**WHORM Subject File Code:** FE002
(Federal Government: Declaration of Independence and the Constitution)
**Case File Number(s):** 270000-284999
**Box Number:** 2

ID # 279810

FE002

# WHITE HOUSE
# CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☒ I - INCOMING
Date Correspondence Received (YY/MM/DD) 84 / 11 / 03

**Name of Correspondent:** ☐ Mr. ☐ Mrs. ☐ Miss Eugene Law

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

**Subject:** Encloses a clipping concerning a ✕ lobby group which is introducing a draft for a new U. S. Constitution. Indicates Federal funds are being used.

| ROUTE TO: Office/Agency (Staff Name) | ACTION Action Code | Tracking Date YY/MM/DD | DISPOSITION Type of Response | Code | Completion Date YY/MM/DD |
|---|---|---|---|---|---|
| CoKell | ORIGINATOR CU | 84/11/06 | | C | 84/11/28 |
| | Referral Note: | | | | |
| ✓ DOJ | 7 | 84/11/10 | FACT Sheet | E | 84/12/14 SUPPLIED |
| | Referral Note: CU | | | | |
| | _ | / / | | _ | / / |
| | Referral Note: | | | | |
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| | Referral Note: | | | | |
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| | Referral Note: | | | | |

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

**Comments:** _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

# RECORDS MANAGEMENT ONLY

## CLASSIFICATION SECTION

No. of Additional Correspondents:_____ Media: L Individual Codes: 4000_____

Prime Subject Code: FE 002__ Secondary Subject Codes: __ ____ __ ____

__ ____ __ ____

__ ____ __ ____

## PRESIDENTIAL REPLY

| Code | Date | Comment | Form |
|---|---|---|---|
| C __ __ | _____ | Time: _____ | P- _____ |
| DSP | _____ | Time: _____ | Media: _____ |

SIGNATURE CODES:

CPn - Presidential Correspondence
- n - 0 - Unknown
- n - 1 - Ronald Wilson Reagan
- n - 2 - Ronald Reagan
- n - 3 - Ron
- n - 4 - Dutch
- n - 5 - Ron Reagan
- n - 6 - Ronald
- n - 7 - Ronnie

CLn - First Lady's Correspondence
- n - 0 - Unknown
- n - 1 - Nancy Reagan
- n - 2 - Nancy
- n - 3 - Mrs. Ronald Reagan

CBn - Presidential & First Lady's Correspondence
- n - 1 - Ronald Reagan - Nancy Reagan
- n - 2 - Ron - Nancy

MEDIA CODES:
- B - Box/package
- C - Copy
- D - Official document
- G - Message
- H - Handcarried
- L - Letter
- M - Mailgram
- O - Memo
- P - Photo
- R - Report
- S - Sealed
- T - Telegram
- V - Telephone
- X - Miscellaneous
- Y - Study

**ROUTING AND TRANSMITTAL SLIP** Date 1/4/85

| TO: (Name, office symbol, room number, building, Agency/Post) | Initials | Date |
|---|---|---|
| 1. Executive Secretariat, Rm. 4416 AA 1/7/84 | | |
| 2. Sally Kelley<br>Director of Agency Liaison<br>3. Presidential Correspondence | | |
| 4. | | |
| 5. | | |

| | | | | | |
|---|---|---|---|---|---|
| | Action | | File | | Note and Return |
| | Approval | | For Clearance | | Per Conversation |
| | As Requested | | For Correction | | Prepare Reply |
| | Circulate | | For Your Information | | See Me |
| | Comment | | Investigate | | Signature |
| | Coordination | | Justify | | |

**REMARKS**

As you requested we have prepared the attached "fact sheet" for inclusion in your response to the letter of Mr. Eugene Lau to President Reagan. You have already received our memorandum of December 14, 1984 on this subject.

