supportive nor contradictory of the dialog amidst which they have been placed.

**Distinctions  
between a  
democracy and  
a republic**

on the other hand—just to distinguish it for a moment, again in a formalistic sense—meant the participation of all the independent people (in the 18th century this group consisted almost entirely of white adult males) in policy making and government. The advocates of republicanism felt that such a democratic system couldn't work across a state or even a county, let alone across a nation. Indeed, it hadn't worked, except in the very smallest of communities, such as some of those in New England.

*"The true distinction between these forms . . . is that in a democracy the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives and agents. A democracy, consequently, must be confined to a small spot. A republic may be extended over a large region."*

James Madison, *FEDERALIST* #14

**A republic's  
sine qua non:  
"a virtuous  
people"**

But, republicanism also meant something else: it had to do with the quality of civic existence; i.e. republicanism as a mere form of government was "bottomed" on some philosophical principles and could not work unless certain moral preconditions existed. Number one, a republic could not exist without "a virtuous people."<sup>2</sup> Virtue, John Adams said, is the *sine qua non* of the republic. If its people gave way to luxury, to any form of corruption, to lassitude, apathy or complacency, to riot and rebellion or to spending more time at the horse races than attending to the business of policy making and constitutionalism, then the republic couldn't survive. The republic was the most fragile form of government because it was born in and of revolutionary times and there had never been any other quite like it. So, "a virtuous people" would be at the top of the priority list; what comes next I'll list in no particular order.

A republic also had to have peace and external harmony. Warfare endangered it: warfare created corruption and an imbalance in power; it gave the executive overweening power and, if nothing else, created military power; it caused money to be maldistributed among contractors who served the government, to people who preyed on ocean-going vessels of enemy nations, and so forth.

*"It is of the nature of war to increase the executive at the expense of the legislative authority."*

Alexander Hamilton, *FEDERALIST* #8

To succeed, a republic also needed internal peace, harmony, comity, equilibrium, balance, so that none of the parts could be stronger than the others. Hence, it needed two houses

<sup>2</sup> A "virtuous" person was one who was wise, just, temperant, courageous, honest, and sincere; one who possessed "traits of special consequence for a free republic: the willingness to act morally without compulsion, love of liberty, public spirit and patriotism, official incorruptibility, and industry and frugality." Clinton Rossiter, *The Political Thought of the American Revolution* (New York: Harcourt, Brace & World, 1968), p. 227.

**Checks, balances  
and other  
essentials**

of Congress, it needed a president to check the Congress and vice versa, it needed a court system to check the other two branches. But, it also meant that in terms of social existence neighbors should get along with each other, that the violence of faction should not proceed too far, and that one should be modest-voiced rather than of violent expression.

*"The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection, in modern times. They are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided."*

Alexander Hamilton, FEDERALIST #9

In addition, to be preserved.— and these men had many very serious and I think justified doubts about whether it could be — a republic could not give way to power. Power destroyed republics, so it had to be fettered, encompassed, reigned in; everything possible had to be done to prevent power from "encroaching"; you'll find that term in THE FEDERALIST PAPERS. Washington used it. Jefferson used it. I think it is significant indeed that in the great crises our republic has endured we've come back to this concern about power again and again. Power was at issue, for example, when Jackson was President, during the Civil War, under the New Deal, throughout the First and Second World Wars, and most recently, during the Johnson and Nixon administrations.

*"But the great security against a gradual concentration of the several powers in the same department [i.e. the executive, legislative and judicial] consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."*

James Madison, FEDERALIST #51

Furthermore, republicans assumed that both landed and personal property would be distributed fairly widely. They were confident about this because property was already well distributed as a result of the availability of land and opportunity to get it. They were well aware, though, that if property became concentrated, then new and dangerous concentrations of power could result. In short, the desire for widespread property was very much related to the fear of undue concentrations of power.

Lastly, republicanism also had a lot to do with the independence of the electorate; i.e. its capacity for autonomy and volition. People had to be independent to make up their own minds, to judge on matters of policy, to determine where they would live and under what conditions. Independence could come through education, through a vital press, through the



give and take of debate. Independence also could come with the ownership of property, in the 18th century sense of acquiring a visible stake in society through which one could testify to one's commitment to live in the republic and make it work because one owned a piece of it.

A virtuous  
people? - a  
different view

**Martin Diamond:** That was of course an excellent presentation, but as you may know, the account that Professor Banner gave is thoroughly controversial. I regard his remarks as a splendid account of the anti-FEDERALIST PAPERS outlook, i.e. an excellent statement of what the opponents of the Constitution believed. What he left out entirely in his explanation were the views outlined in THE FEDERALIST PAPERS themselves. The federalists did not believe you needed a virtuous people for a republic - numbers 10 and 51 are particularly indicative of this - because they didn't think you could ever get one. They thought you had to do without this and that's where the tough and harsh and genuinely interesting aspects of the American system are.

*"Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature. . . . This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public."*

James Madison, FEDERALIST #51

Founding a  
republic was  
a radical  
undertaking

**Pauline Maier:** I'd just like to top off this discussion by elaborating on the historical perspective that has already been developed. As Professor Banner suggested, the founding fathers were doing something exceedingly rare, and therefore they quite naturally lacked any strong sense of confidence about what would result from their efforts. Simply to establish a republic was a relatively new thing in history. Indeed, as late as 1774, to be called a republican was like being called a communist in the 1950s: republicanism suggested popular self-government; it suggested the end of monarchy and hereditary rule; it was subversive; and, worse yet, it was utopian Republics, according to the wisdom of the times, were impractical - they always succumbed to anarchy and instability. Where they worked at all, they covered only a small territory in which the population was relatively homogeneous and cohesive. If to found a republic was itself revolutionary, then to attempt to found one for a nation as large as the United States was even more radical.

The founding fathers were, of course, not raving idealists but practical men who were building on relevant past experiences. Within the states, for instance, republican governments had been instituted and revised for more than a decade and, of course, experience with national government was gained under the Articles of Confederation. To examine these experiences is to get a sense of the sweat, toil, and anxieties that faced revolutionary Americans. Indeed, because our history has

been so compacted into neat symbols – the Declaration of Independence, the Constitution, THE FEDERALIST PAPERS – we tend to forget all the false starts and new beginnings that made the revolution real and contributed to its ultimate results.

There was no consensus on what the form of the American republic should be in 1776 or 1787. The state constitutions testify to a spirit of experimentation. Countless varieties of institutions were tested in those earliest efforts at establishing republics: unicameral legislatures; governments with no executive or with a committee as executive; councils of revision, of censors, of appointments; an electoral college. But even at the Philadelphia Convention in May 1787 they still had much to learn. The convention, I think, was less a battle of big and small states, as we are always told, than a meeting of men who had a great deal in common on what they were about to do but who, in the course of four hot months, came to still better understand and delineate the critical facets of American republican government.

The framers didn't think the Constitution was an ultimate solution

Few thought of the Constitution as perfect in the end, and virtually no one saw it as an ultimate solution to the problems of republican government. Even the "fathers" of the Constitution continued to debate its provisions. Madison, for example, carried on a weighty correspondence with Jefferson over such basic issues as whether the document should have contained provisions for rotation in office; whether the President should have had a veto over state laws; and whether a bill of rights ought to have been included. The states, furthermore, assembled long lists of proposed changes. Indeed, if the Constitution was the perfect document we are led to believe it was, why did the new government have to begin by drawing up ten amendments to it – amendments that are central to our entire modern conception of freedom and the blessings the Revolution bestowed on future generations?

*"If mankind were to resolve to agree in no institution of government, until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert. Where is the standard of perfection to be found?"*

Alexander Hamilton, FEDERALIST #65

If the Constitution was imperfect, it was nonetheless better than the old confederation and had to be ratified. Thus, it was for THE FEDERALIST PAPERS to make as good a case as possible for a document that even one of its authors considered to be deeply flawed. Thus, too, the provision that the Constitution would go into effect when only nine of the thirteen states agreed to ratify it. This meant that the most difficult states were left to discuss less the merits of the Constitution itself than whether or not they would join the new Union that, with or without their participation, would exist. The issue, in short, was, "Do we want in or do we want out?" The political astuteness of the founding fathers in drawing up this provision had perhaps a far greater influence on New York State's decision to ratify than did anything Hamilton, Madison, and Jay ever said in THE FEDERALIST.

# The American Political System: Responsive Government/ Responsible Citizenry

However elusive and resistant to precise definition they may be, all political systems rest on fundamental philosophical principles. In any discussion of American constitutional government, therefore, it is likely that questions regarding such shibboleths as self-evident truths, unalienable rights, individual rights, and the nature of man tend to arise: Do we still believe in them? What changes have taken place in them since the 18th century? What might such changes suggest?

## Self-evident Truths, Unalienable Rights, and Change.

What are self-evident truths?

*"In disquisitions of every kind there are certain primary truths, or first principles, upon which all subsequent reasonings must depend."*

Alexander Hamilton, *FEDERALIST* #31

**M. Caldwell Butler:** My view of this point may be almost unique here. I believe that we staked out the objective and universal truths two hundred years ago when we wrote the Constitution and the Bill of Rights, and the concepts which were present then are still present and accepted today.

**James Banner:** Congressman, what are the objective and universal truths on which the American people would agree?

**M. Caldwell Butler:** They are the ones enumerated in the Declaration of Independence.<sup>3</sup>

<sup>3</sup> Specifically "That all men are created equal", that they are endowed with certain "unalienable Rights," among which are "Life. Liberty

**James Bainter:** Then we know what they are?

**M. Caldwell Butler:** No, I'm not sure that you'd get universal agreement on what they are, but I think you would get such agreement on the question of whether or not they exist.

**Haynes Johnson:** I don't think people believe in these great, sweeping generalities today. They are much more doubtful, much more realistic, and believe much less in the almost mystical principles that seem to be implied in the question of inalienable rights.

**Martin Diamond:** I think this question of objective and universal truths refers not only to their precise content but to the entire question of modern relativism. A whole generation of college students has grown up being told that there are no such things: that Islam has its truths, medieval Christianity had its, the Greeks had theirs, we have ours, and that all of them are merely human responses to given environments. This is called the doctrine of historicism or the doctrine of relativism, and I find it to be a dangerous and false teaching because it possesses the inherent potential to destroy the social fabric that holds us together. Thus, while I am convinced, like Congressman Butler, that most Americans—Archie Bunker, for instance—do believe there are certain true things, the self-evident truths in the Declaration of Independence being an example, I want to stress the ironic fact that the more educated you are the less likely you are to believe that.

They exist, but many of us don't believe in them

Now, if there are no such objective truths, then there can't really be any Constitution. That is, it is by definition a denial of the idea of a constitution if it is merely an expression of what the majority wishes, feels, or wants at any given moment. The original Constitution presupposed the existence of some objective conditions of liberty, equality, and justice. If we deny their existence, we've knocked the props out from under our constitutional system. If there are no self-evident truths, there's no Declaration of Independence. If there is not some objective content to the Preamble of the Constitution, there is no Constitution. So, a very grave issue is involved in this point and I don't pretend by my remarks to have dealt with it, only to call attention to its seriousness and reality.

**Pauline Maier:** I think the question of modern relativism Professor Diamond has just raised is directly tied to a disillusionment with certain pervasive trends in American foreign policy. For a significant period—perhaps going back as far as the American Revolution itself—we have had an arrogant tendency to assume that "the American way" was the best for all persons everywhere, that our republican form of government was an ideal model for all nations. As we move away from

and the pursuit of Happiness"; that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed"; that when "Government becomes destructive of these ends it is the Right of the People to alter or abolish it" and "institute" a new government designed to "effect their safety and happiness."

that attitude toward a greater respect for the distinctive ways of the world's peoples, we naturally question the universal validity of the ideals behind our own institutions.

**They exist,  
but they've  
changed**

On the other hand, I suspect that most Americans today do believe there are some basic rights that are universally valid. They are part of, or basic to, human dignity. This is a somewhat different conception of rights than that of the 18th century. Then, rights were a preserve beyond power; they marked the ultimate limit on what kings and magistrates could do. After 1776 they also came to define the limits of what the majority could do. The Bill of Rights delineates some of these, but that document in no way comprehends all of what we in the modern world think of as human rights. Here we often go back to the Declaration of Independence, with its assertion that there are certain unalienable rights, among which are "life, liberty, and the pursuit of happiness." Does anyone today seriously believe that there are persons for whom these ideals are inapplicable?

**Applying self-  
evident truths  
causes conflicts**

There's another problem with unalienable rights: they conflict. It is easier to define them on paper than to implement them, because implementing one often means another must be violated. That was a central problem of Thomas Jefferson's administration—the philosopher found it hard to pursue revolutionary ideals because it meant impairing people's rights in other areas.

**Dale Balfour:** I think we should be dealing with the factors the founding fathers could not have possibly anticipated. The question is whether or not we can still function with the same set of objective truths, which we probably all agree are necessary, when a whole new set has grown up that in some cases are in conflict with them. For example, the right of private property versus the right of every citizen to a healthful environment, or the right to equal opportunity in education.

**M. Caldwell Butler:** The problem, it seems to me, is two-fold: 1) we have begun to promote legislatively and even judicially conferred rights to a level of natural rights that don't always correspond to the reality of prevailing attitudes and behavior; and 2) the application of these principles has caused tremendous conflicts in our society. A prime example of this is the busing issue. One approach, as I perceive it, is based on the simple right to go to school where you want to; the other is to be sure that you've got an equal opportunity to do so. If we had applied these principles through the years as they were set forth originally, we wouldn't have many of the problems we have today. We wouldn't be arguing about equal rights for women because those who wrote the Constitution and THE FEDERALIST PAPERS said that equality and natural rights are universal. The problems that have arisen over the years have come in applying these principles.

**Keller Bumgardner:** What good was it to have the rights if you couldn't have the laws and conditions that made it possible to implement them? That was what I understood Congressman Butler to have said: we all agree we have them, but we've

had difficulty in applying them.

**M. Caldwell Butler:** They're colliding, that's the difficulty.

We've left  
the original  
concept of  
rights

**Martin Diamond:** They collided in 1787, too. Indeed, rights by definition collide because there's no absolute principle for optimizing them. The problem, Mr. Butler, is as you say: it's the multiplication not of natural rights but of ideas necessarily inferred from them. Indeed, we're not talking about natural rights anymore but about equal gratification. For example, there is not and cannot be a right to a healthy environment; rather it is simply a matter of people trying to have clean air. This is an extraordinary departure from the original American idea of rights, since that concept was based on the premise that most of the time you will fail in realizing them. Now we include almost everything under rights and are furious when the needs they embrace are not met. It is this pattern that has fomented the profound changes in American society we are undergoing today.

Rights not  
only conflict,  
they expand

**Pauline Maier:** I want to mention what is perhaps the most revolutionary attribute of this concept of "rights": the content of any "right" has a way of ballooning out. Whatever Jefferson meant by saying "that all men are created equal," it is extremely doubtful that he meant what later generations made of it. In the 1780s, artisans and mechanics said it meant they could act for themselves politically and not have to be deferential to their betters as they were in the colonial period. But as carpenters began voting for carpenters and artisans began "instructing" their assembly representatives on what to do and how to vote, their earlier leaders oftentimes found themselves in extreme disagreement with their old constituents. Somehow, that was not what equality meant to them. Later, of course, blacks and women claimed the same equality and basic rights accorded at first to white males. Never were these demands accepted without opposition. Rights, then, have a tendency not only to conflict with others, but to expand. They represent, in part, a commitment to an ideal that "balloons" in its consequence, as it is claimed by new and unanticipated constituents. As a result, we have a continuing revolutionary tradition that is intimately connected with this issue of rights.

## Individual Rights – Broader, Narrower, or Restricted?

**Ruth Mary Meyer:** Isn't our concept of individual rights in the late 20th century much broader than it was two hundred years ago? As we approach the next century, it seems to me that we've started to regard as rights such things as medical care, decent housing and gainful employment—things which would never have been considered as rights in the 18th century.

**Dale Balfour:** I don't really disagree, but I think in other areas our rights have been narrowed because our society is so much

**Individual rights—expanded, contracted, or both?**

more complicated. While some of our expectations have broadened, our individual rights—as property holders, for instance, which was a very important item in the 18th century—have become much more constricted. So, it's not that our rights have broadened as much as they've changed according to what the needs of our society have become.

**Sue Panzer:** I would suggest that our perception of rights has grown according to government's recognition of them and the fact that programatically the government has led us to believe that we have these and can have more.

*"An over-scrupulous jealousy of danger to the rights of the people, which is more commonly the fault of the head than of the heart, will be represented as mere pretense and artifice, the stale bait for popularity at the expense of public good. It will be forgotten, on the one hand, that jealousy is the usual concomitant of violent love, and that the noble enthusiasm of liberty is too apt to be infected with a spirit of narrow and illiberal distrust. On the other hand, it will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interests can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government."*

Alexander Hamilton, FEDERALIST #1.

**Individual rights—origins and evolution**

**Martin Diamond:** If we've broadened the idea of rights, we've done so because the people who want these new things call them rights. The idea of rights derives from the state-of-nature theory. Before that there was never any notion of rights. There are no rights in Aristotle, in Plato, in Cicero or Aquinas: there is justice, there is what is naturally right, there are the positive immunities of justice, but there are no rights. "Rights" was an inference from the natural independence of each person in the state of nature to continue to be subject to certain immunities in civil society. That is the only meaning of rights. Therefore, there are no rights against nature, no right not to get wet when it rains. While it may be desirable and wise to limit people's rights to use their property as they see fit, there is no such thing as a right to a clean environment. What has happened is that the doctrine of rights has become a clever rhetorical basis for the strategy of those who have enlarged the range of egalitarian demands upon society; they very shrewdly use the traditional language of rights to help realize this expansion. Yet, there is simply no connection between this enlargement of egalitarian demands, masking as rights, and those invented and understood by Hobbes and Locke that were carried over into our society in the Constitution. There is simply no connection between them and the right of free speech, the right of equal protection under the laws or the right of habeas corpus.

**Haynes Johnson:** The point on the question of individual rights that has long fascinated me is the struggle we've always

**The right to  
be wrong**

had to face over the right to be wrong. Perhaps this is the most important right of all. It's always under assault, and yet, I think it has survived remarkably intact. It disturbed me immensely, for example, to see George Wallace being booed off the stage at Dartmouth. While they thought he was wrong, the real issue at stake was the right to free speech and expression. We saw this kind of thing in the McCarthy period in the mid-1950s and again most recently with the Nixon administration. In this latter period, I think we drew the line very, very close on free expression and I'm not just talking about the press. This is very much in contrast to the fact that we used to celebrate dissenters as heroes — something I'm not at all sure we do anymore.

**Lulu Meese:** To me, it's important to have a right to be free from unnecessary restrictions brought about by endless laws at the state and national level. Many of the founding fathers felt that morality or goodness cannot be legislated and I think we've reached the point where we're trying to do just that. And, in doing so, we're restricting individual rights.

*The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding."*

James Madison, FEDERALIST #44

**Martin Diamond:** The reason for this, Mrs. Meese, is that these "new rights" are interfering with the old ones. The new rights are not abstinences from government, are not absences of authority, but are, rather, impositions of authority and the expenditure of tax money. And that's another one of the indices of their difference in character from rights as conceived by the founding fathers, i.e. they're simply public policies, whether ill or well-calculated, not rights.

**Individual  
rights: hedge  
against govern-  
ment vs. action  
by government**

**M. Caldwell Butler:** The absence of a criminal sanction has become the basis for rights in modern concept. The Supreme Court, for example, has recently said that state statutes which limit or prohibit abortions are unconstitutional. That has been parlayed into a right to have an abortion. Where this becomes complicated is in the attempts that have arisen to cut off federal public assistance funds where the money is used for abortions. The difficulty arises when someone finds out that you cannot deter one means of terminating a pregnancy without infringing on another, because that would be a denial of equal protection. Therefore, the absence of a criminal sanction has now been parlayed to the point that federal funds must be available for abortions if they are available for any other aspect of planned parenthood. And the next step will be a right to a publicly financed abortion. While I don't have any real



objection to that, I do want to stress the point that rights have a way of building upon themselves from bases that you can't foresee and the total spectrum of them has been increasing at such a rate that it is really hard to keep track of them.

**James Banner:** We shouldn't necessarily think of what has happened in the last century in the way of the redefinition of rights to be a bad thing. I think what we have been going through in this respect is a second level of revolution in the modern definition of what rights are, although it is difficult to see where we should go next.

**Individual rights — redefinition isn't necessarily bad**

There have been two stages in this process of defining rights and there have been historical conditions in each case that can be cited to explain any redefinition that has taken place. What we got in the 18th century was not some miracle, but something that could be explained historically, even though it was not accepted by everyone. Those rights were not accepted at first: there was debate on them for at least two centuries, culminating in their general acceptance as being legitimate.

## Rights and Responsibilities

**Barbara Moxon:** I'd like to interject a question here that I think relates to the rights problem. Congressman Butler said earlier in our discussion that we're more concerned now with responsibility than with rights — something he saw as being a positive sign of progress. Yet, in recent years it seems to me that the opposite has been true; we've been much more concerned with rights than anything else.

**Are we more concerned with rights than responsibilities — or vice versa?**

**M. Caldwell Butler:** Well, what I meant to say was that we've pretty much staked out what the rights are, and therefore we're not as concerned with defining them as we were. My feeling is the only thing that really concerned them in 1776 and 1787 was protecting oneself and one's rights. Now, because we've strengthened our system and it's held together for as long as it has, we've begun to direct our energies toward what we perceive to be our obligations. For example, while the right to an education may not be one guaranteed by the federal government, we are certainly assuming obligations in that field. The whole world is asking us to feed them when they have problems, and we are defining what our obligations are in that respect as well. In short, we've moved into the area of considering our obligations and that, I think, is a sign of progress and maturity.

**James Banner:** I would like to point out that one of the reasons that those in the 18th century could concern themselves so much with rights was because they could assume an agreement on obligations, particularly those of the politically independent electorate. They could assume that citizens would participate and accept their civic responsibilities, and that's something we no longer accept. The electorate is not as responsible and responsive as it once was, and it's a damned

hard question to answer why not. It may be because of these rising entitlements or the concern for gratification we've mentioned.

**The 18th century electorate was more responsible**

Whatever the reason, I think we have to understand that in the 18th-century it was assumed that a responsible citizenry would *ipso facto* be a participating citizenry, and that people who were independent would use that autonomy for the good of the republic no matter how much they might disagree on matters of policy. We no longer can make that assumption, because everybody seems to have so many other rights that they are concerned with realizing. We have spent so much time educating our youths to think about the rights to which they are entitled, that we no longer make them aware of the responsibilities they are obliged to discharge in return.

**"Relativism" and a responsive citizenry — is there a link?**

**Sue Panzer:** I would like to pursue the point raised by Professor Diamond on the relativist point of view. If I understood him correctly, he's saying that relativists pose a subtle threat to constitutionalism: either they are a danger or they have simply opted out of the political system because they cannot fit into it. What I'm trying to do is link this thought with Professor Banner's point about a responsible citizenry. For example, in the time of the founding fathers were there people who similarly chose to opt out of the system, or was 100 percent participation the rule? What, if anything, might this suggest about the present political community with its relativists and drop-outs?

**The evidence is inconclusive**

**James Banner:** Well, certainly 100 percent of the people did not participate then, and you put me on the spot when you ask, because voting participation is about the best single way we have, to measure civic involvement. While the view was widely held by people that they were obliged to discharge their civic responsibilities, perhaps as little as 30 percent of those eligible actually voted in the decades immediately following the ratification of the Constitution. It was only with the emergence of political parties, competition, and vital national issues that seemed to make a difference to the informed voting public, that electoral participation went up. Indeed, before the Civil War it reached heights, particularly at the state level, that it has rarely achieved since. Ever since, there's been a steady decline, culminating in the most recent plunge.

*"The definition of the right of suffrage is very justly regarded as a fundamental article of republican government."*

*James Madison, FEDERALIST #52*

**Martin Diamond:** It's hard to get a handle on these questions. It's not the voter versus nonvoter or the apathy versus non-  
apathy issue that's involved. The system is not threatened if half the people don't vote.

Perhaps it would be useful to briefly suggest some possible explanations for the decline in voting that's been mentioned. Firstly, the result of the extensive efforts by organizations like the League of Women Voters is to register the nonvoter — the sleeping dog who, upon being registered, simply

Electoral participation is not the problem; a shift in concepts of equality is

goes back to sleep. Thus, while we have always had those who were disposed to vote and those who were not, now to a greater extent than ever before, both are registered. Those with the disposition to vote, as indicated by certain socioeconomic correlates, actually vote; the others don't. Secondly, the turnout record of newly enfranchised blacks is statistically low. Similarly, the 18-year-old group also tends to reduce the voting percentages. Thus, one must engage in a most subtle statistical analysis to see what may really be happening in our voting behavior. Indeed, the decline may not be at all as symptomatic of apathy or dropping out as we have been led to believe.

But, the relativism issue is really related to something else. What is now a cause for alarm is not how vigorous the electorate is — which is not to say that we shouldn't do everything we can to encourage it — but the idea that each value is equal to every other value, and that everyone's desire is equally entitled to gratification by government, philanthropy, or some other means. I think what has happened is that there has been a switch from liberty-to-try-and-fail to equality-of-getting by virtue of someone else's efforts. People have begun to believe that their wish, desire or whim is equal in moral status to everyone else's. In addition to the destruction of the concept of a hierarchy of values, this has led inexorably to a switch from equality as originally conceived. If you have a race in which everyone is really free, then the superior succeed and the inferior fail. Democracy was a system designed to allow for natural failure by getting rid of artificial impediments to failure, as well as artificial props for success. The difficulty is that we have become bitterly opposed to the idea of the "downs" of democracy and liberty, in contrast to its "ups," and I think this poses grave problems for us.

## The Nature of Man — 18th and 20th Century Attitudes

**James Banner:** In our earlier consideration of objective and universal truths and inalienable rights, Congressman Butler remarked that he felt such things still exist, although it might be difficult to obtain general agreement on what they are. I wonder if the same kind of consensus might exist regarding the 18th century's "realistic" view of human nature.

*"As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence."*

*James Madison, FEDERALIST #55.*

**M. Caldwell Butler:** I think we have the same agreement today we had two hundred years ago. You're an historian, do you disagree with that?

Human nature — do we still agree on what it is?

**James Banner:** Yes, I do disagree. I must confess that if you asked me to tell you in twenty-five words or less what the nature of man is, I would be hard pressed to answer. I guess

what I want to know is, do all of us here agree that the nature of man is fractious, or harmonious, or evil, or good?

"Has it not . . . invariably been found that momentary passions, and immediate interests, have a more active and imperious control over human conduct than general or remote considerations of policy, utility, or justice?"

Alexander Hamilton, FEDERALIST #6.

**M. Caldwell Butler:** We're fallible and that's why the founding fathers set up this system the way they did—to take care of the fallibility of man.

"As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves."

James Madison, FEDERALIST #10.

**A view of human nature lies behind every form of government**

**Martin Diamond:** While it's very hard to say what a realistic view of human nature is, we do know that there are five or six fundamental views of it, and each political system is in some significant way based on one or more of them: for example, the classical Greek, the Judeo-Christian, the Hobbes/Lockean, the Marxian, and the Freudian views. Now, human nature means *what the human end is*: the medieval city and the early Puritan city on a hill embodied a certain salvation view of mankind, while the Greek polis was a view of certain aristocratic potentialities of humans around which all political life was organized.

"Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint."

Alexander Hamilton, FEDERALIST #15.

**The realistic view of human nature: a careful blend of freedom and stability**

In contrast, the 18th century realistic view of human nature was: let us not aim at medieval salvation or the ancient aristocratic heights, but let us aim at a sensible Lockean level of comfortable individual stability and freedom to be achieved by a careful structuring of democracy. This is very much in contrast to modern democratic theories, from Jacobinism to Leninism down to the contemporary varieties of what might be called "enthusiastic democracy." What these modern enthusiastic theories have in common is the conviction that once a system is properly democratic all good things will then follow. As compared to this utopian approach, the 18th century American concept was thoroughly and, I think, usefully realistic.

In accordance with this realistic view of human nature, the founding fathers looked on democracy as being capable of certain faults. Indeed, the Constitution was an attempt to embody democracy's excellences and guard against its faults.

"[The Constitution's structures and principles] are means, and powerful means, by which the excellencies of republican gov-

ernment may be retained and its imperfections lessened and avoided."

Alexander Hamilton, FEDERALIST #9

Furthermore, the heart of THE FEDERALIST PAPERS—especially numbers 9 and 10—is a study of democracy's excellences and faults, the way to optimize the one and minimize the other. The whole of THE FEDERALIST is a commentary on how the Constitution is intended to achieve that result, i.e., how its complex political, social, and economic structures and principles will keep democracy from degenerating into majority folly and majority tyranny.

"... a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concern results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths."

James Madison, FEDERALIST #10.

Does democracy square with a realistic view of human nature?

In short, as the founding fathers saw it, the relationship between human nature and democracy is based on the premise that while man possesses sufficient potential to achieve modest success in realizing the latter, the democratic process can also lead to folly and tyranny if it's allowed to get out of hand. The thing that the founding fathers would have bludgeoned to death, if they had a chance, is the slogan that whatever ails democracy can be cured by more democracy. The difference between 1776-87 and 1976 is a difference regarding precisely this point. We believe equality is good, more equality is better; democracy is good, greater democratization is better, and still more democracy would be best. They disbelieved that utterly, seeing democracy as being everlastingly in need of constant qualification and modification.

There is such a thing as too much democracy

"But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

James Madison, FEDERALIST #51.

James Banner: I think that there's good reason to think of the founding fathers as having given birth to the democratic ideas that set the stage for the emergence of real political, economic

**The founding fathers were not democrats, but they prepared the way for democracy**

**Human nature and government are both fragile**

and, to some degree, social democracy over the ensuing two hundred years. But, these men were not by the widest stretch of the imagination democrats, at least to the following important degree: they believed that there were differences among people, differences not only in intellectual and emotional capacity but differences that grew out of and were reflected in social situations. They lived in a hierarchical society and they assumed that there would be a political elite—indeed, they were by and large members of it—that would be deferentially supported by the voting and nonvoting public. They did not generally go out on the hustings or elsewhere, except under the most extreme conditions of political stress, to get lots of people to vote and thereby end their deference to “the better sort.” Indeed, democratic society and politics didn’t really begin to emerge until between 1825 and 1840, and solely among white adult males at that.

The founding fathers believed that human nature was fragile and that civil government was necessarily fragile. They were tremendously fearful about the abuse of power—a legacy of the events that precipitated the Revolution—and they felt that democracy would devolve into despotism and disorder, and that once that happened the republic itself would be doomed. So to that degree, they just weren’t democrats. They were republicans with a small “r.” But in the ringing phrase that “all men are created equal,” and in the very implications of so much of their writing and their actions, they did set the groundwork for the emergence of democracy as we know it. “Power controlled or abridged is almost always the rival and enemy of that power by which it is controlled or abridged.”

Alexander Hamilton, *FEDERALIST* #15

# The American Political System: “A Deep Malaise Abroad In The Land?”

As a result of the recent disclosures of wrongdoing and misconduct by our public representatives and leaders, many Americans feel that “a deep malaise is abroad in the land,” as one seminar participant put it. In contrast, others would argue that the cynicism and mistrust generated by these revelations are neither sufficiently deep nor widespread to warrant the label “malaise.” Whichever way one may lean on this point, few would disagree that significant numbers of citizens have at the very least lost confidence in their system of government and have become political nonparticipants or even outright dropouts. How can this situation be remedied? Is it, for example, our political institutions that are most defective and in need of reform – or are our political leaders chiefly at fault – or is it the people themselves – or a combination of all three categories?

**John Gardner:** We have to ask ourselves how the world today differs from the world then and whether or not there are things the founding fathers may not have foreseen. I think the answer to this is yes, there are. I think, for example, that the founding fathers would have found it very difficult to foresee what the revolutions in communications and transportation would do to a settled continent. We have become, at least in certain respects, irretrievably one society because of them.

**Things have changed in ways the founding fathers couldn't have foreseen**

I think the founding fathers would have found it very difficult to grasp the problem of a world in which elites and the whole structure of tradition that supported them had decayed, so that the facts of life they took for granted as being in the order of things might just not always be there – a sense of social responsibility or willingness to take leadership, for example.

*“When once an efficient national government is established, the best men in the country will not only consent to serve, but also*

will generally be appointed to manage it; for, although town or country, or other contracted influence, may place men in State assemblies, or senates, or courts of justice, or executive departments, yet more general and extensive reputation for talents and other qualifications will be necessary to recommend men to offices under the national government — especially as it will have the widest field for choice, and never experience that want of proper persons which is not uncommon in some of the States."

John Jay, FEDERALIST #3

They couldn't possibly have foreseen the problems of large-scale organization, the depersonalization, the effects of vastness and complexity on the relationship between the individual and his or her society. How could they have pictured all that this has meant in terms of alienation and the attendant need for intermediary groups to reempower the citizen and give one a renewed sense of relationship with the processes of government?

Some of these unforeseen changes are the basis of our malaise

While the founding fathers were certainly aware of the federal-local problem in the context of the nation versus the states, I don't think they could have guessed how enormously complex the federal-state-local situation would become. All one has to do is look at the multiplicity of federally created local instrumentalities that cut across municipal and state boundaries, to see the largely unexamined groping to resolve this problem today.

"... each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments...."

James Madison, FEDERALIST #45

Lastly, I don't think they could have foreseen the emergence of what I think of as the "special interest state." They certainly understood faction; they certainly understood the inclination of various groups, whether geographical or otherwise, to seize power. But, how could they grasp the fact that we now have a governmental infrastructure — the many federal regulatory agencies are ready examples — which is, in effect, a collection of wholly owned and operated fragments of special interests and groups outside of government?

**Martin Diamond:** I do believe things are different now from how they were in 1776, but not all as different as Mr. Gardner suggests. When he mentions technology and communication and that we're irretrievably one nation, my reply is that this was intended. When he speaks about large-scale organizations and the special-interest state, this too was understood and intended. The most important fact about the Constitution was not that it reflected 18th century reality but that it meant to create a decisively new reality. It was not designed just for three or four million farmers living along the eastern seaboard but rather to bring into being a gigantic commercial union in which tens of millions of people would live in a fashion far different from that of the 18th century. To paraphrase de Tocqueville, the United States under the Constitu-

Things aren't so different — the U. S. was born modern



tion was born modern. That is why we remain closer to our political origins than is the case anywhere else in the world, even though there have been significant changes in our social and economic life since then. In short, I don't see any difficulty, nor do I think Mr. Gardner does, in the fundamental constitutional design, but simply the need now for creative adaptation.

**Haynes Johnson:** What we may be touching on here is something that relates to the way people feel about their inability to do anything about national problems. I don't think it is an accident, for example, that people are voting less in general and particularly at the national level. Although the reason for this is often explained in terms of apathy, I just don't see it that way because apathy by definition means an absence of caring. Rather, it seems to reflect an attitude that there is not much one person can do, so why try. Indeed, the problem goes even deeper than that: people have serious questions about the way their system is operating today. There's widespread mistrust of all kinds of institutions, not just over what one reads in the press or hears when a congressman speaks. And I think this does affect the way we feel about our system of government.

It's not apathy  
-people feel  
helpless

*"I will, in this place, hazard an observation which will not be the less just because to some it may appear new; which is, that the more the operations of the national authority are intermingled in the ordinary exercise of government, the more the citizens are accustomed to meet with it in the common occurrences of their political life, the more it is familiarized to their sight and to their feelings, the further it enters into those objects which touch the most sensible chords and put in motion the most active springs of the human heart, the greater will be the probability that it will conciliate the respect and attachment of the community. Man is very much a creature of habit. A thing that rarely strikes his senses will generally have but a transient influence upon his mind. A government continually at a distance and out of sight can hardly be expected to interest the sensations of the people."*

Alexander Hamilton, FEDERALIST #27

**Linwood Holton:** Aren't you overlooking the distinction between the structure of this government—through which we certainly can attack the various problems that confront us—and the problems themselves, which are infinitely more frustrating? I think that the structure is sound and permits us to attack the problems that frustrate us. Clearly we haven't solved all the problems, but we have the means with which to do it.

We have the  
governmental  
tools to solve  
our problems

**Haynes Johnson:** I agree with that—the tools are there. But I think there is increasing doubt over whether the system itself isn't in need of more of an overhaul in terms of things that go beyond government, such as corporate power. I'm not sure people believe that these questions are being addressed.

**M. Caldwell Butler:** While it is undoubtedly true that there is a general feeling of dissatisfaction with public servants today, I want to point out that on the other hand I also see respect shown toward this country's institutions all the time. I have high school kids coming up to Washington, and they respect

the institutions—the Supreme Court, the Capitol, the Congress or Senate. Furthermore, I was deeply impressed by the letters I received during the impeachment proceedings on President Nixon—almost 1,000 of them—from people who wrote three, four, and five pages in longhand just to tell me how concerned they were about the state of the nation, not necessarily about which side of the question they were on. The feeling of concern that this demonstrated convinces me that respect for the institutions is just as strong as it ever was and that is an encouraging sign for me.

*"The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust."*

James Madison, FEDERALIST #57.

**Disaffection —  
is it with  
institutions or  
individuals?**

Now, when you raise the issue of dissatisfaction with public officials, I think the reason for it is that organizations having the most contact with them do not make a genuine effort to let the rest of the electorate know how difficult their job is. Such groups, for example, will often operate on the premise of trying to shame a legislator into voting a certain way by implying that if he doesn't, he's not on the side of the angels. If we are really concerned about what people think about government today, we ought to spend our time increasing the esteem for those in public life, not in knocking them down.

**Haynes Johnson:** I think where we really disagree is exactly on this point: I think institutions aren't as respected, individuals are. You can go through any number of surveys that demonstrate, virtually without exception over the last fifteen years, that institutions have gone down in terms of public respect and esteem. On the other hand, I think individuals are respected—people want to believe in them.

*"No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability."*

James Madison, FEDERALIST #62

**Antipolitics  
sentiment has  
gone too far**

**John Gardner:** I agree that the antipolitics sentiment in this country has gone too far, and thus whenever I give a speech these days I spend at least a few minutes trying to rehabilitate the idea that politics is the only arena in which we can work out our differences, unless of course, we want to shoot it out or leave it up to the whims of a dictator. I unflinchingly urge citizens to support their able politicians. On the other hand, I don't think organizations like Common Cause can adopt the supportive stance urged by Congressman Butler and still be forceful and effective in dealing with the problems at hand. In this sense, it is an unavoidable fact of life that there will always be the appearance of someone being "knocked down," whether or not this is actually the case.

**Nan Waterman:** While organizations like Common Cause and the League of Women Voters and other citizen groups may in

**Malaise — a reflection of a fragmented society**

a sense contribute to the deep malaise abroad in the land, which we've been discussing, there are other forces at work as well. It seems to me that in many cases, particularly in terms of our elected officials, mistrust and disrespect have developed where they really ought not to because public servants are being called upon to act as mediators between highly fragmented segments of society, each of which carries its own banner and pushes for its own thing.

*"A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities, most governments are deficient in the first."*

James Madison, FEDERALIST #62

**Malaise: right-wing reaction to left-wing over-responsiveness?**

**Martin Diamond:** When people speak of disaffection and malaise, I think what they have in mind is that Americans are annoyed at government from a left-wing position, i.e. that government is insufficiently responsive. While I don't have any poll data to back up my point because none of the pollsters have asked this question, I nevertheless think that just the opposite is true — the malaise is a right-wing objection on the part of ordinary Americans to left-wing responsiveness of government. I've deliberately used the terms "left" and "right," which are certainly much too simple, but I sincerely believe that all the talk of disaffection has its roots chiefly in a kind of Archie Bunker hostility to the over-responsiveness of government.

**Haynes Johnson:** I disagree. It would be wonderful if it were that simple — if it were all political or ideological — but I don't think it is at all.

**Martin Diamond:** I didn't mean to oversimplify it. What I do want to stress is that no one, to the best of my knowledge, has investigated this possibility. Every poll or survey on this issue has taken for granted the view that government isn't responsive enough. I am certain that some of the malaise is due to over-responsiveness, and it's our duty to see to it that this is sympathetically looked into.

**Haynes Johnson:** The problem that tends to occur when we use terms like "left" and "right" is that you can't take literally whatever Archie Bunker is — and I'm not even sure he still exists; maybe he's been replaced by Tom Hartman who smokes pot, has affairs, and gets V.D. — Bunker is a caricature of American life. I think that what people are saying is that it's not a political thing, it's not really governmental either. Rather, it's that there are so many forces and institutions out there — the factory in which they work, the union they join, the officials they elect or don't elect — that don't seem to be in any way relevant to them, and they as individuals have no power. It has nothing to do with a right-wing or left-wing point of view. It's much more complex than that, and people are aware of it. Yet, while people are very sophisticated and understanding about the complex nature of these forces, they nonetheless seem to be operating on the premise that if I can't make a difference, the hell with it.

# The American Political System: The Constitution is Alive And Well . . . ?

As Americans approach the complicated problem of restoring public confidence in their political processes, the idea of revising, amending or even entirely redrafting the Constitution is sometimes put forward as a plausible first step. But for every such proposal there is the counterargument that subjecting the Constitution to full-scale revision might open up a Pandora's box, creating many more problems than it could ever help to resolve.

**Linwood Holton:** If we held a constitutional convention today, the communications industry and the mass audience that has developed in its wake would tend to push it in the direction of becoming a town meeting. And clearly, most of the issues that would be raised would be too complex for the town meeting setting. They would require mature deliberation by people responsible for ascertaining all of the facts, not someone who interrupts his trade or profession on a part-time basis.

**James Banner:** As I listen to Governor Holton, my reaction is that I think those who were in control in the late 18th century would have agreed with him — problems are too complex, too important to be left to the people. Therefore, I suppose the question before us is whether or not they were right and whether or not Governor Holton is right. I find myself in sympathy with what he says, but what he says also has a chronological and social location that we should not lose track of.

*"The danger of disturbing the public tranquility by interesting too strongly the public passions is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society. Notwithstanding the success which has attended the revisions of our established forms of government and which does so much honor to the virtue and intelligence of the people of America, it must be confessed that the experiments are of too ticklish a nature to be unnecessarily multiplied."*

James Madison, *FEDERALIST* #49

**Redrafting the  
Constitution —  
18th century  
precedents vs.  
20th century  
realities**

Secondly, although Madison averred in FEDERALIST #51 that "justice is the end of government, it is the end of civil society," the principal concern the founding fathers had was with order. Justice was for them a means to obtain order. I think, however, that today justice lies much more clearly within the center of our political concerns; it is related much more to equality than to order. Thus, if we were to hold a constitutional convention today, and God help us if we ever do, our principal aim would be the creation and preservation of justice and not the creation and preservation of the Republic through order.

Finally, what also troubles me about the idea of a constitutional convention is not that we would preserve the Supreme Court, have a bicameral legislature, or allow the President to veto acts of Congress and make treaties the supreme law of the land. The problem would be in Section 8 of Article I: what should the powers of Congress be? That's where the real issue would be joined: should government take care of us, inspire us, energize us; or should it just keep the lid on things and allow problems to be solved elsewhere in the polity. This is the classic argument about constitutional government, i.e. what government is supposed to do, and I don't think there'd be any more agreement on that issue today than there was two hundred years ago.

**M. Caldwell Butler:** It makes you wonder how they got agreement two hundred years ago.

**James Banner:** One side won and explained itself.

**George Kennedy:** One of the fears that I would have about a constitutional convention is that it might adopt some sort of structure that did not in fact reflect the kind of knowledge of and experience with instability that the founding fathers had. It seems to me that they knew a great deal about instability, and after two hundred years of the Constitution, we don't. We really cannot conceive of instability unless we've happened to live in South America, Italy, or some similar place.

*"The zeal for attempts to amend, prior to the establishment of the Constitution, must abate in every man who is ready to accede to the truth of the following observations of a writer equally solid and ingenious: 'To balance a large state of society [says he], whether monarchical or republican, on general laws, is a work of so great difficulty that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; EXPERIENCE must guide their labor; TIME must bring it to perfection, and the FEELING of inconveniences must correct the mistakes which they inevitably fall into in their first trials and experiments' "*

*Hume's Essays, Vol. 1, Page 128 "The Rise of Arts and Sciences" as quoted by Alexander Hamilton in FEDERALIST #86*

**Martin Diamond:** The idea of a federal constitutional convention makes my blood run cold. First of all, we wouldn't have the first requirement for a good constitutional convention, and that is absolute secrecy. We would not allow the delegates to

**The problem of  
secrecy**

sit behind locked doors with the press rigorously excluded, as was done in 1787. Indeed, in the evenings Benjamin Franklin and the other delegates were followed to make sure that word of the proceedings did not get out prematurely. What they wanted was for the delegates to be able to argue about what was best for the country and not have to be worried about the political consequences of immediate disclosure of their deliberations. A new convention would therefore require an immense degree of autonomy, something which in these times would be improbable, if not impossible.