Sally
Perhaps in this year I'll be able to have them conform to proper format the first time
Herb

**DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions**

| FROM: (Name, org. symbol, Agency/Post) | Room No.—Bldg. |
|---|---|
| Herb Friemann<br>Susan ~~Blondy~~ | Phone No.<br>633-~~3712~~ 5306 |

5041-102

**OPTIONAL FORM 41 (Rev. 7-76)**
Prescribed by GSA
FPMR (41 CFR) 101-11.206

☆GPO : 1981 O - 341-529 (111)

file with 279810

FACT SHEET

Liberty Lobby, a non-profit citizens' group in Washington, D.C., issued a publication criticizing a proposed new "Constitution for the Newstates of America." The publication contains a reprint of the proposed constitution, a review of Rexford G. Tugwell's book, The Emerging Constitution (1974), by Col. Curtis B. Ball, chairman emeritus of Liberty Lobby, and a commentary by E. Stanley Rittenhouse, author and former Liberty Lobby legislative aid. The publication explains that in 1964 a tax-exempt foundation called the Center for the Study of Democratic Institutions began drafting a proposed new constitution. Ten years later, Rexford G. Tugwell published a final version of the proposal in a book entitled The Emerging Constitution. Without initially specifying the source of the funds, the publication states that "[d]uring most of the time that their constitution was being written, the Center for the Study of Democratic Institutions was lavishly funded to the tune of $2,500,000 annually." The publication also states that the Center, as a tax-exempt foundation, was "able to do political work on what amounts to a subsidy taken from your taxes." The conclusion of the publication, captioned "Don't Be Fooled," indicates that the Center was funded by the Ford Foundation.

The Center for the Study of Democratic Institutions is located in Santa Barbara, California. The Center is a tax-exempt organization that receives no federal grants or subsidies. The Center was created in 1952 with money from the Ford Foundation under the name Fund for the Republic. In 1959, the current name was adopted. Throughout its existence, the Center has been funded only by private contributions.

*LETTER PROCESSING INFORMATION
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Letter.....: WDB.850102.1
Name.....: Mr. Eugene Lau
Letter Type..: WH
Signature....: AH
ENV/LBL.....: ENV
Number Pages.: 1
Number Copies: 1
Reviewer.....: WDB
Review Date..: 850102
Print Date...: January 3, 1985
---
Notes:

Information per DOJ

# Memorandum

279810

C 84/12/28 AB 279810

| Subject | Date |
|---|---|
| Letter and Newspaper Clipping from Mr. Eugene Lau of Cordell, Oklahoma concerning the "Constitution for the Newstates of America." | DEC 14 1984 |

To

Sally Kelley
Director of Agency Liaison
Presidential Correspondence

From

Robert B. Shanks RBS
Deputy Assistant Attorney General
Office of Legal Counsel

This responds to your request of December 11, 1984, for information concerning possible federal funding of the Center for the Study of Democratic Institutions. That organization allegedly drafted the "Constitution for the Newstates of America."

On October 29, 1984, Mr. Eugene Lau of Cordell, Oklahoma, wrote to President Reagan, enclosing a clipping from the Oklahoma and Texas Edition of the High Plains Journal, dated October 8, 1984. In his letter, Mr. Lau expresses concern about the "Constitution for the Newstates of America," which is described in the newspaper clipping. A Mr. Warren Meyer of North Platte, Nebraska, had written to the High Plains Journal to criticize the "Constitution for the Newstates of America." In the clipping, Mr. Meyer asserted that work on the new constitution was begun in 1964 by the Center for the Study of Democratic Institutions. Mr. Meyer also asserted that the Center was funded by taxpayers' money in the amount of 2.5 million dollars a year over a ten year period. He concluded with a statement that details about the new constitution may be obtained by writing to Liberty Lobby, a non-profit citizens' group in Washington, D.C.

Liberty Lobby issued a publication lambasting the proposed new "Constitution for the Newstates of America." The publication contains a reprint of the proposed constitution, a review of Rexford G. Tugwell's book, The Emerging Constitution (1974), by Col. Curtis B. Ball, chairman emeritus of Liberty Lobby, and a commentary by E. Stanley Rittenhouse, author and former Liberty Lobby legislative aid. The publication explains at the outset that in 1964 a tax-exempt foundation called the Center for the Study of Democratic Institutions began drafting a proposed new constitution. Ten years later, Rexford G.