*"The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all parts, and can adjust them to each other in a harmonious and consistent WHOLE."*

Alexander Hamilton, FEDERALIST #82.

A constitution is something that "gets old"

Secondly, a constitution isn't something you can draft with ease. While constitutions are written all the time, by no stretch of the imagination does that mean that they will work and survive. What a constitution is, is something that gets agreement and gets old. We've frequently said today that the average American might not go for the Bill of Rights anew, but he does accept it now because it's two hundred years old and it's his by ancient custom. Blacks, to choose just one example, won rights in this country by brandishing slogans two hundred years old and finally extorting acquiescence to them from bigots. Therefore, I urge that we be most cautious in tampering with a document that has achieved this unique mystique and venerability.

*"... frequent appeals [to alter the Constitution] would in great measure, deprive the government of that veneration which time bestows on everything . . . the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. The reason of man, like man himself, is timid and cautious when left alone, and acquires firmness and confidence in proportion to the number with which it is associated. When the examples which fortify opinion are ancient as well as numerous, they are known to have a double effect."*

James Madison, FEDERALIST #49

We lack the basic prerequisite for a constitutional convention

Pauline Maier: It seems to me we lack the basic prerequisite for any kind of constitutional convention, that is, pervasive dissatisfaction with the standing system. In the past, whenever a constitution was revised, there was a widespread sense that the document had proven seriously defective. Everything we've said today leads to exactly the opposite conclusion. Some of the ideas behind the Constitution may have undergone a permutation in the past two hundred years. We think of

rights in a different and perhaps an expanded way, for example, but I don't think we have a fundamentally different idea of human nature. We have perhaps a more variegated notion, but the basic suspicion of human nature and the desire to protect the nation from individuals or groups who would injure it remain important. And that concern pervades THE FEDERALIST PAPERS.

In short, despite my somewhat irreverent comments at the outset of this meeting, it is clear that the Constitution has lasted very well. We have occasional quibbles. Every few years, for example, we wonder about the electoral college. But there is within the Constitution a mechanism for solving such relatively limited problems. As to the larger problem of containing power, which was discussed earlier, again I think the Constitution itself contains the solutions. We must simply honor it more exactly and take more trouble to understand the foundations of the American republic; to emphasize, for example, its demand that all men be bound by law. There is no need to rewrite the document. □

# **In Conclusion: Questions for Further Discussion**

## **The American Political System: Historical Perspectives**

### **Democracy or Republic: Which or Both?**

What terms do you think most accurately describe the American political system today? How relevant are the 18th century distinctions between a democracy and a republic made by James Madison and others?

### **Checks and Balances: "An Excellency of Republican Government?"**

Does the principle of checks and balances embodied in the Constitution make our system of government more or less democratic – more or less efficient and effective?

### **In Search of "A Virtuous People . . ."**

What is your response to the contention that government can be no better or worse than the sovereign people from which its just powers are derived? If as Professor Banner contended, the founding fathers believed that republicanism required "a virtuous people," do Watergate, Lockheed, and PX-type scandals imply that we are no longer such a people? In order to be effective and enduring does the American political system really require "a virtuous people"? If so, what can be done to foster public spiritedness, incorruptibility, and other characteristics of "a virtuous people"?

## **The American Political System: Responsive Government/Responsible Citizenry**

### **Self-evident Truths and Unalienable Rights: Are There Any Such Things?**

What is your reaction to the contention that the American people can no longer agree on what constitute self-evident truths and unalienable rights? Do you agree with Professor Diamond's claim that widespread disbelief in such first principles "knocks the props out from under our constitutional system"?

### **Is Our Concept of Rights Different Today?**

Do you think that the concept of individual rights is really different today from what it was two hundred years ago? What problems, if any, might a changed concept of individual rights pose for the smooth functioning of the American political system?

### **Are Rights "Ballooning"? Colliding?**

How do you think the founding fathers would react to current usage of the term "rights"? Do we need to differentiate between such "rights" as the right to an abortion, the Equal Rights Amendment, the right to a job or adequate housing? Are the rights-related demands being placed on our system of government pushing us



toward a breaking point and the kind of attendant instability that was among the founding fathers' greatest fears?

### **Rights and Responsibilities: A Need for Balance?**

Do you agree with Professor Banner's statement that the 20th century election was not as "responsible and responsive" as its 18th century counterpart? If you agree, what do you think can be done, to encourage citizens to become more "responsible and responsive"?

### **Democracy: How Much Is Too Much?**

Has our system of government become too "democratic"? What do popular attitudes on issues like crime and "law and order" suggest in this regard? If our political system has become too democratic, what should be done about it?

### **Human Nature: Has It Really Changed?**

What is the relationship between our view of human nature and our attitude toward government? Is it consistent with that envisioned by the founding fathers? If not, is that a positive or negative development?

## **The American Political System: "A Deep Malaise Abroad in the Land"?**

### **Disaffection: Is It With Institutions, With Individuals or Both?**

What is your reaction to the assertion that "a deep malaise is abroad in the land?" If you agree with this diagnosis can you identify what it is that we're disillusioned about? What remedies would you prescribe?

### **The USA Today: Plus ça change, plus c'est la même chose?**

In light of repeated violations in recent years of both the letter and spirit of the Constitution, do the principles and structures it embodies still retain the same promise they held at the time of the founding of the Republic?

## **The American Political System: The Constitution Is Alive and Well . . . ?**

### **On Balance: Strengths and Weaknesses**

In your judgment, do we need to redraft the Constitution? If so, what are the major defects?

### **A Constitutional Convention: Pandora's Box?**

In view of the changes in communication and population that have taken place since 1787, do you think it would be feasible to hold a productive constitutional convention today? Does the amending process the founding fathers deliberately placed in the Constitution remain a sufficient recourse?

### **Limited vs. Pervasive Government?**

If a constitution can be said to mirror the times in which it is written, what would one written in the 1970s look like? What values would be emphasized: justice—order—rights—responsibilities?

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**THE  
FEDERALIST  
PAPERS  
REEXAMINED**

The Bill of Rights Then and Now:

Perspectives on Individual Liberty

**League of Women Voters Education Fund**

# The Bill Of Rights - The First Ten Amendments

- I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
- II. A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.
- III. No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.
- IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
- VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
- VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
- VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
- IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
- X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Edited by Harold B. Lippman

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# Introduction

In May 1974, with the momentous events of Watergate serving as the catalyst, the 1,437 voting delegates to the League of Women Voters national convention engaged in a major debate on representative government, the separation of powers, checks and balances and the role of the executive branch. The essence of the concerns this debate reflected was perhaps best captured by Professor Henry Steele Commager in an address delivered toward the convention's close:

*The great question that confronts us so implacably is whether the American Constitution and American political principles, which have served us so well and have weathered so many crises, can continue to function in a modern world.*

From this convention-inspired beginning, The Federalist Papers Reexamined project grew. It evolved in terms of a rationale often heard during the nation's Bicentennial observance: Can our two hundred year-old constitutional democracy respond to the urgent demands and complex problems of the late 20th and 21st centuries? What better way to help answer this question than to involve as many people as possible in the kind of broad public discussion that was a hallmark of 18th century political experience? Furthermore, why not use THE FEDERALIST PAPERS—a most illustrious example of this 18th century public dialog—to launch such an inquiry?

Specifically, THE FEDERALIST PAPERS were a series of articles addressed "To the People of the State of New York" by Alexander Hamilton, James Madison and John Jay, writing under the pseudonym "Publius." They appeared in various New York City newspapers from October 1787 to August 1788 in response to the vehement attacks on the proposed Constitution that had been adopted in Philadelphia. At issue was the question of whether or not the new Constitution would be ratified by the requisite nine states—a process in which New York's vote would be critical. While New York did finally ratify, THE FEDERALIST PAPERS remain important not because of their impact on this outcome—the extent of which is still debated—but rather, because they are a most profound statement of American thinking on government in which many of the same kinds of issues confronting us today are addressed. As George Washington put it:

*"When the transient circumstances of 1787-89 shall have disappeared, [THE FEDERALIST PAPERS] will merit the notice of posterity, because in it are candidly and ably discussed the principles of freedom and the topics of government—which will be always interesting to mankind so long as they shall be connected in civil society."*

**The Seminars:** The foundation of this renewed public debate on American government rests on a series of six seminars, to each of which the League of Women Voters Education Fund invites a group of 8-10 "discussants," in addition to a small number of League "participants." The discussants, a broad mix of historians, journalists, lawyers, political scientists and public officials, spend the day in a free-wheeling, informal dialog. The League participants serve as citizen representatives, pressing the discussants to clarify their statements, to define terms for nonspecialists, and to elaborate on points of special interest.

**The Pamphlet:** This pamphlet—the second of the project publications—summarizes the main themes that emerged in the course of the discussion at the Bill of Rights seminar. The contents consist of edited seminar dialogue and selected pas-

\*As quoted by Clinton Rossiter in his introduction to THE FEDERALIST PAPERS, Mentor paperback edition, pp vii-viii

sages from THE FEDERALIST PAPERS interspersed with a minimum of narrative text, questions for further discussion, and a bibliographical resource section. The pamphlet serves two purposes: it is the means by which the results of the seminar discussion are shared with League members and other citizens, and it provides the springboard for the public discussion this project is attempting to promote.

**Bill of Rights:** In looking at the Bill of Rights then and now, foremost among the things to consider is the fact that the framers did not originally include one in the Constitution. Indeed, consideration of this issue did not take place until the very end of the Convention, whereupon a motion to include a bill of rights was resoundingly defeated. This very omission became one of the crucial issues in the bitter ratification controversy that followed. From one perspective, supporters of a bill of rights were holding the ratification of the Constitution captive to their demands. However, others argued that it was the federalists themselves who were using this issue to their advantage, i.e., if the supporters of a bill of rights wanted to see their wish come true, they would first have to help ratify the Constitution. Paradoxically, by the time Hamilton actually wrote FEDERALIST #84 summarizing the arguments against including a bill of rights, many federalists had begun to soften, finally grasping the enormous amount of popular support it enjoyed. Indeed, some of them went so far as to promise anti-Constitution delegates at the state conventions that, once ratification took place, the question of rights-related amendments would be immediately considered.

True to their word, after the Constitution had gone into effect the federalists made good on their promises. In his inaugural address after the elections of 1789, President Washington asked the First Congress to take up the bill of rights question. In response to this request, James Madison, putting aside his previous doubts, introduced a series of proposed amendments, twelve of which were passed after extended debate in both the House and Senate. It took more than two years (December 1791) for ten of the twelve amendments to be ratified by the requisite number of states,\*\* whereupon what we have come to call the Bill of Rights formally became part of the Constitution.

#### **The Discussants:**

Harry S. Ashmore (president, Center for the Study of Democratic Institutions)

Ann Stuart Diamond (lecturing in political science, Yale University)

Paul Conkin (professor of history, University of Wisconsin)

Daniel Friedman (Deputy Solicitor General, Department of Justice)

Willard Hurst (Vilas professor of constitutional law, University of Wisconsin)

Robert Kastenmeier (congressman, Wisconsin)

Theodore A. Miles (professor of law, Howard University Law School)

Harold L. Nelson (former dean, School of Journalism, University of Wisconsin)

Lawrence Speiser (attorney, formerly with the American Civil Liberties Union)

Mary Ann Yodelis (professor of journalism, University of Wisconsin)

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\*\*Two amendments, neither of them rights-related, failed ratification.

# The Bill Of Rights: Historical Perspectives

## Was It Necessary?

THE FEDERALIST PAPERS are undoubtedly a most cogent statement of American political thinking, yet the authors' treatment of the bill of rights issue has been the source of considerable controversy. While many later observers concluded that Madison and Hamilton badly missed the mark on this point, others believe they were fundamentally correct. Nevertheless, because THE FEDERALIST PAPERS—particularly Hamilton's arguments in #84—pose the question of the ultimate utility of a bill of rights, they provide an excellent point of departure for a contemporary examination of individual liberty and the first ten amendments.

Hamilton was wrong — a bill of rights was necessary

Lawrence Spieser: I think Hamilton's argument in FEDERALIST #84 suggesting that a bill of rights was not necessary was utterly wrong. For example, the importance of having things spelled out—something he strongly objected to insofar as a bill of rights was concerned—can be seen in the present controversy over the Equal Rights Amendment. Although presumably there is enough in the Constitution to make such an amendment unnecessary, the fact is, women have not been adequately protected under its provisions and that's why people want these rights to be spelled out. The same thing can be said for the Bill of Rights as a whole—they too needed to be spelled out.

*"I [would] affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted."*

Alexander Hamilton, FEDERALIST #84

I also think Hamilton was wrong in maintaining that the Constitution was itself a bill of rights. The Constitution, for instance, makes no mention of the rights enumerated in the First Amendment, such as a free press. In short, regardless of what

THE FEDERALIST PAPERS had to say, the fact is that the Bill of Rights was adopted; and had we been without it we would be neither as free nor as safe from arbitrary governmental actions as we are today.

**Ann Diamond:** There are several reasons why the Constitution did not originally contain a formal bill of rights. First, the framers did not believe that they had delegated power to the national government over such fundamental matters as speech, press and religion. To the contrary, they thought that these powers had been retained by the individual states and the people.

*"For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"*

Alexander Hamilton, FEDERALIST #84

**The framers had sound reasons for omission**

Secondly, they feared that by enumerating or defining rights some would actually be limited or excluded. Thirdly, the founding fathers believed that the best security for individual rights under a form of government where the majority is also the legitimate source of authority is in the structure of the government itself and the processes that take place in society outside of government. They felt that when the source of political power is the majority, no mere declaration of basic rights would be sufficient whenever that majority force wanted to transgress those rights. Thus, while they thought the role of government would always be important in protecting individual and minority rights, they also believed that in the final analysis the only thing that could stop a determined majority would be the structures and processes of society itself.

*"If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The second method will be exemplified in the federal republic of the United States."*

James Madison, FEDERALIST #51

**On the efficacy of a bill of rights - Madison and Hamilton**

**Harold Nelson:** Besides saying that any attempt to guarantee a free press would be easily evaded because the term could not be defined, Hamilton argued further that it would be the support of public opinion that would provide the basis on which this and all rights would ultimately depend. Paradoxically, we know from his other writings that he really had little faith in the public and the particular form of republican government he was espousing in this regard.

THE FEDERALIST PAPERS passages cited herein are not presented to support or contradict the dialog amidst which they have been placed, but rather to illustrate or amplify the discussion



*"What signifies a declaration that 'the liberty of the press shall be inviolably preserved'? What is liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable, and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."*

Alexander Hamilton, *FEDERALIST* #84

Although Madison tended to agree with Hamilton, he was far less disparaging of a bill of rights. Thus, writing to Jefferson late in 1788, after the Constitution had been ratified by several states on the condition that a bill of rights would be added, he stated that he favored one but felt it wasn't very important—the existing state bills of rights were simply "parchment barriers" that had been repeatedly violated by overbearing majorities. Yet, perhaps as a result of Jefferson's responses, eight months later Madison insisted that Congress consider a bill of rights, and in his speech introducing it to the House sounded a little more sanguine as to its probable effectiveness.

In looking at almost two hundred years of experience since then, several conclusions on the accuracy of the federalists' views might be drawn. Firstly, Hamilton's argument that freedom of the press could not be defined and thus would be only an empty declaration in a bill of rights seems to have proven at least somewhat true. It wasn't until the early 1920s that the Supreme Court finally took up the complex and continuing process of defining the free speech and press clause of the First Amendment. Since then, the Court has at times protected individual liberties in the teeth of a local or regional majority's prejudices or beliefs—the Jehovah's Witnesses cases and the expansive protection of writing on sexual subjects are examples. At other times, however, the Court seems to have waited until it sensed a retreat in public clamor for control or suppression, as in its development of First Amendment protection over the advocacy of lawbreaking or the violent overthrow of government. Indeed, sometimes the Court seems to have read the election returns before taking a new step in protecting free speech and press guarantees.

It also seems to me that the belief, which Hamilton asserted more flatly than Madison, that public attitudes affect our liberties more than a bill of rights has also proven at least partially correct. To the extent that we can gauge it, public pressure in times of alarm and crisis has indeed often overridden these freedoms through the threat of mob violence and/or public support of legislative controls. For example, the effective suppression of the discussion of slavery in both the North and South before the Civil War was accomplished by social consensus. In addition, the first quarter of the 20th century saw widespread suppression of socialism and urban/agrarian radicalism through mob violence and police actions.

As for popular pressure on legislatures, several prominent

**Hamilton's  
skepticism  
was partially  
correct**

examples readily come to mind. For instance, there was widespread public support for the Alien and Sedition Acts—laws that punished criticism of the government—just ten years after THE FEDERALIST PAPERS were written. Certainly, there is little question that there was broad popular support for the Dies [Martin Dies, chairman, House Committee on Un-American Activities] Committee of the 1930s and 1940s and for Senator Joseph McCarthy's crusade against Communism in the early 1950s.

**But Madison's qualified optimism has proven more accurate**

Nevertheless, over the long run, Hamilton's harsh skepticism regarding a bill of rights has proven less accurate than Madison's qualified optimism. The great control that their generation feared most—punishment for criticizing government—is much less a problem than it was in the late 18th century. Furthermore, the Supreme Court has its notable ways imposed this "parchment barrier" between repressive majorities and unpopular expression. Thus, it's Madison's vision that has proven to be more true, and as a result we're freer now than we were fifty years ago.

**Paul Conkin:** One has to keep Hamilton's views in perspective. In the first place, he certainly couldn't have foreseen the impact that future amendments would have on the whole meaning of the Bill of Rights. Foremost in this respect was the Fourteenth Amendment, since it radically transformed the first ten amendments by extending the protections of individual rights at the national level to the state and local level.<sup>2</sup> Therefore, the question one has to ask is, What real role did the Bill of Rights play until the tremendous changes fomented by such later constitutional amendments finally occurred? As far as the courts are concerned, the answer is, very little. It may have been a precautionary warning. It may have served as a continuous reminder that these were important principles. But actually, the only early time that it figured in a momentous debate on civil liberties was with the Sedition Act under the Adams administration. And, ironically, in this instance the wording of the First Amendment was used to legitimize rather than prohibit government intervention in regulating the press.

**The early role of the Bill of Rights was limited**

Secondly, one must remember that Hamilton helped to write THE FEDERALIST PAPERS in the first place because he desperately wanted the Constitution to be ratified. Indeed, he did not even approve of all the articles in the new Constitution, and yet he was required to defend certain sections of it. It was in this sense that he came to defend what had become a major issue in the ratification controversy—the lack of a preamble containing a bill of rights. Thus, he tried to make the

<sup>2</sup>The Fourteenth Amendment (Section 1) "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

best possible defense of the Constitution in this respect, and I think his argument was a valid one, given the prior history of bills of rights.

"... the Constitution is itself, in every rational sense, and to every useful purpose A BILL OF RIGHTS. . . . Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention. . . . Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This . . . has also been attended to in [the Constitution]. . . ."

Alexander Hamilton, FEDERALIST #84

When he said, for example, that the Constitution was itself a bill of rights he was not speaking literally. Rather, he was trying to point out that once people assume sovereignty themselves and establish a government by a compact that is amendable, the critical problem is to structure the government and allocate its powers so that their individual liberties will be thereby secured. And he felt that this had already been accomplished in the Constitution because only specific powers had been delegated to the new government and, if those powers ever came to be abused, the amendment process was always available to the people as a recourse. In this sense, he saw a bill of rights as redundant and possibly even dangerous, since the rights itemized in it could be used in order to find a leeway around the Constitution itself. I think the early experience — witness the case of the Sedition Act mentioned above — indicates that this was a valid point.

Hamilton had a point — a list of rights could be abused

Lastly, in some ways I don't think the first ten amendments are really a bill of rights at all. I think it's a bit of a misnomer and an oversimplification to relate them to the traditional idea of a bill of rights. Traditional bills of rights were irrefutable broad statements of principle placed in the preamble — the only proper place — of a compact of government. Thus, while the First and Fifth Amendments do contain such statements, they and the other eight are subject to amendment — something that is itself a contradiction in terms since eternal verities cannot be subject to change. So, in the sense that Hamilton was arguing, maybe what we ended up with was not a bill of rights at all and, therefore, something not inconsistent with his defense of the Constitution in FEDERALIST #84.

The label is a misnomer

**Robert Kastenmeier:** It's probably true that Hamilton's fear — to cite the various rights would imply a grant of power that was not intended for the federal government — has not been borne out. Yet, it's still a very good question to ask: If there had been no Bill of Rights or if the Constitution had been even less far-reaching than is the case, would we be any different today as a society? It may be heresy to say so, but I think not — although it would have been more difficult to have gotten where we are. The evolution of law in the intervening two hundred years — through the courts, state and national legislatures,

The Bill of Rights was unnecessary

through common custom and through new events – probably has contributed more to what we have become than has the Bill of Rights.

**The Bill of Rights was important because it was there**

**Daniel Friedman:** To me the Bill of Rights was very important simply because it was there. Even if there wasn't much litigation about its provisions initially, it stood as a very visible moral barrier against government violation of individual rights. Today, every time the government decides what to do it's very aware of the Bill of Rights, reflecting the fact that it has become so much a part of our thinking and behavior that by definition it plays a tremendous role in all decision making. While no one can tell for certain what would have happened without it, I have a feeling that this country might not have developed the way it has at all.

**The federalists were insensitive**

**Harold Nelson:** The federalists' insensitivity to the very widespread public wish for a bill of rights ought to be mentioned. This subject was given short shrift at the Constitutional Convention – a pattern that continued afterward in the controversy over its ratification – and thus it wasn't until very late in the game that the federalists finally came to realize how deeply this was wanted. Hamilton seems to have written FEDERALIST #84 still not comprehending the depth of popular support for a bill of rights. Indeed, this apparent lack of understanding has been considered for many years to have been the federalists' greatest tactical blunder. So, I pretty much agree with Mr. Speiser that FEDERALIST #84 doesn't speak well to us today; it's the wider debates of the late 18th century that do.

*"It has been several times remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such [were] MAGNA CHARTA, the Petition of Right, the Declaration of Right [in England]. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations, 'We THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution.' Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights and which would sooth much better in a treatise of ethics than in a constitution of government."*

*Alexander Hamilton, FEDERALIST #84*

**Ann Diamond:** I disagree. I believe that the federalists simply thought that the states should retain full authority over the press, religion and other matters. They did not think they had delegated such powers to the national government; moreover, they believed it dangerous to do so.

**It was not insensitivity, but a different attitude about power**

Furthermore, when Madison later proposed the Bill of Rights, he was making a tactical response to the attacks that were being made on the Constitution – attacks directed at taking away a lot of the power that had been given up to the central government and returning it to the states. In so doing, I think Madison was trying to confuse the Constitution's critics by

getting a bill of rights in place of the structural changes that were being mentioned. He said as much in his June 8, 1789 speech in Congress when he introduced the new amendments. So, it wasn't an insensitivity but a different attitude toward where the power over matters of individual rights ought to reside. In short, I think that the federalists were just as committed to individual liberties as their critics were but simply had a different idea of the best way to protect them.

If not insensitivity, then curious blind spots

**Lawrence Speiser:** I want to add a brief footnote on the insensitivity demonstrated by those of the founding fathers who felt that the states, as distinguished from the national government, could infringe on free speech, press, and so forth when they wanted to. The Constitution does contain some protections for the individual *vis a vis* the states, but these provisions focused primarily on economic items, such as contracts or property rights. Another example of this insensitivity lies in the apparent contradiction between the language of the First Amendment prohibiting the establishment of a national religion and the fact that several states did have established religions. What these examples suggest is that the feeling about the Bill of Rights was an on-again, off-again kind of thing. While the reason for this may have been the prevailing fear of the power of the new national government, it nonetheless demonstrates that curious blind spots existed, as far as protecting individual liberties was concerned.

**Paul Conkin:** But, had the Constitution contained a provision specifically prohibiting the states from giving tax support to a church, for example, not one New England state would have ratified it.

The states versus the people — a potential problem the framers weren't concerned about

**Theodore Miles:** I think it's important to remember that the essential purpose of the Constitution was to perfect the very ineffective and much criticized central government of the Articles of Confederation, without doing so at the expense of the states or the people. In this sense the framers weren't, therefore, particularly concerned about the individual states' relationship to the people.

*"From a comparison and fair construction of these several modes of expression [by Congress in September 1786 and February, 1787] is to be deduced the authority under which the convention acted. They were to frame a national government, adequate to the exigencies of government and of the Union; and to reduce the articles of Confederation into such forms as to accomplish these purposes."*

James Madison, FEDERALIST #40.

**Daniel Friedman:** Perhaps the explanation for all this is that the federal system of government that was being created was a new beast. Uppermost in the minds of the framers was the experience they had undergone with the British system, wherein all power was essentially concentrated in the crown. What they were most worried about was what the role of the national government would be, and therefore they put into the Constitution a great number of prohibitions on what it could do. It was in this sense of being preoccupied with the

powers of the new national government that they apparently overlooked the possibility that the states might require similar controls.

State bills of rights took care of this – or did they?

**Paul Conkin:** I don't agree at all. Individual concern in the 18th century about free speech, press, petition, assembly and religion varied a great deal. Certainly almost no one wanted nearly the leeway in private expression that we take for granted today. Nonetheless, to the extent that people in each state wanted protection in these areas, provision was made in their respective constitutions or bills of rights. Indeed, there was in the whole concept of a federal system the pluralistic idea that different states could take different paths. John Adams and others, for instance, argued strongly that geographical, ethnic and religious differences dictated a pluralistic system on questions of personal freedom, knowing full well that local considerations would be involved in deciding the answer.

## Concepts of Rights

Rights defined – there are three categories

**Ann Diamond:** To a very great extent, the American concept of rights rests on the views of the great English philosophers, John Locke and Thomas Hobbes. Hobbes defined a right as the liberty to do anything that the laws do not forbid. Subsequently, Locke described the limits of the legitimate scope of government in order to establish and protect the realm of individual freedom. Briefly stated, the synthesis of their views was: certain fundamental rights inhere in the human condition, they preexist civil society and are, therefore, inalienable and outside the legitimate sphere of governmental authority.

There's also a second category of rights, those that are a result of political society and are meaningless outside of it. Among these are the three great rights the founders considered essential: jury trials, freedom of the press and freedom of religion. Such rights develop over time and eventually acquire the status of prescription, taking on the same aura of importance as the inalienable rights which preexist society and are thought to be in the nature of being human. These rights embody an essentially negative stance in regard to government, that is, that government either may not do certain things or may do them only in specific ways.

Lastly, there's a third category of rights, those created within and conferred by political society – in our particular case through the legislative process. These rest on the shakiest foundation, since rights realized through legislation – social security and medicare, for example – can also be taken away by the same authority.

**Paul Conkin:** There are, as Ann Diamond made clear, those who have always defined "right" in a purely positive or legal sense – as a politically sanctioned or protected leeway for behavior and nothing more. In this sense rights depend upon what the law is. But it's my understanding that in this country we have always used the word "right" in a moral sense – that any legitimate government had to serve certain moral

**Concepts of right:  
"life, liberty  
and property"**

**The American  
experience —  
declarations  
of rights**

ends. If a government does not serve such ends — which in the 18th century came to be expressed in that holy trinity, "life, liberty and property" — then it is by definition tyrannical.

It is in this sense that the words *law* and *right* were so often used, usually in the terms "natural law" and "natural right." Law and right are inverse expressions of the same meaning: law states the obligations and responsibilities of people toward each other, while right identifies the outcome of such realized law — if law prevails, then people will be secure in their right to life, liberty and property. Attaching the word "natural" reflected the belief that certain laws and individual rights inhere in the nature of things — in reality itself — often relating to God or other theistic concepts.

In this country, in contrast to European experience that was predicated on a political perspective dominated by absolute monarchs, the concepts of law and rights evolved differently. They were embodied in a series of declarations of rights in most, but not all, of the thirteen original states, in the form either of separate documents, as was the case in Virginia, or as preambles to the constitutions, such as those in Pennsylvania and Massachusetts. As declarations of right written into the preamble they were broad ethical statements about the purpose and end of government and, therefore, for a long time it was doubted that they would even have a role in the enforcement of law since they were not technically part of the constitution itself. Nonetheless, there were those at the federal Convention of 1787 — the preeminent author of the Virginia Declaration of Rights, George Mason, among them — who thought that such a broad statement of principles ought to be included in the Constitution. As we know, they were overwhelmingly defeated when they introduced a motion to this effect toward the Convention's close, so it was left to the states to raise the outcry that ultimately led to the first ten amendments.

# **The Bill Of Rights Today: Old Dilemmas, New Problems and Questions.**

All too often, people regard the Bill of Rights as a theoretical "something-out-there," having no practical role in their everyday lives. Yet many a heated debate going on in living rooms, offices, factories and elsewhere is rooted in one of the "first ten." For example, states' rights advocates have justified their views in terms of the Tenth Amendment. Similarly, gun control opponents often base their arguments on the Second Amendment phrase "to keep and bear Arms." The ways in which First Amendment guarantees touch our daily lives are almost endless—the newspapers we read, the public speaker we hear, the meeting we attend, the faith we follow.

This relationship between the Bill of Rights and our daily lives proved to be a major concern of the seminar participants. Reflecting this concern, a wide-ranging discussion developed, touching on salient aspects of the First, Second, Fifth, Sixth and Tenth Amendments. In each case, the discussion swirled around two pivotal questions: Are more problems and uncertainties arising than ever before about the potency of the Bill of Rights in safeguarding the principles and guarantees embodied in it? If there are, what does this indicate about the state of individual liberty in mid-20th century America?

## **The First Amendment: The Mass Media and the Problem of Access**

**Harry Ashmore:** I'm astonished that our discussion has assumed that the media are still newspaper-oriented, when in fact this is no longer true. The advent of broadcasting has given us, among other things, a national communications sys-



tem — a fact that raises a set of considerations that were absolutely unthought of when the First Amendment was adopted. For instance, the existence of the Federal Communications Commission to oversee licensing of the media would have been profoundly shocking to the libertarians of the 18th century. Indeed, "licensing" was the scare word they used when they talked about censorship. Well, we're in the licensing business now, and most of the information we receive comes to us under a grant of federal authority — with all that this may imply *vis a vis* the First Amendment.

**The advent of mass communications — the access problem**

**Mary Ann Yodelis:** In the 18th and 19th centuries, when freedom of the press was talked about it was discussed in terms of the press's ability to inform the public of government's activities. But now, because of the advent of mass communications and because the communications industry has become so technologically complex and expensive, the question of how the people can gain access has arisen. One can't go out and easily buy and/or run a newspaper or a television station — a printing press alone, for example, can cost thousands of dollars. These new developments raise the problem of getting before the public diverse opinion about what government is and should be doing — a question now being considered by various citizen interest groups

**The access problem — democracy versus boredom?**

**Harry Ashmore:** The complexities involved in access are readily apparent in the recent controversy involving the public broadcasting station in San Francisco, KQED. The station is very democratic, insofar as its 140,000 dues-paying members elect the board of directors by mail ballot. Nevertheless, it is being sued by a group of counterculture people who claim that the representation it provides does not adequately reflect their interests and that, since KQED is a public station, it should. The station management has replied (and I think they're right), "If we devote a certain portion of air time to the views of these people, we'll lose our audience and our dues-paying members."

Though it is perhaps impossible to prove this one way or the other, I think the issues raised have a good deal of merit. If one's purpose is to create and sustain a general audience — something broadcasters do for commercial and other reasons — there's no way in the world it can be done by absolute participatory democracy. The audience, I'm sure, would simply dissipate out of sheer boredom.

**Unlimited access to a mass audience is impractical**

**Daniel Friedman:** As a practical matter, I don't think we can expect all the people to have access to a national audience. We would have chaos if every year one, two or three million people got access to the national media to present their points of view. Suppose, for instance, that the government decided to make the granting of licenses contingent on the licensee's making at least two hours of air time a day available to members of the public who want to be heard. The immediate question that arises is, How many people would listen? But even more important, if five thousand people say they want to be heard, who is going to decide who gets on the air and on what basis? If the

decision is left to the station, there's a danger that something important might be shut off; if it is left to the government, there's the real danger of censorship

**Theodore Miles:** I think it is possible to find ways to engineer access, especially in the context of licensing procedures. Some public and commercial stations, for example, have programs consisting entirely of people calling in, some air town meeting-type programs; others incorporate a letters-to-the-editor segment in prime time news.

**Access to a local audience is more feasible**

**Robert Kastentmeier:** A better balance in this respect might ultimately be realized if individuals or groups gain access to local media via cable TV and other technological innovations that are now becoming available.

**Harold Nelson:** But when did any large number of individuals ever have access to a mass audience? Generalizations about the little newspaper of the 19th century, for example, are really full of dubious assumptions. If the "mass audience" in that day was the people of your town or state, then I suppose we can argue today that the national mass audience is more important because the federal government and national concerns are more important. Yet in this kind of reasoning—extending what was once true to what's now true—it seems to me you get into a never-never land. In any case, I don't think very many people ever had access to a mass audience and therefore perhaps it isn't necessary now.

**Have we ever had access to a mass audience?**

## First Versus Sixth Amendment Rights: The Free Press-Fair Trial Dilemma

*"The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury . . ."*

Alexander Hamilton, FEDERALIST #83

**Judith Helmann:** I would like to hear what the panel thinks about the free press-fair trial dilemma.

**Harold Nelson:** We might get some insight on this point from the case currently up for review by the Supreme Court, *Nebraska Press Association v. Stuart* (1976),<sup>3</sup> which deals with the

<sup>3</sup> On June 30, 1976 the Supreme Court ruled unanimously (9-0) that the gag order imposed in this case contravened the First Amendment's free press guarantee. The majority, however, declined to rule that a gag order on the press can never be justified, although their opinion made it clear that it would be extremely difficult to find circumstances that warranted its use.

question of whether or not a fair trial can be had with the press and media being able to report beforehand specific statements made in open court, such as those regarding confessions and prior criminal records. It seems to me that the press cannot easily justify reporting such pretrial specifics

The problem of  
free press-fair  
trial - a classic  
case of rights  
in conflict

**Harry Ashmore:** This Nebraska case is a classic example of a head-on collision between conflicting rights. I've always assumed that the reason court proceedings are public - that the press has access and can't be gagged - related to the rights of the defendant. It was to protect the defendant from star-chamber proceedings\* by insisting that a trial had to be open to public view. Reporters were allowed in because in effect they were representing the public and were therefore entitled to be there. Yet there isn't any question that there is such a thing as prejudicial publicity and that such publicity can affect jurors before and during a trial. For example, it seems to me that the coverage of the Patty Hearst case was a disgrace because the reporting became trivialized and sensationalized. I don't think the public got the impression that what was going on there was a great human tragedy and I think the court, the lawyers and the press are to blame. I haven't resolved your question, except to emphasize that it's a classic example of the kind of moral-legal problem that the courts ultimately resolve only with the greatest difficulty.

Gag rule  
guidelines:  
a solution?

**Mary Ann Yodelis:** I certainly agree that this is one of the most difficult questions, one that the Wisconsin Bar, Judiciary and Press Joint Interest Committee has been working on. Wisconsin, incidentally, has had for a number of years ethically binding guidelines requiring that the press not print materials that might become prejudicial publicity. But the big issue now is whether the drawing of guidelines for gag rules might encourage the courts to use them more frequently. The response to a recent poll on this issue seems to be split down the middle: half of the journalists accept the guidelines, the other half do not; the same split occurred among the attorneys - half of whom suggested that this is something that simply ought to be part of ethical practice.

*The Court of the Star Chamber (1487-1641) was a body consisting of "the Lord Chancellor, two common-law judges, a high prelate and an indefinite number of king's councillors. Formalized by act of Parliament it enabled king and council to bypass nearly all the processes and safeguards of the English common law. The judges did the trying, determined the guilt and imposed the sentence. It did indeed prove efficient, and for many years its popularity was high. But like all possessors of arbitrary power, it was corrupted by its own authority and its methods. Turning from the chastisement of robbers to the suppression of political and religious freedom, it made injustice swift, sure and terrible." Irving Brant, *The Bill of Rights - Its Origin and Meaning* (New York: New American Library, 1965), pp 94-95.*

# The Second Amendment: Gun Control and the Right to Bear Arms

**Donna Schiller:** Since gun control has become an important issue many people have become concerned about the meaning of the Second Amendment. Does it simply refer back to the individual's right to bear arms or is it hung on that clause referring to the need for a well-regulated militia?

*"If a well-regulated militia be the most natural defense of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security the plan of the convention proposes to empower the Union 'to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.'"*

Alexander Hamilton, FEDERALIST #29

**Lawrence Speiser:** The Supreme Court answered this question in *U. S. v. Miller* [1939] in which it upheld a gun control provision — albeit not a very strong one — on the basis of a well-regulated militia. In other words, in this decision the Court was saying that gun control does not violate the Second Amendment. In this sense, the gun control problem is not judicial or constitutional, but legislative — a question of public opinion versus the lobbying clout of the National Rifle Association

**Gun control:  
the Second  
Amendment  
doesn't prohibit it**

**Willard Hurst:** I agree with Mr. Speiser. The Supreme Court has tied the Second Amendment very narrowly to a state's right to have its own armed force, thereby conceiving of gun control as not involving individual rights at all.

**Daniel Friedman:** The attacks on gun control are couched in terms of the Second Amendment because implying that such legislation would violate the Bill of Rights get people's hackles up. However, a substantial number of people — hunting groups and scores of others — are opposed to the basic principle of gun control because they see licensing as an entering wedge of federal control in other areas of their lives — the old business, if you let them go so far there'll be no stopping.

**Harry Ashmore:** I think another factor should be pointed out. In the 18th century a great many people still lived on the frontier, and for them guns were a necessary tool for hunting and in their constant state of semi-warfare with the Indians. Today, however, I can't see anything that's been said that would militate against licensing. Gun control would not necessarily disarm everybody, instead, it would simply require registration of guns. Consider, for example, that every state in the

union already requires licensing for hunting. This requirement hasn't raised any constitutional questions, and I don't believe registration of guns would either

*"Previous to the Revolution, and ever since the peace, there has been a constant necessity for keeping small garrisons on our Western frontier. No person can doubt that these will continue to be indispensable, if it should only be against the ravages and depredations of the Indians. These garrisons must either be furnished by occasional detachments from the militia, or by permanent corps in the pay of the government."*

Alexander Hamilton, FEDERALIST #24

**A different view  
- should a  
sizeable minority  
be protected from  
the majority?**

**Daniel Friedman:** While I don't have any doubt about the constitutionality of these various gun control statutes, on the other hand, might this not be an area where the majority should be prevented from imposing its will upon a substantial minority? If there really are so many people against gun control legislation, perhaps one of the roles of the Constitution is to prevent Congress, as the representative of the majority, from forcing its view on them.

## The Fifth Amendment: Property, the "Richest" of Rights

**Joan Lawrence:** I've always heard of the right to life, liberty and property, but in my own mind I have tended to denigrate the right to property. I was surprised, therefore, when it was referred to as one of the richest of rights and would accordingly like to hear more about it.

**Property: equal  
access to what  
God gave all  
people in common**

**Paul Conkin:** As the concept of property has developed over time it has essentially involved equal, nonmonopolistic access to both the resources of nature and the means of production. Rudimentary in the labor theory of value - the proper source of property is one's labor - and in most discussions of the moral concept of property is the idea that no one has a right to preclude other people from having access to what God gave mankind in common. In that sense the preeminent moral meaning of property entails a right to acquire it, as well as keep it. It was later in the process of its development that we made property primarily entail the right to keep something we already have, i.e., we gave it a legal and vested meaning rather than solely a moral meaning. This is, perhaps, largely a result of the emphasis we have come to place on the right to retain the product of one's own labor.

In his *Second Treatise on Government* [1690], which contains the best definition of natural property, John Locke discussed the inherent facets of property - access to nature and labor returns - as being indispensably tied to being free. We can't be free, autonomous, independent people if we're under

**Liberty – an extension of property**

other people's domination and control, if someone has the access to nature locked up and we have to go through him in order to get our livelihood. Thus, the basic concept of liberty is, in a sense, deductive from the right of property. And this provides a beginning toward the definition of property that was used in the Virginia Declaration of Rights and subsequently in the preamble to the Declaration of Independence. In the latter, "the pursuit of happiness" implied both property in the very narrowly restricted moral sense and the concept of liberty derived from property in the less restrictive access and labor sense. That's why I say the word "property" is terribly complex and rich in meaning. It embraces to the fullest extent concepts of autonomy, of being independent, of being free from slavery, serfdom or any type of entangling dependence on other people, particularly with regard to our work and our livelihood.

*"The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties."*

James Madison, FEDERALIST #10

**Property is intangible as well as tangible**

**Ann Diamond:** As a footnote to this, I have just reread a marvelous newspaper commentary that James Madison wrote on the subject of property in which he defines it in the broadest sense, including all the things we just heard. However, he also includes the Lockean idea that you have property in your opinions – the free communication of them – and in your rights of conscience. In other words, man has not only tangible property but intangible property as well. So, I agree that the concept of property does open up a very large area for consideration.

**Harry Ashmore:** I think it would not be an exaggeration to say that the great political question of this age is whether or not one can have individual liberties without private property.

*"Government is instituted no less for protection of the property than of the persons of individuals."*

James Madison, FEDERALIST #54

**The concept of property has a public as well as private side**

**Willard Hurst:** Just to put a slightly different emphasis on what Professor Conkin said – I think he would probably agree that one can look at the constitutionally established right of property as a protection of human individuality and the creative will *vis a vis* the allocation of scarce resources. But on the other side of the coin is the demarcation between what is public and what is private, particularly the notion very much stressed in Locke that no individual should have to depend on the license or favor of some public official in order to initiate decisions on how to acquire and use these scarce resources.

**Paul Conkin:** I would like to make clear that *natural property* –

**Natural property is a narrow concept**

that sense of the term in which certain types of ownership or possession are inherently tied to any chance of human fulfillment — is a narrow concept. Even Locke did not think that all types of property in a society are or should be natural. Beyond the elemental ethical principles fulfilled by natural property, Locke thought that a society may choose to vest ownership rights in many different things, money being an example, having nothing to do with natural property. When in a scarce economy you vest ownership of the land, and particularly when you protect unearned increments of value (the enhanced value of land attributable to increased population and scarcity) as we do in this country, you've already moved far beyond this narrow concept of natural property. Indeed, you may even threaten it.

**Conventional forms of ownership can curtail natural property rights**

This threat exists because it is conceivable that many types of conventional property do not qualify as natural property in the most ancient sense. Even though in our society we hope that the basis for property lies in the public will as expressed in public policy, conventional, accepted and/or legally vested forms of ownership can nonetheless curtail one's natural property rights. In other words, any type of property that tends to make the people servants or slaves, that prohibits their access to a livelihood, that violates the right to initiate decisions in their own life is contrary to natural property. For example, consider the absurd possibility of one person owning all the land and resources — what would that make the rest of us? To say that his property is protected under the concept of natural property rights would be a mockery of our language and the very meaning of the term.

**The ancient concept of property is anachronistic**

**Lawrence Speiser:** The last thing in the world I want is for us to go back and put "life, liberty, or property" on the pedestal it once occupied. Though it may have been a valuable 18th century tool to help convince the political powers that be to adopt the Constitution, I think it would just be a step backward to put that holy trinity up on the altar again.

**The ancient concept of property can be a useful comparative learning device**

**Paul Conkin:** You misunderstand me. I agree that proposing to restore the ancient concept of property today is so radical that it's beyond any possible realization. I can't think of anything that would be more disruptive to our present society, especially since we're a nonpropertied society as a whole — probably less than twenty percent of the people are property owners in the sense of the means of production. Certainly we no longer have any semblance of what the 18th century meant by free enterprise. What I do mean is that these old moral concepts of property and free enterprise may have some value — if one uses them in their original context — as a means of criticizing existing society; as a way of understanding some of the elements of hierarchical subordination that do exist in our present economy; as a way of explaining why people have a sense of futility and a lack of control over their lives.

**Daniel Friedman:** I'd like to stress the point that what the Fifth Amendment protects is deprivation "of life, liberty, or

**The concept of property—a question of “due process”**

property, without due process of law.” Thus, the issue is not just a question of defining property or going back to the 18th century definition, rather, it’s the problem of how the vague phrase “due process of law” is used to deny people these rights.

**Willard Hurst:** While I agree with Professor Conkin that we are no longer a propertied people in the late 18th century sense of the term, I think the Lockean idea of the legal protection of the individual’s access to economic assets is still very potent in view of the fact that most people are wage and salary recipients. The value of money, for example, has come under expanded protection as a form of property. When we say that a house renting for \$100 a month should be rented to anyone who turns up tendering the \$100, regardless of race or religion, we are in effect saying that we are going to guarantee \$100 worth of the property right to buy rental facilities. When we say that otherwise qualified individuals should not be denied opportunity to a job because of race or religion or should not be arbitrarily dispossessed of their job and should be protected by the processes of collective bargaining from arbitrary impositions of discipline, we are protecting a kind of property right in the employment area. When we expand, as we have done in the 20th century, a vast array of administrative controls over financial institutions on which more and more people rely—insurance companies, mutual funds, pension funds and the like—we are in a very real sense protecting 20th century private property in a way that is intimately related to the humane quality of individual life the ancient right of property implied.

**The concept of property—18th and 20th century parallels**

**Paul Conkin:** I agree completely, and of course that’s why I say the old moral concept of property is a potentially valuable critical tool. If one took literally the fuller development of the concept of property you talked about, however, I would have to agree with the revolutionary bicentennial groups who maintain that being employed by large corporate enterprises, large associations, or similar collectivities—we have a largely collective economy today—should after a time procure other vested rights for the worker, such as ownership rights or more job security rights than are now normally found in such institutions. If workers could have a sense of ownership, participation in decision-making and greater job security, then I suppose that the old moral meaning of property, added to what you’ve already mentioned, would come much closer to realization.

**The concept of property: bridging the gap between 18th and 20th century realities**

## **The Tenth Amendment: A Resurgence of States’ Rights?**

*“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in*



the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

James Madison, FEDERALIST #45

States' rights  
- 20th century  
aberration  
versus 18th  
century reality?

**Harry Ashmore:** While we look upon states' rights as some kind of aberration, it was a very big practical and theoretical issue in 1787 because the founding fathers were faced with the problem of needing to take power away from the states, all of whom considered themselves to be sovereign entities. Furthermore, I think the reserved powers clause of the Tenth Amendment had an implication that went even beyond the powers reserved to the state governments, turning as it does on the notion that there are certain inherent powers that reside in the people and that those powers weren't vested in government unless they were specifically delegated.

"It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities."

Alexander Hamilton, FEDERALIST #17

States' rights  
- pretty much  
a dead issue

**Theodore Miles:** Constitutional adjudication under the Thirteenth, Fourteenth and Fifteenth Amendments and the commerce clause [Article 1, Section 8] has extended the reach of the national government so far that as a practical matter states' rights is pretty much a dead issue. In other words, if the federal government wants to regulate a particular area, it can do so and pretty much expect not to be challenged successfully by the states. Indeed, while the reach of the national government at first tended to be confined to federal-state issues, now it even extends into the area of the states vis a vis the individual. For example, just recently Title VII of the Civil Rights Act was amended to allow suits against state governments for discrimination against individuals. In short, the earlier protections that came into existence as against the federal government have been almost completely absorbed into the relationship between states and individuals.

**Ann Diamond:** Didn't Colorado recently try to use a states' rights approach on the question of protecting its natural resources, and haven't some other states done the same thing? I don't know if they had any success, but I do think it's the same old states' rights argument they're using.

States' rights  
in the 20th  
century - is  
a change  
taking place?

**Daniel Friedman:** Perhaps a change is taking place - I don't know that the Supreme Court is going to remain so receptive to this notion that the commerce clause allows the federal government to do virtually anything. This possibility was raised in a case involving the constitutionality of an extension of the Fair Labor Standards Act to cover all state employees.

*National League of Cities v Usery* [1976] It's far from clear that the Court is going to uphold that statute.<sup>5</sup> An enormous amount of hostility surfaced during the oral argument — something I'd never seen before — when Justice Powell interrupted the Solicitor General, who according to custom had begun to describe some of the facts of the case, saying, "I don't want to hear any of the facts, I want to know what the legal theory is under which you think the federal government can come in and take over the states."

" each of the principal branches of the federal government will owe its existence more or less to the favor of the state governments, and must, consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them."

James Madison, *FEDERALIST* #45

Another example is in the litigation that has resulted from attempts to implement the Environmental Protection Act. Under this law the federal government sets the standards and it's then up to the states to implement them. But suppose a state refuses, maintaining that it's perfectly happy with things as they are. The issue therefore becomes: Can the federal government force the states to enact legislation to correct certain environmental problems and further require them to appropriate 10 or 20 million dollars a year to enforce it? The feeling I get from these examples is that perhaps we're becoming concerned that "Big Brother" is so big now that he's going to take over everything.

**States' rights  
versus federal  
preeminence:  
a recurring  
question**

**Robert Kastenmeier:** Rather than being an issue that is ultimately settled one way or the other, the states' rights-federal preeminence question is a recurring one. For example, Congress recently considered a bill that would enable past and present felons to vote. Action on this legislation was stalled (and remains deadlocked) by two questions: Should the law apply solely at the federal level or at both the state and federal levels? Can the states be forced to comply if they don't want to? On the other hand, in considering the Newsmen's Privilege Act — a bill protecting reporters from being forced in certain situations to reveal their sources — Congress would have required that it be applicable to the states as well as to the federal government, because of the pervasive influence of the mass media. Even though this bill died in committee, I have the distinct feeling that Congress would have prevailed on this point. So, the states' rights-federal preemption question occurs in many areas and will continue to do so. This is not to deny, however, that there has been a resurrection of resistance at the state level to federal intrusions into areas where the states had formerly been considered preeminent.

**Willard Hall:** I just want to take exception to any blanket condemnation of the expansion of the power of the federal

<sup>5</sup> In June 1976 the Court did in fact rule that the extension of the Fair Labor Standards Act in question was unconstitutional.

**The expansion of federal power: blanket condemnations should be avoided**

government, because I think it is unrealistic to do so without also taking into account the reasons why it has come about. The commerce clause, among other things, has expanded because in the last hundred years ours has become an increasingly interdependent economic market system. For example, whether one state is willing to tolerate a degree of air pollution that its neighbors won't isn't solely its own business, since the spillover is bound to affect other states. This is one of the penalties of being part of a federal system—you are that much more vulnerable to what is done by your fellow sovereigns.

*"If the people should in future become more partial to the federal than to the state governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due."*

James Madison, FEDERALIST #46

Similarly, on the matter of revenue it seems clear that we have moved into an era of policy problems where the only purse big enough to deal with many resource allocation questions is the national purse. I don't think it makes very much political or moral sense, moreover, to say that the federal government should supply the money but pay no attention to the uses to which it is put. These are all areas of allocating economic resources; I would not necessarily defend the expansion of federal power in other realms of policy.

**Harry Ashmore:** Regardless of the legal interpretation of the question of states' rights—which I agree may very well be changing now as a result of perceptible shifts within the judiciary—we must realize that there has certainly been a growing popular protest against government and especially the federal government. Indeed, in the political campaigns of 1976 everyone's running against Washington—a strong indication of the anti-central government sentiment that has been surfacing in recent years. We've even disinterred John C. Calhoun and are suddenly beginning to pay attention to him as a political philosopher, which is probably not such a bad idea, because his doctrine of the concurrent majority—that the Union can only hold together if it doesn't push polarizing issues too far—was very important and seems to have much to say to us today.

*"Everything beyond the nature and extent of the powers as they are delineated in the Constitution must be left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is hoped will always take care to preserve the constitutional equilibrium between the general and the state governments."*

Alexander Hamilton, FEDERALIST #31

**The doctrine of states' rights is alive and relevant**

# “... The Right To Be Let Alone – The Most Comprehensive and Valued of Rights . . .”<sup>6</sup>

While many rights-related problems are a question of conflicting interests and viewpoints, the right to privacy – which, ironically, is nowhere specifically mentioned in the Bill of Rights, or the Constitution – appears to be one about which there is virtually no disagreement. All of us seem to be somehow concerned about privacy, particularly as the specter of “Big Brother” becomes more and more plausible as a result of the miniaturization and proliferation of space-age technology. No discussion of individual liberty and the Bill of Rights, therefore, would be complete without trying to come to grips with such complex issues as the institutional (government, business, and so on) need-to-know versus one’s right to privacy; the right to be informed versus the right to privacy; individual expression (lifestyle, clothes, hair, and so on) versus conformity; in short, the “right to be let alone” versus 20th century encroachments thereon.

## Privacy: Libel, the Mass Media and the Right To Be Informed

**Privacy versus the public’s right to know: the Sullivan doctrine**

**Harry Ashmore:** As a journalist and former newspaper editor, the issue that most quickly comes to mind when privacy is mentioned is the problem of libel. Having lost some libel suits in the past, I led the cheering when the Supreme Court in the famous *Sullivan*<sup>7</sup> case came very close to repealing the law of

<sup>6</sup> Justice Louis Brandeis, *Olmstead v. United States* (1928)

<sup>7</sup> *New York Times v. Sullivan* (1964), in which an advertisement pub-

libel. Now, after ten years of experience with the new climate generated by this decision, I'm beginning to have some second thoughts, especially as this may bear on privacy.

**Harold Nelson:** As far as stories about persons and personalities are concerned, some real checks may be coming on the great protection given the news media under the *Sullivan* doctrine. The fact is, it was in the realm of privacy that this doctrine was carried very early to its apogee. The Supreme Court decided that any "public figure" involved in a matter of general interest or concern—even if accidentally, unwillingly, unhappily or protestingly—finding her or his privacy invaded by a news story would have to go to great lengths to recover damages. But in the last couple of years the area of protection for the media has shrunk—notably in two recent major cases, *Gertz v. Robert Welch, Inc.* [1974] and *Time, Inc. v. Firestone* [1976]—and therefore it's not going to be as easy as in the last decade for the media to defend themselves against suits brought by private persons. I think we might anticipate that the area of privacy will continue to get more of the kind of protection embodied in these recent decisions.

**Have reporters become less accurate and/or responsible?**

**Danfel Friedman:** In the past, the only thing many publishers were always concerned about was defamation suits. Before they would permit an article to be printed they'd check out every detail that was in any way derogatory to be sure they had backing for it. What concerns me is how much the *Sullivan* doctrine, once it gave journalists a little more license in this respect, may have encouraged them to make some less accurate and perhaps slightly more irresponsible statements.

**Harold Nelson:** I'm not sure that your fear has much basis. The number of libel suits hasn't really declined much, even though the number of recoveries was vastly reduced and, therefore, the expense of defending against such actions has remained very much on an editor's and publisher's mind.

**Accuracy remains high—but the *Sullivan* doctrine has caused "P.R." problems**

**Mary Ann Yodelis:** The problem with the *Sullivan* doctrine, as some of the decisions that have come out since then have indicated, is that one has had to go pretty far in order to prove that a journalist acted with malice knowing that his or her statements were false, or with reckless disregard of whether they were false. This has caused public relations problems for the press because many people feel that journalists now have

lished by the *New York Times* attacking the conduct of Alabama law enforcement officials during some civil rights demonstrations became the basis for a \$500,000 libel suit brought by the Montgomery Commissioner of Public Affairs. The Supreme Court reversed the Alabama jury decision in favor of the plaintiff, holding that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ." One of the major effects of this ruling was to bring under federal aegis a significant segment of libel law that had previously been the exclusive preserve of the states

too much license. In actual practice, however, I think the press has been just as concerned as ever with trying to continue its high standards of checking out materials, of trying to establish two or three credible sources for problem areas, and so on.

An ominous development?:  
"The New Journalism"

**Harry Ashmore:** I'd have to file a mild dissent to those statements, because of the serious reservations I have about the growth of the so-called "new journalism." Basically, while the new journalism—a good example is the new book by Robert Woodward and Carl Bernstein, *The Final Days*—includes the usual checking of facts, sources and so forth, it also goes beyond them into the realm of the novelist, telling you what Mr. Nixon was *thinking*. I find this a rather alarming trend because it seems to have become a pervasive force in newsrooms across the country.

## Privacy: "If the Government Doesn't Get You, the Computer Will"

Privacy and technology—a problem the founding fathers didn't foresee

**Madelyn Bonsignore:** We've slid past an important dimension of the right-to-privacy question—the feeling many of us have that we're all just numbers and that if the government doesn't get you, the computer will. I think it's the prosaic, trivial and highly personal perceptions of the loss of privacy that are uppermost in the minds of ordinary citizens: the out-of-state traffic ticket that somehow is recorded on your driver's license, the machines of the credit bureau, the whole third-class mail question—who can get hold of your name and so on. I'd like to hear the panel address such matters precisely because they are a dimension of the privacy issue that was totally unimagined at the time of THE FEDERALIST PAPERS.

The subtlety of eroding privacy: an illustration

**Lawrence Spelger:** Not long ago I had an experience that I think usefully illustrates some of the subtly complex and insidious facets of the right-to-privacy issue. Knowing that Congress had somewhere enacted a kind of limited prohibition on the use of social security numbers—individuals have a right to know the purpose of such a request and whether or not a state or local regulation requires this information—I was surprised to receive an IBM card telling me to go down to the District of Columbia Department of Motor Vehicles and bring my social security card if I wanted to renew my operator's permit. Since this seemed to be more than just a question of what one's number is, I wrote asking what the basis for this request was (Just to backtrack for a moment, an explanation is supposed to accompany such a request at the time it is made.) After a few weeks I got a mimeographed sheet providing the answers, but I'm the exception to the rule—most people aren't going to take the trouble to write and ask. Still worse,

the day I went to the Motor Vehicle Bureau a man came up to renew his license who didn't have his social security number, whereupon, the clerk, without any explanation, refused to process his application. This is a perfect demonstration of how easy it is for executive agencies to violate both the spirit and the letter of the law at the expense of one's right to privacy.

**Robert Kastemeier:** I can only respond by saying that I think we're making progress; although the question remains as to whether or not our efforts will be able to keep up with the technological advances being made. For example, Congress recently approved the Mid-decennial Census, but only after having deleted the criminal penalties and the \$100 civil penalty for nondisclosure of information by individuals. The Census has also begun to move away from the long-lived practice of asking more and more questions, which were then used for more and more purposes.

Confronting the  
problem: signs  
of progress  
in Congress

Another promising sign lies in the bill just passed in the Subcommittee on the Courts, Civil Liberties, and the Administration of Justice, called The Bill of Rights Procedures Act.<sup>a</sup> This bill deals with violations of privacy by public and private institutions by attempting to curtail, or at least require an accounting for, certain practices, such as their accessing themselves to your bank or credit card records, looking at the cover of your mail or conducting telephone overhearings.

All this goes in the direction of redressing some of the grievances that an ordinary citizen would have on invasions of privacy. Congress has even begun to move toward the possibility of requiring a warrant for national security wiretaps for intelligence-gathering purposes, though this doesn't ordinarily lie in the course of business affecting most individuals. Therefore, I am rather more hopeful at the moment than distressed.

Privacy:  
a matter  
of balancing  
conflicting  
interests

**Daniel Friedman:** It's rather interesting that this discussion has been in terms of action by the Congress. Yet, legislative actions are not part of the Bill of Rights, but are, rather, steps taken by Congress to carry out what they believe the will of the people to be. I think this is the way it should be, because it's the function of the legislature, acting as the representative of the people, to try to balance conflicting interests. For example, in the Freedom of Information Act Congress has said that ordinarily people do have the right to get information from the government; yet this law also contains specific exceptions that Congress saw were needed if the government were to continue to be able to function effectively.

Another example of these competing interests lies in the question of access to one's F. B. I. files. At first glance this idea of access sounds fine—every government employee should have the right to see anything in his personnel and official files. But let me put this question to you: If you were being asked to recommend a candidate for federal employment about

<sup>a</sup>The House Judiciary Committee failed to report out this bill, although it is likely that it will be reintroduced in the 95th Congress

whom you had some very derogatory information, how likely is it that you'd be candid if you knew that your remarks were going to be made available to the individual in question? The answer is, you're going to pull your punches, the end result of which is likely to be that someone will be hired for a government job who really should not get it.

**Theodore Miles:** But what about the other side of the coin? If you're applying for a job and don't get it because someone has provided incorrect or malicious information about you, how would you feel about having had no opportunity to confront this information?

**Privacy and the  
"secret accuser":  
where does the  
balance lie?**

**Lawrence Speiser:** This argument about the secret accuser has gone on for many years, but I would balance it the other way. When you talk about people providing information about others, you have exactly the same problem that exists in the criminal justice field, unless such people are willing to stand behind what they say, the information provided cannot and should not be used by the government in a detrimental way.

I've heard investigative agencies say that stricter standards in this area would dry up their sources of information, and that this applies not just in the field of government employment but other areas as well. My answer is twofold: 1) I'm quite willing to lose the kind of information provided by people who will not stand behind what they've said; 2) they've never really tried another way, and I'd like to see some results from that kind of experiment before I draw any final conclusions.



# The Bill Of Rights: Prospects

In 20th century America, where progress is so closely identified with change, it sometimes seems that the "outmoded trappings" of the past are too readily discarded in favor of the present's "new realities." Not surprisingly, therefore, when questions about the continued efficacy of our political institutions arise, it is often suggested that we need to revise or even entirely recast "outdated documents" such as the Bill of Rights. These proposals, however, evoke an immediate counter-question: Would tampering with such venerable documents cause more harm than good?

## Is It Adequate?

**Harry Ashmore:** I wouldn't change the Bill of Rights, primarily because I think it's dangerous ever to reopen a document of this kind. The Constitution has enormous symbolic importance. Indeed, the Constitution and the Supreme Court are really the only unifying symbols we have, incorporating a notion of tradition and history — "the supreme law of the land" — that at times has seemed to embody almost magical powers. I personally witnessed the power of this mystique in Little Rock during the school desegregation crisis in the late 1950s and can testify to its authenticity.

**We don't need to rewrite the Bill of Rights, we need to adjust governmental powers**

The most urgent business ahead of us lies not in rewriting the Bill of Rights but in making all levels of government conform to the drastically changed situation in this country. For example, there's going to have to be some kind of fundamental redistribution of governmental powers among the local, state and national governments. We now have a concentration of federal power far beyond anything the founders envisioned, and therefore we've got to see what functions can be brought closer to the people and which ones ought to remain under the central government.

**Lawrence Spelser:** I don't want to reopen the Bill of Rights for the very reason that Mr. Ashmore just mentioned — because it would open a Pandora's box. Furthermore, I'm not certain that many of its existing provisions would be adopted if they had to undergo ratification again, so I wouldn't want to take a chance in that respect either.

Instead, I'd like to see state bills of rights expanded to further specify our individual rights, since all too often it is not

**A better alternative: expanding and/or revising state constitutions**

**Vagueness: a major strength of the Bill of Rights?**

**Considering the question of revision: a useful exercise**

the Supreme Court that has the final word but, rather, the clerk down at the county courthouse. While that clerk might never read a Supreme Court decision, he or she might read a state bill of rights in which things are set out in greater detail than in the federal Bill of Rights

For example, while the First Amendment provisions pertaining to freedom of religion and separation of church and state have been interpreted by the Supreme Court as being applicable to atheists, when such a question comes up before a clerk who has to have someone swear an oath, all kinds of problems occur. The obvious dilemma here is, How can an atheist swear an oath? The Bill of Rights specifies freedom of religion, yet it doesn't say anything about freedom of irreligion.

**Daniel Friedman:** I think it would be a mistake to try to particularize the Bill of Rights a great deal more. Indeed, its major strength lies in its vagueness, which has enabled the courts to find a basis for adjusting general governing principles to the temper of the times. As soon as specifying and particularizing take place, the latitude the courts have used in facilitating adjustment to change would tend to be circumscribed.

**Robert Kastenmeier:** Even if one agreed that it would be better not to rewrite the Bill of Rights, it might be useful nonetheless to go through the exercise of doing so, in order to learn from what it might look like if we did. In the First Amendment, for instance, we could strike the word "Congress," so that no authority could presume to make a law abridging the rights of free speech, press, religion or assembly. Next, both the Second and Third Amendments appear to be unnecessary. In such a theoretical exercise I would make the Fourth Amendment clearer and would probably add provisions regarding privacy to it. I think the language in the Sixth Amendment on the rights of the accused in a criminal prosecution ought to be restated. On number Seven, why not allow matters coming under its purview to be handled by statute, rules of civil procedure, and the like? The item in the Eighth Amendment on excessive bail could be placed into the Sixth and could be further amplified to conform to present law. The Ninth and Tenth Amendments are really far more difficult to deal with in terms of the implications to be drawn, so I would probably leave them alone.

**Paul Conkin:** If I were rewriting the Constitution, at the beginning I would have a general preamble on certain purposes and ends of government. I would do so because at that level of ethical principle one can affirm without any reservation that life and liberty ought to be respected and that we shouldn't enslave or kill people arbitrarily. But, while one can be absolute in the statement of general principles, when it comes to the actual functioning of rights in society it's always in part contextual. That is, it's something that develops over time, through the implementation of principles and even constitutional articles, through legislative processes and, in our country especially, through an elaborate judicial process.

Rather than trying to resolve practical problems by redrafting bills of rights, I think it would be better to try to do so in the political process by negotiating back and forth between the

We can't resolve our problems by rewriting the Bill of Rights

moral principles and practical contextual realities of society. While this is an unending and very difficult process — one that is taking place informally all the time — I'm not too unhappy with how things presently stand. Accordingly, I wouldn't want to open up the Constitution for revision, although I uphold the right of the people to do so if they aren't happy with it.

**Theodore Miles:** I think there are three areas that ought to get serious attention if we were revising the Bill of Rights. One is to incorporate the notion of judicial review, clarifying the role of the courts in areas like *habeas corpus*<sup>9</sup> and criminal matters. There isn't anything explicit in the Bill of Rights about the standing of the citizen *vis a vis* access to the courts, for example, and I think this should be made clear enough in the Constitution so that it would no longer be a debatable question. Secondly, I think individual rights *vis a vis* large nongovernmental organizations ought to somehow be included. Finally, questions of personal privacy and family integrity, including the abortion-sexual area, should be more explicitly and broadly defined in any revised Bill of Rights.

## The Courts: Protector of Individual Liberties?

**Sally Laird:** Am I getting the correct impression that you feel that the Supreme Court really has the dominant role in how the present Bill of Rights, or any future one, might be interpreted and applied?

The people, not the Supreme Court, are sovereign

**Paul Conkin:** No, the people are ultimately dominant because they can always amend, even if this admittedly does take a lot of time. If Supreme Court decisions over a long period of time run counter to what the public wants the government to do, the people have the residual authority to change the Constitution in ways that will put the Court straight. In a word, the people are sovereign, not the Supreme Court or the courts in general.

*"[Nothing should] render nominal and nugatory the transcendent and precious right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness' "*

James Madison, *FEDERALIST* #40

**Theodore Miles:** While it's true that you do have the option of amending if the Court is wrong, the basic day-to-day answer to your question is yes, the Court is terribly important in interpreting the present or any future Bill of Rights.

The Supreme Court's role — protecting the minority

**Harry Ashmore:** We have to begin with the proposition that the Bill of Rights applies almost entirely to people who are unpopular. If you're on the popular side you don't need it. A dissident must have some protection, not only against the government, but against the people when they decide that some persons or views are heretical and demand that their elected representatives do something about it.

This all goes back to a fundamental facet of human nature

<sup>9</sup> A writ of *Habeas Corpus* (literally, "you should have the body") protects the individual from arbitrary arrest and indefinite detention without the formality of an open trial.

—we don't really like to have someone disagree with us. Our first impulse when someone does disagree is to want to shut them up. The Bill of Rights is precisely intended to maintain and protect the right of dissent by curbing this natural desire to stifle disagreement. This has to be done by some agency, such as the Supreme Court, that is somewhat removed and insulated from the democratic process and the popular pressures to which it responds.

**Paul Conkin:** The people's power to change the Constitution by amendment doesn't and shouldn't change the fact that the final decision on the enforcement of the law lies in the courts. The whole idea of a libertarian constitution, such as the one we have, is to find at least some stop-gap ways to stand in the teeth of the majority will, because liberty certainly cannot be safe if it has to be voted on in every instance.

In the long term, however, I don't think there's a way that any court system can sustain and enforce a protection against overwhelming majority sentiment, since the courts will sooner or later lose power if they try to do so. Thus, the ultimate basis for libertarian ideas — and this sounds like Hamilton speaking — has to be long-term and mature popular support for any principle in question. In the end, libertarian principles must be matters of belief and conviction, not legal machinery. Legal machinery is an interim measure to protect minority rights for a time until public sentiment has had a chance to soothe down. And the slow constitutional process of amendment gives us the insurance we need, since it helps us to weather the storm of momentary passions, thereby protecting minority rights against an outcry of democratic opinion.

**Harold Nelson:** Professor Conkin's statement about the importance of coming to conclusions and decisions in spite of the momentary passions of the majority is a fine "amen" to the work of the Constitutional Convention.

**Harry Ashmore:** Let's take the example of the *Brown v. Board of Education* [1954] school desegregation decision. Without any question, in all of the sixteen states to which the decision applied, a substantial majority was opposed to desegregation. What the decision accomplished couldn't possibly have been brought about by legislation; it had to come through the courts.

**Daniel Friedman:** There is, perhaps, another very critical facet of this process: our whole government rests on popular acceptance of the decisions of the courts; when the Supreme Court or any other court announces what the law is, most people obey it. If people refused to obey the law, we'd be heading into anarchy. The frightening thing about the *Brown* decision, for example, is that it resulted in one of the rare instances where for years and years large segments of the population were not obeying the law because it was so contrary to their fundamental beliefs. I suspect, moreover, that their refusal to accept this decision was based on the belief that this area is not within the purview of the courts.

What worries me is that the old pattern has given way to a notion that one doesn't really have to respect the courts or the laws. In the past when there was a strike, for instance, if a

**The Constitution rests on mature popular support, not on the courts**

**Some changes can only come via the courts**

**When the courts decide, people obey — or do they?**

court told the strikers to return to work, they did so. Now, sometimes they do, sometimes they don't.

**No, people don't obey the courts**

**Lawrence Speiser:** I think that the idea that the people obey the Supreme Court is simply untrue. It's something that has to be constantly striven for, but it just hasn't worked out that way. As for the contention that the path of disobeying the supreme law of the land leads to anarchy, I think precisely the opposite is true. It's the majority, not the dissenters, who disobey the supreme law of the land; that's where the danger lies.

**Constitutional adjustment: should it rest on judicial self-restraint?**

**Willard Hurst:** Shouldn't we discuss the possibility of writing into the Constitution some sort of general hierarchical value mandate for the Supreme Court? One of the most dangerous majorities in this country is five—five out of nine justices—and thus the issue becomes. Should we leave them without any constitutional tether at all as we do now, or should we perhaps tell them explicitly in the Constitution that they can apply a presumption of constitutionality in an area that is primarily open to reasonable debate (economic matters), while applying a presumption of unconstitutionality to legislation that appears to infringe on peaceful political processes and/or human individuality? In short, since we rely so much on the informal case-by-case process of constitutional adjustment via the Supreme Court, should we leave it as completely up to the self-restraint of the justices as we have now for almost two centuries?

**Ann Diamond:** I think our memories are much too short regarding the relationship between the Supreme Court and the Bill of Rights. As a matter of fact, the 1954 *Brown* decision is to some extent a consequence of the Court's lousy decisions at the end of the 19th century, especially in *Plessy v. Ferguson* [1896] and the absolutely scandalous Fourteenth Amendment decisions in the *Slaughter-House* [1873] and *Civil Rights* [1883] cases. We should not place too much reliance on the Court, indeed, I would like to see it on a much tighter rein, since I think it can't be trusted. The history of the Court over the past two hundred years is not one to make a civil libertarian all that comfortable, especially as far as the First Amendment is concerned.

**The Supreme Court can't always be trusted**

**Mary Ann Yodelis:** I suppose I agree with Hamilton's assumption in *FEDERALIST #78* that the judiciary would be the least powerful of the branches of government. However, I would also like to add that I don't think we should discount its potential for impact either. I think, for example, that the recent appointments by Presidents Nixon and Ford have had a significant impact on the Court, particularly in the area of freedom-of-the-press cases. There's been a terrific increase in such cases recently, and I'm not certain that I like the way the trend of the decisions in them is developing.

**Harry Ashmore:** To maintain the degree of liberty we have in this country—which is not adequate in my view—involves living dangerously to some extent. As an extension of this, I find myself defending the Supreme Court more than I've done in the past. Just think about *Plessy v. Ferguson*, for example. If you look at it in the context of the times in which it was

**The Supreme Court - agent for social change**

rendered, I suspect it represented about all the Court could rationally have done. Indeed, it may have been even a rather bold decision, because it declared for equality, though under a separate-but-equal formula that turned out to be invalid. When it became evident after fifty years that the result was separation but no equality, the Court came up to date with the *Brown* decision.

Furthermore, I'm not sure that the kind of social change that followed the *Plessy* and *Brown* decisions could have been accomplished any faster, since these things do take time. I've always denounced President Eisenhower for talking about how difficult it is to change the minds and hearts of men, because if that were entirely true we'd still have slavery, on the other hand, there is an element of truth to this - the social process cannot be hurried too much, either by the courts or the legislature. Thus, if you consider the present in terms of whether the bottle's half full or half empty, the changes since the *Brown* decision must be seen as probably the most significant single social transition in human history. This is not to suggest, however, that the situation isn't still pretty bad - it is - but Little Rock Central High School is now 50 per cent black and 50 per cent white, and calm.

## "The Spirit Of Liberty"

While it is always desirable that a discussion of this type conclude on an upbeat note - in this case with Little Rock Central High School integrated and calm - the following dialog segment goes one step further. It brings the subject of the Bill of Rights full circle, back to the point where the future of individual liberty would seem to inevitably rest - in the minds and hearts of the people.

**Daniel Friedman:** The Bill of Rights, it seems to me, incorporates at least two concepts: the spirit of liberty and a fundamental requirement that government not engage in conduct that violates the basic political rights of its citizens. While we all know a good deal about this latter requirement, the spirit of liberty is a more elusive concept. Fortunately, some thirty years ago the preeminent jurist, Learned Hand, eloquently defined this phrase as follows:

*"Liberty lies in the hearts of men and women, when it dies there, no constitution, no law, no court can save it. While it lies there it needs no constitution, no law to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few, as we have learned to our sorrow. The spirit of liberty is the spirit which is not too sure that it is right, the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interest alongside its own without bias."* □

# In Conclusion: Questions for Further Discussion

## The Bill Of Rights: Historical Perspectives

### What Is a Right?

Do you agree with the definitions of rights on pages 10-11? How would you define this term?

### Was It Necessary?

What do you think of the outcome of the Bill of Rights fight. Was it in fact necessary to spell out the rights enumerated in the first ten amendments? Do you think we would "be any different today as a society" if the Bill of Rights had not been added to the Constitution? Are there additional rights - ERA, for example - that need to be spelled out? Or have we come back full circle to Hamilton's view that less is better when it comes to specifying rights in a constitution?

### Minority Rights versus Majority Will

Were the proponents of a bill of rights correct in thinking that one of its major functions would be to protect minority rights from overbearing majorities? How effective has the Bill of Rights been in this respect? What was its role, for example, during the "red scare" period of the 1950s, the Vietnam War years; "dirty-tricks" (illegal wire-tapping, character assassination, and so on) used by the FBI against public figures such as Martin Luther King?

## The Bill Of Rights Today: Old Dilemmas, New Problems and Questions

### The First Amendment and Media Access: Mountain or Molehill?

How would you define the relationship between the "right" to media access and the First Amendment, i.e., should access be presumed to be an intrinsic part of our free speech and press guarantees? Is individual access to a mass audience a necessity, or would it lead to media chaos?

### The First Amendment versus the Sixth Amendment: The Free Press-Fair Trial Dilemma

What is your reaction to the statement that the free press-fair trial dilemma is a "classic example of a head-on collision between conflicting rights"? Can you think of an instance where a gag order would be appropriate? In view of the enormous amount of Watergate-related publicity, for example, did Haldeman, Erlichman, Liddy, *et al* receive a fair trial?

### The Second Amendment and Gun Control: Minority Rights versus The Public Interest?

Is the question of gun control today representative of the kinds of problems the founding fathers might have envisioned when they discussed the need to protect minority rights from the will of the majority? Where does the "public interest" begin and minority rights end?

## **The Fifth Amendment: Property – Still the “Richest” of Rights?**

What does the term “property” mean to you? Do you agree, for example, with the relationship outlined by Professor Hurst extending the concept of property to housing, employment and financial institutions? Do you think the “ancient concept of property” described by Professor Conkin has any 20th century use?

## **The Tenth Amendment and States’ Rights: Antiquated Notion or 20th Century Remedy?**

Did the federalists foresee the possibility that the question of federal-state preeminence might be characterized by an ebb and flow between them? What do recent phenomena such as revenue sharing, “anti-Washington” sentiment, or energy crisis-inspired reassertions of state sovereignty over natural resources indicate about this ebb and flow relationship between state and federal instrumentalities? Which level of government do you think poses (has posed) the greatest threat to individual liberty?

## **“... The Right to Be Let Alone – The Most Comprehensive and Valued of Rights ...”**

### **Defining Privacy: Where Does It Begin and End?**

How would you define the right to privacy? Is it a right that needs to be spelled out? How can it be defined when it so often seems to involve a clash of legitimate conflicting interests? In terms of the First Amendment right to a free press, for example, where does the public’s right-to-know end and libel begin?

### **Eroded Privacy: How Do We Cope with “Big Brother”?**

What measures would you recommend to halt abuses of the right to privacy that have occurred since computer, electronic and other technological innovations came to be widely used in all sectors of American life?

## **The Bill of Rights: Prospects**

### **Revising the Bill of Rights: Is It Necessary?**

In your judgment should the Bill of Rights be rewritten? If so, what would you change? If not, how would you assess the idea of further protecting our individual liberties through revision of the various state constitutions? Do we simply need to “adjust governmental powers” to the changed setting and circumstances that have evolved since the first ten amendments became part of the Constitution?

### **The Supreme Court: Bulwark of Individual Liberty?**

Do you agree or disagree with those who feel that because of its performance over the years regarding individual liberties, the Supreme Court “can’t always be trusted”? What do you think the primary role of the Supreme Court ought to be vis a vis the Bill of Rights?

### **“The Spirit of Liberty”: Cornerstone of a Free Society?**

What is your reaction to Learned Hand’s assertion that no constitution, no law, no court can save liberty once it has died in the hearts of men and women? How can we foster the intangible qualities exemplified in the spirit of liberty?



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3

THE

FEDERALIST  
PAPERS  
REEXAMINED

Perspectives on Congress: Performance  
& Prospects

League of Women Voters Education Fund

Edited by Harold B Lippman

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# Introduction

*"The great question that confronts us so implacably is whether the American Constitution and American political principles, which have served us so well and have weathered so many crises, can continue to function in the modern world. Is a constitutional mechanism rooted in 17th century ideas of the relations of men to government and admirably adapted to the simple needs of the 18th and early 19th centuries adequate to the importunate exigencies of the 20th — and of the 21st?"*

This challenging question, posed to members of the League of Women Voters by Henry Steele Commager in 1974 is at the core of the *Federalist Papers Reexamined* project. The audience was appropriate and the timing auspicious. The League of Women Voters, after all, has a long-standing commitment to help citizens understand their government and become involved in its workings. Moreover, the momentous events of Watergate and Vietnam had set in motion a great national debate on the health of our nation and the soundness of our system of government. The Bicentennial, coming soon after, invited further discussion and reflection on the questions that prompted this debate: What are our roots as a nation? Where are we going? How serviceable are our democratic structures and processes?

What better way to help answer such questions than to involve as many people as possible in the kind of broad public dialog that was characteristic of the 18th century political milieu out of which our constitutional system grew? Furthermore, why not use *THE FEDERALIST PAPERS* — a most illustrious example of this 18th century discourse, which addresses precisely the same issues that confront modern Americans — to launch such an inquiry?

Specifically, *THE FEDERALIST PAPERS* were a series of articles addressed "To the People of the State of New York" by Alexander Hamilton, James Madison and John Jay, writing under the pseudonym "Publius." They appeared in various New York City newspapers between October 1787 and August 1788 in response to the vehement attacks that had been launched there against the proposed Constitution. At issue was the question of whether or not the new Constitution that had been adopted in Philadelphia would be ratified by the requisite nine states — a process in which New York's vote would be critical. New York did finally ratify, but *THE FEDERALIST PAPERS* remain important not because of their impact on this outcome — the extent of which is still debated — but, rather, because in them, as George Washington aptly pointed out, "are candidly and ably discussed the principles of freedom and topics of government — which will be always interesting to mankind so long as they shall be connected in civil society."

**The Seminars:** The foundation of this renewed public debate on American government is a series of six seminars, sponsored by the League of Women Voters Education Fund. At each, a group of 8-10 "discussants" — a broad mix of historians, journalists, lawyers, political scientists and public officials — spend the day in a

\*As quoted by Clinton Rossiter in his introduction to *THE FEDERALIST PAPERS*, Mentor paperback edition, pp. vii-viii

free-wheeling, informal dialog. League "participants" serve as citizen representatives, pressing the discussants to clarify their statements, to define terms for non-specialists and to elaborate on points of special interest.

**The Pamphlet:** This pamphlet – the third of the project publications – summarizes the main themes that emerged in the discussion at the seminar on Congress, which took place in Boston in September 1976. It presents edited seminar dialog (interspersed with a minimum of narrative text), selected passages from THE FEDERALIST PAPERS, questions for further discussion and a list of suggested readings. The pamphlet serves two purposes: it is a way to share the seminar discussion with League members and other citizens and it provides the springboard for the public discussion this project is attempting to promote.

**The Seminar on Congress:** The discussion focused on several broad concepts that are intimately associated with the structure and operations of Congress: bicameralism, checks and balances, representative government and the separation of powers. In addition, a subtle underlying theme emerged in essence, that of the three major branches of government, Congress is the most misunderstood and the most unjustly criticized.

**The Discussants:**

Barber Conable (congressman, R-New York)

John Culver (senator, D-Iowa)

Martin Diamond (professor of political science, Northern Illinois University)

William Gifford (manager, Executive and Legislative Programs, General Electric)

Ralph Hutt (executive director, National Association of State Universities and Land Grant Colleges)

Nelson W. Polsby (professor of political science, University of California, Berkeley)

Chuck Stone (columnist, *Philadelphia Daily News*)

Linda Wertheimer (reporter, National Public Radio)

**League of Women Voters Participants:**

Alice Ayers (Connecticut)

Natacha Dykman (New York)

Aileen Katz (New Hampshire)

Florence Rubin (Massachusetts)

Eleanor Sasso (Rhode Island)

Dolores Vail (Maine)

Kathy Wendling (Vermont)

Shirley Downs (national staff)

Connie Fortune (national board)

Ruth Hinerfeld (national board)

Harold B. Lippman (project director)

Susan M. Mogilnicki (project assistant)

Mary Stone (national staff)

Carol Toussaint (project chairman-moderator)

# Congress: How Does It Stack Up?

At a time when opinion polls place Congress near the bottom of the list of institutions that command public respect, attempts to explain this turn of events have become commonplace. Perhaps because ours is a "now"-oriented culture, such attempts often ignore or dismiss too readily the value of looking closely at the past to better understand the present. This approach seems to be especially applicable to an institution as easily misunderstood as Congress; and thus, this exploration begins by assessing its performance with the benefit of historical hindsight.

**One view:  
Congress is a  
remarkable  
legislative body**

**Martin Diamond:** I believe that the Congress of the United States is the most remarkable legislative body in the world. I say this not so much for the eminence of intellect displayed there nor because of its civic spiritedness and fidelity to the public trust but because, more than any other legislative body now and perhaps more than any other in modern history, Congress governs. Whatever its defects, it participates directly and indirectly in the full governance of the United States — policy making, administration, foreign affairs and so on — to an extent unmatched by any other legislative body. The English Parliament, for example, even at its most glorious peak never remotely approached the level of involvement in governing that Congress has achieved, from high policy down to the most picayune detail.

The second remarkable fact about Congress is its extraordinary continuity with the constitutional design developed by the founding fathers. Congress, on the whole, continues to strike that "decent mediocrity" between excessive, vacillating responsiveness to public opinion and the competent and stable government at which the founding fathers aimed. And, in so doing, it has remained astonishingly close to its origins and the fundamental role for it envisioned by the authors of THE FEDERALIST PAPERS and the Constitution. In short, even though it is admittedly an imperfect institution, Congress does about as good a job in combining democratic representation and competence in directing our public affairs as can be expected.

**Chuck Stone:** I agree that Congress has performed well on occasion, but if what we mean by "well" is representing the rights of the many versus the property of the few, I don't think

**Another view:  
Congress tends  
to be elitist**

it has performed well enough. Let's not forget that THE FEDERALIST PAPERS and the Constitution were designed to protect the property of the few, in apparent contradiction of the spirit of the Declaration of Independence, which was written in support of the rights of the many. I sometimes feel that Congress has tended to perpetuate the elitist view held by those of the founding fathers who looked upon the people as "a great beast," as Alexander Hamilton put it, deserving contempt instead of affection or compassion. In this sense, Congress has done precisely what the federalists thought it would do. After all, they were followers of Hobbes's view that government is instituted not for just concerns but because men are so mean and narrow-minded that they cannot be trusted to govern in good faith and by good will. Never in their wildest imaginings did the federalists anticipate that their plutocratic republic would one day evolve into a people's democracy.

Indeed, I think Congress has only occasionally been in step either with the mood or the needs of the people. Above all else, Congress serves the congressional will — an entity independent of and more important than the people's will. Occasionally these two have coincided — the end result of which is some great legislation — but Congress more often tends to act as a legislative plutocracy. When Presidents have introduced legislation that would more widely distribute the fruits of democracy, for example, Congress has consistently permitted a few of its members — primarily powerful committee chairmen — to let those proposals wither on the vine and die. And, even on those rare occasions when it has raised itself to high plateaus of statesmanship by expanding jobs, housing, child care and so on, it has all too often let its democratically expressed will be thwarted by a presidential veto.

Last, and still more glaring, Congress has sometimes behaved differently toward different members on the same basic issue. For example, in a typical exercise of congressional racism, unequal treatment was meted out against Adam Clayton Powell, a black congressman from Harlem, and Thomas Dodd, a white senator from Connecticut, when both were charged with misconduct in office.

**Martin Diamond:** I disagree with the assertion that the Constitution was designed to protect the property of the few. This misconception is an outgrowth of writings by Vernon Parrington, J. Allen Smith and Charles Beard, among others. Being to varying degrees progressives, Marxists and socialists, they presented an ideologically predisposed interpretation of the founding, not a true account of it. The fact is, the Constitution did not protect the privileged, propertied elite; rather, it helped to create a modern commercial propertied mass. Moreover, all of those involved in the founding, federalists and anti-federalists alike, were in favor of the Locke-inspired protection of property embodied in the Constitution. So, to say that the Constitution favored the privileged, propertied elite simply misses the point.

**Ralph Hult:** Frankly, I think Congress is the greatest legislative body in the world, one that's clearly a good deal better

Why does Congress have such a bad reputation?

than most Americans are willing to admit. The obvious question is, Why does it have such a bad reputation?

Well, for one thing the deliberations of Congress are much more open than those of the other branches of government. So, when Congress makes a mistake, it does so in full public view. In contrast, what happens behind the closed doors of any Administration, or for that matter the judiciary as well, is not at all as readily apparent to the public. Indeed, I have personally witnessed the processes of the executive branch at work and have seen seat-of-the-pants decisions made about matters of great import that were nothing less than frightening.

Secondly, Congress has a bad name because its own members run against it as an institution. When a member of Congress out on the campaign trail is asked a question about some issue, a frequent response is, "Well, I introduced a bill on that subject, but you know the Rules Committee - they wouldn't let me get it to the House floor for a vote." That's why recent studies find citizens speaking ill of Congress while in the next breath speaking well of their own individual congressman. No matter what kind of member it was - Republican or Democrat, liberal or conservative - when researchers asked people in a given congressional district for their opinion, the answer most often was, "We've got the best congressman in the country." In effect, members of Congress do a good job in just about everything except institutional public relations. And that helps to explain why the popularity of Congress as an institution is so low, while the popularity of most of its individual members is relatively high.

Congress is alive, well, and getting better all the time

**John Culver:** During the twelve years I've been a member of Congress, I've been a consistent and outspoken critic of its flaws and the attendant need for institutional reform. Nonetheless, in that same period more genuine, constructive reforms have been made than in all the preceding years of its existence put together. Strong, unprecedented movements are underway, moreover, that will further this trend, making Congress still more responsible and less subject to conflict of interest than it ever was in the past. In sum, the operations of Congress can be seen as being representative of the workings of the American political system in general. That is, our three-branch, constitutional system is alive, well and working - not perfectly, not smoothly and not always efficiently, but with an overall serviceability that reflects the genius of the design developed by the founding fathers. □



# How Has the Bicameral System Worked?

Of all the mechanisms embodied in our constitutional system, one of the most important is bicameralism, the division of the legislative branch into the Senate and House of Representatives. This decision to separate the national legislature into two houses reflected the founding fathers' abiding fear that Congress would encroach on the other branches of government.

*"In republican government, the legislative authority necessarily predominates. The remedy for this . . . is to divide the legislature into different branches, and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit."*

James Madison, FEDERALIST #51

How this bicameral arrangement has worked, therefore, is a question that any thoughtful examination of Congress and the legislative process must address. It focuses attention on such cherished political concepts as checks and balances and representative government—an exercise that is essential for acquiring insight into the complex interrelationships that are a characteristic part of congressional activity.

## The Two-House Concept: Popular Passion and Continuity

**Barber Conable:** The two major factors that determine the respective roles of the two houses are different terms of office and different constituencies. Behind the idea of the six-year senatorial term was the assumption that the Senate would be the "saucer," as George Washington put it, in which the popular passions would be poured to cool. While this theory has not always worked as the framers envisioned—the Senate

**The impact of different constituencies and terms of office**

is not a "cool" body—the six-year term has had a significant effect in giving the legislative process continuity and stability. With only one-third of its members being elected every two years, the Senate changes less rapidly than the House; thus, it acts as a breakwater, slowing down the quick swings in public opinion that are felt more quickly in the latter.

*"To a people as little blinded by prejudice or corrupted by flattery as those whom I address, I shall not scruple to add that such an institution [i.e., a 'well-constructed Senate'] may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers, so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?"*

James Madison, FEDERALIST #63

The House, on the other hand, at least in part because of the shorter two-year term of office, does stay closer to the people. For example, I have yet to go home less than 40 times each year—something that I feel reflects what people expect of their representative. Indeed, the two-year term seems wiser now than ever, since the American people—thanks to the impact of mass communications and the openness it has helped to foster—seem to be capable of changing their minds frequently. If the House weren't elected as frequently as it is, the gap between government and governed would quickly spread to alarming proportions.

*"As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured."*

James Madison, FEDERALIST #52

Differences in constituencies also have a marked effect on the respective House and Senate roles. Senators, for the most part, represent much larger numbers of constituents, spread over a greater area. They therefore tend to have more of a national perspective on problems than that of the average House member.

Significantly, this problem of keeping in touch with one's

THE FEDERALIST PAPERS passages cited herein are not presented to support or contradict the dialog amidst which they have been placed but, rather, to illustrate or amplify the discussion

constituents is not confined solely to the Senate, although it is certainly much more pronounced there. House members now represent 500,000 people apiece, so they too must cope with the reality that the larger the constituency, the more one is constrained to settle for dealing only with the most organized and activist individuals and interests. While this is not too surprising as far as the Senate is concerned, I don't think it is what the founding fathers anticipated would happen to the House. Thus, it's even more incumbent on individual representatives to do everything possible to retain the closeness to the people that has historically been one of its greatest strengths.

*"It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents."*

James Madison, FEDERALIST #56

**The two houses  
have shifted from  
the constitutional  
design**

**Nelson Polaby:** I think Congressman Conable has only told half the story on the question of where continuity and popular passion now reside. In terms of the informed, steady, year-in and year-out scrutiny of public policy by Congress, continuity is far more apparent in the House, although this wasn't necessarily what the founding fathers intended. Secondly, the home of "popular passion" has come to be the Senate, primarily because of the ongoing national ambitions of many senators. Such ambitions, besides feeding on and generating publicity, tend to bind senators not so much to expertise as to mobilizing national interest groups. This fact explains, in part, the Senate's great oral tradition—debates and the attendant publicity—whereas the House has evolved more in terms of continuity, expertise and the persistent chipping away at long-term problems.

There are some vivid illustrations of these shifts from the original scheme. One notable example is the legislation to enshrine the special prosecutor—the so-called second Watergate bill—where popular passions ruled the Senate, while sober second thoughts came from the House. There are countless similar examples in health legislation, where national interest groups, just to cite one instance, have sought to find a cure for cancer via Senate-originated bills. Time and again, the House has been the body that has asked the tough questions and has looked at issues in the longer term.

*"The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. All that need be remarked is that a body which is to correct this infirmity ought itself to be free from it, and consequently ought to be less numerous. It ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration."*

James Madison, FEDERALIST #62

**Martin Diamond:** I agree that the Senate has become more like the House was originally supposed to be and vice versa. In the first place, the size of the Senate has increased beyond

**Some reasons  
for the shifts**

anything originally calculated. Indeed this very point was the source of one of the most anguishing debates at the Constitutional Convention. Originally, it was intended that the Senate closely resemble a conciliar body, something a great deal smaller and more intimate than it has become. However, once the framers reached the compromise that gave each state two representatives in the Senate, the multiplication of states guaranteed that it would become more numerous than was first considered desirable. The present Senate is, in fact, larger than the original "tumultuous" assembly of the House, which was to have had only 65 members.

*"The number of which this branch of the legislature [the House of Representatives] is to consist, at the outset of the government, will be sixty-five. At the expiration of twenty-five years, according to the computed rate of increase, the number of representatives will amount to two hundred, and of fifty years, to four hundred."*

James Madison, FEDERALIST #55

Another reason behind the unforeseen shift in House and Senate style and substance is the power of incumbency in the House, once a member has successfully negotiated the hurdle of being elected to a second term. While I don't know what the exact statistics are, I'm sure that at least half of the members of the House have tenures in practice comparable to those constitutionally prescribed for the Senate.

*"A few of the members, as happens in all such assemblies, will possess superior talents, will, by frequent reelections, become members of long standing, will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages."*

James Madison, FEDERALIST #53

Thirdly, the shift from indirect to direct election of the Senate has also had an impact. It was originally intended that senators would be elected indirectly, though not undemocratically since the process ultimately rested on the people through their state legislatures or electors. The framers envisioned what Madison called "a filtration of the popular will," the effect of which would be to insulate senators from the immediate expression of popular passions. To sum it all up, the House has become more stable and moderate than expected and the Senate more directly democratic.

**Ralph Huitt:** I want to reply to those here who think that all the passion has moved over to the Senate and that the House is now the repository of stability and continuity. If you have ever handled a piece of legislation in the House, as I have, you'd know that you run scared all the time. Once the House takes up a bill it tends to stay with it until it's either passed or killed. The House, moreover, makes things harder by not permitting very many staff people on the floor, so that communication between the member on the floor and someone who's interested in the legislation is very, very difficult. I have seen more than one bill go to the House floor with every assurance that it would have no trouble, only to see it changed so drastically that even though it's got the same title and number, I

**On the floor,  
passions do run  
higher in the  
House**

couldn't support it if my life depended on it.

In the Senate, on the other hand, if a bill's in trouble, someone typically gets up and says, "I have trouble with this piece of legislation"; after which the presiding officer simply puts it aside, thereby postponing debate for the time being. This having been done, senators and staff begin to meet off the floor to discuss the impasse—a process that I imagine very much resembles diplomatic negotiations—so that agreement is effectively reached out of the limelight. Thus, when the bill comes up for passage on the floor, most, and sometimes all, of the "passion" has already been dissipated and therefore there tends to be much less difficulty than occurs in the House.

**Nelson Polsby:** By referring to patterns of floor activity in the respective houses, Ralph Hitt has reverted to the first half of the continuity-popular passion question I mentioned earlier. The essence of my point was that in the long run, and particularly in the committee context, it is far easier to get expertise and interest-group activity going in the House than in the Senate. I don't disagree at all, however, with the distinction he drew regarding the different styles, once legislation reaches the floor. I wouldn't call activity on the House floor "passion" exactly—I'd prefer to refer to it, as Sam Rayburn did, as "rolling waves of sentiment"—but I agree that what happens there is liable to be more spontaneous, chaotic and acrimonious than that which tends to take place on the Senate floor.

**Kathy Wendling:** I'm not sure I fully understand the point that senators have less expertise than members of the House. Is it solely because senators serve on more committees?

**Barber Conable:** No, that's not the only reason. For instance, senators are under much greater pressure than their House colleagues, they're national figures who have a much heavier burden of personal distinction to carry. The Senate is indeed the launch pad for national candidacies.

*"The qualifications proposed for senators, as distinguished from those of representatives, consist in a more advanced age and a longer period of citizenship. . . . The propriety of these distinctions is explained by the nature of the senatorial trust, which, requiring greater extent of information and stability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages."*

James Madison, FEDERALIST #62

**House-Senate contrasts: a question of numbers** But, the fact that senators serve on more committees does have important consequences. It does, for example, force senators to rely much more heavily on staff, who accordingly tend to have much more literal input than do their House counterparts. Even though I have considerable constituency pressures—mail, casework and so on—my personal office staff can generally handle this side of my job for me. Unlike most senators, I can do almost all of my own legislative work; I am the only politician, and almost the only researcher, in my congressional office.

The effects of these differences are most obvious and pronounced in a Senate-House conference committee, wherein

representatives from each house convene to resolve the differences between conflicting versions of the same legislation. In these meetings, most senators sit like bumps on the proverbial log, asserting a few broad principles with great determination without at all seeming to understand how to facilitate the enactment of those principles. Therefore, most of the moving and doing is done at the instigation of the House conferees. While all this sounds very critical of the Senate — and sometimes I feel such criticism is deserved — I don't want to paint an unduly negative picture, because I also see the Senate's input as being a necessary part of the overall legislative process.

*"It is sufficiently difficult, at any rate, to preserve a personal responsibility in the members of a numerous body, for such acts of the body as have an immediate, detached, and palpable operation on its constituents.*

*The proper remedy for this defect must be an additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects."*

James Madison, FEDERALIST #63

**John Culver:** As a first-term senator with ten years previous service in the House, I'd like to suggest that the major difference between the two bodies is, in a word, numbers: there are 100 senators versus 435 representatives. With both bodies having about the same number of standing committees, every senator usually has to serve on three major committees, while, with important exceptions, the House member normally serves on one. And, there's still another numbers-related difference: a senator's single vote carries much more weight, proportionately. Even the most junior senator, given the present rules of procedure, can bring the whole operation to a screeching halt simply by exercising the right to filibuster. In addition, the Senate leadership knows they've got to deal with you because it's a given fact that you'll be there for at least six years.

**House-Senate contrasts: what do they signify?**

Now, what do these differences mean? First, a senator is by definition spread more thinly. I represent three million people now, whereas when I was in the House I represented one-sixth that number, and I am accordingly subject to proportionately greater constituent pressures. The effect of these increased numbers is dramatic, since I'm now required to know about and have a position on a far wider range of public policy questions than I ever had to in the House.

Secondly, in order to be effective in the Senate one doesn't necessarily have to spend the rest of one's life on a specific committee building up seniority and expertise. In the House, just to use myself as an example, I was fortunate enough to get the committee assignment I wanted and therefore didn't have to face the prospect of moving and the attendant inevitable loss of seniority. In the Senate, seniority is much less important than it is in the House. Changing committees is easier and less fraught with consequences; senators can move every two years to a more powerful or prestigious committee

or to one that is more relevant to their constituent interests and responsibilities. On the minus side, this mobility causes a veritable musical chairs process, the upshot of which is, as Congressman Conable said, that senators don't usually acquire as much expertise in a given area as their House colleagues; they don't sit in one place long enough to do so.

Finally, because of the weight of his vote and his relative mobility, a senator will usually have much more impact and power from the very first day of his term of office. Moreover, being insulated by the six-year term, he can afford to take on a more pronounced leadership role on some of the more controversial and complex issues that face us.

**Nelson Polsby:** Before we move on, I think it is important to point out that what we're really talking about in discussing the popular passion-continuity question is the broader constitutional concept, bicameralism. The fact that the House and Senate have different operating procedures, in addition to the very powerful point that both chambers have to deliberate over a bill before it can pass, means that both expertise and "generalness" are, perforce, an integral part of the legislative process. I consider this present bicameral arrangement to be an excellent one and would very much like to see each house continue to cultivate its particular comparative advantage.

**Popular passion and continuity: a reflection of bicameralism**

## The Bicameral System and Terms of Office

*"No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate. A part of this knowledge may be acquired by means of information which lie within the compass of men in private as well as public stations. Another part can only be attained, or at least thoroughly attained, by actual experience in the station which requires the use of it. The period of service ought, therefore, in all such cases, to bear some proportion to the extent of practical knowledge requisite to the due performance of the service."*

James Madison, FEDERALIST #53

**Alice Ayers:** Could we top off this discussion of the two-house concept by considering changes in the terms of office; especially, for instance, the idea of a four-year term for members of the House?

**Linda Wertheimer:** I think it's absolutely necessary for House members to serve two-year terms, if senators serve six-year terms, to get the benefit of views derived from two different perspectives. The short term of office, in fact, is the main reason why House members spend a lot of their time attending to case work and the relatively trivial concerns of their individual constituents when they go back to their district. Where else could we go if we couldn't hold House members accountable every two years?

"The aim of every political constitution is, or ought to be first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one is such a limitation of the term of [office] as will maintain a proper responsibility to the people."

James Madison, FEDERALIST #57

**Ralph Huitt:** Perfectly said. Indeed, in one of the few mistakes he ever made regarding what Congress would go along with, Lyndon Johnson proposed a four-year term for House members in one of his State of the Union messages. The House turned him down out of hand, because they pride themselves in being "the people's House," and therefore they don't mind going back every two years.

**The four-year House term: a "con" view**

**Barber Conable:** Will the gentleman yield to me? In fact, it wasn't the House that turned LBJ down, it was the Senate. The reality behind congressional unwillingness to approve this idea is that no senator is going to support a four-year term for congressmen, because it would mean that House members could run for the Senate without jeopardizing their own job. Quite apart from this reality, the present scheme embodies a compromise that has proved eminently workable, making the best of both continuity and the short-term — so, why change?

"... who will pretend that the liberties of the people of America will not be more secure under biennial elections, unalterably fixed by such a Constitution, than those of any other nation would be, where elections were annual, or even more frequent, but subject to alterations by the ordinary power of the government?"

James Madison, FEDERALIST #53

**The four-year House term: a "pro" view**

**Chuck Stone:** I'm an advocate of the four-year term for congressmen and congresswomen. When the framers agreed on a four-year term for the President, two-year term for members of the House and six-year term for senators, there was no magic in those numbers. So, I don't see anything sacrosanct about the two-year term. In fact, by not thinking seriously about possible modifications, we're reinforcing and perpetuating a system that could well afford some improvement in its efficiency, responsiveness and humanity. Making the term of office for House members coterminous with that of the President would strengthen the presidency, strengthen the President's party, strengthen the role of political parties in general and tend to make everyone involved in government more aware and responsive.

**Barber Conable:** I disagree. A four-year term coterminous with the presidency would mean you never had members of Congress running except as part of a national ticket. One of the positive effects of the two-year term is that it gives the elec-



torate a semi-national referendum halfway through the life of an Administration, which can, among other things, serve as a warning for a President who may be headed in the wrong direction. The two-year term also gives us a chance to get rid of any incompetents who may have been swept in on someone's coattails, by making them run, in the off-year election, on their own record and on what they stand for as individual representatives.

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# Toward a More Effective Legislature: Congress and Change

Over the years, Congress has been often and strongly criticized for being unresponsive, unrepresentative or inefficient. In evaluating such criticism, and certainly before weighing in with any proposals for change, it is important to consider two related questions: If Congress is not the effective institution people feel it should be, what role do its structures and procedures play in this failing? Which of these are imposed by the Constitution, which by custom, which by statute? Realizing that congressional reform is largely a process of self-reform, answering these questions might suggest ways to build up the momentum needed to effect the kinds of changes that would make Congress more responsive, representative and efficient.

## Responsiveness, Representation, Efficiency

*"The members of the legislative department . . . are distributed and dwell among the people at large: Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people."*

James Madison, *FEDERALIST* #49

**John Culver:** Of all the branches of the national government, Congress is the most responsive and accessible to the people. In fact, what with jetting back home constantly, telephones, endless media coverage and the all-inclusive people-contact all these things entail, I wouldn't be exaggerating if I said that we figuratively hang by our thumbs for the American people.

**Responsiveness:  
a two-edged sword**

While I obviously look on Congress's responsiveness as a strong point, it also has some less positive implications, particularly since it tends to cause some loss of efficiency and orderliness. Two houses, made up of 535 representatives from diverse backgrounds and locales, can hardly be expected to perform as a single efficient entity. I think that the founding fathers, preoccupied as they were over our inherent potential for abusing power, were fully prepared to sacrifice some efficiency to assure democracy. If sheer efficiency, rather than freedom, were the most precious thing, then I suppose they would have opted for a more regimented Congress and, of course, the more regimented society that it would reflect.

*"In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarring of parties in the department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority."*

Alexander Hamilton, FEDERALIST #70

**The essence of  
representative  
democracy:  
responsiveness  
to whom?**

Having said this, I'd like to propose that we keep some basics in mind as we talk about responsiveness. For instance, when we discuss one of the tenets of representative democracy, free elections, two things count: those who vote and those who contribute. How does this relate to responsiveness? Almost all elected officials are primarily motivated by wanting to be reelected. Members of Congress accordingly, are responsive to a fault, calibrating their constituents' views as carefully as a doctor monitoring the blood pressure of a patient with heart disease. So, the issue becomes not simply responsiveness *per se*, but responsiveness to whom.

*"The House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it."*

James Madison, FEDERALIST #57.

If we want Congress to develop an agenda that is more representative of the public will, we have to make sure that the process by which members get elected and stay in office embodies specific incentives to that end. In the absence of such incentives, special interests prevail: they participate because they have, by definition, something to protect or promote. Until these incentives exist, the best we can hope to get from Congress is sporadic responsiveness to the broad national interest, as in the all too rare case when a member takes a controversial and politically risky position as a matter of personal conscience. Human nature being what it is, we cannot assume that the level of integrity, courage, or leadership in Congress is necessarily going to be any better than that in any other walk of life.

**Responsiveness:  
a question of  
pluralism?**

**Chuck Stone:** We need to place this discussion of responsiveness in the context of moving Congress to reflect more accurately this nation's pluralistic diversity. A Congress of 535 members, of whom only three percent are women, is anything but representative. Indeed, it is a prime example of the kind of demographic immorality that is embodied in a tradition dating back to the beginnings of American history, which assumed that white men have been ordained to rule women and all nonwhite peoples. By all objective demographic criteria, Congress should have nearly 270 women members instead of the present 18:

### **Parliamentary Democracy: Pro and Con**

**Chuck Stone:** I am an admirer of the English parliamentary system — the form of government I feel comes closest to the ideal combination of responsiveness and maximized political participation. Therefore, I think the best way to try to correct our present inequities would be to strengthen our political parties and centralize control of Congress in them. As a black man, I cannot help but conclude that if this country had had strong party government in the past, just causes like the civil rights movement would have been advanced far more quickly. Members of the Democratic Party — its southern wing in particular — would have had only two options: to vote with the party or to leave the party.

**Martin Diamond:** While I understand Chuck Stone's admiration for the British parliamentary system, it is my belief that party government is antithetical to the goals he seems to want most, maximum responsiveness and political participation. Party government implies the contraction of the opportunity for political participation, because everything that is important occurs in a few party congresses or conferences where broad popular discussion and participation is obviously limited. How can that be a better alternative than our own constitutional system? If you want to achieve maximum political participation and responsiveness, what you need is the brand of "organized chaos" we have, in which as many people as possible have a piece of the action. There cannot be, for example, a powerful League of Women Voters in England or Sweden because the party systems in those countries largely preempt the function of such groups. In short, if what is wanted are the advantages of a nonauthoritarian liberal democracy, then the kind of constitutional package that is needed is one that offers the most diverse means for political expression; and, clearly, the American constitutional system provides far more opportunity in this respect than do any of Europe's parliamentary systems.

**Ralph Huitt:** I have two comments. First, I want to point out that Congress is responsive and representative in two quite different, yet complementary, ways. It is representative of localities in the sense that senators and representatives are elected by people from particular states and districts. But Congress is also representative and responsive in national terms. This characteristic is by and large the result of the committee system, which allows the members to break out of the bonds of localism—something I see all the time as a lobbyist who regularly deals with these committees. Their chairpersons produce legislation with the broadest national implications, and over time their perspectives seem, therefore, to expand correspondingly.

**The dangers of too much responsiveness**

Paradoxically, in trying to make government more and more responsive and representative, I think Congress and the other branches have created an already authoritarian, albeit not yet totalitarian, representative democracy. We estimate that the large public universities our association represents have to spend about four percent of their budget in complying with federal regulations. While these regulations certainly reflect some of the best impulses of the American people, using government more and more to accomplish such ends causes us to move ever closer to a totalitarian state, that is, a state where government has its hands in everything. So, when we talk of responsiveness and representation this is one thought I think we should keep uppermost in mind.

**The activist minority versus the uninvolved majority**

**Barber Conable:** I'd like to make a couple of points that go hand-in-glove with what Ralph Huitt has just said. First, it is inevitable that there be some lag in government's responsiveness to prevailing public views, partly because public opinion in recent years seems to change so quickly, partly because public officials are not all elected at the same time. Second, isn't it possible that the public will throw their elected representatives out of office for the very reason that they're trying to be responsive to some of the social justice issues? Perhaps Congress has already become more responsive to cries for social justice than the great majority of Americans want. Maybe, "true" responsiveness should be geared to the uninvolved citizen whose Thursday-night-out bowling constitutes the sum total of his or her institutional activism. The essential question, then, is: To whom should Congress try to be more responsive—the activist minority or the uninvolved majority?

One final comment: government is necessarily one of the most conservative forces at work in our rapidly changing world. While many people think that government should somehow be a great progressive force, it is the very need for responsiveness and the need to safeguard our democratic processes that most often brings us almost to a halt as we try to achieve consensus in our decision making. This is no accident, for the founding fathers knew that democracy had to be somewhat inefficient. Certainly, they didn't want an overly efficient central government; rather, they wanted one that had just enough power to get the job done. Even at that, they circumscribed that power as much as possible. In the past thirty years or so

we've decided that the national government should be the prime problem-solver, yet we've done nothing to offset the obstructions the founding fathers designed into our constitutional structure against that very possibility. On balance, I'd prefer to see us put our faith in a pluralism that involves as many people as possible, not just a few decision-makers in Washington.

**Responsiveness and efficiency: conflict is inevitable**

**Linda Wertheimer:** From the perspective of one who covers Congress as a reporter, I have to agree with Senator Culver's earlier point that the tendency to make Congress more open and responsive also tends to make it less efficient. If we really want to have democratic government, we are stuck with the fact that there will always be obstacles to overcome in order for the people to be able to exercise their will.

**The unforeseen ombudsman role.**

**William Gifford:** We haven't mentioned a very important dimension of this whole responsiveness question — something the founding fathers apparently could not have foreseen — and that is the congressional ombudsman role. For people, the essence of what their representatives in Congress do or ought to do is to be a case worker. New members are often quite surprised to find how much of their staff time and their own time is allocated to services wholly unrelated to the legislative process — sweeping up the errors (lost Social Security checks, denial of veterans benefits and so on) and mending other breakdowns in the relationship between government and governed. Maybe, as we think about responsiveness, we need to distinguish between how it is accomplished strictly via legislation and how it is realized in terms of the ombudsman activities that have come to occupy so much of Congress's time and energy.

**“Special interests” perform a vital service.**

**Nelson Polsby:** In this discussion there is the very basic disagreement over *which* people should be permitted to have preferences about public policy, and *whether* they ought to be allowed to get these preferences into the decision-making process. This disagreement, of course, goes straight to the heart of the question of special interests. Special interests need not be looked on solely as a force that inevitably tends to subvert our democratic processes. Indeed, they perform the vital service of “organizing intensity.” They reflect the constitutional right people have to get together to try to do something on an issue about which they have strong feelings. While there has always been a tension in our political system between numbers and intensity, these elements don't necessarily act in opposition to each other to the detriment of government and efficiency. This is one subject that Americans are going to have to address in greater detail and in much less pejorative terms.

**John Culver:** I have two brief Churchillian observations that may help give us a perspective on the disparate points we've raised in discussing the efficiency-responsiveness question. One is the axiom that democracy is the worst form of any kind of government — except for any other. The other is, that there are two things one should never watch being made if one wants

Openness is  
more important  
than efficiency

to continue to like them, sausages and laws.

On the latter point, I agree that the more we encourage openness in Congress the more confusion we'll be likely to have. This will be particularly true when a reform of this nature is first instituted, simply because of its attendant effect of making us more aware of what has been going on prior to it, warts and all. In the long run, however, I believe that openness will be tremendously beneficial, albeit still somewhat at the expense of efficiency. Indeed, some recent reforms have had a salutary effect even in the short run. The changes instituted in the House Democratic Caucus at the beginning of the 94th Congress are one example. Believe me, as a result of this change, the mind-set of committee chairmen is anything but the arrogant, autocratic, insensitive fiefdom operation that existed until recently. I can't stress enough, moreover, how healthy I think it is to require public disclosure of campaign contributions. If it makes people like the oil lobby nervous and gun-shy for a couple of years, then so be it. The important thing is that it can't help but force lobbyists into a more responsible role in the political process. In sum, while there inevitably seems to be some price exacted for adjusting and correcting certain aspects of our constantly evolving constitutional system, I think the cost is well worth the trouble.

## The Possibilities of "Planning"

Can Congress  
exercise foresight  
as well as  
oversight?

**Chuck Stone:** I'd like to take this discussion one step further, because I feel that there are ways for Congress to upgrade its performance. I've always thought, for instance, that Congress ought to undertake some kind of management study to develop a type of planning mechanism for the legislative process. If major corporations operated with Congress's degree of efficiency, large sections of the American economy would quickly come to a screeching halt. I'm not hung up over the concept of planning — it is no more antithetical to democracy than setting sales goals is antithetical to capitalism.

*"The objects of government may be divided into two general classes: the one depending on measures which have singly an immediate and sensible operation; the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation."*

James Madison, *FEDERALIST* #63

**John Culver:** I agree. One of Congress's great unmet problems is its failure to develop a foresight capability as well as the oversight one it already has. In a time of accelerated change, when the margin for error has become more and more limited, Congress badly needs to be able to look ahead, in order to avoid the horrendous mistakes that sometimes result from work done by obsolete committee jurisdictions, from the recycling of obsolete data, from the tendency to lurch from crisis to

crisis. A prime example is the impact of the post-World War II "baby boom." Congress has missed the boat in every conceivable way in terms of anticipating things like hospital beds, jobs, the needs of the elderly in 1980 and so on. Some efforts have already been undertaken — the establishment of Budget Committees in both the Senate and the House, five-year budget planning, establishment of offices of technology assessment and so on — but we need to keep pushing forward on this planning capability.

**An inhibiting factor: the term of office**

**Natacha Dykman:** But doesn't that imply that members of Congress have to be in office for longer terms than at present?

**John Culver:** Your question is right on the money. The term of office does tend to inhibit long-term planning, but that should not deter us from continuing to seek solutions. One way to attack this problem is to develop incentives within the political process that reward someone who takes the long-term view and tries to drive home a warning before we actually feel the pain. Who in 1970, for example, would have dared propose the possibility of gasoline rationing in anticipation of the energy crisis? The present system tends to encourage precisely the opposite; it only provides incentives for reacting to immediate problems or those that have already rolled by and are still festering. We can also attack this problem by a massive education program to help the public understand the need to look ahead. In fact, if the electorate is not sophisticated enough or committed enough to resist the kind of demagoguery that is fixated on the short-term, then very little of what their elected representatives would like to do in terms of long-range planning will be practicable.

**Is it unrealistic to expect Congress to do long-term planning?**

**Barber Conable:** It's unrealistic to expect Congress to do a lot of planning, although I don't mean to imply that government doesn't properly have a planning role. If there is any such mechanism, it's pretty much going to have to be done by the Senate because of its longer term of office, and, frankly, I don't think the Senate has shown itself capable in recent years of this kind of contemplative deliberation. It seems to me that Congress will have to continue to live with that horrible aphorism we members repeat to one another as though it were an absolute truth: "If you have to explain anything, you're in trouble." In other words, if one wants to be a successful senator or representative, the key is to thunder around with the popular cause of the moment and not look past the end of your nose. □



# Congress and the Three-Branch System: How Has the Separation of Powers Worked?

As important as the concept of checks and balances and representative government are, just as significant is the constitutional principle of the separation of powers.

*"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."*

James Madison, *FEDERALIST #47*

Any examination of Congress must ask: How has the separation of powers system worked? In so doing, several related questions arise: What should the role of Congress be? What are its powers? Why do executive-legislative-judicial relationships evolve as they do?

## Which Branch Really Originates Legislation?

*"What are to be the objects of federal legislation? Those which are of most importance . . . are commerce, taxation, and the militia."*

James Madison, *FEDERALIST #56*.

**Alleen Katz:** As I read THE FEDERALIST PAPERS I was struck by the erosion of the legislative branch's powers that seems to have occurred since they were written. For example, doesn't virtually every piece of legislation now come from or somehow have to pass through the executive branch? I guess what I'm asking is, What has happened to the powers of Congress?

**Ralph Huitt:** At least a partial answer to your question on who originates legislation—Congress or the Executive—is that it

**Originating legislation: it depends on the President**

depends on the Administration in office. If the President happens to be LBJ, who placed great store in his ability to move legislation, the rule of thumb was that there would be an Administration bill on anything he wanted. Yet LBJ always knew that Congress would work its will on his proposals and that frequently the resultant legislation would be an improvement. When I was responsible for legislative activities in HEW, for example, we sent up an air pollution bill, which was routed to a subcommittee chaired by Senator Muskie. Now, he had dealt with this subject for a long time and had a first-rate staff assisting him, so when he changed our proposal and guided a good substitute bill through the Senate in its place, I suggested to LBJ—who readily agreed—that we drop ours and go along with the Muskie substitute.

On the other hand, I also remember Al Quie, a Republican from Minnesota, remarking about an Administration-inspired education bill, "I'm putting in this bill at President Nixon's request only, because I'm introducing a better one of my own."

What tends to emerge out of the legislative relationship between the Executive and Congress is an amalgam, particularly when the Administration and the majority party in Congress are the same. The general rule of thumb is that a law will be a combination of what the Executive proposes and what the congressional committee with jurisdiction over that area wants to do. No President who has ever worked with the legislative branch could ever believe that he can simply propose a bill and expect Congress to enact it exactly as submitted.

**Law-making is a product of executive-congressional cooperation**

Nelson Polsby: I certainly agree that many textbooks refer to the relationship between the Executive and Congress in terms that describe the former as "proposing" and the latter as "disposing." However, and this is something that has always puzzled me, such viewpoints don't really seem to acknowledge where an Administration bill itself actually comes from. The answer is, generally, that it doesn't come fully formed out of a clam shell but, rather, out of a combination of inputs by interest groups, the bureaucracy and people in Congress who've had something related to it lying around in their desk drawers for a while.

**Originating legislation: "the incubation process"**

Only rarely does an Administration bill originate from scratch. More typically, it floats around for some time in a state I call the incubation process. And that's something in which Congress participates very heavily in, several ways, especially in the Senate, whose members are constantly searching for "an issue"—something that the senator believes in or is interested in, something he can make speeches about, something with which he can establish alliances with important national interest groups. The name of the game is to take up that cause, learn about it, put in bills, hold hearings on them and so on. All this can go on for ten years or more before a President, who after all comes into office needing to make some kind of splash, appropriates that issue and, presto, all of a sudden we get a "New Frontier" or a "War on Poverty." In short, there is a very powerful sense in which one has to concede that Congress is engaged in policy initiation, the very

thing the textbooks claim it doesn't do.

**Ralph Huitt:** I want to add an amen to that. The main rule if you work in the Executive is, when something looks hot take off with it and never acknowledge the source from whence it came.

**When it comes to resources, the Executive has the upper hand**

**William Gifford:** The main difference I saw, moving from Congress to the White House, was that the Executive had a big advantage in the availability of professional and technical people with all kinds of specialized skills. Members of Congress, in contrast, simply do not have the same access to such talent. Congress has been either unwilling or unable to address this "resource gap" question effectively, so it continues to find itself in an inferior position in terms of its ability to compete with the Executive.

## The Ebb and Flow of Power: Congress *vis à vis* the Other Branches

*"the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."*

James Madison, FEDERALIST #51

**Ruth Hinerfeld:** I'd like to shift to the broader question of whether the pendulum has begun to swing back toward the legislative branch. Some observers feel this has already happened and is beginning to pose a potential hazard to the conduct of our foreign policy, an area for which the Executive is constitutionally responsible.

*"The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments has been already more than once suggested. The insufficiency of a mere parchment delineation of the boundaries of each has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the executive upon the acts of the legislative branches. . . . [However] if even no propensity had ever discovered itself in the legislative body to invade the rights of the executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left to the mercy of the other but ought to possess a constitutional and effectual power of self-defense. But the power in question has a further use. It not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws."*

Alexander Hamilton, FEDERALIST #73

Executive-Congressional relations: a new equilibrium

**John Culver:** The short answer to your question is Yes. Congress, as a result of the swing in public attitudes prompted by Watergate and Vietnam, is now attempting, however inartfully, to reassert its authority in its relations with the Executive. The significance of this shift lies in the fact that it is a reminder and confirmation of the soundness of our constitutional structures. Imperfect though this constantly evolving process may be — indeed, it's typically confusing, messy, even "bloody" — the flexibility designed into the Constitution has allowed a vital ebb-and-flow relationship to develop among the branches of government, the net effect of which has been to sustain an equilibrium that has enabled the ship of state to right itself following periods of great stress. This process embodies the kind of pragmatic outlook the founding fathers sought to institutionalize, allowing one branch of government to come forward to try to deal with new situations that one or both of the others has shown itself to be either unwilling or unable to address effectively. In the early 1960s, for example, the shoe was on the other foot, and it was the legislative branch that was in the public's bad graces. Although no one can say for certain what will happen in the present situation, the upshot of that pendulum swing was that the Executive became too powerful.

A need for caution — Congress can't work miracles

In the mid-1970s, therefore, we do need to be cautious, as Congress begins to reassert itself, about what we expect to accomplish. It's reasonable to expect the legislative branch to improve its performance; but, it would be unrealistic to assume, simply because we're disenchanted with the executive branch, that Congress will be able to work miracles by taking on some functions that — within the legitimate domain of the former. As the national legislature tries to strike a new equilibrium, it must do so ever mindful of the constitutional requisite of needing two to tango. The founding fathers correctly designed the Constitution to guard against abuse and centralization of power in any one branch, and we'd be no better off if Congress simply took the place of the Executive in overreaching its proper constitutional role.

*"It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it."*

James Madison, FEDERALIST #48

**Ralph Huitt:** I wholeheartedly agree, since I've been to more wakes for Congress than I can count. A couple of years ago, for instance, *Time* magazine went to great lengths and expense to bring the likes of me and Nelson Polsby to a meeting to support the publisher's thesis that Congress was on the skids. The fact was — and is — that none of us believed that at all.

**Effective policy-making depends on continuous executive-legislative interaction**

**Martin Diamond:** These previous statements are a powerful reminder for us not to lose our cool the way some writers and commentators did two or three years ago at the height of Watergate. We shouldn't mistake every ebb for Armageddon and every flow for a tidal wave.

**Nelson Polsby:** Events of the last decade have brought into focus the tension between two theories — both of which have a good deal to do with this discussion of executive-legislative relationships — that legitimize national government in this country. One theory stipulates that government gets its legitimacy (that is, the entitlement of rulers to rule) exclusively by virtue of the popular election of the chief executive. The alternate theory, which seems to me to be far closer to the spirit of the Constitution, takes the view that, even though legitimacy does proceed in part from elections, it also depends on the continuous interaction of these elected officials in the process of governing. In other words, the entitlement of our elected officials to govern is not granted once and for all in a single election; rather, it is the product of an ongoing process through which representatives elected from different constituencies, by different methods, interact with one another in developing public policy. Consequently, from where I sit, the central stake we have in a strong Congress is in the way in which it continuously interacts with the policy-making arms of the Executive in order to initiate, modify and produce public policy.

*"The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the function of the executive magistrate."*

Alexander Hamilton, FEDERALIST #75.

**Connie Fortune:** I'd like to hear the panel clarify the role of Congress in a then-and-now-context. What did the founding fathers, for example, intend the role of Congress to be? Have we expanded that role over the years? Have we deviated altogether from it?

*"The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."*

James Madison, FEDERALIST #48.

**John Culver:** I have two comments. First, I believe the founding fathers thought Congress would have a broader role than it now has; the Judiciary and Executive, relatively less extensive roles. I don't know if I'd go as far as to say that the growth of the last two has necessarily been at the expense of the first, but I would point out that Congress has generally been tolerant, at times even deferential, as the expansion of executive and judicial power has evolved.

Secondly, I find it truly ironic that at the very time Congress is being subjected to almost unprecedented criticism, there's little doubt that it is far and away the best we've ever had, in the quality of its membership, their motivation, the absence of conflict of interest and so on. Every two years during the twelve I've been there its overall quality has improved, and that's one thing I think we should keep in proper perspective.

The role of government, not the role of Congress, has changed

**Martin Diamond:** I think the essential roles of Congress and the Executive remain as close to the original design as is conceivable, given the transformation in governmental functions that has taken place since the 18th century. That is, we've moved from a relatively negative stance, which assigned government a limited role, to an immensely positive one that implies just the opposite. Despite the hazards involved in this transformation, the original system was so cunningly well designed that, of all legislatures in the world, Congress remains the most vital and powerful.

*"To what purpose separate the executive or the judiciary from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be merely nominal, and incapable of producing the ends for which it was established. It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government; and, whatever may be the forms of the Constitution, unites all power in the same hands."*

Alexander Hamilton, FEDERALIST #71.

Congress and the "third" branch: the growth of judicial power

As far as the original design is concerned, however, the role of the Judiciary has undergone extraordinary growth—partly because it is one of the institutional symbols of the Constitution most revered by the American people, partly because it has become the favored instrument of any group that thinks it can extract what it wants from "the system" by appealing to the Supreme Court and the courts in general. Indeed, both liberals and conservatives have inflated the power of the courts for their own purposes. Still another factor that has helped judicial power to grow far beyond anything envisioned for it by the founding fathers is the "buck-passing" that has often been characteristic of executive and congressional behavior.

**Nelson Polsby:** I'd like to try to summarize the major points we've been making about the role of Congress. First, it initiates, incubates and scrutinizes public policy. Second, it checks and balances the executive branch in its policy-making functions and in the execution of those policies. Third, it channels interests and demands, in the large, from the public into the government. Fourth, it channels interests and demands, in the small, via the ombudsman activities it performs in behalf of individual citizens.

It seems to me, also, that we've drawn some conclusions on how the legislative branch does what it does. First, it doesn't do everything; members of Congress pick and choose

from the limitless list of what needs to be done. Second, the nature of this sampling process reflects the organizational imperatives that distinguish the House from the Senate and vice versa — the term of office, the size of each, their respective internal structures and procedures and so on. These organizational imperatives, in turn, reflect events generated by party politics — whether or not Congress and the presidency are controlled by the same party and whether or not the general fortunes of the parties at any given time are evenly or unevenly balanced.

Finally, to bring the entire discussion full circle, my general conclusion largely coincides with Martin Diamond's opening statement: from the historical perspective, it's amazing how coherent and active a legislature Congress still is; from a comparative perspective, it's abundantly clear that Congress is by far the most vital and interesting legislative body on the face of the earth. □

# In Conclusion: Questions for Further Discussion

## Congress: How Does It Stack Up?

While some of the discussants said Congress is a "great" legislative body, others asserted that it has been—and remains—an elitist institution. Do you think Congress tends to represent the *interests of the few* rather than the *rights of the many*? Has Congress's performance, in fact, indicated a tendency to look on the people as "a great beast?"

## How Has the Bicameral System Worked?

### The Two-House Concept: Popular Passion and Continuity

As House-Senate roles have shifted from those envisioned by the founding fathers, what impact have these changes had on the legislative process? Do you think these shifts have been in the best interest of effective representative government?

### The Bicameral System: Can It Be Improved?

What do you think are the strengths and weaknesses of the two-house system? What changes would you propose to help the bicameral system function more effectively? What do you think would be the impact of going to the often-suggested four-year term for members of the House of Representatives?

## Toward a More Effective Legislature: Congress and Change

### How Representative Is Congress?

What do you think of the statement that Congress is "demographically immoral?" What correlations do you believe ought to exist between representation and the composition of society—men/women, ethnic minorities and so on? If you think demographic balance is important, how can it be encouraged?

### The Essence of Representative Government: Responsiveness to Whom?

In his famous FEDERALIST #10, Madison is emphatic in stating: "The regulation of these various and interfering interests ['mercantile, landed, manufacturing, moneyed'] forms the principal task of modern legislation." How do you think Congress has done on this score, i.e., regulating the "various and interfering interests?" To whom should Congress be responsive—the activist minority or the uninvolved majority?



## **How Efficient and Responsive Can Congress Be?**

What is your reaction to the argument that the more responsive Congress is, the less efficient it will be? What do you think can be done to foster the most constructive balance between the two? Is there such a thing as too much responsiveness?

## **A More Effective Congress: What Are the Possibilities?**

Do you agree that Congress is weak on foresight and that its effectiveness would be increased if it were to institute some sort of a planning mechanism? What other reforms might Congress undertake to help make it more effective? In view of Senator Culver's observation - "Human nature being what it is, we cannot assume that the level of congressional integrity, courage or leadership is necessarily going to be better than that in any other walk of life" - are our expectations regarding Congress and its members realistic?

## **Congress and the Three-Branch System: How Has the Separation of Powers Worked?**

### **The Ebb and Flow of Power: Congress vs the Other Branches**

How does Congress's relationship with the Executive and Judiciary square with the original constitutional design? Do you agree that lately the balance of power has been shifting from the Executive to Congress? What changes do you think are needed in this system of relationships, i.e., what should the role of Congress be in our republican form of government?

## **On Balance ...**

How would you evaluate Congress's performance and prospects?

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## **League of Women Voters Sources:**

The League of Women Voters constantly publishes materials that relate to the ideas discussed in this pamphlet. The most recent such publication is *You and Your National Government*, 1977 edition, publication #273, \$1.00. For further information consult the *Catalog for Members and the Public*, publication #126, free; or contact the League of Women Voters Education Fund's Government/Voters Service Department at the address on the back cover of this pamphlet.

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# THE FEDERALIST PAPERS REEXAMINED

Achieving "Due Responsibility": Perspectives  
On the American Presidency.

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# Introduction

*"The great question that confronts us so implacably is whether the American Constitution and American political principles, which have served us so well and have weathered so many crises, can continue to function in the modern world. Is a constitutional mechanism rooted in 17th century ideas of the relations of men to government and admirably adapted to the simple needs of the 18th and early 19th centuries adequate to the importunate exigencies of the 20th — and of the 21st?"*

This challenging question, posed to members of the League of Women Voters by Henry Steele Commager in 1974 is at the core of the Federalist Papers Reexamined project. The audience was appropriate and the timing auspicious. The League of Women Voters, after all, has a long-standing commitment to help citizens understand their government and be involved in its workings. Moreover, the momentous events of Watergate and Vietnam had set in motion a great national debate on the health of our nation and the soundness of our system of government. The Bicentennial, coming soon after, invited further discussion and reflection on the questions that prompted this debate: What are our roots as a nation? Where are we going? How serviceable are our democratic structures and processes?

What better way to help answer such questions than to involve as many people as possible in the kind of broad public dialog that was characteristic of the 18th century political milieu out of which our constitutional system grew? Furthermore, why not use THE FEDERALIST PAPERS — a most illustrious example of this 18th century discourse, which addresses precisely the same issues that confront modern Americans — to launch such an inquiry?

Specifically, THE FEDERALIST PAPERS were a series of articles addressed "To the People of the State of New York" by Alexander Hamilton, James Madison and John Jay, writing under the pseudonym "Publius." They appeared in various New York City newspapers between October 1787 and August 1788 in response to the vehement attacks that had been launched there against the proposed Constitution. At issue was the question of whether or not the new Constitution that had been adopted in Philadelphia would be ratified by the requisite nine states — a process in which New York's vote would be critical. New York did finally ratify, but THE FEDERALIST PAPERS remain important not because of their impact on this outcome — the extent of which is still debated — but, rather, because in them, as George Washington aptly pointed out, "are candidly and ably discussed the principles of freedom and topics of government — which will be always interesting to mankind so long as they shall be connected in civil society."<sup>\*</sup>

**The Seminars:** The foundation for this renewed public debate on American government rested on a series of six seminars, sponsored by the League of Women Voters Education Fund. At each, a group of 8-10 "discussants" — a broad mix of historians, journalists, lawyers, political scientists and public officials — spent the day

<sup>\*</sup>As quoted by Clinton Rossiter in his introduction to THE FEDERALIST PAPERS, Mentor paperback edition, pp vii-viii

in a free-wheeling, informal dialog. League "participants" served as citizen representatives, pressing the discussants to clarify their statements, to define terms for nonspecialists and to elaborate on points of special interest.

**The Pamphlet:** This pamphlet—the fourth of the project publications—summarizes the main themes that emerged in the discussion at the seminar on the Executive, which took place in San Francisco in December 1976. It presents edited seminar dialog (interspersed with a minimum of narrative text), selected passages from THE FEDERALIST PAPERS, questions for further discussion and a list of suggested reading. The pamphlet serves two purposes: it is a way to share the seminar discussion with League members and other citizens and it provides the springboard for the public discussion this project is attempting to promote.

**The Seminar on the Executive:** With the extraordinary events of recent years serving as the essential backdrop and stimulus, the discussion evolved in terms of several distinct but interrelated questions, the common theme of which was the broad issue of presidential accountability. How accountable did the framers of the Constitution think the presidency was going to be? How accountable, in fact, is it? By what means do we hold our President accountable? What improvements are possible?

**The Discussants:**

Morton Borden (professor of history, University of California, Santa Barbara)  
Charles Hardin (professor of political science, University of California, Davis)  
David Lissy (associate director of the White House Domestic Council for the Ford administration)

Frederick Mosher (professor of government, University of Virginia)

Neal R. Peirce (contributing editor, *The National Journal*)

Merrill Peterson (professor of history, University of Virginia)

Robert Pierpoint (White House correspondent, CBS News, Inc.)

Nelson W. Polsby (professor of political science, University of California, Berkeley)

Timothy Wirth (congressman, D-Colorado)

**League of Women Voters Participants:**

Jacqueline Grose (Nevada)

Adele Hopkins (New Mexico)

Maxine Krull (Washington)

Wanda Mays (Oregon)

Sandra Metcalf (Arizona)

Joan Rich (California)

Patricia Shutt (Hawaii)

Emilie Zasada (Alaska)

Madelyn Bonsignore (national staff)

Judith Heimann (national board)

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Harold B. Lippman (project director)

Martha T. Mills (national staff)

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Mary Stone (national staff)

Carol Toussaint

(project chairman-moderator)

Nan Waterman (national board)

Veta Winick (national board)

# Federalist Versus Antifederalist: Historical Perspectives On The Presidency

Much of the controversy surrounding the ratification of the Constitution stemmed from the radically different opinions of federalists and antifederalists on how best to achieve "due responsibility" on the part of the President. Today, couched in terms of "presidential accountability," the debate goes on—and on, as a spontaneous point-counterpoint confrontation at the seminar's beginning served to illustrate. It provided an excellent point of departure for an examination of the role of the Chief Executive in our constitutional system, by immediately tying together the threads of its 18th century beginnings to its 20th century character. Echoing and reiterating the federalist and antifederalist arguments in the ratification fight, panelists at once outlined the familiar—and still unresolved—issues involved in balancing presidential accountability and effectiveness.

**Morton Borden:** Most of my work has been with the antifederalists—the opponents of the Constitution, about whom we hear very little, since they were the losers in the ratification controversy. Yet, if we use the narrow margin of some state convention votes for ratification as an indicator—Virginia, 89-79; New York, 30-27—their perceptions and concerns were obviously shared by many 18th century Americans. Though the antifederalists were wrong about many things—they predicted all kinds of dire calamities if the Constitution were adopted—they were also much more perceptive than their federalist opponents on some other points. I want, therefore, to share a few of their more interesting predictions, which are unknown to most Americans.

- The antifederalists predicted that the Senate would become a "rich man's club."
- They believed that sectional differences would be neither



restrained nor ameliorated by the Constitution and that there would, therefore, be a civil war some day.

□ Some antifederalists objected to the constitutional provision that made treaties the "supreme law of the land," anticipating by 170 years the "Bricker amendment" — which lost by a single vote in the Senate in 1954 — that prohibited the making of any treaty or executive agreement that might affect the constitutional rights of American citizens.

□ They felt that one day ordinary citizens would be unable to afford the expense involved in prosecuting a case in the federal courts.

□ They predicted that there would be a forced draft of citizens into a national army and complained about the lack of a specified ceiling on the national debt.

□ The antifederalists also thought that the states would be gradually eclipsed in power and prestige. For example, Richard Henry Lee, writing anonymously in "An Additional Number of Letters from the Federal Farmer . . .," pictured a national capital overwhelmed by "officers, attendants, suitors, expectants, and dependents. . . . However brilliant and honorable this collection may be, if we expect it will have any sincere attachments to simple and frugal Republicanism, to that liberty and mild government, which is dear to the laborious part of a free people, we must assuredly deceive ourselves."

**Antifederalist  
fears: too much  
power, not enough  
restrictions**

As far as the presidency was concerned, the antifederalists had the following fears. First, they were greatly concerned about the length of the term of office and reeligibility. Even though they disagreed among themselves on precisely what the best formula would be — some favored a single seven-year term, others an indefinitely renewable one-year term — they were virtually unanimous in their dissatisfaction with the four-year formula adopted by the Convention. William Grayson, in a speech at the Virginia Ratifying Convention on June 18, 1788 warned: "This quadrennial power cannot be justified by ancient history; there's hardly an instance where a republic trusted its executive so long with so much power, nor is it warranted by modern republics. The delegation of power is in most of them only for one year." And Richard Henry Lee again: "Whether seven years a period is too long or not is rather a matter of opinion, but clear it is that this mode is infinitely preferable to the one finally adopted."

Secondly, many antifederalists objected to the electoral college, which they felt would even further remove the President from the people. On November 8, 1787, the *New York Journal* published a "Letter from Cato" expressing the antifederalist sentiment that, "It is a maxim in republics that the representative of the people should be of their immediate choice, but by the manner in which [this Constitution proposes that] the President [be] chosen, he arrives at this office at the fourth or fifth hand." Likewise, "Republicus," in the March 1, 1788 *Kentucky Gazette*, asked rhetorically,

"[Has] it then become necessary that a free people should first resign their right of suffrage into other hands besides their own, and then secondly, that they to whom they resign it should be compelled to choose men whose persons, characters, manners, principles they know nothing of, and after all [that], entrust Congress with the final decision . . . is it necessary, is it rational that the sacred rights of mankind should thus be dwindled down to electors of electors?"

Thirdly, antifederalists complained that the President's powers were simply too great, especially for one who lacked the necessary "virtue." One after another, they questioned whether presidents after Washington would possess sufficient virtue. "It is perhaps a chance of 100 million to one that the [future] will furnish an example of so disinterested a use of great power as that of [General] Washington," asserted "An Old Whig," in the *New York Journal* of December 11, 1787.

Finally, many antifederalists believed that the President and Congress were much too closely intertwined. They objected, for example, to the Constitution's treaty-making provisions, which they felt would bring the President and the Senate too close to one another. One antifederalist, writing under the name of "William Penn" in the *Philadelphia Independent Gazetteer*, on January 3, 1788, even went so far as to object to the President's veto power: "It is . . . a political error of the greatest magnitude to allow the executive power a negative or in fact any kind of control over the proceedings of the Legislature."

In short, the antifederalists thought that the office of the chief executive had too much power and not enough restrictions. The entire thrust of their arguments against the Constitution in this regard, therefore, were that legal ways and means must constantly be sought to limit presidential power, especially by vesting more countervailing power in Congress.

The federalist  
view: enough  
power, enough  
safeguards

Merrill Peterson: In rereading what THE FEDERALIST PAPERS had to say about the presidency, I was again struck by the constant repetition of certain key terms — energy, unity, stability, independence, duration, permanency and so on. In order to defend an executive that possessed these characteristics, Hamilton had to show that it was perfectly compatible with the republican concepts of liberty, safety and responsibility — a most difficult undertaking, given the widespread monarchical fears of the time. In revolutionary republican ideology, the great danger to liberty and self-government was "magistering," and, above all, chief magistracy, whether it came in the form of a king or a governor. Paradoxically, the federalists tended to turn revolutionary republican ideology upside down, because one of their greatest concerns was that liberty and self-government could also be endangered by too much freedom, too much legislative power or too weak an executive.

"A feeble executive implies a feeble execution of the government.  
A feeble execution is but another phrase for a bad execution;

and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."

Alexander Hamilton, FEDERALIST #70.\*

Axiomatic for Hamilton is the idea that "Energy in the executive is a leading character in the definition of good government." Significantly, he seems to be less concerned with what this energy is used for than that it exist in the first place. In other words, he is more articulate about means than ends. Hamilton also assumed—in a manner scarcely flattering to democracy—that the indirect election of the President was a good thing because it would help to avoid the tumult and disorder associated with direct popular elections. It would allow for a more reasoned choice, by judicious men, thereby helping to raise the chief magistrate above corruption and intrigue. And Hamilton assumed that the four-year presidential term would help to make an Administration independent, firm and stable because it tied a president's personal interests to the rights and responsibilities of the office. In a certain sense, a president's private interests thus appeared to be exalted above the concept of public virtue that revolutionary republicans had hoped would provide sufficient incentive for good conduct. Yet, it was Hamilton's view that the comparative independence this gave a president was a necessary means to insulate him from popular whim and caprice, from the agitations of demagogues, from the encroachments of the legislature. In effect, Hamilton felt that this would enable a chief executive to save the people from their own worst enemy—themselves. Following closely on the heels of this latter point, Hamilton defended at length the idea of a perpetually reeligible president. It, too, he maintained, would provide incentive for good conduct, would promote stability in an Administration and would help to secure the necessary degree of independence he felt a president needed.

These views on the term of office and reeligibility, it must be remembered, clashed head-on with the republican doctrine of rotation in office and, therefore, served as a rallying point for those who feared the monarchical behavior they thought these constitutional provisions would invite. Thomas Jefferson, among others, opposed perpetual reeligibility, which he feared would lead to an elective monarchy. Patrick Henry was his usual emphatic self, solemnly announcing in the Virginia Ratification Convention, "Your President may easily become a King."

*"The President of the United States would be an officer elected by the people for four years; the king of Great Britain is a perpetual and hereditary prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable. The one would have a qualified negative upon the acts of the legislative body; the other has an absolute*

\*THE FEDERALIST PAPERS passages cited herein are not presented to support or contradict the dialog amidst which they have been placed but, rather, to illustrate or amplify the discussion

negative. The one would have a right to command the military and naval forces of the nation; the other, in addition to this right, possesses that of declaring war, and of raising and regulating fleets and armies by his own authority. . . . What answer shall we give to those who would persuade us that things so unlike resemble each other?"

Alexander Hamilton, FEDERALIST #69.

Hamilton's response to such reservations was to emphasize the point that energy, stability, order and independence in the Executive would combine to promote republican responsibility. That is, though these characteristics could be found wanting because they seemed to give the President too much opportunity for power and glory, they also firmly fixed upon him the responsibility for failure to live up to the standards of appropriate conduct they embodied.

# How Accountable Is An "Energetic Executive"?

Among the greatest fears 18th-century Americans had about the presidency was that it might become as autocratic as the monarchy from which they had fought so hard to free themselves. In certain respects, these fears have proven groundless — the system of separated powers and checks and balances has worked remarkably well in keeping the presidency within the limits prescribed by the Constitution. Yet some evidence — notably, Watergate and the rise of the "imperial presidency" — reinforces the relevance of these two-hundred-year-old concerns. Indeed, one could safely say that 18th-century doubts about the nature of the presidency still go to the heart of the issue, particularly since similar misgivings in the 20th century continue to emphasize the need to address some of the same questions that concerned Americans 200 years ago: How much power should the President have? How much conflict should there be between a president and the various components of our democratic system? How accountable can an "energetic executive" be?

*"The ingredients which constitute energy in the executive are unity; duration; an adequate provision for its support; and competent powers.*

*"The ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility."*

*Alexander Hamilton, FEDERALIST #70*

Concepts of  
accountability —  
the mandate  
theory versus  
the continuous  
theory

## Accountability: What Does It Mean? How Does It Work?

Nelson Polsby: As I see it, there are two chief theories of presidential accountability. One I call the mandate theory, since it is based on the idea that the principal entitlement a president has comes from his election by the people. Proponents of this theory contend that there is a special legitimacy

resident in the presidency that entitles a president to ignore "special interests" and do whatever he wishes. Practically every president and presidential aspirant in the last ten years—Jimmy Carter, Eugene McCarthy, Richard Nixon, Robert Kennedy, among others—has claimed such a personal relationship with the people.

The second theory of presidential accountability—the one that was written into the Constitution—is predicated on a continuous process in which all sorts of special interests, elite groups and institutional checks combine in a manner that requires presidents to seek piecemeal permission to do whatever they want to do. This form of accountability sees presidential politics as something that happens continuously in the political system, not just once every four years. As such, it suggests that responsibility for governing is legitimately shared with interest groups, political parties and, most especially, with Congress.

**Charles Harbin:** I don't completely disagree with what Professor Polsby has said, but I do think that the mandate theory of presidential accountability he mentioned does somewhat of an injustice to our electoral process. To me, the main function of quadrennial elections is not so much to give a president a mandate but, rather, to give the people a regular opportunity to turn him out of office. Thus, I see accountability more as an expression of the public will, than as a popular mandate by which a president can ignore certain interests.

**Merrill Peterson:** My view of accountability generally coincides with Hamilton's thoughts on this matter: that the President is responsible to the people for the use and abuse of power; and, above all, that the President's major responsibility is to uphold and defend the Constitution. The means to render the President accountable, Hamilton believed, would normally occur via the electoral process or, if necessary, through impeachment. However, Hamilton's views on accountability did not include the modern idea of democratic responsibility—responsiveness to the popular will—which has made the test of a responsible presidency not simply the actions of the strong, "energetic" executive he thought the President ought to be, but the fulfillment of what the people want from the government.

The test of "due responsibility" has changed

This distinction is tremendously important—and problematic. For, it is the perceived failure to fulfill continuously whatever people feel their needs are, I believe, that has contributed to the waning public confidence in our political system in recent years. This has been more damaging than the cynical abuses and usurpations of power by presidents of late, however intolerable some of the latter may have been, and it is likely to become increasingly so in the future. If the problem were solely, or even primarily, presidential corruption, oppression or whatever, the implied remedy would be simply to weaken the presidency. Yet, if the problem is accountability in the sense of direct responsiveness to the majority will—as seems to be the case presently—then the

remedy lies in more, not less, presidential leadership. In this sense, then, Hamilton's arguments in THE FEDERALIST PAPERS for a strong, energetic executive who is nonetheless accountable are still serviceable.

"Does [the executive] also combine the requisites to safety in the republican sense — a due dependence on the people, a due responsibility? The answer . . . is satisfactorily deducible from these circumstances; the election of the President once in four years by persons immediately chosen by the people for that purpose, and his being at all times liable to impeachment, trial, dismissal from office, incapacity to serve in any other, and to the forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States, would, by that plan, be subjected to the control of a branch of the legislative body. What more can an enlightened and reasonable people desire?"

Alexander Hamilton, FEDERALIST #77

**Robert Pierpoint:** What we're really talking about as we discuss this question of presidential accountability is not so much whether or not a strong chief executive is a good idea — we've already gone far beyond the mere acceptance of that — but how strong our President should be and how his powers can be curtailed, if necessary. I think Watergate did prove that presidents can still be held accountable but I also feel that modern problems and circumstances invite expansion and abuse of presidential power in a way that poses a continuing threat to our constitutional system.

**Merrill Peterson:** There is, perhaps, an even more fundamental way to look at this question of accountability: Having established a form of government based on a system of built-in checks and balances, how do you make it work? Woodrow Wilson, among others, indicated the implicit difficulty in this question, arguing that at least in theory it was almost impossible for such a system to work, because it was based on a kind of Newtonian model in which coordinated action was prevented by the very nature and functions of the political institutions themselves. In a way, the entire history of our national government has been one of trying to somehow overcome the obstacles provided by the checks and balances built into the Constitution.

"To WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? The only answer that can be given is . . . by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."

James Madison, FEDERALIST #51.

**The federalists  
saw confrontation  
as the way to  
keep a president  
accountable**

Today, the accountability problem comes down to the question of whether or not we can get the kind of performance out of the presidency that is necessary to meet our internal and external needs. In other words, should we continue with a system built on conflicting checks and balances, or should we consider ways to provide a political environment in which such conflict would be minimized, with a corresponding increase in more broadly based democratic presidential leadership?

**Timothy Wirth:** As I read THE FEDERALIST PAPERS, what struck me most was the notion of confrontation that ran through them. The federalists fully expected sharp conflicts — checks and balances, or whatever else one may call them — within our constitutional processes. But we've evolved away from this initial assumption toward a system in which confrontation is abhorred; and the accountability issue must be looked at partly in light of this change.

**David Lissy:** I disagree. I don't think that the system has evolved in a manner that abhors conflict. On the contrary, I believe that our political processes thrive on conflict. I can only speculate, but what may have led Congressman Wirth and others to conclude that conflict has become abhorrent is, in a word, Watergate. Having worked in both the Nixon and Ford administrations, the only way I can respond to the above is to say that a terrible aberration in the exercise of presidential power did indeed take place in the Nixon administration; but, even more important, I can also personally testify to the openness and healthy friction that characterized the Ford administration. To me, then, the healthy kind of confrontation Congressman Wirth saw in THE FEDERALIST PAPERS is still workable, working — and essential.

**But, the American  
people fear  
confrontation**

**Joan Rich:** I don't think the American people understand that conflict — between the branches of government, between political parties and so on — is not only inevitable but healthy; they tend to become confused or frightened when they see it happening. For example, what reaction have some of you gotten from citizens when you have criticized or otherwise challenged the President?

**Robert Pierpoint:** I think you're quite right. If I ask the President a tough question at a press conference, for instance, I get a stack of mail criticizing me for being disrespectful. The cumulative weight of such experiences has left me with the distinct impression that many Americans do get quite nervous and upset when their presidential father figure is criticized by the media or, for that matter, by members of Congress or anyone else.

**Timothy Wirth:** For a member of Congress the answer to your question is, it depends on the composition of the district he or she represents. As a relatively liberal Democrat who represents a predominantly Republican constituency, I got all kinds of flak whenever I took on Presidents Nixon or Ford head-on. However, I quickly learned that if I'm going to criticize the President on some policy or piece of legislation, I



should do so in a circumspect manner that avoids, wherever possible, any direct head-to-head clash. So, I couch my disagreement in terms of how we can best get the job done.—an approach that seems to be much more agreeable to my constituents.

## The Imperial Presidency — Why?

**Nelson Polacy:** I'd like to suggest some reasons why the presidency has become so imperial. Above all, I think, is the threat of assassination—a problem inherent in a mass democracy like ours, in which tremendous attention is focused on the President as a national symbol. Second is the increase in the role of government and the attendant growth of the bureaucracy, which has given the President the opportunity to reach into many more areas of policy than was originally imagined. Third is the growth in the importance of foreign affairs, for which the President has no real constitutional rival.

*"The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States."*

Alexander Hamilton, FEDERALIST #75.

The last reason is one for which I think academics have to bear more than a small share of the responsibility: that is, the prevailing view that vigorous presidents are the best presidents. Aside from the understandable pressure generated by the coalition of people and interests who help a president to get elected, the gatekeepers of presidential greatness—historians, political scientists and journalists—have greatly contributed to presidential aggrandisement and imperialism by intimating that a president who says, "I really shouldn't get into that," is somehow deficient in doing his job.

**Morton Borden:** This problem of the trappings of the presidency has, of course, been with us from the very beginnings of the Republic. William McClay, a member of the first Senate, for example, kept a diary in which he complains about the hoopla that attended the Washington administration—the servants, the wigs, the loss of democratic spirit and so on. Of course, Senator McClay stood practically alone in this view. Indeed, people like John Adams thought that there should be even more pomp, more grandiose titles and such. And, in accordance with these aspirations, one wag replied that perhaps they could start by calling Adams "His Roundity!"

Is an imperial  
President what  
we want?

**Robert Pierpoint:** In spite of the constant stream of criticism leveled against the so-called "imperial President," I really think that that's just what the American people want their

Chief Executive to be. I've already alluded to one reason for my feeling on this point in mentioning the mail I receive when I'm apparently or actually critical of the President. But my impressions in this regard are also derived from other experiences. Over the years, for instance, I've often had occasion to circulate through a crowd of people waiting to see a president at an airport or some similar place. What I've gleaned from this is that in a way it doesn't matter who the President is, or whether or not those present are for or against him. The reason they're there is the palpable sense of excitement that the Office of the President has come to signify in their minds. One can literally feel the surge of energy that goes through the crowd when the presidential jet lands, when the band strikes up "Hail to the Chief," when he enters the waiting long, black limousine—all under the watchful eyes of the Secret Service agents and the retinue of press people, TV people and aides scurrying about. A kind of psychological aura has evolved around the Office of the President, the growth of which has been wittingly and unwittingly aided and abetted by the hoopla that surrounds his every move. What worries me about this is that, even with the traumatic events of Watergate still fresh in our minds, too few Americans are bothered about the explicit threat posed by this psychological advantage they've given the President.

**The imperial presidency: how does it affect "the man"?**

**Timothy Wirth:** The answers to the questions of how or why the President has become so imperial have been pretty well documented I believe. The more important question is: What personal impact has this trend toward increased presidential power had? How does a president become so isolated? How does he become immune to criticism or, better yet, how can he deal with the criticism he will inevitably face? How do we assure that he doesn't become a prisoner of his own PR and the endless stream of other self-serving information his staff churns out in his name?

# The Accountability Process: Institutional Curbs and Constitutional Mechanisms

With Watergate safely behind us, most Americans feel that through the stresses and strains of those momentous times, "the system" worked. Yet, while there is broad agreement that the system worked, far fewer of us actually understand how and why it performed as it did. Some of us could identify the individual role being played at that time by certain institutions and procedures — Congress, the bureaucracy, impeachment, for example. It was and is, however, far harder to say how these various parts of the accountability process worked, collectively, to help bring our political system back into equilibrium.

In effect, while Watergate indeed showcased the accountability process — an intrinsic part of "the system" — working at its best, it is even more important, for at least two reasons, to understand how and why its various institutional and procedural facets performed as they did. One, they are not simply at work during times of crisis but, rather, are continuously operating *vis-à-vis* the Executive to help keep government on an even keel. Two, their interaction with and impact on the President don't just reflect the status of his accountability at any given point but, in a wider sense, are also a barometer of the general health and well-being of our constitutional system.

## Institutional Curbs

### The Role of The Media: Potential Unrealized

**The media aren't in the business of public education** Robert Pierpoint: I'd like to make a comment about media responsibility and presidential accountability — the degree to which radio and TV go into or fail to go into public issues. For better or worse, almost any complex issue will become newsworthy solely if it can somehow be made meaningful to the

average American. It doesn't really matter what the major issue is that the White House may trot out, since it will generally be complicated, hard to explain and, therefore, unnewsworthy — unless there is some kind of conflict or confrontation involved. Our basic assumption about broadcasting the news, then, is that we have to report oversimplified, "dramatizable" items because that's the only thing that the vast majority of Americans will watch or listen to. Obviously, this approach does not satisfy most of you in this room, which is why those of us in broadcasting find ourselves constantly being criticized by those most involved in and concerned about national issues.

Nonetheless, the bottom line on all this is that the news business is just that — a business. No matter how much some people would like it — and, very frankly, no matter how much I myself would like it — we are not in the education business. Years ago I used to say that I wished we could become The New York Times of broadcasting. Now, however, I believe that if that did happen, the CBS Evening News and Walter Cronkite would be off the air in no time flat. That, in brief, is the problem we face, and I just don't see a quick or easy solution to it.

**The potential is there, it's just not being realized**

Timothy Wirth: I completely disagree that the media can abdicate their responsibility for educating the public just because they are, first and foremost, businesses. If that were entirely true, why would we go to such great lengths to guarantee a free press? Similarly, the Communications Act of 1934 is specific in stipulating that the broadcast media must operate "in the public interest." The successful operation of the media need not necessarily be antithetical to public education. Rather, the problem lies in the same kind of greed that appears to govern so many enterprises in this country. In the media generally, but particularly radio and TV, what's happened is that the power of the almighty dollar is ultimately determining what will or won't go on the air. For instance, in the name of profitability the major networks successfully eliminated competition during the forties and fifties, a practice that's been repeated in their more recent opposition to UHF, cable, satellite or other technological breakthroughs that might provide some additional possibilities for public information programming.

The media are never going to be as informative and educational as they should be generally, and particularly in terms of the accountability process, if we continue to accept the assumption that they are solely enterprises whose bottom line is profit. Indeed, in order for the media to be forced to perform more of an education function, there has got to be, in the first place, a basic change in the outlook of the American people themselves. In other words, if all we expect from the media is entertainment and financial gain, I suppose that's all we'll continue to get — a prospect I find both repulsive and frightening.

**The problem is, what the media do is too often incorrect or misleading**

Nelson Relsby: What bothers me about this question of the role of the media in public education — and, by inference, their corresponding potential to help make public officials like the

President accountable—isn't necessarily that they aren't doing enough. Rather, it's that what is done is too often misleading or wrong, because many media people don't adequately understand the subject matter with which they're dealing. An excellent example of this was a network TV special, the theme of which was how the Executive overwhelms Congress. At one point the program focused on a hearing at which the newly installed Secretary of Health, Education and Welfare, Casper Weinberger, was about to testify. The camera zoomed in on the Secretary's inches-thick notebooks and the various deputies arrayed behind him, in marked contrast to the lone figure of the subcommittee chairman, Paul Rogers—all of which dramatically suggested the inherent inequality in the confrontation about to occur. While the narrator kept insisting that this was an example of how the Executive goes about overwhelming the Congress, the camera was showing exactly the opposite taking place. Paul Rogers had chaired this particular subcommittee for quite a while and literally knew more about Secretary Weinberger's department than Weinberger did. Accordingly, he was asking one pointed question after another, the net effect of which was that the Secretary was overwhelmed rather than the other way around. My point, then, is not that the media should do more but that when they do a story they should get it right. In other words, I think the media have a tremendous need to police themselves—to strive to upgrade the level of expertise and knowledge that goes into their work.

**Morton Borden:** It might be useful to remember that when the Constitution was going into effect, there was considerable controversy over what the relationship between the press and the government should be. For example, many people doubted that the press ought to be allowed to cover Congress at all; the precedent for which was Parliament's policy of excluding reporters and forbidding the printing of comments or speeches by its members. At first the House of Representatives had just a few reporters covering its proceedings, while the Senate completely excluded the press for its first ten years. Whatever their present failings may be, we've made great progress since the 18th century in making the media an informative and effective agent of accountability.

## The Role of the Bureaucracy: Contradictions in Potential

**Frederick Mosher:** It is evident that the founding fathers designed a variety of tensions into the Constitution regarding the Executive. Yet, they didn't mention one element—the paradoxical relationship between a president and the bureaucracy—which has become a sizeable problem, because this relationship has the inherent potential to play both a positive and negative role in the accountability process. Specifically, I'm referring to the seemingly unavoidable suspicion and distrust—most pronounced at the beginning of an Administration—

The bureaucracy:  
accountability  
agent and  
presidential  
instrument

between the career civil servants and the incoming President and his appointees. On the one hand, there is the legitimate question: How and to what degree can or should a president be held accountable for the actions of the bureaucracy? On the other is the equally legitimate question: What rôle does the bureaucracy play in helping to make a president accountable? Whatever the answers to these questions may be, the essential fact remains that the President heads a bureaucracy that can both check his power and act as a vehicle for its use and abuse. This largely unforeseen relationship between the President and the bureaucracy, in short, has come to have an enormous impact on the whole broad accountability question we've been discussing.

*"The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual and perhaps in its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operations of war—these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government. The persons, therefore, to whose immediate management these different matters are committed ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendance."*

Alexander Hamilton, *FEDERALIST* #72

Jacqueline Grose: Professor Mosher's comments raise several further questions in my mind. For example, I find it hard to understand why civil servants, who have expertise based on years of experience, aren't trusted. Secondly, why does each arm of government feel the jealous need to have its own staff of experts, with all the duplication of work this would appear to entail? Lastly, why isn't the collective expertise of the bureaucracy even more widely used, not just to keep government running smoothly but, for example, as a resource pool of talent to be tapped into on an as-needed basis?

**Why the bureaucracy isn't trusted** Frederick Mosher: While I do think civil servants are trusted a good deal more than the media would have us believe, there are some reasons why an incoming president might be suspicious of them. First, these people have been working either for the other party or for someone from their own party with whose style and goals the incoming President may strongly disagree. In addition, it's important to remember that when we discuss the "bureaucracy," we're not talking about some uniform, monolithic entity. Rather, we're discussing a whole system of expertise—the civil service, the foreign service, the armed forces—that by definition embodies different and at times conflicting perspectives, ambitions and rewards.

**Robert Pierpoint:** I think there are two major reasons that may at least partially explain why the bureaucracy isn't trusted: the misuse of the concept of "executive privilege" and the virtually ceaseless conflict between Congress and the Executive. During the years I've covered the White House, first there was a Republican President—Eisenhower—and a Democratic Congress. Next, there was what, in retrospect, appears to have been almost a three-year honeymoon between John Kennedy and the still Democratic Congress, although even they didn't get along entirely. Then came LBJ and the Vietnam period, in which this process of distortion continued to grow because Congress and the Executive were so much at odds. And, finally, there's the just-concluded eight-year period in which congressional-executive branch conflict reached epic proportions.

Distrust of the bureaucracy has also been caused by the specific misuse of the concept of executive privilege to deny Congress information it has requested and should rightfully have. Executive privilege, as we all know, was one of the key tactics used by President Nixon to disrupt and thwart Congress's legitimate powers of investigation during Watergate. The net result of this abuse of executive privilege has been to force Congress to develop its own alternatives to provide it with the information it has been unable to obtain from the bureaucracy.

**Accountability through diversity: the bureaucracy is an institution in its own right**

**Nelson Polsby:** In order to better understand the general problem of accountability between the bureaucracy and the President, or the bureaucracy and Congress, I think it's helpful to conceive of the bureaucracy as constituting a branch of government entirely different from the presidency, Congress or the courts. In addition, the bureaucracy should be viewed as fragments of government, each of which gets captured, from both within and without the government, by different interests, ideologies and alliances. Thirdly, it's also useful to think of the various government agencies that collectively make up the bureaucracy as being identified with and embodying long-term commitments about what is and isn't proper—commitments that may be, and quite frequently are, different from the ideas and responsibilities of the people with whom they interact, such as the President, Congress or their respective staffs.

Finally, just as there is a multiplicity of agencies that collectively make up the bureaucracy, there are already in our political system multiple oppositions and multiple points of entry for them. Starting around World War II—and to a certain extent before then—the United States has been developing public, private and mixed public/private agencies that systematically produce alternative and sometimes opposing expertise. For example, The RAND Corporation, which was initially financed exclusively by the government, spawned a whole new set of defense experts who, for the first time in any modern society I'm aware of, took expertise on military matters out of the exclusive hands of the armed forces. The Coun-

cil on Foreign Relations, which is privately financed largely by Wall Street lawyers and others in the New York City business community with international interests and connections, is another such organization.

These organizations develop and spin off studies, provide meeting grounds for those in and outside government and so on, so that when Cyrus Vance, for instance, comes in from a Wall Street law firm to take over the State Department, there is a large pool of talent always available upon which he can draw. Conversely, many of those leaving the Ford administration will go into such outside organizations-in-waiting until their number comes up again. The point I'm stressing is that expertise is not wholly lodged in the bureaucracy; it is also spread through all sectors of our society, thereby providing an important and ongoing link in the accountability process.

## The Congress: Expanded Potential

The role of Congress: a "zero-sum game"?

**Frederick Mosher:** Obviously, no discussion of presidential/executive branch accountability would be complete without examining the role of Congress in this respect. Indeed, one of the most visible responses to Watergate has been an acceleration in the already developed trend to increase Congress's resources and tools *vis-à-vis* the Executive. I didn't realize, for instance, that the General Accounting Office—an agency that assists Congress through special audits, surveys and investigations—has about seven times as much professional staff as the executive branch's counterpart, the Office of Management and Budget. And consider the impact of the establishment of the Congressional Budget Office and the House and Senate Budget Committees. Now, Congress will have in hand not just the annual budget proposal that OMB traditionally prepares for the President, but also one prepared by their own people. This cannot help but prove useful as far as accountability is concerned. The catalog of new congressional resources, moreover, doesn't stop there: an Office of Technology Assessment has been established, Library of Congress staff have been increased to do specialized research that was always the domain of the Executive, tentative approval has been given to setting up a congressional "think tank" to do the same type of in-depth policy research that companies like the RAND Corporation have been doing for years for the Executive.

These reforms offer great promise in terms of accountability *per se*; yet, they may also pose some problems. Along these lines, perhaps the major question is: Are power relationships in the federal government a "zero-sum game"? That is, when the power and resources of Congress are increased, does that inherently mean that the power and resources of the Executive are correspondingly decreased? If so, does that mean that these new tools will somehow make Congress less accountable while they're being used to make the Executive more accountable?

**Timothy Wirth:** What strikes me as we discuss this is the



**Congressional  
impact on  
accountability  
depends on  
the media**

critical role Congress's relationship to the media will play in the future success of the measures Professor Mosher mentioned. However much members of Congress may want to exercise their constitutionally prescribed oversight and other related investigatory powers, they find it difficult to justify the requisite time and energy in terms of the benefits that are likely to accrue: one does not, in my opinion, get reelected for making the Occupational Safety and Health Administration work better or by moving bureaucrats around via legislatively inspired reorganizations. Important though it may be to reactivate oversight, my experience has been that when I try to explain its significance to my constituents they're simply not interested. In fact, it is partly because of this lack of constituent interest that Congress has been so delinquent in exercising its oversight responsibility for the past 25 years or so. If the media helps the public to understand how necessary a part of good government it is, they will be performing a major service in making oversight the effective tool of accountability that it can and should be.

## **Constitutional Mechanisms**

### **Impeachment: What are the Alternatives?**

**Adele Hopkins:** Do we need an easier, more effective way than impeachment to remove a president—for whatever reason?

*"The President of the United States would be liable to be impeached, tried and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."*

Alexander Hamilton, *FEDERALIST* #69

**Charles Hardin:** The fact is, short of some drastic changes in the Constitution, there's no realistic alternative. I would, though, like to mention one possibility, however unrealistic it may be—developing some sort of a vote-of-confidence mechanism similar to those in many parliamentary democracies. What such a mechanism does is to give a prime minister a chance to step down or be replaced without any great shock to the body politic. In England, for example, this allowed Winston Churchill to replace Neville Chamberlain in 1940. More recently, similar procedures in West Germany and Japan allowed their prime ministers to step down when they were in one way or another discredited. The point I want to stress—again, being fully aware of how drastic a change in our constitutional system such a vote-of-confidence mechanism would require—is that we need to stop taking it for granted that once we've elected a president there's no way, short of assassination or impeachment, that he can be removed from office. At the very least, we should be seriously considering other al-

**Removing the President: pro and con on a vote of confidence**

ternatives, however implausible, they may seem. If anything is going to be done, the first thing we've got to change is the mind-set with which we tend to approach this problem.

**David Lissy:** I'm not sure that our present constitutional arrangements—impeachment and quadrennial elections—are insufficient. Moreover, while I wouldn't quarrel over considering other alternatives for removal of a president, I do have some reservations about the vote-of-confidence alternative. Because of the powerful role Congress can play under our principle of the separation of powers, I don't think we're nearly so vulnerable with a weak or inept president as parliamentary democracies are with an inadequate prime minister. Our separation of powers system has a great deal of flexibility built in. In contrast, in countries like Great Britain, West Germany and Japan virtually everything governmental seems somehow to stem from the prime minister, so that being stuck with a horribly inept one could, indeed, cause some kind of a crisis if removal were not relatively easy. Because of these differences between the systems, I don't think the problems of removal of the Chief Executive are comparable, and so I don't see any profound need for a mechanism such as the vote of confidence.

**A problem of the system: no middle ground on removal of the President**

**Merrill Peterson:** My answer falls somewhere between the two preceding statements. That is, I think we do have a serious problem: short of impeachment, what can we do to punish or get rid of a bad president? Yet as long as we have the presidential-congressional system we have, there's little we can do, other than exerting pressure via the force of public opinion or by the various kinds of pressures that Congress can bring to bear. Congressional censure, I might add, was tried once during Andrew Jackson's second term. It failed when Jackson forced Congress to back down. He told them that if he'd violated the law that would constitute a high crime, and therefore he'd have to be impeached. Jackson told them to go right ahead if they wanted to do that, but said they had no right to censure him. The problem, in brief, is that there is no middle ground in our presidential system on this question of removal.

*"The true meaning of this maxim [i.e., the separation of powers] has been . . . shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is even, in some cases, not only proper but necessary to the mutual defense of the several members of the government against each other. An absolute or qualified negative in the executive upon the acts of the legislative body is admitted . . . to be an indispensable barrier against the encroachments of the latter upon the former. And it may, perhaps, with no less reason, be contended that the powers relating to impeachments are, as before intimated, an essential check in the hands of that body upon the encroachments of the executive. The division of them between the two branches of the legislature, assigning to one the right of accusing, to the other the right of judging, avoids the inconvenience of making the same persons both accusers and judges; and guards*

against the danger of persecution, from the prevalency of a factious spirit in either of those branches."

Alexander Hamilton, FEDERALIST #66

**Would it help to make the impeachment procedure more precise?**

**Frederick Mosher:** I have one suggestion that falls somewhere between the extremes we've been discussing; that is, either by simple statute or, better yet, perhaps by amending the Constitution, to define more precisely the term "high crimes and misdemeanors." A more exact definition would make it much easier for the American people to understand what actions constitute sufficient grounds for a president to be held subject to removal from office by impeachment. Short of drastic alteration in our system, I think this possibility of making the impeachment process more precise and therefore, less time-consuming and cumbersome may hold some promise and ought to be looked into.

*"[Impeachment applies to] those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may, with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."*

Alexander Hamilton, FEDERALIST #65

**Nelson Polsby:** I think that's a terrible idea. To the contrary, I believe that it's essential for the impeachment process to continue to be intensely political, one embodying a sufficient degree of latitude so that the House of Representatives can rise to such occasions as are presented by ornery, deceitful or criminal-beyond-a-doubt presidents. The fact is, the way our system works is to take power away from a president piecemeal, rather than get rid of him. That, in effect, is what happened to President Nixon in Watergate and ultimately paved the way for his resignation. A whole train of things happened before the tapes finally surfaced the "smoking gun" that everyone was looking for: the White House budget came under great scrutiny; the Select Committee chaired by Senator Ervin was instituted and began its investigation, the special prosecutor was forced on him, and so on.

## The 22nd Amendment: A Hindrance to Presidential Performance?

**Judith Heimann:** What impact has the 22nd Amendment, which limits a president to two successive four-year terms in office, had on the whole question of accountability?

*"Nothing appears more plausible at first sight, nor more ill-founded upon close inspection, than a scheme which in relation to the present point has had some respectable advocates—I mean that of continuing the Chief Magistrate in office for a certain time, and then excluding him from it, either for a limited period or forever after. This exclusion, whether temporary or perpetual, would have nearly the same effects, and these effects would be for the most part rather pernicious than salutary. One ill effect of*

*the exclusion would be a diminution of the inducements to good behavior "There are few men who would not feel much less zeal in the discharge of a duty when they were conscious that the advantage of the station with which it was connected must be relinquished at a determinate period, than when they were permitted to entertain a hope of obtaining, by meriting, a continuance of them."*

Alexander Hamilton, FEDERALIST #72

**Merrill Peterson:** I'm going to play devil's advocate on the 22nd Amendment, and the specific core issues — term of office and reeligibility. If we accept Hamilton's argument in favor of "permanency . . . of administration" and "perpetual reeligibility", as inducements to responsible presidential conduct, we cannot accept the 22nd Amendment or any other limitation along such lines. But has Hamilton's argument proven accurate? In the 20th Century, I think the answer to this question has clearly been no. In fact, now there are other, even more powerful inducements to good conduct: the constant glare of publicity; the risk of public censure and disgrace; either with or without impeachment; the role of the two-party system and the democratic process; the restraints of the judiciary and so forth

**The case for a nonrenewable, six-year term**

At the same time, I'm convinced that the four-year term doesn't maximize the potential for effective, responsible presidential performance. One major reason is that it takes time for new members of the executive branch — the President included — to learn the ropes and get a grip on their respective functions and responsibilities. For instance, so much of the budget is locked up in standing commitments and so much lead time is needed to plan, mount and enact new programs that any change-oriented president is bound to be faced with the hassle of reelection before he's had a fair chance to retool and redirect the machinery of government according to his wishes. In this sense, a president's first term boils down to a simple race against a four-year clock. Jimmy Carter, for example, will become President on January 20, 1977, but he will not get his first crack at preparing a budget of his own until the fiscal 1979 cycle gets under way. In short, because of such first-term limitations and the intrinsic tendency they have to slow down and disrupt an incoming president, it seems to me that a longer term of office is needed — six years, perhaps.

*"As on the one hand, a duration of four years will contribute to the firmness of the executive in a sufficient degree to render it a very valuable ingredient in the composition, so, on the other, it is not long enough to justify any alarm for the public liberty"*

Alexander Hamilton, FEDERALIST #71

Yet, the concept of a longer term of office also hinges on the question of whether or not it should be renewable. Frankly, I don't think it should be, primarily because of the tremendous advantages an incumbent president now has: an estab-

hished image; immense exposure to public opinion; the psychological edge provided by the trappings of the imperial presidency and so on. But just as important, tying a longer term of office to nonrenewability would free a president from the constant pressures of reelection. Now by this I don't mean to imply that we ought to "take politics out of the presidency," but, rather, that the Chief Executive should not have to keep one eye cocked toward reelection from the very first moment he steps into the Oval Office. Of course; he doesn't have to do that now during his second term but, with a single, six-year term he wouldn't have to do it at all.

*"With a positive duration of considerable extent, I connect the circumstances of reeligibility. The first is necessary to give the officer himself the inclination and the resolution to act his part well, and to the community time and leisure to observe the tendency of his measures, and thence to form an experimental estimate of their merits. The last is necessary to enable the people, when they see reason to approve of his conduct, to continue him in the station in order to prolong the utility of his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration."*

Alexander Hamilton, FEDERALIST #72

These are some of the things that can be said in favor of altering or abolishing the 22nd Amendment. But, as I said at the outset, I'm not entirely convinced of any of these arguments myself. What I do mean to emphasize is that the idea of a longer term, with or without reeligibility, deserves a good deal more serious attention than it has heretofore received.

**The four year,  
two-term system  
is better and safer**

**Nelson Polsby:** If the question before us is whether the present four-year, two-term system is better or worse than a single, six-year formula, I guess on balance I'd come down in favor of the former. While familiarizing himself with his job, I think it's healthy and beneficial for a new president to be aware that he and his Administration are on trial and will soon be held accountable at the polls for their actions up to that point. In other words, the fact that the President has to be elected in the first place—prior accountability—is obviously important; but, so is the need for subsequent accountability—which is exactly what the present system provides for.

**Frederick Mosher:** In a study of the presidency I participated in several years ago, we discussed many of the same ideas as have been presented here. One of the major points around which our discussion revolved—and, this was half a year before the June 23, 1972 tape blew the lid off Watergate—was that most of the dangerous things of which President Nixon was being accused had been done after his 1972 reelection. Because this tended to reinforce the already enormous doubts in our minds at that time on the whole question of accountability, the consensus of the panel was that a single, six-year term would be undesirable. Even though we could see before our very eyes that the limited eligibility provided

for in the 22nd Amendment was no guarantee against presidential misconduct, the majority of the panel remained opposed to repeal.

*"Duration in office . . . has relation to two objects: to the personal firmness of the executive magistrate in the employment of his constitutional powers, and to the stability of the system of administration which may have been adopted under his auspices. With regard to the first, it must be evident that the longer the duration in office, the greater will be the probability of obtaining so important an advantage. It is a general principle of human nature that a man will be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it; will be less attached to what he enjoys by a durable or certain title; and, of course, will be willing to risk more for the sake of the one than for the sake of the other."*

Alexander Hamilton, FEDERALIST #71

**Morton Borden:** I think we've been letting a most important point slide by: that the founding fathers never meant our Constitution to be an immutable document. What they were really doing in 1787 was simply laying out some ground rules and setting up some mechanics—but, ground rules and mechanics that they expected could and would be changed via the amending process. In other words, the Constitution was by design a very ambiguous work. What it amounts to, therefore, is not a perpetual solution to the intricate, ongoing problems of government but, rather, a perpetual postponement—so that each generation has the inherent opportunity to rethink and rewrite it. Significantly, this implicit ambiguity and uncertainty in the Constitution is something the American people have shown themselves quite able to live with and adjust to, despite all the cynicism to the contrary that has been fostered by most members of the media. In a roundabout way, then, what I'm saying is that the American people seem to be content enough with the present mechanisms of presidential accountability, imperfect though they may be; and, frankly, there are many far more important problems facing us than what we should or shouldn't do about the 22nd Amendment.

## The Electoral College: Useless Anachronism or Stabilizing Force?

*"This process of election [via the electoral college] affords a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will*

not be too strong to say that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue."

Alexander Hamilton, FEDERALIST #68

**Frederick Mosher:** I guess we're agreed that the idea of a single, six-year term doesn't have a prayer of a chance at this point. However, in light of the statistics coming out of the presidential election of 1976, I do think there is an opportunity to do something about the electoral college, and it should not be missed. I know, for example, that Senator Bayh is off and running again with another constitutional amendment to do away with it and make determination of the winner contingent solely on the popular vote. When one realizes that a few thousand votes in Ohio could have swung the election to Mr. Ford, despite the fact that Mr. Carter had won with about 51 percent of the popular vote, perhaps Senator Bayh's amendment isn't such a bad idea.

**Why the electoral college shouldn't be abolished**

**David Lissy:** I want to say emphatically that the electoral college should not be abolished—not solely because I believe the kind of situation we just experienced is uncommon but because it offers some direct benefits. First, in an election where the popular vote might have been even closer than in this last one, one thing the electoral college does is to guarantee the determination of an immediate majority—a majority that can't be questioned—thereby helping to avoid the likelihood that the losing side would go rushing in to charge vote fraud or whatever. In contrast, if a presidential election is determined only on the basis of the popular vote, I suspect that the probability of charges of vote fraud and the like would be greatly increased. Second, and even more important, the electoral college has served as a long-term stabilizing force in our political system by providing minority interest groups with a means by which they can feel that they actually do have some clout.

**Nelson Polsby:** I agree. I think the electoral college is a legitimate part of our present political process and, though it may indeed reflect some of the distortions that exist in our constitutional system, on balance—not only is it good, but it also comports with the intentions of the founding fathers.

*"... the executive should be independent for his continuance in office on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official consequence. This advantage will also be secured by making his reelection to depend on a special body of representatives, deputed by the society for the single purpose of making the important choice [of electing the President]."*

Alexander Hamilton, FEDERALIST #68

**Merrill Peterson:** In THE FEDERALIST PAPERS, the theory that is offered to explain the need for the electoral college is the advantage of indirect election it embodies. The

**Historical perspectives: the theory of indirect election of the President**

federalists believed that by screening the popular vote through a select group of men who would, assumedly, be more judicious and less subject to the dangers of disorder and tumult, the electoral process would be protected from the kind of "popular passions" they so deeply distrusted. In other words—and, this is all part of the deferential conception of politics that characterized 18th century thinking on government—an elite chosen by the people to elect the President would offer a wiser choice than the masses of the people themselves. Not incidentally, it should also be remembered that the context out of which the electoral college grew was a last minute compromise at the Constitutional Convention. This compromise met a lot of different objectives and was, therefore, widely accepted by federalists and antifederalists alike.

On the other hand, I would be omitting a significant aspect of this history if I didn't mention that parts of the federalists' arguments in favor of the electoral college were self-serving and glossed over some important points. The Constitution, in fact, allows for presidential electors to be chosen by state legislatures—something the federalists only obliquely acknowledged. In the early presidential elections, for instance, electors were chosen by their respective state legislatures in roughly half the cases, not by the people directly. It wasn't until the 1820s that there was a movement toward the fairly uniform system of direct popular election of electors that has more or less survived intact down to the present.

*"Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it."*

James Madison, FEDERALIST #45

**Why the electoral college should be abolished**

Neal Peirce: My position on the electoral college issue is clear and unequivocal—it ought to be abolished. Having said that, let me respond to some of the specific points that have been raised thus far. First, while it's true that we were fortunate in 1976 that things ultimately worked out smoothly as far as the electoral vote-popular vote-question is concerned, we have been faced with similar, albeit not quite as serious, situations on four other occasions in the 20th century: 1968, 1960, 1948 and 1916. So I'm not reassured by the argument that there's nothing to worry about because in modern times an actual crisis along these lines hasn't happened.

Neither am I persuaded by the automatic majority point Mr. Lissy stressed. For example, if some rare combination of circumstances resulted in a situation where the electoral vote ran counter to the popular vote, how would we explain this apparent reversal of the popular will to the people? Regardless of how much is said and done to explain the role of the electoral college, the fact remains that the vast majority of Americans don't understand it and think that they are literally voting for the candidate of their choice. Had the 1976 campaign turned out differently as a result of the aforementioned



**The electoral system is undemocratic**

shift of a few thousand votes in Ohio, I guess we'd be telling southerners, "Well, you're concentrated in the South so your votes don't count as much as those of people living elsewhere." Frankly, I just don't see how under our democratic system such an explanation can or should be taken seriously.

Thirdly, the point was made that we have distortions in our federal system—the electoral college being one—and that they are good. While this may hold true in some cases—two senators for each state being a ready example—I don't think that this doctrine applies as far as the presidency is concerned. As I suggested above, the American people see their role in the election of their president as being special and direct.

Finally, the question of the positive role the electoral college can play *vis-à-vis* minorities and other small groups is based on a theory expounded by Alexander Bickel and others. They argue that the more populous states who, therefore, have a larger number of electoral votes, contain urban minorities that can ~~only~~ effectively express themselves politically through the existence of the electoral college. Yet, what we came very close to in this last election was exactly the opposite—an outcome in which the candidate favored by these very urban minorities would have lost because of the absolutely irrational scheme upon which the electoral vote is based.

**Robert Pierpoint:** I think Neal Peirce has just done a magnificent job of demolishing the arguments in favor of retaining the electoral college. I'd like to add one other point that I think is often overlooked, that is, the technological changes that have taken place since the Constitution was written. In 1789 I think it was very difficult for most Americans, who lived in widely dispersed small towns and settlements, to know exactly what George Washington looked like, thought like, dressed like and so on. Today, not enough can be said to do justice to the change that has taken place in this respect. Assuredly, this is not to say that we knew all about Jimmy Carter before November 2nd, but as a result of TV and the broadly expanded role of the media generally, the average American voter in 1976 knew infinitely more about the candidates running for president than did their 18th and 19th century counterparts. The electoral college, in short, has been rendered obsolete by technology, if by nothing else.

# Increasing Presidential Accountability: What Else Can Be Done?

Not surprisingly, an underlying theme of the discussion at the seminar was, How can future "Watergates" be prevented? Or, as one panelist put it, "the question of presidential accountability is not so much whether or not a strong chief executive is a good idea . . . but how strong our President should be and how his powers can be curtailed, if necessary." Another panelist, however, was just as forceful in reminding those present that, "all the accountability in the world isn't going to do us any good if we develop structures, in seeking to achieve it, that would prevent us from getting anything done." Perhaps, therefore, the essential point that any examination of the Executive must address is how to make certain the President is sufficiently accountable without rendering him unable to translate that accountability "into a reasonable expectation that the public is going to get what it wants and needs." In short, having looked at presidential accountability in terms of the past and present, some fundamental future-oriented questions remain: What else can be done to ensure "due responsibility"? How do we balance accountability and effectiveness?

**Mary Stone:** Up to this point we've been describing the problem of presidential and executive branch accountability. What we haven't sufficiently gotten into, however, are questions about what can be done to make the presidency more accountable: How can we cut through the trappings of the imperial presidency? How can we keep the President and his staff in touch with "reality"?

**Neal Peirce:** You're absolutely right—it's always far easier to point up what's wrong with the system than to figure out remedies. I do have a few ideas in this regard. First, I think there's a good deal a president can do on his own to increase accountability. Despite all the temptations to the contrary, he could, for instance, try to decrease reliance on slick public

There are  
things the  
President  
can do

relations techniques to sell programs and/or cover up mistakes. He could also set up some mechanism to encourage presidential advisors to speak out when they think he's wrong - to counteract what George Reedy (in *Twilight of the American Presidency*, New American Library, 1971) has described as the seemingly inescapable problem of a president becoming unwilling to accept criticism from his staff, combined with the latter's fear of broaching such subjects simply because of who the President is. A president can try to involve the general public more directly in the policy-making process, with special emphasis on bringing a sense of proportion and humility to his decisions. Time and again, we've seen presidents overcome by a sense of their own infallibility, an inability to admit that such and such a policy is nothing more than a series of difficult choices, each of which has advantages and disadvantages.

There are several specific ways a president might proceed in this respect. One would be to address the nation - before Congress, for example - setting out the problem at hand and detailing the costs and benefits of the various options he feels are available. Similarly, he could widen the scope of such a presentation by including members of his Cabinet, congressional leaders of both parties and so on. He could also invite public response to such addresses, through public interest channels, letters to the President, letters to Congress and the like. Whether or not any of these possibilities would work on a national scale can only be determined, in my opinion, by trying them once or twice. I do know that some similar experiments at the regional level - using a returnable ballot to query the general public on sensitive issues such as reforming the tax base or welfare - have proved quite successful.

There are things the media and citizen groups can do

Perhaps the greater need - more important than the things a president himself can do - is to encourage the development of accountability agents completely outside the public sector. The media, as has already been pointed out, have a responsibility in this regard about which they haven't even begun to think seriously. Cooperatively or competitively, the media must expand coverage of the executive branch and the presidency on an ongoing, indepth basis. The generally superficial stuff they put out at election time is just not good enough. Citizen groups can also attempt to do the same kind of thing more widely, either with or without the media. I don't have an exact blueprint in mind, but I strongly feel that nonpartisan accountability reports on presidential and executive branch performance - or, for that matter, on any other public institution or official - can and should be made.

**Robert Pierpoint:** Even after having covered the White House for twenty years, I still haven't quite figured out exactly how it operates. What particularly bothers me in this respect is that the various executive departments and agencies have, it seems to me, been superseded by a layer of White House staff who all too often are substituting their personal policy preferences for decisions made at the Cabinet level. In other words, what has evolved is a "superlayer" above the

**There are things Congress can do**

Cabinet and even above the President himself.

My proposal to deal with this problem is simple: there's got to be very careful oversight on the size, funding and functions of the President's staff—perhaps by one or both of the new congressional Budget Committees. This may sound like a ridiculously easy task, but I assure you it is not. For example, I still am not sure how to determine the actual size of the White House staff. It is always much larger than official figures indicate, because there are almost limitless ways for people to be "detailed" to the White House, while still being maintained on some other executive department payroll. Until we can get consistently reliable information on such seemingly trivial matters, I don't think we'll ever get the kind of accountable presidency most of us want and feel is needed.

**Timothy Wirth:** I wouldn't want to omit from our list of ways to increase presidential accountability the need to continue to refine and improve the existing federal election campaign laws. While their provisions regarding public financing of presidential campaigns, for instance, have already made the President more accountable by taking away from special interests the ability to acquire undue influence over his programs and policies, there is always more that can be done. In a society such as ours—one seemingly fueled and motivated so much by money and greed—we have to strive ceaselessly to scale down the role of money in politics.

**A procedure for censure: obstacles and benefits**

**Charles Hardin:** Earlier, I mentioned the idea of a vote-of-confidence mechanism as an alternate means for removing a president from office. Now I want to approach this idea from a slightly different perspective, to suggest that one way to increase presidential accountability would be to create a procedure for censuring a president. Censure, as Professor Peterson pointed out, is not a procedure wholly alien to our political history, although the Constitution itself is silent about it. Hamilton, for one, thought that censure would be more important than punishment in achieving "due responsibility," since he felt that the Chief Executive would more often be untrustworthy than criminal. Indeed, Hamilton went so far as to use his special status as Secretary of the Treasury and his close personal ties to President Washington to try to expand his Cabinet post into that of a first or prime minister, challenging Congress to allow him to appear to answer questions or enter into the kind of debate that could lead to censure. His efforts failed when Congress declined to let him appear and instructed him, instead, to report in writing.

*"[Due] responsibility is of two kinds—to censure and to punishment. The first is the more important of the two, especially in an elective office. Men in public trust will much oftener act in such a manner as to render them unworthy of being any longer trusted, than in such a manner as to make them obnoxious to legal punishment."*

Alexander Hamilton, *FEDERALIST* #70

Some of Hamilton's ideas about censure have a modern

ring. Numerous proposals, for example, have been made to have question periods in Congress, including President-elect Carter's suggestion that Cabinet officials appear regularly to answer written and oral questions, preferably with live television coverage. The problem with such suggestions is that they don't go far enough. Unless there is a "prime minister," for instance, such a question-period would be likely to aggravate the tendency toward division within the executive branch that is a marked defect of our system. No president could long tolerate public airing of the grinding conflicts within his Administration; nor, could he permit a member of his Cabinet to become prime minister. That leaves just one alternative, in my opinion: that the President himself appear before Congress for such questioning.

But even if this should prove possible, yet another obstacle will crop up if the President's party also controls Congress. That is, the country under such circumstances would hardly be likely to get the kind of vigorous debate that would tend to be most illuminating because neither would want to risk embarrassing the other. Therefore, the onus for instigating a telling debate ought to rest in a formal opposition. Obviously, though, since ours is not a parliamentary system we really cannot provide such a mechanism, especially since we have no formal opposition peer of the President who can meet him on his terms.

Nonetheless, I don't see this as an insurmountable problem. There is a logical person who could fill such a role as opposition leader: the defeated candidate for President. Certainly, this shouldn't be so onerous a prospect given the fact that Gerald Ford received nearly 49 percent of the popular vote in the last election. The most obvious way to institutionalize an effective opposition and to create conditions in which censure could be formally attempted would be to give the defeated presidential candidate a seat in the House of Representatives, with perquisites and powers appropriate to this prospective role.

What might all of the above accomplish? Certainly, it is highly unlikely that a president would ever be censured, since his majority in Congress would be too firm for that. But the regular appearance of a president before Congress would virtually guarantee that the vital issues of the day would be aired in a manner that could not help but be edifying for the public. Instead of being continually subjected to manipulation and preemption by the President, that mysterious entity, "the people," would be able not only to support government but also to oppose it and via such opposition greatly increase their ability to hold him and his Administration accountable.

**Presidential timber: how do we get all the information we need?** Merrill Peterson: Perhaps one way to have an accountable president is to try to learn enough about the character of the prospective candidates before the fact, not after the winner is installed in office. If the theory propounded by James Barber (in *The Presidential Character*, Prentice-Hall, 1972) is correct and the conduct of the presidency depends to a large degree on

"characterological" considerations, then the personality and hang-ups that the person brings to the office are of first importance.

**A national primary might help**

How do the American people come to know the character of presidential candidates? I doubt that the electorate now gets all the information it needs in order to make an informed choice. We therefore need, among other things, a much less haphazard and time-consuming primary system, a more structured means of presenting candidates to the public (something to which the League of Women Voters Education Fund-sponsored debates in 1976, made a positive contribution), and a more informative media. Why not, for example, have a uniform national primary law which would establish common standards and procedures and a time frame within which the respective primaries could take place? In addition, why not accelerate the whole primary process—perhaps by limiting it to two or three months? I think one reason so many Americans tend to be indifferent by the time November finally rolls around is that the whole process goes on for so long that it eventually becomes an utter distraction and turns people off.

*"As the select assemblies [i.e., electors] for choosing the President will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence."*

John Jay, FEDERALIST #64.

**Robert Pierpoint:** As one who has undergone the grueling routine of covering a presidential campaign from start to finish, I'm not really unsympathetic to Professor Peterson's suggestions. But I have to say that by and large the system seems to have worked fairly well. With the stunning example staring us in the face of "Jimmy Who?" having been elected, I don't see how we can come to any other conclusion, however chaotic and exhausting the primary and nominating processes may indeed be.

**Summing up: an "insider's" perspective on presidential accountability**

**David Lissy:** From the vantage point of having worked at one time or another in the State Department, HEW and the White House during the last eight years, I'd like to comment on a few underlying themes that have emerged during today's discussion. First, I want to respond to the question of how to keep the President and his staff in touch with reality. I don't think it's fair to single out the President or his staff for a tendency that exists in every nook and cranny of official Washington and, to a lesser extent, in government at any level. It's a basic part of human nature to become susceptible to being carried away by the power and excitement of one's position and lose a sense of perspective on the real world. The consequences of such a loss of perspective are undoubtedly more noticeable and potentially harmful in Washington, but there's nothing at all unique about it.

As for solutions, I would mention two—neither of which are exactly reassuring. I dealt with this problem in my own case by constantly reminding myself of how transitory my tenure would be and how inevitable it was that it would all soon pass. We must also do everything possible to bring into government the kind of people who'll be least likely to succumb to this tendency to lose their sense of proportion and perspective.

On a different point—throughout this dialog, I have been bothered by the fact that, in discussing this broad concept of accountability, we've never quite got down to the most nitty-gritty issue: that the bottom line in government is to get something done. We haven't focused on the tools needed so that accountability can be translated into a reasonable expectation that the public is going to get what it wants and needs. All the accountability in the world isn't going to do us any good if we develop structures, in seeking to achieve it, that would prevent us from getting anything done. All we could do in that case would be to throw the "ins" out every time, only to replace them with a new group who'd be no more successful than their predecessors.

Finally, we have to bear in mind that almost everything we've talked about today has been colored by perceptions based on the traumatic events of recent years. Thus, I think it would be useful to pause for a moment and divorce ourselves from these perceptions, in order to try to figure out how well we feel our constitutional system is functioning and can continue to function. I have two comments in this regard. Firstly, as Professor Peterson mentioned, perhaps the single most important ingredient for success in government, as in any other endeavor, is the character of the people who work in it. I mention this primarily to emphasize my feeling that no system of government can ever be perfect because human beings themselves are imperfect—a thought, not incidentally, that is stressed in THE FEDERALIST PAPERS and is reflected in the unique blend of separated powers and checks and balances the framers designed into the Constitution. Secondly, despite all of the frustration and disappointment I experienced in working amidst some of the most trying circumstances this nation has ever known, I am still deeply convinced that our system of government works. Indeed, I have just had this feeling affirmed once again, however unhappily, by being on the losing side in this last presidential election. This explicit example of the accountability process at work, embodied in the peaceful transfer of power, says to me that the system indeed works well and shows every promise of being able to continue to do so.

**There is no such thing as a perfect system of government**

# **In Conclusion: Questions For Further Discussion**

## **Federalist Versus Antifederalist: Historical Perspectives On The Presidency**

### **How Prophetic?**

While the antifederalists argued that the presidency had "too much power and not enough restrictions," the federalists believed that the Constitution contained an adequate blend of "energy" and safeguards in this respect. Over the long term, has either of these views proven more accurate?

### **How Accountable Is An "Energetic Executive"?**

#### **How Much Power Does a President Need?**

Do you agree that "modern problems and circumstances invite expansion and abuse of presidential power. . . ."? What impact have 20th century issues – national security, a strong economy, the communications revolution and so forth – had on presidential accountability? How has executive branch accountability been affected by "the modern idea of democratic responsibility – the fulfillment of what the people want," as contrasted to the concept of "due responsibility" articulated by Hamilton?

#### **Conflict: Cornerstone of Presidential Accountability?**

Is political and institutional conflict an essential part of presidential accountability? Have we, in fact, moved away from this original constitutional concept, as Congressman Wirth asserts? If so, is it worth restoring?

#### **The Imperial Presidency: Asset or Liability?**

What is your response to the assertion that "an imperial president is just what the American people want their Chief Executive to be"? Have Americans made the President a kind of national "father figure," thus discouraging disagreement and criticism? What, if anything, should be done about the "psychological advantage" Mr. Pierpont feels the American people have given their presidents in recent years?



# **The Accountability Process: Institutional Curbs and Constitutional Mechanisms**

## **Institutional Curbs: How Are They Working?**

What role do you think institutional curbs play in the accountability process? How important were the media, Congress and the bureaucracy, for example, during the Watergate crisis? What steps would you recommend, if any, to broaden or restrict their role?

## **Is The Accountability Process a "Zero-Sum Game"?**

Do you agree with Professor Mosher's notion that "power relationships in the federal government necessarily amount to a zero-sum game" in which one institution's gain is another's loss? For instance, in order to have a more accountable Executive must Congress have more power, thereby introducing the possibility that the latter will then become correspondingly less accountable?

## **Constitutional Mechanisms: How Effective Are They?**

Are existing accountability mechanisms such as impeachment and quadrennial elections still adequate? If not, what alternative procedures would you suggest to remove a president from office? What is your reaction, for example, to the idea of developing a vote-of-confidence procedure similar to those in various European parliamentary democracies?

Does the 22nd Amendment hinder presidential performance? What do you think about the idea of modifying or repealing it? What impact would a substitute amendment providing for a nonrenewable, six-year term have on the accountability process? Are there other alternatives?

Has indirect election of the President via the electoral college outlived its usefulness or do you think it is a "stabilizing force"? What system, if any, would you recommend in its place and what effect do you think your ideas are likely to have on presidential accountability?

## **Increasing Presidential Accountability: What Else Can Be Done?**

### **The Prospect of Censure**

What is your response to Professor Hardin's outline of a system for regular, direct presidential confrontation with Congress? In what ways, if any, would such a system render a president more accountable?

### **The Role of "Characterological" Considerations**

What specific procedures would you recommend to enable the body politic to learn as much as possible about presidential aspirants both before and after their selection as their parties' nominees?

### **"Energy" and Accountability: A Contradiction in Terms?**

To what extent are the concepts of an "energetic executive" and presidential accountability mutually exclusive? What are our priorities in balancing accountability and effectiveness? Do you agree with Mr. Lissy's contention that "all the accountability in the world isn't going to do us any good if we develop structures, in seeking to achieve it, that would prevent us from getting anything done"? Bearing this in mind, how do you think the presidency can be made more accountable? If the Constitution were being drafted today, what mechanisms for "due responsibility" do you think would prevail?

# Readings

## Primary Sources

The Constitution of the United States, especially Article II, sections 1-4; and the 12th, 20th, 22nd and 25th Amendments.

Hamilton, Alexander; John Jay; and James Madison, *THE FEDERALIST PAPERS*, especially #67-77, introduction by Clinton Rossiter, New American Library, 1961, Mentor paperback, \$1.95.

## Secondary Sources

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Neustadt, Richard E., *Presidential Power The Politics of Leadership With Reflections on Johnson and Nixon*, John Wiley & Sons, Inc., 1976, paper, \$5.95. A fresh look at the author's earlier work, which focused on presidential power in terms of "what it is, how to get it, how to keep it and how to use it."

Schlesinger, Arthur M., Jr., *The Imperial Presidency*, Popular Library, 1974, paper, \$2.45. A broad examination of the growth of presidential power from Washington to Nixon: why it has occurred, what its impact has been and what can be done to curb it.

## League of Women Voters Sources

The League of Women Voters Education Fund constantly publishes materials that relate to the ideas discussed in this pamphlet. The most recent such publications are: *You and Your National Government*, 1977 edition (#273, \$1.00) and *Letting the Sunshine In Freedom of Information and Open Meetings* (#223, 30¢) Also of interest are: *Presidential Accountability* (#578, 60¢), *Perspective on the Presidency* (#579, 35¢); and *Perspective on the Presidency A Look Ahead* (#594, 35¢) For further information consult the free *League of Women Voters Catalog for Members and the Public* (#126) or, contact the LWVEF Government/Voters Service Department, 1730 M Street, N.W., Washington, D. C. 20036.

# 5 THE FEDERALIST PAPERS REEXAMINED

The Growth of Judicial Power: Perspectives  
on "The Least Dangerous Branch"

League of Women Voters Education Fund

Edited by Harold B Lippman

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# Introduction

*"The great question that confronts us so implacably is whether the American Constitution and American political principles, which have served us so well and have weathered so many crises, can continue to function in the modern world. Is a constitutional mechanism rooted in 17th century ideas of the relations of men to government and admirably adapted to the simple needs of the 18th and early 19th centuries adequate to the importunate exigencies of the 20th—and of the 21st?"*

This question was posed to members of the League of Women Voters by Henry Steele Commager in 1974. The League took up the challenge. It has, after all, a long-standing commitment to help citizens understand their government and be involved in its workings. With the help of its companion organization, the League of Women Voters Education Fund, it developed the Federalist Papers Reexamined project, to help citizens probe for answers to this critical question.

Why THE FEDERALIST PAPERS? Well, what vehicle might better serve as the point of departure for a broad public dialog on the Constitution than this series, which is so distinguished an example of 18th-century political discourse and so significant a part of the ongoing debate over our constitutional system? What source could better nourish an inquiry that asks: What are our roots as a nation? Where are we going? How serviceable are our democratic structures and processes?

Specifically, THE FEDERALIST PAPERS were a series of articles addressed "To the People of the State of New York" by Alexander Hamilton, James Madison and John Jay, writing under the pseudonym "Publius." They appeared in various New York City newspapers between October 1787 and August 1788 in response to the vehement attacks that had been launched there against the proposed Constitution. At issue was the question of whether or not the new Constitution that had been adopted in Philadelphia would be ratified by the requisite nine states—a process in which New York's vote would be critical. New York did finally ratify, but THE FEDERALIST PAPERS remain important not because of their impact on this outcome—the extent of which is still debated—but, rather, because in them, as George Washington aptly pointed out, "are candidly and ably discussed the principles of freedom and topics of government—which will be always interesting to mankind so long as they shall be connected in civil society."<sup>\*</sup>

**The Seminars:** The foundation for this renewed public debate on American government rested on a series of six seminars, sponsored by the League of Women Voters Education Fund. At each, a group of 8-10 "discussants"—a broad mix of historians, journalists, lawyers, political scientists and public officials—spent the day in a free-wheeling, informal dialog. League "participants" served as citizen representatives, pressing the discussants to clarify their statements, to define terms for nonspecialists and to elaborate on points of special interest.

**The Pamphlet:** This pamphlet—the fifth of the project publications—sum-

<sup>\*</sup>As quoted by Clinton Rossiter in his introduction to THE FEDERALIST PAPERS, Mentor paperback edition, pp. vii-viii.

marizes the main themes that emerged in the discussion at the seminar on the judiciary, which took place in New Orleans in February 1977. It presents edited seminar dialog (interspersed with a minimum of narrative text), selected passages from THE FEDERALIST PAPERS, questions for further discussion and a list of suggested readings. The pamphlet serves two purposes: it is a way to share the seminar discussion with League members and other citizens and it provides the springboard for the public discussion this project is attempting to promote.

**The Seminar on the Judiciary:** With the remarkable growth of judicial power serving as the focal point, the discussion revolved around a number of distinct but interrelated topics: the doctrine of judicial review; judicial activism versus restraint; judicial independence versus accountability, the appointment process, and prospects for the future.

**The Discussants:**

- Lyle Denniston (staff reporter, *The Washington Star*)
- Ann Stuart Diamond (political scientist, member, advisory committee for the Federalist Papers Reexamined project)
- Sophie Eilperin (attorney, Washington, D.C.)
- Geoff Gallas (professor of public administration, University of Southern California)
- Gerald Gunther (William Nelson Cromwell professor of law, Stanford University Law School)
- Robert H. Hall (associate justice, State Supreme Court of Georgia)
- A. E. Dick Howard (White Burkett Miller professor of law and public affairs, University of Virginia)
- Thomas Railsback (congressman, R-Illinois)
- Alan F. Westin (professor of public law and government, Columbia University)
- J. Skelly Wright (United States Circuit Judge)

**League of Women Voters Participants:**

- |                                |   |
|--------------------------------|---|
| Betty Jane Anderson (Texas)    | Madelyn Bonsignore (national staff)     |
| Doris L. Barwick (Mississippi) | Judith Head (national board)            |
| Kay Braasch (Missouri)         | Harold B. Lippman (project director)    |
| Diane Brown (Oklahoma)         | Kathy Mazzafern (national staff)        |
| Silvine Hudson (Tennessee)     | Susan M. Mogilnicki (project assistant) |
| Evelyn Baty Landis (Louisiana) | Dot Ridings (national board)            |
| Elizabeth Metcalf (Florida)    | Ruth Robbins (national board)           |
| Phyllis E. Rea (Alabama)       | Carol Toussaigt                         |
| Pat D. Stewart (Kentucky)      | (project chairman-moderator)            |
| Barbara Weinstock (Arkansas)   |   |

# Historical Perspectives: From Judicial Review To Judicial "Supremacy"

In considering the relative powers of the three branches of the national government — the executive, the legislative, the judicial — some, at least, of the founding fathers believed that the last of the three would be the weakest. Yet today a case could be made that precisely the opposite has come to pass. Even if one does not fully accept either generalization, no one would deny that the role of the judiciary has grown markedly, even startlingly, since 1789. That historical fact invites questions, the answering of which shaped much of the seminar dialog. The discussants began their exploration with an attempt to recapture the pulse of the 1780s debate over the place of the judiciary in the new scheme of things. They moved on to pinpoint the moment when, and the means by which, the evolutionary process began. And they asked and debated the question, What forces have fostered the growth of judicial power and what impact has this growth had?

## Judicial Review: The Entering Wedge of Judicial Power

*"Laws are a dead letter without courts to expound and define their true meaning and operation"*

Alexander Hamilton, FEDERALIST #22 \*

**Ann Diamond:** In a series of letters written during the controversy over the ratification of the Constitution, an anonymous antifederalist author calling himself "Brutus" made a thoughtful and prophetic attack on the proposed articles per-

\*THE FEDERALIST PAPERS passages cited herein are not presented to support or contradict the dialog amidst which they have been placed but, rather, to illustrate or amplify the discussion

**Antifederalists  
were afraid that  
judicial power  
would be  
uncontrollable**

taining to the federal judiciary. This was, it should be remembered, before Chief Justice John Marshall's landmark decision in *Marbury v. Madison* (1803), in which the Supreme Court's power of judicial review was firmly established, and before the creation of the lower courts — two of the decisive developments that were to be instrumental in making the Supreme Court the most powerful body of its kind in the world. In these letters, Brutus predicted the entire development of the judiciary, *vis-à-vis* the states and the two other branches of the national government. The essence of his charges against the judiciary was that its proposed powers were unprecedented, particularly in that it would decide questions on the very meaning of the Constitution. Brutus predicted that this power of judicial review — the process by which the Supreme Court nullifies legislation that it considers to be unconstitutional — would become uncontrollable and would enable the federal judiciary and the Congress to enlarge their powers at the expense of the states to an enormous extent.

So persuasive was the substance of these writings that Hamilton was forced to respond to it in one of the last of THE FEDERALIST PAPERS (#78), contradicting some views he and Madison had expressed in Numbers 33 and 44, respectively. In these earlier papers, their essential point had been that the remedy for unconstitutional legislation would be via the ballot box.

*"If it be asked what is to be the consequence, in case the Congress shall misconstrue the Constitution and exercise powers not warranted by its true meaning the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers."*

James Madison, FEDERALIST #44

Accordingly, Hamilton's arguments in Number 78 must be understood as being essentially reactive. That is, instead of boldly asserting the case for the principle of judicial review — that it would function as a solitary check on the popular will — he was actually trying to turn the best of Brutus's charges to his advantage.

*"It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority."*

Alexander Hamilton, FEDERALIST #78

In this way, Hamilton converts Brutus's assertion that the Supreme Court would enlarge its powers and those of the legislative branch by drawing a picture of the Court in Number 78 that is completely compatible with the essential principles of representative government. He describes a judiciary — irrespective of the possibility that it might con-



tradict the Constitution by setting aside the acts of the people's elected representatives — that is more democratic than the will of the people as expressed through the legislative branch. This necessity to respond to Brutus also accounts for Hamilton's admission in Number 81 that "there is not a syllable in the plan . . . which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution . . ." and his further explanation that Congress would be able to prevent judicial encroachment on its powers by means of the threat of impeachment.

*"The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body"*

Alexander Hamilton, FEDERALIST #78

In making these assertions to turn the flank of Brutus' arguments, Hamilton was, to say the least, walking a tight-rope, since he deeply believed in the utility and necessity of the power of judicial review. Both he and, later, John Marshall argued for this power because of their abiding belief that what the Constitution was establishing was a limited government and that the only effective way to maintain those limits was to have some specific means by which to keep the legislature — the branch most likely to exceed those limits — within its constitutional bounds. In other words, their argument was predicated on the assumption that the powers of government are necessarily limited to certain ends and that a judiciary empowered with the right of judicial review would constitute an essential check on their abuse. In this sense, judicial review was meant to be a conservative check on the democratic process and was, therefore, resisted or criticized by Madison, Jefferson and others.

**Hamilton saw judicial power as an essential check on the democratic process**

In the 20th century, however, the Supreme Court and the federal courts can no longer be considered to be a conservative check on the democratic process. Ours has become a nonlimited government and Hamilton's arguments in favor of judicial review are, thus, by definition suspect. The contemporary problem this underscores is that in thinking about the judiciary and its relationship to democracy we've never quite come to grips with the perennial question — which this dialog between Brutus and Publius embraced — that the tendency to resort to judicial review would undermine the political capacity of the people and deaden their sense of moral responsibility. In this sense, the different viewpoints on the proposed judiciary enunciated in the 18th-century ratification controversy are, alive, well and worthy of our reexamination.

**The courts — the mechanism for enforcing the supremacy of federal law**

**Gerald Gunther:** I'd like to elaborate on that historical perspective by focusing on the pivotal significance of the judiciary in the constitutional scheme developed by the founding fathers. What most concerned those at the Constitutional Convention were the intricacies involved in designing a federal system based on a division of power between the states and a national government. What was stymieing them

was the practical question of how such a system would actually operate — how would disputes be resolved? The breakthrough on this problem — and to me it was the most creative and novel one in the drawing of the Constitution — came via an idea that disputes between the states and a national government would be resolved, as Hamilton put it, “by COERCION of the magistracy,” rather than “by the COERCION of arms.” What was so innovative and important about this solution was that it flew in the face of prevailing attitudes, which saw such disputes as being resolved by force — whether military or political. In effect, when nationalists such as Madison and Edmund Randolph came up with the “Virginia Plan,” so much of which later found its way into the Constitution, they and their colleagues hadn’t really conceived of the possibility that the mechanism for conflict resolution could be instituted by means of a system of courts.

It is certainly one of the great ironies of our history that the antifederalists and others who were least enthusiastic about a strong union were the source of the idea that a judicial branch ought to be the linchpin in making the proposed federal arrangement workable. Men like Luther Martin of Maryland, George Mason of Virginia, Oliver Ellsworth of Connecticut and William Paterson of New Jersey were supporting what they thought would be the lesser evil — the greater evil being the prospect of settling disputes by political or military force. What they came up with was the “supremacy clause” which declared: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land. . . .”

*“ . . . it is said that the laws of the Union are to be the supreme law of the land. What inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident that they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY.”*

Alexander Hamilton, FEDERALIST #33.

There was nothing really new about the idea that federal law and the Constitution should be “supreme”; that principle had been embodied in the Articles of Confederation, which, we must remember, had failed for the very reason that this question of how to enforce them had never been effectively resolved. What was novel and significant was to refer to the Constitution as “the supreme law of the land.” Once the Constitution was called a law, the idea that it could be taken into court to be argued about was opened up. The combined impact of the “supremacy clause” in Article VI and the pro-

visions in Article III giving the federal courts the power to decide constitutional questions was to make routine lawsuits the normal way of bringing federal law down to the grass-roots.

This "lesser evil," I believe, is the key to why our constitutional system has performed so well. Even at a time when the Supreme Court doesn't act as a brake on Congress and national power as much as it once did, the recourse to the courts as a check on state power — the main concern of many 18th-century Americans — still forms a significant part of the judiciary's business. Modern courts continue to "police" federalism, not only under the 14th Amendment — which came long after the ratification controversy — but also under the provisions of the original Constitution. In short, even though the federal courts have taken on many responsibilities in addition to their federalism-umpiring role, what they do can still be traced back directly to this novel breakthrough that occurred during that long, hot summer in Philadelphia nearly 200 years ago.

*"What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing observance of them? . . . No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of the Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former. . . ."*

Alexander Hamilton, FEDERALIST #80

### The legitimacy of judicial power evolved over time

Dick Howard: As I read FEDERALIST PAPERS Numbers 78 through 82, what struck me about them was their central concern with quieting the fears of many 18th-century Americans about the tendencies of judicial power toward excess. What Hamilton seemed to be saying was, "Look, it's just not going to be that bad. The courts are 'the least dangerous' branch. The best the judiciary can do is hold its own against the other branches, so all this talk about judicial overreaching is preposterous." Considering the political climate from about 1765 (the time of the Stamp Act) until the eve of the Revolution, Hamilton needed to make his case regarding the judiciary as he did. It was a period in which peoples' liberties were thought to be safeguarded by the legislative branch of government, not by governors or courts. In fact, to the extent that great libertarian questions were fought out in court, it was juries, not judges, who were thought to be the more trustworthy protectors of individual rights. Even after 1776, the notion that it was natural to look to courts to vindicate claims of right was still only embryonic. In short, while the legitimacy of judicial power was evolving, it certainly wasn't clear to a lot of people at that time.

Still, some profound forces were at work to keep the pot boiling, so to speak, as far as the legitimization of judicial power was concerned. One of these was the colonists'

habitual way of defending their rights on the basis of such great English libertarian documents as Magna Carta, the Petition of Right, the Bill of Rights and the Act of Settlement. As a result, there developed a deep-seated tradition that fostered the concept of a super-statute by which ordinary legislation would be measured. Thus, for example, when John Marshall finally sat down to write the *Marbury v Madison* decision, there was a body of convention and practice upon which he could depend to vindicate the Court's right of judicial review, even if that power had not been explicitly spelled out in the Constitution.

**J. Skelly Wright:** I suspect that the reason the question of judicial review was not resolved specifically in the Constitution itself was simply that the Constitution might not have been ratified if it had been. It was one of those essential problems, the framers realized, that would have to be left to be resolved in time; and so it was.

**Judicial power is  
an intrinsic part of  
the political  
process**

**Alan Watson:** What strikes me in looking back on the judiciary and the power of judicial review is their political impact on our constitutional processes. I conceive of the actions of courts and judges as being part of the political process, which is, at its simplest, as Professor Harold Lasswell put it, nothing less than the essential question of who gets what in the distribution of society's opportunities and benefits. I don't think one has to be a Marxist to see that the courts are a reflection of the fundamental economic and social foundations of society. They are a part of the established order of things and, therefore, speak largely in behalf of continuity, precedent and interests that have already been won from the political system.

This political dimension of the role of the judiciary and judicial review can be divided roughly into three periods: 1790 to the mid-1930s; 1937 to 1968; and 1969 to the present. During the first of these periods the Supreme Court was, as Hamilton and others wanted it to be, primarily an instrument of "high conservatism": those who were helped by the Court during that span were property holders, slave owners, merchants and others who followed capitalist principles. It acted as an instrument to keep the scale of justice firmly weighted in favor of society's "have" elements. Those who supported the Court during that period, with a few exceptions, saw it as a great instrument for limiting the reformist impulse — as a brake on overreaching majorities and legislatures. Conversely, those who attacked the Court during this period consisted of groups that were striving to make political changes and win entry into the political mainstream — farmers, populists, blacks, trade unionists, women, the new urban immigrants and those — such as Jefferson, Jackson, Lincoln, Bryan, La Follette and Teddy Roosevelt — committed to their support.

In the second period — about 1937 to 1968 — from a jurisprudence geared to the protection of property, the Court became essentially noninterventionist in protecting the economic interests of the "haves." Instead, it shifted to issues that dealt with equality and personal liberty, giving definition and meaning to the underlying social revolution for economic justice and equal rights that developed during those years.

The Court's decisions reflected the coming of age of an entirely new set of ideas about the way people should be judged by all the "gatekeeper" institutions controlling access to society's opportunities and benefits. Thus, for the first time in its history — and it reached its height in the 1960s with the Warren Court — there was a complete turnaround in those who attacked or defended the Supreme Court. Now, for instance, David Lawrence, who had earlier written a book (*Nine Honest Men*) defending the Court against the onslaught of Franklin Roosevelt's "court-packing" legislation, wrote scathing articles calling for the impeachment of Earl Warren and the other eight "interveners." In short, those who attacked the Court in this period were segregationists, conservatives and others who felt that their political position was being eroded by the Court's decisions. On the other hand, the great supporters of the Court at this time were the heirs of Jefferson, Jackson, et. al. — liberal organizations like the National Association for the Advancement of Colored People and the American Civil Liberties Union. These former critics of the Court now found themselves extolling it as an instrument of the democratic will — as a recourse through which society could be moved in conformity with majority opinion, when other organs of the political process were unwilling or unable to do so.

In contrast to the orientation between 1937 and 1968 toward questions of equality and personal liberty, the present period — the era of the Burger Court — has seen the Court's role in the revolution for equal rights more or less run its course. While the Burger Court is likely to continue to administer the precedents laid down by the Warren Court in the area of racial and sexual equality, it is not likely to be as innovative and expansive. The Court, as has been the case throughout its history, has been feeling the effects of what is taking place in society — in this instance, the economic woes and political turbulence that have plagued us since the late sixties. The Court's attention, therefore, has been diverted away from matters that were the focal point of the Warren justices. As a result, the pendulum of public support has also swung. Once again, those disenchanted with the Court are, not surprisingly, civil libertarians, blacks and women, and some others who only recently came to seek the judiciary's help, such as consumers and environmentalists. These groups have been attacking the Court not only for the substance of its decisions but for restricting access to the judicial process in ways that frustrate their efforts to win judicial review of their claims. On the other hand, however comforting the Burger Court's output may be to conservatives — businessmen, the "silent majority" and so forth — it has not yet become as outspoken a champion of "high conservatism" as its pre-1987 predecessors.

This brief historical narrative underscores the point that in order to understand the role of the judiciary and the process of judicial review, it helps to keep two thoughts in mind. First, whose interests are being served by the Supreme Court and who, therefore, is attacking or defending it. Second, the courts are both a powerful and vulnerable political instrument whose decisions inherently involve the distribution of society's opportunities and benefits.

# The Growth of Judicial Power: What's Happened to the "Least Dangerous" Branch?

"Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment, and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

Alexander Hamilton, *FEDERALIST* #78.

The growth of judicial power is deeply rooted in our history

J. Skelly Wright: In my opinion, the key to understanding the growth of judicial power — judicial activism versus judicial restraint are the code words — lies in the fact that it is not simply a modern phenomenon but is a process deeply rooted in our history. It goes back to the Supreme Court presided over by John Marshall — who was, I believe, the most activist judge in the entire history of the federal bench — and the 1803 *Marbury v. Madison* decision referred to earlier.

Ironically, having so speedily broken the ice on the right of judicial review, the Court did not declare another act of Congress unconstitutional for more than fifty years. And when it did, it was the notorious pro-slavery ruling by Chief Justice Roger Taney in *Dred Scott v. Sanford* (1857). This decision was a dreadful one — if ever there was a prostitution of the judicial process, this was it. Yet the point remains that it, too, continued the precedent of using judicial power to try to resolve a problem. The difficulty lay in the fact that the problem was slavery — an issue, which with the benefit of hindsight, we know the Court could not possibly have resolved.

Since then, the Supreme Court has been through other cycles, all of which have somehow involved the use of judicial power, however selectively. Thus, the post-Civil War Court forgot about states' rights and focused on the economic problems that attended our industrial revolution. When, for example, the state and national legislatures tried to protect people by passing child labor, income tax and women's rights laws, the Court, in literally hundreds of cases, held such acts unconstitutional.

My point, then, is that the Constitution is not a clear document but is, rather, a statement of grand principles that does not specifically decide many things at all. The judges who interpret it, therefore, can only be motivated by a desire

to do what they think is right, within the contours of its language and the precedents that have been built up on that language. It is in this sense that the exercise of judicial power has always been an intrinsic part of our constitutional system.

**Judicial power has expanded because we expect more from the government**

**Ann Diamond:** The expanded role of the judicial system has to be viewed in context. The crux of the matter lies in the total reversal — beginning with the New Deal, — in our attitude toward what the proper role of government ought to be. Since Congress and the executive have been increasing their role, it's just as likely that the judiciary would expand its role as well. Certainly, the founding fathers could not have foreseen at least 75 percent of what the state and national governments are doing now. They had a very different attitude toward what the proper role of government ought to be. Most of them were not, in any contemporary sense of the term, democrats, and thus the notion of the Supreme Court's being in the forefront of egalitarian, social and political change would have been profoundly disturbing to them.

*"[The Judiciary will] guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."*

Alexander Hamilton, *FEDERALIST* #78

**Dick Howard:** I'd like to use those comments as a springboard to air what is perhaps the most dramatic single development in the growth of judicial power: the federal courts' shift from their centuries-old tradition of being involved in two-party private litigation, to a new role as makers and affirmers of public policy. Admittedly, there were 19th-century precedents for this shift — the striking down of state welfare and economic legislation from the 1800s to the 1930s, for example. But what distinguishes this new trend, which began in about 1960, is the form of relief the Court has ordered and the effect it has had. In the late 19th and early 20th centuries, the Court simply told the states or Congress that they couldn't do thus and so — and that was usually the end of the matter. The result was that businessmen simply went on doing whatever it was that the Congress or state legislatures had sought to forbid. Beginning in the sixties, however, it became commonplace to see court orders that more and more closely resembled statutes or rules and regulations — a striking difference from the traditional pattern of litigation. There are federal district courts — the one in Alabama presided over by Judge Frank Johnson is a classic example — that have become engaged in day-to-day supervision of jails, schools, mental hospitals, police forces and other public institutions.

**Federal courts are taking over functions of the other branches of government**

The implications of this shift are enormous. It means, for one thing, that the daily operation of certain institutions is taken out of the hands of those who normally administer

them. There is also a tremendous consequent impact on the allocation of resources. For example, if a mental hospital is in dire financial straits, someone files a suit and a judge ends up paying a visit. The hospital smells, the plaster is peeling, so the judge immediately begins, with expert help, to devise a court order. The troublesome point is that while a problem is thereby solved, it's not a judge's business to decide where the money needed to fix up this mental hospital should come from, yet that's precisely what occurs. Such judicial decisions, then, turn a judge into both legislator and administrator — taking on the specific functions the two other branches of government have been constitutionally mandated to perform.

*"...the judiciary is beyond comparison the weakest of the three departments of power it can never attack with success either of the other two, [indeed,] all possible care is requisite to enable it to defend itself against their attacks"*

Alexander Hamilton, *FEDERALIST #78*

**This expansion has been caused by powerful political and social forces**

Why has this expansion of judicial power taken place? It has been fostered by some very powerful forces — notably the civil rights movement and the reapportionment cases of the sixties. The civil rights movement was enormously successful in bringing courts to do what the other branches of government would or could not do. Similarly, one-person, one-vote proponents got reapportionment from the courts when Congress and the state legislatures had refused to do anything about it for decades. Furthermore, these examples were there for every lawyer to see. It was on the basis of these precedents that public interest lawyers began initiating suits in behalf of such groups as consumers and environmentalists. Congress has actually supported this trend toward public interest litigation by making it easier for people to seek relief in the courts from acts of administrative bodies.

The most interesting facet of this whole shift away from the traditional role of judges and the courts is that we as a people seemed content to let it happen. I, for one, really have no complete explanation for this acceptance of the growth of judicial power, except to point out that it may have occurred, in part, because we are surely the most legalistic nation on earth. We are a nation of lawyers — for good and ill — and have a way of going to court when people in other cultures would not. The average Englishman, for example, would consider it embarrassing to be dragged into court. We, on the other hand, seem to welcome the idea of fighting things out in court.

Alan Westin: I'd agree with everything Professor Howard said, as long as he was not implying that the exercise of power by the federal courts sprang solely from the brow of the civil rights and one-person, one-vote movements. I can think of at least two areas in which the Supreme Court and the lower federal courts were involved in the 19th century in activities similar to those taking place today: they endlessly administered the budgets of municipalities that had gone bankrupt, and they were similarly involved in railroad reorganizations and receiverships. I guess I'm agreeing with Judge Wright's earlier comments that the courts have almost always

**Has the nature of judicial power really changed?**



had such powers, powers that are used in one era and lie fallow in others

**Yes, it has** **Dick Howard:** I see a great deal of difference between what the courts were doing then and what they're doing now. In the 19th-century cases, which were essentially responses to private or municipal corporations getting into financial trouble, the courts were dealing with the principle of contractual obligations. That's a far cry from what's come to pass in the sixties and seventies, with the courts deciding which undertakings a municipality or state should get into in the first place or how much they should do afterward. It's the broad oversight of public policy that's involved now, not just the relatively narrow principle of contractual obligations.

**Gerald Gunther:** I want to stress a critically important link in the historical chain of expanded judicial power — the 1954 *Brown v Board of Education* decision and the school desegregation cases that came in its wake. Following the *Brown* ruling, there was a great deal of debate about what the lower federal courts could do and ought to do to implement it. Despite the 19th-century precedents, which Professors Howard and Westin discussed, the Court did, in fact, shy away at first from attempting to impose on the lower courts any initiative for implementation. In so doing, I think it was acting on the basis of a hope — one that may have rested on a somewhat mistaken understanding of human nature — that school administrators would come forward voluntarily with desegregation proposals to comply with the *Brown* ruling. The watchword for the judges was, "Give us a plan!" However, the good will or restraint that the judges exercised quickly evaporated when it became clear that state agencies and local school boards were going to defy the *Brown* order. The gist of their response was, "We're not going to do anything — you're going to have to make us comply!" This, in turn, left the federal courts with no recourse other than to come up with their own desegregation plans. That's the critical turn of events that paved the way for the quantum leap in the expansion of judicial power that occurred thereafter. In effect, once judges started to perform the role of mayors, governors and school board members in the desegregation dilemma, it was just a small step to move over into other substantive problem areas, such as prisons, mental hospitals and the like.

**In some areas the growth of judicial power has been necessary, and should continue** **Sophie Ellperin:** It may be true that courts have stretched their mandate in recent years by taking on quasi-legislative and administrative tasks. It may even be true that this expanded role has altered the judiciary's status as the "least dangerous" branch. But I want to call attention to one area where I think the courts need to be even more "dangerous" — in protecting individual rights. Unlike executive bodies — which, once they stoke up to carry out the ever-growing list of assignments from Congress, too often lose track of the human beings behind the red tape and computer printout — courts essentially see people as individuals.

" the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of [unjust and partial] laws. It not only serves to moderate the immediate

mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts."

Alexander Hamilton, FEDERALIST #78

In many instances of late, the judicial branch has become the last resort for individuals who feel their rights have been violated by the government. It is the courts, for example, that have said an administrative body has to explain why a nuclear facility needs to be located at such and such a site, that public hearings on the proposed plant have to be held, and so forth. In such ways, I think the courts have been serving a most necessary and benign function — one that I would be pleased to see more of.

"... though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter so long as the judiciary remains truly distinct from both the legislature and the executive."

Alexander Hamilton, FEDERALIST #78

No, the courts have  
already gone too  
far

**Thomas Rallsback:** I disagree completely. Let me just cite two examples of why I think the courts may already be "dangerous" enough. Picture Hamilton reading the banner headline — "Too Much Law" — and the accompanying story in a recent weekly news magazine. He'd be flabbergasted. Among other items, the story refers to a lawsuit filed by irate Washington Redskins football fans after a controversial decision that had cost their team the game. The decision, allowing a game-winning touchdown by the opposing team, was, in the eternal tradition of the vagaries of sports, written off by virtually every Washington rooter as just another lousy call — except for this handful of attorneys who filed suit in federal court to have the officials' decision overturned!

This example might be too frivolous, to disturb Hamilton, but I think he'd be somewhat troubled by the implications of some of the actions of United States District Judge W. Arthur Garrity in the wake of his decision that the schools of Boston were racially segregated. When local officials didn't comply with the desegregation order he had prepared, Judge Garrity placed one of the high schools in receivership, in effect becoming its principal. He then hired a new headmaster and ordered the Boston school board to spend more money than it had budgeted for this particular school. It boggles the mind, but one day in his court Judge Garrity found himself pondering a purchase of tennis balls for this school! At that point, the article poses the question, "Do the courts rule the nation?" Such examples give one more than sufficient reason to wonder

**Robert H. Hall:** How Hamilton might react to this question of the growth of judicial power reminds me of the story of the drunk on the Titanic who, on hearing the crash that doomed the ship, staggered out on deck, looked around and said, "I ordered ice, but this is ridiculous!" I imagine that Hamilton might feel pretty much the same way if he could see what's happened to the judiciary since he discussed it in THE FEDERALIST PAPERS

# The "Independent" Judiciary: How Accountable Is It?

Spurred on by an apparently endless stream of scandal and wrongdoing in the executive and legislative branches, most of us have become more aware than ever of the need for government accountability. This newly acquired awareness stops short of the judiciary, however. Indeed, "too many Americans don't really understand how the judicial process works," as one panelist noted, let alone how judges and the courts are rendered accountable. A plausible explanation for this lack of public interest is that the courts in general, and the Supreme Court in particular, are held in comparatively high esteem by the American people. Still, in a democracy such as ours, ignorance can never be bliss where government is concerned. In short, the question of accountability is as central to any discussion of the role of the "third branch" of our constitutional system as it is to a review of the other two.

## Curbing Judicial Power— Who Judges the Judges?

*"[Because] the natural feebleness of the judiciary . . . [places it] in continual jeopardy of being over-powered, awed, or influenced by its co-ordinate branches [and because] nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security."*

Alexander Hamilton, FEDERALIST #78

**Robert H. Hall:** In my opinion, the key to any discussion of the problem of judicial accountability lies in the constitutional phrase "good Behaviour." That is, while the founding fathers felt that an independent judiciary was essential and that this independence would rest to an enormous extent on the principle of lifelong tenure, they also believed that a judge's continuance in office should be contingent on the faithful and diligent conduct of the office.

"The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince, in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."

Alexander Hamilton, FEDERALIST #78

**Impeachment of  
judges hasn't  
worked**

If a judge's tenure is dependent on good behavior, the obvious question this raises is, how is that standard enforced? Hamilton's answer was that the proper constitutional remedy lay in impeachment. Yet impeachment has proven to be a largely unused and therefore inadequate way of fostering judicial integrity and accountability. This being so, I strongly support the idea of establishing a statutory procedure within the judicial system, to deal with questions of the removal or involuntary retirement of federal judges for reasons of inappropriate conduct or the onset of mental or physical disability. Almost every state in the union already has such a mechanism and it's high time that something be done at the federal level.

"The precautions for [the judges'] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified for holding any other .

The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good."

Alexander Hamilton, FEDERALIST #79

**Judges must give  
sound reasons for  
what they do**

Gerald Gunther: Because it is the most important and least understood facet of the process by which we justify and control the power of the courts, I want to stress the point that judicial accountability depends almost entirely on self-restraint. The fox, if you will, is in charge of the chicken coop. The essence of this self-policing concept lies in what Hamilton referred to as a judge's responsibility to exercise "judgment" more than "will." That is, we properly expect judges to give reasons for what they do and, moreover, to tie such explanations of their decisions to the Constitution.

"It can be of no weight to say that the courts may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes, or in every adjudication upon any single statute. The courts must declare the sense of the law, and if they should be

disposed to exercise WILL, instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body."

Alexander Hamilton, FEDERALIST #78

The problem is,  
they don't always  
do so

Now the problem with this process — one that emphatically reflects the growth in judicial power that has taken place since Hamilton's time — is that too many judges have come to think that the mere act of putting on the gown gives them a commission to be "Platonic Guardians," as Learned Hand once put it, who because of their exalted station do not have to explain themselves. For example, in the 1973 *Roe v Wade* decision — which had the effect of legalizing abortions — Justice Blackmun, who wrote the opinion, simply recited at length the medical history of abortion and tenuously tied that to a vague "personal privacy" interest. Then, injury was added to insult: with that precedent still reverberating loudly throughout the country, the Court summarily affirmed a Virginia statute prohibiting homosexuality. In these two cases the Court not only failed to explain its actions adequately but compounded the error by ruling in a grossly inconsistent manner on related issues.

In short, since federal judges are not directly accountable — they are appointed for life, not elected — they are obligated in a way that neither a president nor a member of Congress is to explain their actions, to be consistent in their pronouncements and to keep sight of the fact that they, too, are fallible. While most (but by no means all) judges make some efforts to explain their rulings, be aware of their limitations and so on, that isn't always enough. That's a point that we cannot overlook when we discuss judicial accountability.

*"To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."*

Alexander Hamilton, FEDERALIST #78

The quality of the  
reasoning in an  
opinion should not  
be confused with  
the Court's right to  
decide

Alan Westin: I agree and disagree about the need to hold judges to a level of craftsmanship different from what we expect of those in the other two branches. Judges generally have adequate time for preparing their opinions. It's reasonable, therefore, to expect their rulings to do more than express a decision, they ought to reflect a high degree of discipline, logic and self-restraint. I begin to have problems with this notion at that subtle point at which criticism of an opinion begins to imply that the Court should not have tried to resolve the issue in the first place. Oftentimes, the Court is not simply engaged in an exercise in the construction of logic but is, rather, involved in deciding an outcome that reflects the "rightness" of a political idea. Whether or not the *Roe v Wade* decision, for example, was well reasoned and/or well written, to me, is less important than the fact that the outcome and rule promulgated was thoroughly appropriate — it was right for the times and it was right for the Court to have

addressed it. Similarly, even though an entire issue of one of our leading law reviews was devoted to criticizing the "badly reasoned basis" for the Nixon tapes decision, I believe it was absolutely correct. The issue, after all, was clear-cut — the President was defying an order to produce evidence — and therefore the Court had no choice but to require its presentation in as convenient language as it could. If this sounds like result-oriented jurisprudence, it should: that, as I indicated earlier, is precisely what the Court is supposed to do in a system such as ours. Given the long-lived expectation that the Supreme Court is the prime voice in defining fundamental rights, we should not confuse effectiness of expression — how well reasoned an opinion is — with the right and necessity for the Court to be involved.

**J. Skelly Wright:** I have several comments. Firstly, I agree that until judges sit down and try to justify what they've decided, they haven't done their job. Secondly, at least some judicial accountability is derived, however indirectly, from the appointment process. Richard Nixon, for instance, quite literally campaigned against the Warren Court and when he was elected made four appointments within a matter of a few years that significantly altered its character. Similarly, President Carter now faces a situation in which five Supreme Court justices will be 70 years old or more, so it's not at all unlikely that he'll have a chance to fill some vacancies before his term is out. In addition, there are some 135 vacancies — out of approximately 550-600 — on the federal bench right now, providing President Carter with yet another opportunity to place his imprint on the judiciary.

Judges are influenced by what's happening around them

Finally, while it has virtually become a cliché, it is nonetheless true that judges do indeed read the newspapers and are well aware of election returns. Speaking from years of personal experience, I can say that, with rare exceptions, judges are bound to be influenced to some degree by what is going on around them.

**Dick Howard:** I wouldn't say that the judiciary responds to election returns and the newspapers in a day-to-day sense. Yet, I do think that judges at all levels are aware of and responsive to the climate of the age in which they live. For instance, in a 1961 case, *Hoyt v Florida*, the Supreme Court had to decide whether or not Florida could constitutionally allow women to be excused from jury duty on grounds not open to men. In upholding the Florida system, Justice Harlan, who wrote the opinion, observed that women do have other duties — their families need them at home — that could be used to justify their being excused. Fifteen years later, though, in *Taylor v Louisiana*, the Court struck down a similar Louisiana law. There were technical differences between these cases — the '61 decision was based on the 14th Amendment's "equal protection" clause, while the '76 decision involved the 6th Amendment right to trial by jury — but when those differences are stripped away, what remains is the obvious fact that in the latter instance the Court was simply keeping pace with the times. Sex discrimination, in brief,

was not the issue in 1961 that it had become by 1976.

**The least accountable branch may also be the most responsive**

**Sophie Elperin:** Although the judiciary may be the branch of government that is least directly accountable, it is the one that is perhaps closest to us and our everyday problems. Unlike many officials in the other two branches, judges quite literally have to listen to the arguments being presented before them. In this sense, judges are directly in touch with people's problems and concerns and are in a unique position to be able to do something about them. Perhaps, then, the question we ought to raise is not how *accountable* the judiciary is but how *responsive* it is. To the extent that the judicial system is responsive to the needs of the people, the problem of accountability would appear to be correspondingly less relevant.

**Geoff Gallas:** That generalization moves me to add one critically important point. It is not just the judges who have to be accountable if judicial power is to be controlled. Aside from the judges, the judicial branch includes administrative, technical and other support staff who in one way or another can and do have an enormous impact on the judicial process, and whose role, therefore, should be an integral part of any examination of the question of judicial accountability.

**Alan Westin:** A few additional factors that help to make the judiciary accountable ought to be mentioned.

□ A judge's deliberations are very much affected by the possibility that a decision might be defied, evaded or overturned — factors which, given the judiciary's high concern that its decisions be respected, constitute subtle but important checks on judicial power.

□ State legislatures and Congress can rewrite a given law in reaction to a judicial ruling based on statutory interpretation, effectively overcoming it by finding other ways to accomplish whatever purpose was originally intended.

□ Some degree of restraint on the power of the judicial system can be brought about via budgetary controls and executive prerogatives. If the courts, for instance, don't have enough staff with which to conduct their affairs or if marshalls will not execute their directives, their activity may be commensurately reduced.

*"A legislature, without exceeding its province, cannot reverse a determination once made in a particular case, though it may prescribe a new rule for future cases. This is the principle and it applies in all its consequences, exactly in the same manner and extent, to the State governments, as to the national government."*

Alexander Hamilton, *FEDERALIST* #81

One last point. On balance, our judicial system has been and remains as democratic and accountable as we need it to be. This conclusion is supported by recent studies showing that a Supreme Court decision that runs counter to public opinion will at worst have a delaying effect. It might hold back a movement or idea for a few years or so, but it will rarely, if ever, totally veto the political forces at work in our country at

**The judicial system has been as accountable as we need it to be**

any given time. There are too many formal and informal mechanisms by which the judicial process can be checked for anyone to conclude that the courts are ruled by a group of bionic men and women whose powers are virtually limitless.

Accountability isn't possible when people don't understand how the judicial system works

**Lyle Denniston:** A major obstacle to judicial accountability is that too many Americans don't understand how the judicial system works. To put it another way, the judiciary has become the absolute captive of the professionals, who feel that the public has a right to know only the *result* of judicial decision making, not the *process* by which that result is achieved.

Take the *Roe v. Wade* decision, for instance. That case at first went the other way — in the preceding term the Court voted to sustain the anti-abortion statutes in Texas and Georgia. Only after Justice Blackmun spent six weeks during the summer recess at the Mayo Clinic Medical Library researching the medical lore and ethics of the abortion question, did he become convinced that a doctor has the right to advise a woman that she can choose to have one. If one reads his opinion carefully, it becomes clear that the argument he used to justify the Court's decision was little more than a judicial afterthought to make respectable his underlying deference to medical judgment. In effect, the Court's decision in *Roe v. Wade* was more a matter of personal ethics than of sound constitutional interpretation.

I agree wholeheartedly, therefore, that if judges are to be held accountable they must explain the reasons upon which they have based their decisions and tie those reasons to the Constitution. But I would go even further: not only should decisions be made available to the public in an intelligible form but the process through which they were arrived at should be opened up more than it now is. We should be able, for example, to see the draft opinions in a case. There is nothing wrong with exposing to public view the fact that at a certain point a judge felt differently about a matter than he or she did ultimately, as was the case in *Roe v. Wade*.

In sum, as we talk about an accountable judiciary we have to keep uppermost in our minds that the ultimate authority in our constitutional system resides in the people. If the Supreme Court and the courts in general don't make sense to the ordinary citizen, then they are simply not exercising their powers properly. To me, it is sad that the only branch of the federal government that persists in resisting the "sunshine" concept is the judiciary.

Will the "sunshine" concept help?

**Gerald Gunther:** I'm of two minds on this point. To the extent that judges behave like politicians — being influenced by constitutionally illegitimate factors — I favor any person or process that exposes them. But to the degree that they do what they ought to do — explain and justify their decisions — I become much more cautious. We have to be careful not to throw the baby out with the bathwater; there is a vitally important dimension of the deliberative process that should not be entirely open to public view. I think, for instance, that a "Woodward and Bernstein" approach — who had what for breakfast, who wrote which nasty note to whom, and so forth



— would do more harm than good to the ideal of careful internal deliberation that the judicial process strives to realize. Still, more should and can be done to inform the public about judges, the courts and judicial decisions. To go back to my earlier point, I particularly favor putting to the test of public scrutiny the reasons judges give for their rulings. I think that focusing the accountability process on this point would most effectively serve the public interest.

## The Appointment Process: Will “Merit” Selection And/Or “Affirmative Action” Help?

*“The President is ‘to nominate, and, by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for in the Constitution. But the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, or in the courts of law, or in the heads of departments.’”*

Alexander Hamilton, FEDERALIST #76

**Dot Ridings:** As we discuss judicial accountability, the point that troubles me most is the degree to which the appointment process has become politicized in recent years. What particularly concerns me is the impact that partisan political considerations may be having on the quality of Supreme Court justices — the Carswell and Haynesworth nominations by President Nixon readily come to mind — and other judges who are being appointed to the federal bench. In short, I doubt the adequacy of the present system of judicial selection and would like to hear what the panelists think about this point.

**Robert H. Hall:** I quite agree that the present appointment process leaves a great deal to be desired. We still have not achieved the kind of system — selection of judges on the basis of merit via a nonpolitical procedure — that I believe Hamilton had in mind in FEDERALIST Number 78 when he said that there would “be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges . . . [And] the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.” We continue to choose federal judges by a heavily political process that is grounded in anachronistic notions of party “courtesy” and patronage.

Merit selection of  
judges: the pro  
view

How might a properly constituted merit system work? The American Bar Association does now have a merit procedure, but it reviews prospective judges *after* they’ve been nominated. I envision a system based on a nominating commission that would seek out the most qualified persons, then reduce the number of candidates for a given vacancy down to three to five individuals, from among whom the President would select the nominee. At the circuit court level the nominating

commission might consist of some members appointed by the President, a number recommended by the U.S. senators involved with that circuit court, some laypersons and lawyers.

Significant benefits might accrue from such an arrangement. Firstly, under present procedures the most qualified people aren't necessarily included in the list of those being considered; under the merit selection method, this would be much less likely to occur. Secondly, a merit procedure would help to get political debtors off the hook. That is, a governor or senator, who is approached by an unqualified person to whom he or she is politically indebted can simply say, "I'd really like to be able to help you, but I just can't fight this commission that's been set up to screen the applicants." A merit procedure would go a long way, on these two scores alone, toward depoliticizing the selection of federal judges and would move us closer to the high standards of judicial quality and integrity that Hamilton wrote about in THE FEDERALIST PAPERS so long ago

**Merit selection of judges: the con view**

**Geoff Gallas:** I'm not sure that a merit selection system is either necessary or desirable. As to necessity, recent studies in some states that have a merit system in operation have uncovered no empirical evidence that it gives us better judges than any other method — and that, after all, is what we're after. Moreover, traditions like senatorial courtesy in federal appointments are not as important as they may have been at one time. The Department of Justice, for example, already undercuts the effects of such vestiges of the past by screening prospective federal judges in face-to-face interviews.

As for the desirability of having a merit system, such proposals tend to foster unrealistic images and expectations. On the one hand is the image of the smoke-filled room types — a Mayor Daley and his cronies sitting around figuring out who is the most "loyal" among those who might be considered. On the other side, we conjure up the image of the totally dispassionate, objective commission made up of people whose goals are entirely altruistic. Neither extreme matches real life.

**We need to assure that judges come to the bench independent and remain so**

The crux of the appointment process lies not in the way judges are selected but, rather, in trying to assure that they come onto the bench independent and are able to remain so throughout their tenure. Thus, to a great degree, the quality of judges will depend on such considerations as how much they're paid, how well trained they are and a host of mundane but highly important ways in which their personal and professional relationships can be managed so as to encourage judicial integrity

*"NEXT to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will"*

Alexander Hamilton, FEDERALIST #79

**Judith Head:** This discussion of how to get the best judges makes me wonder about what role the principle of "affirmative action" ought to play in the appointment process?

**Geoff Gallas:** I'm not sure that affirmative action will have any pronounced effect on the judicial process. Recent studies of decisions made by black and women judges found little difference between them and those rendered by their colleagues on the bench. There is nothing, in other words, to suggest that a black or female judge will necessarily represent the interests of their respective constituencies more effectively than other judges do.

Moreover, if the main goal is to get the best people on the bench, then I'd be comfortable with affirmative action only if it were to remain one among many different criteria used in judicial selection. To my way of thinking, nominating a woman to be a judge primarily on the basis of her gender, or a black primarily because of his or her skin color, will help us get neither better judges nor a better brand of justice.

Affirmative action  
is likely to be more  
harmful than  
beneficial

**Dick Howard:** Part of the difficulty in trying to deal with this question of affirmative action is that, in recent times we've been subjected to an overdose of behaviorism, which erroneously implies that accumulating data — merely knowing enough about a judge — will enable one to predict what he or she will do. Justice Louis Brandeis, for instance, was a corporation lawyer, yet when he was appointed to the Supreme Court he was one of those in the forefront of getting the courts off the back of government so that it could get on with the work of regulating big business.

If one wants to talk about putting more blacks, women, chicanos or members of other specific ethnic or racial groups on the Supreme Court or the lower federal bench, I think the argument in support of this idea ought to be framed in largely nonbehaviorist terms. That is, if particular groups of people have to live with a given body of judicial rulings, will it be helpful if they know that individuals like themselves shared in making those decisions? If the answer is yes, then perhaps affirmative action ought to be included as a criterion in the selection process. I think a line has to be drawn, however, when arguments in favor of affirmative action are couched in terms that imply that the quality of judicial opinions will be improved or become more representative simply because a member of one's own ethnic or racial group is a judge. This approach, in my opinion, is at best misconceived and at worst untenable. All in all, I rather agree with Geoff Gallas that the case for affirmative action in choosing judges has not been made.

# The Judiciary And The Future: Promise, Contradictions And Change

Having weighed the questions of judicial power, independence and accountability, the panelists topped off the day's discussion with an exchange of ideas about the future. This dialog began with some specific recommendations that went to the heart of the issue of the relationship between the federal and state court systems. The give and take then turned more philosophical, focusing on a series of interrelated questions: What can the courts do? What should they do? What are they likely to do? The discussion wound to a close with the panelists debating the efficacy of certain reforms that are often mentioned in attempts to define and clarify the future role of the judicial branch.

*[What of] the situation of the State courts in regard to those causes which are to be submitted to federal jurisdiction? Is this to be exclusive, or are those courts to possess a concurrent jurisdiction? If the latter, in what relation will they stand to the national tribunals?*

*When we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited."*

Alexander Hamilton, *FEDERALIST* #82

**Robert H. Hall:** The time has come for a reappraisal to determine how workable and efficient our dual court system now is and how workable and efficient it is likely to remain. In my judgment, there is too much concurrent jurisdiction in our federal and state courts, with resultant logjams. *Habeas corpus* cases are one troublesome example. State prisoners bring thousands of suits to federal courts each year petition-

*\*Cases resulting from suits brought in federal courts in behalf of state prisoners who feel that they are being illegally detained or have been imprisoned in violation of their constitutional rights.*

ing for release. Since less than one percent of these are successful, I see no reason why habeas cases shouldn't be left more completely to the state judiciaries.

*"The power of constituting inferior [federal] courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It is intended to enable the national government to institute or authorize, in each State or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits."*

*But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the State courts? This admits of different answers. . . State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws."*

Alexander Hamilton, FEDERALIST #81

**The time has come to revitalize state judiciaries**

**Lyle Denniston:** I, too, believe that the time has come to revitalize our state judicial systems. I foresee this happening in the context of a broader process already underway, which is shifting power and responsibility from the federal level to the state and local levels.

Moreover, I think an ideological realignment has begun to take place, the effect of which will be to continue this trend. For instance, within the next generation or so, the erosion of the bases of support for the Republican Party may have gone so far that it will have to close up shop. In its place, however, it is likely that a new "conservative" party will emerge — consisting of former GOP members and ideologically estranged Democrats — one that will adhere more strictly to the principle of decentralized government.

Finally, I believe that what might be called a "delegalization" of our processes of conflict resolution is occurring. The people of this country have gotten to the point where they're beginning to agree with William Shakespeare that when the revolution comes the first thing to do is get rid of the lawyers. I detect a growing feeling among many Americans that the use of the legal process to order the human condition has simply gone too far. Since it's the federal government that has become so closely identified with this tendency, it is safe to assume that delegalization will be tied to greater state and local involvement, especially as nonlegal alternative procedures for resolving conflict are developed.

**The need for judicial review may be decreasing**

**J. Skelly Wright:** In the third century of our republic, I see a maturing process setting in, we are becoming a more sophisticated people and nation. One effect of this maturing process on the judicial branch, which stands out above all of the others, is the paradoxical possibility that the need for and exercise of judicial review will diminish. As we become more adept, for example, in handling the decisions of the Supreme Court — as expounded in detail by the lower federal and state courts — the chance that Congress and/or the state legislatures will pass laws that might run into a constitutional barrier of some kind will decrease correspondingly. I'm anticipating that this maturing process will ultimately make federal-

state relationships and the relationships among the three branches of the national government much more productive and satisfying than they are at present.

This maturing process aside, I see other changes taking place within our judicial system in the years to come. For instance, I agree with Judge Hall that the time has come to get rid of the federal-state-overlap involved in *habeas corpus* cases. We must not forget, however, that we've come to this point where federal *habeas* access seems to have outlived its usefulness only because the Supreme Court required state courts to provide remedies for constitutional violations of the rights of their prisoners or suffer the consequence of having federal courts supply them. Only when this stark alternative confronted them did state legislatures and courts get busy.

Finally, I see the disappearance of diversity jurisdiction, in which a federal court intervenes in a case because the parties involved are from different states. Again, it should be remembered that at one time this power was looked upon as being so essential that the founding fathers had it spelled out in the first Judiciary Act of 1789. It's because state courts have become accustomed, under this discipline, to protecting all litigants, irrespective of where they come from, that we are able to consider its abolition.

*"in order to have the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded."*

Alexander Hamilton, FEDERALIST #80

There are limits to what the courts can and should do

**Gerald Gunther:** I'd like to attach one or two important qualifications to Judge Wright's observations on the maturing process. First, I think this process will also bring some recognition by judges and the courts that there are limits to what they can and should do to resolve society's problems. Too many Americans have excessive expectations about what the courts ought to do and under what circumstances they ought to be resorted to. We will be more mature, then, to the extent that we become more willing to look to the states and the other branches of government to solve our most basic and persistent problems.

Second, when I hear people say that Congress can be relied upon to get more into the act or that more power will be returned to the states I become wary. There is often some hypocrisy involved in such assertions, which often turn out to mean that we'll let the political process and the states solve problems if — and only if — they come out with the results we want. An important facet of this maturing process, therefore, will have to be a recognition that Congress and the states must be allowed to fail as well as succeed.

**Judicial reforms should not interfere with the courts' fundamental purpose**

As for the issue of change and the future of our judicial system, I will not shock you if I offer a decidedly conservative message. The current talk about increased staff, administrative reform and overall unkenking with the structure of the Supreme Court leaves me profoundly cold. To the extent that Chief Justice Burger is spending time on the administration of justice and court administration, he must be diverting himself from what I still consider to be the fundamental job of any Supreme Court justice — to pay strict attention to the cases before him and to the opinions being written in deciding them. Judges, I repeat, must make decisions and give adequate reasons for them. That is their fundamental purpose, and any proposed "reform" must be most carefully weighed in terms of how it will strengthen or weaken this essential judicial principle.

**More of us will seek access to the courts, but fewer will get it**

**Dick Howard:** I'd like to make a subtle distinction regarding Judge Wright's assertion that a more sophisticated, mature society will make judicial review less necessary. I foresee more people wanting access to the courts and judicial review but fewer getting it. Assuming that the points of contact between citizens and government will be increasing on both the state and federal level, the opportunities for people to complain about how government has mistreated them, when it fails to meet their needs, will be multiplied. There's a corresponding likelihood that people will increasingly want to go to court. I don't think, for instance, that the trend toward public interest litigation is going to recede. People will continue to seek judicial redress for the kind of broad social issues that those cases embody. On the other hand, I think this growing demand for judicial review will be counterbalanced by a Supreme Court that has already begun to practice its own particular brand of judicial restraint. Unless there's a dramatic change in its composition in the immediate years ahead, the Burger Court is likely to build on recent decisions that have had the effect of making it harder for the average person to gain access to the courts.

**A more-is-better approach won't necessarily improve the judicial system**

As for institutional changes, I share some of Professor Gunther's skepticism about administrative tinkering. For instance, while the proposal for a national court of appeals might not seem to be a bad idea on its face, I don't see how it can fulfill its proponents' expectations. I am not convinced that having one more tier of courts will get more cases settled more justly or more speedily than now. In brief, the more-is-better approach to improving our judicial system must be approached with great caution.

**Thomas Rallsback:** I'd like to tick off a few of the more important actions regarding the judiciary that I think Congress is likely to consider in the near future.

- Now that there is a Democratic President and a Democratic Congress I think we'll see a speedy end to the drastic shortage in the number of judges. Perhaps as many as 150 additional federal judges will be appointed.
- We are going to take up the question of abolishing diversity

**Congress will be considering some changes**

jurisdiction, as well as the idea of an intermediate court of appeals

I would fervently hope that we will do something about the disparity between the sentences state and federal courts mete out in criminal cases

Congress will soon have to reconsider the so-called "Speedy Trial Act," which, however well intended, has accomplished its objective of expediting the handling of criminal cases at the expense of greatly slowing down the judicial process in other areas, notably, civil litigation

I think we will be considering the idea of a disability tribunal — some body empowered to decide if a judge has become disabled or for some other reason ought to be mandatorily retired

*"The constitution of New York, to avoid investigations that must forever be vague and dangerous, has taken a particular age as the criterion of inability. No man can be a judge beyond sixty. I believe there are few at present who do not disapprove of this provision. There is no station in relation to which it is less proper than to that of a judge. The deliberating and comparing faculties generally preserve their strength much beyond that period in men who survive it. [Thus,] the dismissal of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity than is to be found in the imaginary danger of a superannuated bench."*

Alexander Hamilton. FEDERALIST #79

In conclusion, let me add just one more point. I think that on balance our judicial system has been most effective and responsive to our needs. Indeed, I must admit with some chagrin that the growth of judicial power has often been a direct consequence of the vacuum caused by legislative apathy, fear and/or inaction. I hope, then, that the measures mentioned above, and others that Congress may soon consider, will be steps toward restoring a more healthy balance between the legislative and judicial branches, without affecting the latter's most important attribute, its "independent" character.

*"It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority which has been upon many occasions reiterated is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen, but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the*



other, would give to that body upon the members of the judicial department"

Alexander Hamilton, *FEDERALIST* #81

**We need some new  
judicial structures  
and mechanisms**

**Alan Westin:** Before getting down to specifics, I want to emphasize one point. I don't believe that we are going to or should rewrite the Constitution as far as the judicial branch is concerned. I do think, however, that a number of less drastic measures are worth considering.

We need a specific court of science and technology, one comparable in power and functions to the Court of Military Appeals or the Tax Court, because existing judicial institutions cannot cope with the extremely complex problems of our interconnected technological society. This intermediate court — whose output, like the others cited, would be subject to review by the Supreme Court — would be presided over by judges with sufficient breadth of background and experience to develop a working knowledge of areas ranging from biochemistry to nuclear technology, while not necessarily being specialists in their own right. Such a court would be staffed six-deep with experts to advise it, experts whose opinions would be subject to the adversary process in order to avoid the pitfalls of their role involving secret whisperings in the judges' ears.

We need to address the problems of our criminal justice system in a total systems manner. In our criminal justice system — a system that includes police, prosecutors, prison administrators and probation officials, as well as judges and court staffs — the courts are the weakest link. In recent years, through such federal agencies as the Law Enforcement Assistance Administration, we've been trying to shore up the criminal justice system. But the emphasis of this vast infusion of federal money has been on the application of space-age technology to law enforcement, some upgrading of prisons and the probation process and so forth. Where emphasis has been lacking, therefore, has been at the administrative level — everything from staffing and running the courts to reforming the criminal code and so on. Recent experience suggests that if we allocate resources to improve the performance of one part of the system without similarly trying to strengthen the others, the total effect will be greatly diminished.

We need some new mechanisms to bring the judicial process closer to people and their problems. The system is serving the well-to-do and the very poor (who are provided for via public defender systems and the like) fairly well. But for the average American, going to court has become too awesome, too costly and/or too time consuming. As a result, the need for cheaper, faster, more accessible ways to adjudicate disputes, particularly in civil cases, has become increasingly urgent.

**Sophie Ellperin:** While I realize that Professor Westin's idea of a court of science and technology reflects the reality of 20th-century circumstances, I am not very enthusiastic.

about it. Creating new institutions to handle new problems has not been very successful during the last decade or so — perhaps because in an era of inflation, no institution, much less a new one, ever seems to have enough money or resources. Certainly, I don't have a better idea about how to handle the legal ramifications of 20th-century science and technology issues, but I still think we should be able to work them out through existing institutions, rather than by establishing new ones.

**If Congress curbs the executive, the burden on the courts will be reduced**

Secondly, I was reassured to hear Congressman Railsback disagree with my earlier remark suggesting that the courts are not dangerous enough. I say reassured because, if Congress helps to put limits on the executive branch, the interventionist role of the courts will not be as necessary as it has been in recent times. I'm not trying to oversimplify the hard choices that will have to be made before such restrictions can be effected. Nonetheless, I believe that to the extent that the various departments and agencies of the executive branch are kept within legislatively prescribed limits, the burden on our courts will be reduced correspondingly.

To summarize my attitude toward our judicial system and hopes for its future, I want it to remain "independent" enough to be able to think about and act on the important issues. As Justice Robert Jackson put it, "It is difficult to see how the provisions of a 150-year-old written document can have much vitality if there is not some permanent institution to translate them into current commands and to see to their contemporary application."

**Geoff Gallas:** What I find most fascinating and reassuring about our judicial system is that it is presently being pushed and pulled in two opposite directions. In a spate of recent decisions, the Supreme Court has made it clear that it is trying to figure out how to reinvigorate the state courts and take power away from the federal judiciary. Yet, there seems to be a host of pressures in our society pushing us toward the very kind of centralized judicial system that the Burger Court appears intent on eliminating. For instance, because we have become so mobile — we're told that, on the average, Americans move once every five years — we're seeing a lot of support for a more uniform national court system, we find it hard to live with the inconsistencies in the judicial process from state to state.

**The genius of our constitutional system — the judiciary can be headed in opposite directions at the same time**

While this paradoxical situation, which finds the judiciary simultaneously headed in opposite directions, is significant in its own right, there's an even more important point that it underscores. That is, it is the very genius of our constitutional system that we can accommodate these contradictory forces without getting into too much trouble. This constitutionally derived ability to reconcile such conflicts and contradictions tells us a lot about how and why we have come as far as we have and how much promise our third century of existence holds.

# In Conclusion: Questions For Further Discussion

## Historical Perspectives: From Judicial Review To Judicial "Supremacy"

### Federalist v. Antifederalist: Who Was Right — Brutus, Publius, Neither, Both?

According to the letters of "Brutus," the antifederalists were afraid that judicial power would become uncontrollable. Hamilton and some other federalists, on the other hand, saw it as an essential check on the democratic process. Over the long run, has either of these views proven more accurate?

### The Courts: How "Political" Are They?

What is your reaction to the statement that the actions of the courts are an intrinsic part of the political process and, as such, are necessarily involved in "the essential question of who gets what in the distribution of society's opportunities and benefits"? If this is true, how do you feel about this facet of our constitutional system?

### The Growth of Judicial Power: How, Why and What Effect?

How has the nature of judicial power changed since 1789? Have these changes reflected shifts in our conception of what the proper role of government can and should be? Are there limits beyond which judicial activity ought not to be permitted? If so, what are they and what can be done to keep judges and courts from exceeding them?

## The "Independent" Judiciary: How Accountable Is It?

### "Independence" and Accountability: A Contradiction in Terms?

To what extent are the concepts of judicial independence and accountability mutually exclusive? What is your reaction to the argument that it is no longer appropriate to rely primarily on self-restraint for judicial accountability — to trust that judges will exercise "JUDGMENT" more than "WILL"? Has the principle of life tenure for federal judges become more of a liability than an asset?

### **The Judicial System: "As Democratic and Accountable As We Need It to Be"?**

The panelists differed sharply about whether the judiciary ought to be made more accountable, and even moreso on specific reform measures that have been proposed in this regard. Where do you stand on this question? What effect, if any, might such ideas as merit selection, affirmative action and greater openness in judicial decision making have? Do you have any other recommendations related to judicial accountability?

### **Is the Least Accountable Branch Also the Most Responsive?**

What is your response to the statement that "although the judiciary may be the branch of government that is least directly accountable, it is the one that is perhaps closest to us and our everyday problems"? Do you agree that "perhaps the question we ought to [be raising] is not how accountable the judiciary is, but how responsive it is"? What do you think of the concept of "result-oriented jurisprudence" — the notion that the "appropriateness" of a court decision is more important than its basis in reason?

## **The Judiciary And The Future: Promise, Contradictions And Change**

In your judgment, has the time come to revitalize our state judiciaries? In what ways could this be done? What effect do you think this might have on judicial prospects, generally? Can state court systems be counted on to be any more or less activist than their federal counterparts?

What do you think of the idea that any future judicial role will depend to a great extent on what Congress and the Executive are doing? If government activity diminishes, would this mean that judicial activity would decrease correspondingly? Or, having become the arbiter of the powers of all organs of government, must the judiciary always play a broad, ongoing role in our constitutional system?

What measures would you recommend to improve the overall performance of the judicial system? For instance, do you think that more federal judges or special courts, such as a court of science and technology, are needed? Should access to the judicial process be expanded or restricted? Should greater emphasis be placed on seeking out nonlegal means to resolve conflict? And, will the effect of your ideas tend to curb or expand the role of judicial power and influence?

# Readings

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## League of Women Voters Sources

The League of Women Voters Education Fund constantly publishes materials that relate to the ideas discussed in this pamphlet. The most recent is *You and Your National Government*, 1977 (#273, \$1.00) For further information consult the free League of Women Voters' *Catalog for Members and the Public* (#126) or, contact the LWVEF Government/Voters Service Department, 1730 M Street, N.W., Washington, D.C. 20036

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6

**THE  
FEDERALIST  
PAPERS  
REEXAMINED**

Our "Compound Republic": Perspectives on American  
Federalism

190

**League of Women Voters Education Fund**

Edited by Harold B Lippman and Elena Van Meter  
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# Introduction

*The great question that confronts us so implacably is whether the American Constitution and American political principles, which have served us so well and have weathered so many crises, can continue to function in the modern world. Is a constitutional mechanism rooted in 17th century ideas of the relations of men to government and admirably adapted to the simple needs of the 18th and early 19th centuries adequate to the importunate exigencies of the 20th—and of the 21st?*

When Henry Steele Commager posed this question to members of the League of Women Voters in 1974, the League took up the challenge. It has, after all, a long-standing commitment to help citizens understand their government and be involved in its workings. With its companion organization, the League of Women Voters Education Fund, it developed the Federalist Papers Reexamined project, to help citizens probe for answers to this critical question.

Why THE FEDERALIST PAPERS? Well, what vehicle might better serve as the point of departure for a broad public dialog on the Constitution than this series—a distinguished example of 18th-century political discourse and a significant part of the ongoing debate over our constitutional system? What source could better nourish an inquiry that asks: What are our roots as a nation? Where are we going? And how serviceable are our democratic structures and processes?

Specifically, THE FEDERALIST PAPERS were a series of articles addressed "To the People of the State of New York" by Alexander Hamilton, James Madison and John Jay, writing under the pseudonym "Publius." They appeared in various New York City newspapers between October 1787 and August 1788 in response to the vehement attacks that had been launched there against the proposed Constitution. At issue was the question of whether or not the new Constitution adopted in Philadelphia would be ratified by the requisite nine states—a process in which New York's vote would be critical. New York did finally ratify, but THE FEDERALIST PAPERS remain important not because of their impact on this outcome—the extent of which is still debated—but, rather, because in them, as George Washington aptly pointed out, "are candidly and ably discussed the principles of freedom and topics of government—which will be always interesting to mankind so long as they shall be connected in civil society."<sup>\*</sup>

**The Seminars:** The foundation for this renewed public debate on American government rested on a series of six seminars, sponsored by the League of Women Voters Education Fund. At each, a group of eight to ten "discussants"—a broad mix of historians, journalists, lawyers, political scientists and public officials—spent the day in a free-wheeling, informal dialog. League "participants" served as citizen representatives, pressing the discussants to clarify their statements, to define terms for nonspecialists and to elaborate on points of special interest.

**The Pamphlet:** This pamphlet—the sixth and final project publication—

<sup>\*</sup>As quoted by Clinton Rossiter in his introduction to THE FEDERALIST PAPERS, Mentor paperback edition, pp. vii-viii.



summarizes the main themes that emerged at the seminar on federalism, which took place in Denver in April 1977. It presents edited seminar dialog (interspersed with a minimum of narrative text), selected passages from THE FEDERALIST PAPERS, questions for further discussion and a list of suggested readings. The pamphlet serves two purposes: it is a way to share the seminar discussion with League members and other citizens and it provides the springboard for the public discussion this project is attempting to promote.

**The Seminar on the Nature of American Federalism:** The discussion began with a disagreement over the origins of American federalism. It then revolved around a number of interrelated topics: Does federalism refer to a contractual relationship among governments, or to a structure of government? How do individuals relate to the federal system? What are the effects of regionalism, metropolitanism and sectionalism on American federalism? And, finally, how will the federal concept change to meet the needs of the American people in the 21st century?

**The Discussants:**

- James M. Banner, Jr (professor of history, Princeton University)
- George E. Brown (lieutenant governor of Colorado)
- Daniel J. Elazar (director, Center for the Study of Federalism, Temple University)
- Robert Hunter (acting federal insurance administrator, Federal Insurance Administration, Department of Housing and Urban Development)
- George Kennedy (professor of classics, University of North Carolina)
- Martin Kulson (professor of government, Harvard University)
- Robert P. Knowles (former member of the Wisconsin State Senate, member, U.S. Advisory Commission on Intergovernmental Relations)
- Gladys Noon Spellman (congresswoman, D-Maryland)
- Rochelle Stanfield (staff correspondent, *The National Journal*)

**League of Women Voters Participants:**

- |                            |  |
|----------------------------|--|
| Mary Ann Bradford (Kansas) | Jean Anderson (national board)               |
| Mary Hempleman (Montana)   | Madelyn Bonsignore (national staff)          |
| Beverly Housel (Nebraska)  | Janet Damtoft (national staff)               |
| Kathryn Lex (Wyoming)      | Betsy Dribben (national staff)               |
| Judy Lyke (Colorado)       | Judith Heiman n (national board)             |
| Mary Mech (Idaho)          | Harold B. Lippman (project director)         |
| Gina Rueke (Utah)          | Susan M. Mogilnicki (project assistant)      |
|                            | Carol Toussaint (project chairman-moderator) |
|                            | Nan Waterman (national board)                |

# The Nature of American Federalism

What is the nature of American federalism? In that question lies one of the most difficult issues associated with the founding of the republic. Reflecting 18th-century political realities, both the Constitution and THE FEDERALIST PAPERS leave unclear whether the founding fathers meant to create a national or a federal government. Indeed, Publius argues that the Constitution provided for both.

*"The proposed Constitution, therefore; even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national, in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national."*

James Madison, FEDERALIST #39 \*

The ambiguity was no accident. On this issue, as on others, the founders tried to arrive at a consensus through language that had something for everyone. They blurred from the very beginning the boundaries between a strong national (central) government, and a confederal system dominated by the several states. In the Civil War both sides drew their theoretical justification from this very ambiguity. The North claimed that the Union was indivisible because it was inextricably tied to the concept of a strong national government established by the people, the South asserted that the states had made the Union and therefore had the right to unmake it by seceding.

This duality, in fact and in perception, still lies close beneath the surface of many of the issues bedeviling us today. School desegregation, revenue sharing, welfare reform, energy supply, land use — the way opponents define such problems and the solutions they propose are very much grounded in how they perceive the relationships between the national govern-

\*THE FEDERALIST PAPERS passages cited herein are not presented to support or contradict the dialog amidst which they have been placed but, rather, to illustrate or amplify the discussion

ment and the states.

An effort to trace the development of these relationships is no sterile exercise. Some insight about the nature of American federalism is essential to a fuller understanding of the political dialog that is the backdrop of American problem solving. What were its origins? What did it signify in the 18th century? What does it mean today?

**George Kennedy:** *Federal* came from the Latin *foedus*, which means a league or agreement between sovereign states. It implied a rather weak kind of confederation, such as those in ancient Greece, some of which were greatly admired by Montesquieu and other influential 18th-century political thinkers. In preparation for the Constitutional Convention, Madison actually made a study of these leagues. He concluded that they were prone to disintegrate more through the strength of the individual parts than through the growth of the central government's power. Armed with this lesson from the distant past and having the failure of the Articles of Confederation fresh in their minds, Madison and others at the Convention argued steadfastly for a strong national government.

*"It must in truth be acknowledged that . . . there are material imperfections in our national system and that something is necessary to be done to rescue us from impending anarchy . . . We may indeed with propriety be said to have reached almost the last stage of national humiliation. There is scarcely anything that can wound the pride or degrade the character of an independent nation which we do not experience. . . . Do we owe debts to foreigners and to our own citizens . . . ? These remain without any proper or satisfactory provision for their discharge. Have we valuable territories . . . in the possession of a foreign power which, by express stipulations, ought long since to have been surrendered? These are still retained to the prejudice of our interests, not less than of our rights. Are we in a condition to resent or to repel the aggression? We have neither troops, nor treasury, nor government. . . . Is commerce of importance to national wealth? Ours is at the lowest point of decadence. . . . This is the melancholy situation to which we have been brought by those very maxims and counsels which would now deter us from adopting the proposed Constitution. . . ."*

Alexander Hamilton, *FEDERALIST* #15

Madison's notes on the Convention and the language of the Constitution itself make clear that a victory was won for national government over confederate government, though it was disguised for practical political reasons. The best single symbol of the victory of national government is the fact that the Constitution opens with the ringing words, "We the people of the United States . . ." that is, the people as a whole.

The words *federal* and *federalist* in 1787-1788—and to some extent through U.S. history since—have been, I venture, more rhetorical than politically precise terms: they have the advantage of very little meaning. There is no better example of their rhetorical use than *THE FEDERALIST PAPERS* themselves which, it is well to remember, were intended to reassure the doubtful about the strong central government proposed in the Constitution. It's worth noting, on the other hand, that some

of the opponents of the Constitution also called themselves federalist, by way of demonstrating their feelings against the Constitution's proposed national character.

This is not to deny that federal features survived in the Constitution. The powers of the states were integrated into the power of the national government. At nearly every point some language of escape from the centralizing thrust was provided. Still, if you'll allow some overstatement, we do not have a federal system. We have a national government, conveniently called federal, with an unusually complex system of regional and local semi-autonomy that somewhat tempers the exercise of power at the top. The unique character of our form of government stems in part from the fact that it grew out of a federal union, in part from the fact that our state governments are guaranteed by the Constitution, rather than being established by statute after the fact, as is the case in most countries.

The meaning of  
American  
federalism:  
two views

**Daniel Elazar:** Let me break in with some comments in a contrary direction. I think we have to remember that the federalists saw federalism not as a matter of governmental structure but as a form of political relationship—principally, but not exclusively, between the national government and the states. They used the term *federal* to denote the relationship between two layers or levels of government—the kind of relationship that has to do with the real meaning of the word *foedus* in Latin, which is covenant, not league of states or league of states with an overarching government.

The word *federalism* first came into the English language in the 17th century through the Puritan-Calvinist-Reformed tradition of Protestantism, which was founded on a federal theology that was more than a simple matter of structure. It had to do with the relationships that are created when people and powers are bound by covenants and compacts and, therefore, have to respect each other's integrity and adjust to one another's needs and ways. Significantly, of the Americans who belonged to a church in the latter part of the 18th century, more than half were members of congregations that came out of this theological mold. So, when the framers talked about the relationships embodied in the concept of federalism, they were talking to an audience that knew whereof they spoke. If we have come to think of federalism strictly as a structural matter, then it would be wise to reconsider the framers' original sense of it.

*"The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety, and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE."*

Alexander Hamilton, *FEDERALIST* #82

**Rochelle Stanfield:** Above all else, what came through to me as I reread THE FEDERALIST PAPERS was that they were written by consummate politicians, masters of the art of the

**The name of the  
game was—and  
is—compromise**

possible As Hamilton put it in FEDERALIST Number 16, "It is vain to hope to guard against events too mighty for human foresight or precaution, and it could be idle to object to a government because it would not perform impossibilities." The federalists knew that to create a union out of that broad strip of land along the eastern seaboard would require a very difficult balancing act. This practical need for balance and compromise—the very soul of politics—is, in my opinion, the major lesson to be drawn from THE FEDERALIST PAPERS. We were in the 18th century, and have remained ever since, a nation of artful compromisers

**Robert Knowles:** As I read through THE FEDERALIST PAPERS, I kept asking myself, What would the federalists think if they could return today? They would be in for some surprises. I think they might pinpoint the 16th Amendment, creating the federal income tax, as a major departure from federalism as they had conceived it. With hindsight, that amendment could be said to be the point at which states' rights became an anachronism. At the very least, this change laid the groundwork for the centralization in government that has followed. I think they would also be amazed at how large a part the Supreme Court has played in centralizing power.

Perhaps the federalists would be most surprised—and pleasantly so—at how the multiplicity of governments in our federal structures has given minorities chances to enlarge and extend their interests in the political system. There's been a sort of federalism at work between individuals and governments, not just between layers of government. At the same time, the size and extent of the republic seems to have required the acculturation of various minority groups, in order for them to be effective politically on a national scale. The American federal system itself may have been responsible for the ability of the nation to absorb so many different ethnic, religious and racial groups—to become an American culture

*" if we still will adhere to the design of a national government, or, which is the same thing, of a superintending power under the direction of a common council, we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens—the only proper objects of government "*

Alexander Hamilton, FEDERALIST #15

**The boundaries  
between cultural  
and political  
federalism are  
ill-defined**

**Martin Kilson:** From the perspective of a political sociologist, the primary emphasis I'd place on the American federal experience is that federalism has been an instrument that has helped to regulate and manage, within tolerable limits, the "curse of faction." What is central is that from the very beginning, the boundary between cultural federalism and political federalism here has been very ill-defined. That's what distinguishes ours from any other brand of federalism

"The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans ought to be our zeal in cherishing the spirit and supporting the character of federalists."

James Madison, *FEDERALIST* #10

**James Banner:** I agree. Unlike most other federated nations, we do not have coextensive political and cultural boundaries. In fact, only once in our history have we come apart at the seams politically because of a breakdown in cultural federalism and that, of course, was during the Civil War. To put it succinctly, the main reason for our stability is that, for better and worse, the Irish are not just in Boston, they, and Poles, Germans, blacks and other groups are all over the place. Therein lies the strength of our federal system. In contrast, in Canada and Spain, to cite two well-known examples, the Quebecois and Basques, respectively, have been agitating for independence for years. The United States, in short, is one of the few nations that is not feeling the effects of such separatist tensions in the 20th century.

**In order to survive,  
the republic had to  
be federal**

**Daniel Elazar:** I'd say that the founding fathers saw the federal principle both as a means for creating a national union out of preexisting states and as an essential way to guarantee that the "extended Republic" would be, in fact, extended and republican. In other words, if it weren't a federal republic, it couldn't survive as a republic at all. The founders saw Czarist Russia as an example of a large state that could be nothing more than a large tyranny because it did not have the internal divisions and separation of power that were an intrinsic part of the proposed American federal system.

**Jean Anderson:** Where do the American Indian tribes fit into the mosaic of American federal experience?

**Martin Kilson:** The case of the American Indian is a prime example of the difficulty I mentioned earlier: How do we integrate cultural federalism into the political arena? It closely parallels the difficulties that other minorities—blacks and women, in particular—have experienced in becoming part of the American political fabric. But, since we don't have a clear sense of what the rules are or should be for legitimizing claims that have a strong cultural basis, their problem goes even deeper than racism or sexism.

**Daniel Elazar:** It's certainly true that the Indian tribes have

always been in a kind of anomalous position as a result of the separation between political and cultural federalism that Professor Kilson has described. Originally, under the Constitution they were perceived as foreign nations. But, in the 1870s Congress passed legislation that deprived them of this sovereign status, making Indians wards of the government. Since the 1930s, however, there has been a pronounced swing towards giving Indian tribes greater jurisdiction over their own affairs.

**The case of the  
American Indian: a  
classic example of  
the federal  
dynamic at work**

The effect of this recent trend has been to foster the development of a tacit, if not formal, arrangement out of which we're getting entities in the federal system that are founded on both an ethnic and a political basis. While it's probably going to be very hard for the American people to come to grips with this departure from our traditional pattern of territorial-political federalism, I think that our federal institutions and procedures are flexible enough to accommodate it. In other words, the American federal experience has been characterized by the fact that it has provided different routes of access for different groups who, upon learning which is the most suitable for them, then proceed to make use of it. Seen in this light, the recent experience of the American Indian is scarcely different from that of virtually any minority group that has set about the work of trying to get what it wants from government and society. □

# The Role of The States: From Decline To Resurgence?

A major argument used against ratification of the Constitution was that "the operation of the federal government [would] by degrees prove fatal to the State governments" (FEDERALIST Number 45). Hamilton, Madison and other federalists, however, argued that the proposed federal system implied no such threat. They were sure that the state governments would, as Madison put it, "have the advantage of the federal government" on almost every count, including "the predilection and probable support of the people."

Does the substantial decline in the power of the state governments that has in fact taken place mean that the anti-federalists' fears were justified? Or is it plausible to attribute this decline to the states' own inability and/or unwillingness to live up to their original constitutional mandate?

*"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation, will for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."*

James Madison, FEDERALIST #45

The decline of  
the states'  
advantage—why?

**Robert Hunter:** What struck me most in reading THE FEDERALIST PAPERS was the loss of the states' advantage since they were written. I see two reasons for this change. First, technology has altered national-state relations enormously by bringing the national government even closer to the people than the governments of their own states. Ours is an age in which the President can command an hour of prime time into our homes for a "fireside chat" about the Constitution. Thus, Hamilton's reassurance to the Constitutionists in FEDERALIST Number 27 that "a government equally at a distance and out of sight can hardly



be expected to interest the sensation of the people," appears to have lost its meaning.

Second, I think the power of the states has declined because they have abdicated their responsibilities. I say this as a federal administrator who oversees programs that generally have counterparts at the state level. I'm involved in state no-fault insurance programs, and in my observation, any reforms the states have made amount to little more than palliatives to keep the "feds" off their backs. For example, instead of acting in the best interest of their citizens, many states have let automobile insurance rates skyrocket out of sight.

*"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 ultimate authority, wherever the derivative may be found, resides in the people alone.*

*If, therefore, the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due."*

James Madison, FEDERALIST, #46

**Daniel Elazar:** Let me see if I can modify what Mr. Hunter just said about the framers' powers of prophecy. In most respects, I think they did rather well at outlining the conditions under which things could change, even if they could not have forecast the precise form such changes might take. Specifically, even though they couldn't forecast the advent of mass communications, they did suggest that if the national government should ever begin to come into contact with the people routinely, just as local and state governments did, then it would indeed acquire the powers and prerogatives it has now come to possess.

**George Brown:** I want to underscore Mr. Hunter's point about the quality of state government. In the 22-plus years I've been a part of it, I have seen it demonstrated time and time again that state government is inept, that it is callous, that it's separated from the people, and that it's more subject to special-interest pressure than any other level of government. With this kind of bottom-line assessment, I find it hard to be sanguine about the states' role in a scheme of government suited to coping with today's and tomorrow's problems. Yet I know we must try to define such a role. I believe, for example, that we must keep trying to bring government services and functions as close to the people as possible, and state government is an essential means for doing so.

**James Banner:** I'd like to emphasize two points. First, I think we have to distinguish between a state's failure to do an effective job because of incompetence and insensitivity, and its failure to do what's necessary simply because it does not possess the necessary wherewithal. The example of this distinction that comes most readily to mind is the Great Depression of the 1930s. That crisis was of such magnitude that no single

state or organization of states could cope with it, indeed, many state treasuries were bankrupt. It required national resources, policies and programs to begin to move the country forward. And that isn't the only instance in which states have faced situations clearly beyond their control.

Our history has also shown that ever since the Revolution, the great ideas, the great experiments of American government have started with the states. In the four major reform eras of American history—1820 to 1840, the turn-of-the-century Progressive era, the New Deal, and our own time—many of the innovations that have altered the structure and practice of government were tried out first in the states. Out of the western states, for example, have come such reforms as the referendum, recall, sunshine laws and government financing of state elections. Contemporary American government would probably not be as sound as it is were it not that states have acted as laboratories—originating, testing and improving upon our constitutional-structures and procedures so that we can cope with the tremendous changes that have taken place since the 18th century.

**The states as laboratories of innovation: two views**

**George Brown:** I agree that the states have been a vehicle for trial but I don't think that that necessarily makes state government good. General Motors, for instance, has long used the cars of its Pontiac Division as experimental prototypes. Does that mean that we ought to buy Pontiacs all the time? The answer, to me, is obviously, No.

**Gladys Spellman:** I want to weigh in with a slightly more positive evaluation of state performance. Even though the states clearly don't have the clout that they did in the 18th century, they're much stronger today than they were even ten years ago. They are probably one of the most rapidly expanding units of government in the federal system. Until the 1930s, they were doing relatively little; today, they are getting involved in everything—from land planning to the energy crisis. They are far better organized than they were: sixteen have new constitutions and a number now have income and sales taxes. In short, compared to the 1950s, the states are giants today.

**State government is improving, but it still has a long way to go**

Still, they have been late in coming out of the cocoon. During that long period of dormancy, the cities and counties got used to looking directly to Washington to get what they wanted. Now, the states—which are trying to become more responsive and effective—will have to prove that they can do a better job than the federal government, before the cities and counties will find it in their interest to turn back to them.

**George Brown:** I agree that when you compare states with what they were in the 1950s, they look awfully good. But when you compare states with what they ought to be, they don't look so good.

**George Kennedy:** The thought just struck me that until now we haven't mentioned that sacred phrase, "states' rights." Does this mean that the question of states' rights has become a dead issue?

**Martin Kilson:** My short answer to the question is, Yes. There was a strong constituency in the South for states' rights as

**States' rights: dead letter or concept on the move?**

long as the status of blacks was problematic in the political process of deciding who got what, how, and why. Once that began to clear up, the states' rights constituency ceased to exist. Strong residual feelings and preferences, yes; but not an identifiable constituency capable of institutionalizing a states' rights posture in American politics. In that sense, this term has lost its substantive and symbolic significance.

**Robert Knowles:** I believe that a constituency still exists in the South. At least among the southern legislators whom I know, there are strong states' rights feelings.

**George Brown:** Aside from the lingering race-related attitudes in the South, the recent Arab oil embargo and the resultant advent of the energy crisis may have begun to breathe some life back into the states' rights issue. Governors in various western states are certainly working very hard to build the kind of constituency Professor Kilson mentioned. If they are successful, I'm sure that they'll raise the states' rights banner to the top of the flagpole.

**James Banner:** I find myself more disturbed than I thought I could be, by the prospect of such a renaissance of states' rights. Certainly, there's no reason why the citizens and elected officials of the western states shouldn't organize to protect their interest; in fact, federalism has always been based on an acceptance of the kind of particularism such efforts embody. But, as we move ahead toward the 21st century, too much particularism seems to me to be just about the last thing we can afford. Ours has now become a system in which such parochial, albeit not unworthy, considerations have to give way to broader public concerns and needs. The prospect that states like Wyoming and Texas will move to protect what they perceive to be their interests at the expense of the people in general is ominous.

**George Brown:** There's general agreement in these states that their natural wealth must be used for the benefit of all Americans. What they—we—are saying, though, is that people living in the West don't want someone in New Jersey or Mississippi to decide that their states should become the coal bin of the nation. They—we—want a strong voice in making that determination. We don't want that role taken away from us simply because fewer people live in Colorado and Wyoming than in New York or California. States' rights in this sense means making sure that the land in the western states won't be raped for shale oil, with no consideration given to other values that residents consider important—the land itself, wildlife and so forth.

**Gladys Spellman:** Since I've been on Capitol Hill, I've heard the term states' rights time and again whenever some hot potato issue comes up—14-B, for example, the right-to-work provision in the Taft-Hartley law, which organized labor wants repealed. I can assure you that the concept of states' rights is alive and well in Congress and is likely to remain so. □

# The Changing Face of National-State-Local Relationships

When Publius wrote about federalism, he was discussing the relationship between the states and the national government. In the 20th century, however, the term encompasses much more. Today, any discussion of federalism includes units of local government, such as cities and counties, as a matter of course. In addition, the federal system is showing the effects of one genuinely new element—metropolitanism—and some old ones dressed up in new clothes—regionalism and sectionalism.

Modern federalism may also have become more of a one-way street. Some would say that money from Washington now defines national-state-local relationships. In 1976, state and local governments spent \$110 billion in the 539 programs using federal grants-in-aid. Further reflecting this pattern, a recent study in Kansas showed there were only two major state functions—banking and insurance—not significantly affected by such grants-in-aid and their attendant regulations.

Such changes in the structure and operation of American federalism are points on which any reexamination of our constitutional system ought to focus. Why have they occurred? What impact have they had? What do they reveal about the current status of our federal system?

## National-State-Local Relationships: A One-Way Street?

**James Banner:** The founding fathers saw a place for a central and national government, but I don't think they clearly understood how large, preponderant and even, at times, coercive it would become. Furthermore, they didn't foresee the rise of the bureaucratic state—the massive apparatus that has come into existence to administer the profusion of federal programs enacted in recent decades. Between 1929 and 1970, for

example, while the number of paid employees of state and local governments increased by roughly three-and-a-half times, their counterparts at the national level increased five-fold. Ever since the New Deal, the national government has been gaining in size and, correspondingly, in power over the state and local governments.

*"The number of individuals employed under the Constitution of the United States will be much smaller than the number employed under the particular states. There will consequently be less of personal influence on the side of the former than of the latter."*

James Madison, *FEDERALIST* #45

**The carrot-and-stick approach: an unforeseen change in the federal dynamic?**

**Robert Hunter:** The founding fathers didn't have much of a feeling for the kind of carrot-and-stick approach that characterizes most of the programs emanating from Washington. A case in point is HUD's national flood insurance program. In the 15,500 communities participating in this program there are more than six million structures located in flood-prone areas. The carrot comes into play in that one million of these structures are covered by flood insurance purchased at rates—directly subsidized by taxpayers' dollars—that private insurers alone cannot afford to offer. The stick part of the process lies in the fact that this coverage is contingent on the communities' agreement to adopt and enforce a kind of land use code, specifying the conditions under which construction can take place in flood-prone sections. Moreover, if a community doesn't agree, HUD can refuse to allow other federal monies to go there to be used for construction in a flood-prone area.

I think it is essential to understand that, though the merits of such programs—and the carrot-and-stick approach they embrace—are at times a matter of heated controversy, these programs are responses to specific needs and demands. Indeed, the parent agency for this particular program—the Federal Insurance Administration—was established when the urban riots of the late sixties led private firms to withdraw fire insurance coverage from inner-city areas. That's a brand of federalism that was wholly unforeseen by the Constitution's framers.

**Daniel Elazar:** As we talk about the grants-in-aid process and its effect on the federal system, I think it's important to point out that this 20th-century phenomenon has roots in some of the earliest experiences under the Constitution. During the first few years of the republic, Hamilton, as Secretary of the Treasury, managed to push through Congress the idea that the national government ought to assume the states' Revolutionary War debts. He didn't do this because he was a great friend of the states but because he saw clearly that the national government would become more powerful by providing such monies to the states. And he was right. The states accepted the money offered and promptly reduced or in some cases even stopped levying taxes, thus taking the first steps toward dependency on the national treasury.

**Our concept of federalism has changed**

Historical perspectives aside, more has changed than the size of the national government. The most striking change affecting federalism—one quite unanticipated by the founding fathers—has been in how Americans think. We have replaced

political forms of thinking with bureaucratic and management-oriented modes of thinking: they saw the federal system as a kind of matrix, or network of arenas, in which different units of government act as agents for the people in their various aggregations; we now view it as one of levels in an organizational pyramid.

Nowhere in early American political thinking is the federal system referred to as being one of levels of government. What there is, is a sense of larger and smaller arenas, each of which is distinctly important in its own special way. Levels, on the other hand, implies a hierarchical arrangement with the federal government at the top, the people at the bottom and the state and local governments in between. Before World War I, the organization charts in textbooks on American government always showed the people at the top. It's only since that time, when our way of looking at government began to change, that this portrayal has been reversed. Now such charts typically place the federal government at the top and the people on the bottom.

And if we accept the idea of levels in the federal system, it's just as plausible to say that our executive, legislative and judicial branches are not what the founding fathers envisioned they'd be—coequal parts of a governmental whole. We just went through a period in which the end result of this "levels" thinking was to put the President above the Congress and to give us the "imperial" presidency. So, this semantic distinction between levels and arenas is much more than a quibble on how we choose to symbolically portray the American system in textbooks. It tells us something about the way things have been going in our political institutions and processes.

**Gladys Spellman:** I've been sitting here nodding in agreement with everything Professor Elazar has said about levels. Yet I still will not concede that we really don't have them. Most Americans do think of local government as moving on to the state level and from there to the national level. This might not necessarily be the best way to characterize our federal system, but that's how most of us perceive it.

The problem isn't  
Levels versus  
arenas, but rather  
"we-they" modes of  
thinking

More than distinguishing between levels and arenas, what troubles me is that local-state-national relationships today are atrocious. I come from 18 years of working on the local level, where I always thought that the people up there at the national level didn't know what it was all about. When I was elected to Congress, I found to my amazement that there are some brilliant people there. There is far more knowledge in Congress than I expected, but far less togetherness, far less understanding, far less acceptance of other government officials than I think our founding fathers envisioned; and I find this loss of mutuality disturbing.

A glaring example showed up in the recent congressional debate on the extension of revenue sharing, during which my colleagues kept referring to state and local officials as *they*—as though they were the enemy. The implication was that we members of Congress are the "enlightened ones" with the answers, to whom the public ought to come in obeisance. When I had heard enough of this, I found myself protesting in anger: "There is no such thing as 'we and they'; it's us. We're repre-

senting the same people and ought to be finding ways of getting together to serve them."

The bureaucracy  
cements the  
federal system as  
political parties  
once did

**James Banner:** If we're talking about bringing a greater sense of rapport into the various arenas of government, perhaps the question we ought to pose is: How is our federal system tied together? Let me suggest a possibility that will perhaps cast a different light on the bureaucracy. It used to be the political parties that bound together the legislative and executive branches of the government and the various arenas of the federal system. Since the New Deal, however, I think this has been changing. I believe this binding function has been taken over by the bureaucracy; it, and not the party structures, now serves as the glue that helps to hold our federal system together.

**Daniel Elazar:** I agree. For instance, although members of Congress never served as delegates from their states in the strict sense of waiting for instructions from what to do, at least in the past they did tend to represent state interests through means provided by their respective party organizations. The party was the link for those serving in local, state and national office. Today, bureaucrats with their own special professional ties are playing an analogous role. When professionals with the same expertise, trained at the same or similar institutions, meet at the same conferences and so on, a commonality of interest and experience is bound to develop, regardless of whether one works for a national, state or local body. This common sense of professional obligation and responsibility has, in turn, fostered mutual trust across the various arenas of government.

Bureaucrats'  
professional ties  
modify  
picket-fence  
federalism

I stress this point for several reasons. First, it has helped to enhance what the Advisory Commission on Intergovernmental Relations calls "picket-fence federalism," because connections among bureaucrats tend to be with their counterparts in other arenas, rather than with other kinds of experts in their own arena. Second, it has held down the need for rules and regulations. Professionalism creates common goals and modes of operation that obviate the need for detailed rules; where bureaucratic professionalism is lacking, resort to rule-making has tended to become an overbearing problem. Finally, we need to keep in mind how the bureaucracy greases the wheels in the federal system, because bureaucrats, particularly those in Washington, have become scapegoats for circumstances and problems for which they are not responsible and that are simply beyond their control.

## The Impact of Regionalism, Metropolitanism and Sectionalism

*"As in republics strength is always on the side of the people, and as there are weighty reasons to induce a belief that the State governments will commonly possess most influence over them, the natural conclusion is that such contests will be most apt to end to the disadvantage of the Union; and that there is greater probability of*

encroachments by the members upon the federal head that by the federal head upon the members. But it is evident that all conjectures of this kind must be extremely vague and fallible: and that it is by far the safest course to lay them altogether aside and to confine our attention wholly to the nature and extent of the powers as they are delineated in the Constitution. Everything beyond this must be left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped will always take care to preserve the constitutional equilibrium between the general and the State governments."

Alexander Hamilton, *FEDERALIST* #31.

Regional bodies are the least accountable form of government in the federal system

**James Banner:** The framers of the Constitution may have foreseen—but they certainly would not have accepted—one of the chief 20th-century solutions to the problems of jurisdictional chaos: planning boards and regional governments. For example, the Minneapolis-St. Paul Metropolitan Authority, which is probably the largest and most powerful one of its kind in the United States, is run by officials who are not elected. Such regional bodies have been mandated by state legislation and imposed to some large degree upon the metropolitan areas. They do not rise from the people as was generally the case for town and state governments of the 18th and 19th centuries. These regional bodies are, therefore, the least accountable form of government in our federal system. In short, after the experience of the sixties and early seventies, I think that a thoughtful and informed citizen would want to raise some very tough questions about the need for and accountability of regional bodies.

There are two kinds of regionalism: urban and sectional

**George Kennedy:** There are really two kinds of regionalism operating today. Most of the recent experience and most of the dangers that have resulted involve the kind you are talking about—local regions or the smaller units of regionalism that are an outgrowth of urban problems. There is also a somewhat different concept of regionalism, one that embraces the idea of broad geographic sections of the country, such as New England, the South, the Northwest and so forth.

This broader regional concept, it seems to me, may be more necessary and legitimate, given the growing inability of states to deal with the problems that affect their neighbors. One thinks, for instance, of the problems of the coastal plain and of offshore oil, which involve a whole series of states. This phenomenon suggests that the mobility of the American people may be deemphasizing that historical sense of belonging to a particular state—which was of such great concern to the authors of *THE FEDERALIST PAPERS*—in favor of a growing allegiance to the region in which one lives. My ten years of having lived in the South, for example, have given me a growing sense of this kind of regional attachment. Indeed, if we were to construct a new federal union today and make some sharp breaks with historical precedents, it seems likely that that new system would be built up on a regional rather than a state basis.

"Many considerations, . . . seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States."

James Madison, *FEDERALIST* #46.



**Daniel Elazar:** I agree with George Kennedy's distinction about regionalism. There is a good term in American political theory to describe what we now refer to as multistate regions, and that's *sectionalism*. There's a whole literature on sectionalism and I think it's a very important term that ought to be revived. Just to give one example: Some 300 years ago the then-colonies of New England formed the New England Confederacy, which was quickly disbanded by the British Crown because it became too uppity and independent. But in our own time, just about the same thing is occurring; the six New England states, through interstate compacts and agreements, have created what in effect is a sectional confederacy. To me, that's a very creative use of sectionalism—one that fully comports with our federal principles and institutions—and, therefore, ought to be emulated by other sections of the country.

**George Kennedy:** The only problem with the term *sectionalism* is that, because of the association with slavery and the Civil War, in the minds of many of us it remains a pejorative term. In the course of time this lingering negative connotation might ebb away, particularly if sectional institutions perform the kind of positive role of which they seem to be capable.

**Regional bodies have grown up because local government can't cope with certain types of problems**

**Gladys Spellman:** One reason we need to have so many sub-state regional governments is that we have so many tiny units of government that are unable to cope with the kinds of problems others here have mentioned—air pollution, welfare aid and so on. It seems that everything on the front page of today's paper must be dealt with beyond the local level. That's why we're talking increasingly about larger arenas of government. The drafters of the proposed constitution for the State of Maryland, for example, recognized the importance of such regional arenas. Just as important, they also recognized the need to make them accountable, so the proposed constitution stipulates that regional bodies must be elected.

**Robert Knowles:** The Advisory Commission on Intergovernmental Relations (ACIR) recently undertook a massive study of regional governments. The findings of that study were that regional government should not be another level of government and that any regional body should be strongly dominated by elected local officials.

**Regionalism: the beginning of the end for units of local government?**

**Mary Ann Bradford:** With our growing awareness of the need for regional planning and cooperation, and with the increasing growth in the role of the state governments, will we be seeing a related reduction in and/or abolition of local governments?

**Gladys Spellman:** I don't think so. In fact, at a number of conferences I've attended in which such federalism-related questions were examined, the conclusion reached was that the counties are going to become more and more of a force in governmental activity.

**Rochelle Stanfield:** I don't necessarily disagree that the role of the counties may increase. But, having done a good deal of research on their current status, I'd have to say they're a very mixed bag. The point is, it depends on which counties one has in mind. Those in California and Maryland, for example, do a

great deal and do it well. However, in New England the counties do virtually nothing at all. They serve as little more than geographic boundaries. So, when we talk about the future role of counties, we've got to be careful to distinguish between models.

On the other hand, there are sound reasons why the role of county governments is likely to increase. Counties increasingly have become conduits for federal money—with the attendant expansion of power and prestige that brings—as suburbs have grown so dramatically ever since World War II.

**No, Americans are too attached to their local governments to let that happen**

And, in any case, I don't think there's any way that local governmental units are going to be abolished: people simply won't let it happen. I witnessed this firsthand when I worked on the ACIR study Senator Knowles mentioned. When public hearings were held as part of this study, scores of citizens emphatically expressed unshakable support of their local governments. An even better example of this kind of emotional attachment occurred when the Postal Service first began to implement the zip code system. From the outcry it generated, you'd think people were losing a best friend or something of a similar magnitude. Just the seemingly innocuous idea of using numbers in place of geographic designations got people tremendously upset. Perhaps the growing concern about governmental impersonality and bigness, which has become such a raw nerve for so many Americans, may have been the reason behind this furor. But even that reinforces my point—local government is, after all, the least remote and impersonal of the units of government in our federal system.

*"It is a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union, unless the force of that principle should be destroyed by a much better administration of the latter."*

Alexander Hamilton, FEDERALIST #17

**People are also distrustful of change**

**Robert Knowles:** I think there's something more operating here than a simple emotional attachment to local government. When people react as they did at the ACIR hearings, I believe they are responding to a realization that there is a finite amount of power to be wielded in this country and that, when one level of government increases its position, it does so at the expense of another's. After years and years of confronting this outlook, I've come to refer to it as the "resistance-to-change factor." Many Americans are deeply suspicious that they are going to lose some of their individual rights and prerogatives by allowing more and more power to go to larger units of government.

**George Brown:** The point I would make on this question of the relationship between regionalism and local government, is that inner-city minority groups have ample cause to be distrustful. What concerns them is the motivation behind regionalism. Is this trend toward metropolitan government really a response to legitimate needs, or is it just a way to regain or maintain control over the inner cities? Or course, I'd be the

first to admit that the answer to this question isn't obvious. The solution—and I'm not sure how practicable it may be—is that, when we think in terms of metropolitan alternatives, we do so in a way that encourages the preservation of the best possible balance between neighborhood sensibilities and needs and the broader concerns that have given rise to these larger units of government.

**Regional bodies  
are flexible enough  
to include local  
governments**

**Daniel Elazar:** My perception of regional governments is that they are flexible tools that are at their best when based on existing units of government. Metropolitan government need not imply either the phasing out or destruction of the various units of local government.

**Robert Hunter:** I think people are attached to one unit of government more than another only insofar as they think they can derive more from it. In other words, it seems to me that what you love depends almost entirely on how you see your own ox being gored. I think this was true when THE FEDERALIST PAPERS were written and remains true today.

# Whither Federalism— Whither American Government?

Over the course of the past two centuries, the American federal system has been in continuous flux. Some alterations have been formally established. The 18th Amendment, for example, provided for the direct election of U.S. senators, instead of election by the state legislatures. Some—the upper hand the national government has attained through the grants-in-aid process, for example—are de facto changes that are not expressed in a law or a constitutional amendment. Still others seem to be a consequence of forces that transcend traditional jurisdictional boundaries; the population patterns and technological changes underlying regionalism are but one instance.

We can be sure that our federal system will keep on changing and evolving in the future. But changing and evolving toward what? To wind up the seminar, and the Federalist Papers Re-examined project as well, the panelists were asked: "Looking ahead, what purposes should federalism serve as we enter our third century as a nation? What broad changes are needed in American constitutional government to enable it to cope with the 'importunate exigencies' of the 20th and 21st centuries?"

*"... if it be possible at any rate to construct a federal government capable of regulating the common concerns and preserving the general tranquility, it must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed Constitution. It must carry its agency to the persons of the citizens."*

Alexander Hamilton, FEDERALIST #16

**The American federal system won't change very much.**

George Brown: I don't think our federal system will be much different by the year 2000 than it is now. I think we will have more planners and, consequently, more plans than we have today. As a result of innovations like "sunset" legislation, we'll probably have less government regulation. At the same time, we're going to have more government units. Metropolitanism, for example, will create another layer in the federal system. We will not, however, have eliminated any of the government en-

**The national government will become stronger and less democratic**

ties above or below this new layer, because there will continue to be enough people who'll want to keep them. We are also going to see more interference at the state level by the national government. I use the word interference on purpose, because I believe that state officials will see such intrusions as being a violation of their legitimate constitutional rights and responsibilities.

**Gladys Spellman:** I see the national government becoming much stronger, because state and local governments will be unable to cope with the problems facing them. For instance, welfare will be handled more and more on the national level. Similarly, state, local and other units of government will increasingly look toward Washington for money. I observed this trend when I was chief executive of a county of more than 700,000 people, finding that the amount of the budget we actually controlled was just 11 cents on the dollar. Everything else was mandated by federal and/or state edict. Notwithstanding the potential for growth some observers feel county governments may possess, I don't see that local governments will really get much more of a handle on things, although they will ceaselessly try to do so.

I also think we are going to have to recognize that, as much as we'd like our democratic system to be as inclusive as possible, involvement of too many people creates so many problems that decision making becomes impossible. While local, state and national officials will say that they want to hear from everyone, decision making will have to come more and more from Washington.

**Robert Hunter:** I'm impressed with the caliber of people in Congress, in the top echelons of the executive branch, in the top echelons of state governments, and within local governments. Consequently, I think that the dirty word, "bureaucrat," won't be so derogatory by the year 2000. Bureaucrats on all levels will be relied upon more and more in the years ahead. We will, for example, be depending increasingly on bureaucrats to do long-term planning, in contrast to the kind of short-term problem solving that's required of elected officials. I'm not sure, though, whether this expanded role might not have some potentially damaging side effects because bureaucrats are obviously not as accountable as elected officials.

I believe that the states will pick up more authority in certain spheres, particularly as service agents for the national government. Local governments will have a more direct relationship with the national government, but it's hard to say who'll prevail in the tug-of-war between neighborhood and regional bodies. Probably, it will be a little of each, depending on specific needs and circumstances in different areas of the country.

**Robert Knowles:** There are already some clear indications of the direction in which we're headed. On the issue of dependency, 20 years ago the national government was contributing about 11 percent of state and local expenditures. Today, it's up to 29 percent and still climbing. Thus, while the roles of the various levels of government—and I use the word levels because I believe that's where the trend lies—are likely to be more precisely defined, there's no doubt that broad public pol-

**Will greater centralization cause increased tension in the federal system?**

icy will continue to come from Washington. We will have a federal system characterized by decision making at the top, with state and local governments serving as agents to carry out national programs and policies.

**Rochelle Stanfield:** I think we're going to be facing some major tensions in the future. Most of us agree, for instance, that government needs to be more efficient and effective. Yet in order to do so we may have to sacrifice some political participation, some accountability. On the other hand—and this is where at least one major tension will develop—I really think people are going to demand a greater say in the decisions that affect their lives.

**Martin Kilson:** I agree that there is going to be more centralization of government. But I'm not certain that such increased centralization will give rise to tension between the center and the periphery. I suspect that we're not far away from seeing the emergence of a kind of lowering-of-expectations movement, the effect of which will be to reduce tension, to reduce fears of authoritarian proclivities, to reduce excessive tendencies toward coercive solutions to conflicts between the center and the periphery.

At the same time, by the year 2000 our system will have had to contend with the need to forge a more viable morality regarding the "ins" and "outs" in American society. We've got to reduce the sharp differences in accessibility to the good things in life, which still exist between those who are part of the political and cultural mainstream and those who are not. There is moral energy in America that can and ought to be tapped to try to lower the gaudy levels of expectation that grew out of the Depression and to make it clear that some of us have already reached the ceiling of our fair share of society's opportunities and benefits. Those in this latter category have got to learn to be satisfied with what they have and to understand the need to respond to the claims of the weak sectors of American society, the largest part of which remains black and Spanish speaking.

**George Kennedy:** There are three general historical forces in operation—and in conflict—the interaction of which will shape the future of American federalism and American government. One is the growing interdependency among the nations of the world, which is going to lessen our ability to control our national destiny. The second force is the growth of the power of the national government—a trend that will continue. Third is the development of regional and sectional bodies, both here and abroad. In the clash of these various forces, the unit of government in our federal system that will come closest to being destroyed will be the states.

**Daniel Elazar:** I see three possible scenarios developing, all of which are tied into an evolving international arena that many Americans have not wanted to think about lately. First, a nuclear holocaust could break out, in which case there would probably be only two sets of survivors: the Chinese, because out of 900 million of them, 5 million would survive, and the Swiss, because they've quietly been building tunnels in the

mountains throughout their country to protect themselves from this very possibility.

The second scenario assumes that there will be a strengthening of the powers of the larger arenas of government. This does not mean, though, that the formal structure of our federal system will be changed drastically. The American federal system has proven over and over that the increase of the powers of the national government has not necessarily been tantamount to centralization. Of course, some centralization has been involved, but the growth of governmental power has not been restricted just to the national government. It has also involved strengthened governments across the board. Sometimes this has been at the expense of individuals, sometimes not, because for everything we've given up, we've also derived certain benefits and freedoms.

The third scenario assumes that there will be a decrease in the trend toward strengthening the powers of the larger arenas of government. For example, as Congress has to make more and more hard decisions, it is likely that it will resort to its own brand of federalism: anything that might have a positive payoff should come from Washington; everything that might cause problems should be left to the state and local governments. If Congress adopts this approach more widely, interest groups and factions will find themselves unable to get what they want from the national government and will probably turn more to the states and localities. We'd get a different mix as a result, one that might involve more initiative by the states than if the second scenario took place.

In sum, we emerged from the post-World War II generation in the mid-1970s to find the answers we'd worked out about what should be done and how to do it, threadbare and shopworn. We are now entering a new generation. As has been the case in every such time of transition, our first task will be to identify the problems facing us and determine what kinds of solutions can be found for them.

**The key to the future: the relationship between American and worldwide federal concepts**

We also must realize, however, that whatever solutions we may come up with—whichever scenario or variation may occur—will somehow reflect the fact that since World War II we've witnessed a worldwide federalist revolution. Forty percent of the world's population lives in systems that proclaim themselves to be federal, while another 32 percent live in countries—Belgium or the European Community, for instance—that have instituted some kind of federal concept to accommodate internal diversity. The common thrust toward some kind of international order that this worldwide trend suggests leads me to believe that we will have to adjust our federal system to it. Unlike Professor Kennedy, I think this will tend to work to the advantage of the states—as distinct from the localities or the national government—because they're the bodies that parallel the intermediate arenas emerging overseas.

**James Banner:** By the year 2000 there will be larger and more powerful governments, including international ones. International federalism will have become more observable, along with what seems to follow in the wake of such new levels of government: namely, new interest groups. In fact, we al-

**American  
federalism: the  
name of the game  
has always been  
disagreement**

ready have such interest groups at the international level in the multinational corporations.

On the other hand, I don't foresee that there is going to be such a definite pattern to changes in American governmental and federal structures in the next 23 years. We've never taken well to avowed patterns of thought or action. Even the products of any planning we may undertake will likely turn out to be incompletely integrated or interrelated. In short, 23 years from now the League of Women Voters, or some other organization, will convene a meeting on the state of American federalism, and there will be as many disagreements then as there are now—and as there were in 1787. And that, I might add, is more likely to be a reflection of the soundness and health of our constitutional system than the contrary. □



# **In Conclusion: Questions For Further Discussion**

## **The Nature of American Federalism**

What purposes do you think federalism should serve? Is it more of a substantive political tool or a convenient administrative arrangement today? In short, what is form and what is substance?

What is your perception of the relationship between political and cultural federalism? Does "the strength of our federal system" lie in the fact that we "do not have coextensive political and cultural boundaries"? As an example of cultural and political federalism in action, what might the recent experience of the American Indians suggest about current trends in American government?

## **The Role Of The States: From Decline To Resurgence?**

In FEDERALIST Number 45, Madison asserts that, "The powers delegated by the proposed Constitution to . . . the State governments are numerous and indefinite." In your opinion, why did the role of state governments decline? Do you think a return swing of the pendulum is desirable? If so, how would you foster a revitalization of state government? Is a revival of "states' rights" sentiment likely in America? What factors are likely to work for and against such a trend?

## **The Changing Face Of National-State-Local Relationships**

### **The Growth of National Power: Is It Out of Hand?**

Is the "carrot-and-stick" approach embodied in many federal programs and policies a legitimate "response to specific needs and demands"? Or, has the role played by the national government in the federal system gotten out of hand? If so, how has this come about and what can be to correct it?

### **Levels Versus Arenas: A Critical Distinction?**

How important is Professor Elazar's distinction between levels and arenas in shaping our perceptions of and attitudes toward government?

### **A New Sectionalism?**

What are the implications of strong regional antagonisms emerging out of such questions as energy resource development and land use?

### **Metropolitanism: Another Tier in the Federal System?**

How can metropolitanism and sub-state regionalism be accommodated? Do such bodies spell the beginning of the end of local government? Or, are we "too attached to [our] local governments" to let that happen?

## **Whither Federalism—Whither American Government?**

What is your vision of American federalism in the year 2000? What should the roles and relationships of the various governments be?

# Readings

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