Tugwell published a final version of the proposal in a book entitled The Emerging Constitution. Without initially specifying the source of the funds, the publication states that "[d]uring most of the time that their constitution was being written, the Center for the Study of Democratic Institutions was lavishly funded to the tune of $2,500,000 annually." The conclusion of the publication, captioned "Don't Be Fooled," indicates that the Center was funded by the Ford Foundation.

The Center for the Study of Democratic Institutions is located in Santa Barbara, California. On December 12, 1984, an attorney from this Office called the Center (805-961-2611) and spoke to Ms. Gladys Gilkeson, who confirmed that the Center is a tax-exempt organization that receives no federal grants or subsidies. The organization was created in 1952 with money from the Ford Foundation under the name Fund for the Republic. In 1959, the current name was adopted. Ms. Gilkeson explained that throughout its existence, the Center has been funded only by private contributions.

Mr. Meyer appears to have been confused by the statement in the publication that, the Center, as a tax-exempt foundation, was "able to do political work on what amounts to a subsidy taken from your taxes." Based upon this information, it appears that Mr. Meyer simply mistook the nature of the Center for the Study of Democratic Institutions in his October 5, 1984 letter to the High Plains Journal, and that, in fact, the Center is not federally funded.

cc: Executive Secretariat

T H E  W H I T E  H O U S E  O F F I C E

REFERRAL

DECEMBER 10, 1984

TO: DEPARTMENT OF JUSTICE

ACTION REQUESTED:
(FURNISH FACT SHEET TO BE USED AS ENCLOSURE)

DESCRIPTION OF INCOMING:

ID: 279810

MEDIA: LETTER, DATED OCTOBER 29, 1984

TO: PRESIDENT REAGAN

FROM: MR. EUGENE LAU
1203 EAST THIRD
CORDELL OK 73632

SUBJECT: ENCLOSES A CLIPPING CONCERNING A LOBBY GROUP WHICH IS INTRODUCING A DRAFT FOR A NEW U. S. CONSTITUTION - INDICATES FEDERAL FUNDS ARE BEING USED

PROMPT ACTION IS ESSENTIAL -- IF REQUIRED ACTION HAS NOT BEEN TAKEN WITHIN 9 WORKING DAYS OF RECEIPT, PLEASE TELEPHONE THE UNDERSIGNED AT 456-7486.

RETURN CORRESPONDENCE, WORKSHEET AND COPY OF RESPONSE (OR DRAFT) TO:
AGENCY LIAISON, ROOM 91, THE WHITE HOUSE

SALLY KELLEY
DIRECTOR OF AGENCY LIAISON
PRESIDENTIAL CORRESPONDENCE

LAU
WDB.850102.1

SLR

OCT. 29 - 84

279810

DEAR MR. REAGAN

snd.

MR. REAGAN THIS IS THE FIRST LETTER I HAVE EVER WRITTEN A PRESIDENT. AND WOULD APPRECEATE YOUR PEOPLE SEEING THAT YOU GET IT PERSONALY. I AM CONCERNED ABOUT THIS ARTICLE OF A LOBBY GROUP INTRODUCEING A DRAFT FOR A NEW UNITED STATES CONSTITUTION. IT SAYS A VERY SMALL FRACTION OF THE AMERICAN PEOPLE KNOW ABOUT IT, AND THAT IS A FACT. I AM SENDING A CUT OF THE PAPER WITH THE ARTICLE.

MR. REAGAN I VOTED FOR YOU LAST TIME AND WILL THIS TIME EVEN THOUGH I AM A DEMOCRAT, BECAUSE I TRUST AND APPRECATE YOUR TAKING A STAND ON THE THINGS OUR COUNTRY WAS FOUNDED ON.

I AM POSITIVE YOU WILL BE OUR PRESIDENT FOR THE NEXT FOUR YEARS. THAT IS WHY I AM WRITING THIS BEFORE THE ELECTION. SO I WILL MAKE THIS SHORT.

IF THIS IS A FACT AND IS REALY HAPPENING I WOULD LIKE TO KNOW. LET THE AMERICAN PEOPLE KNOW ABOUT IT . THE MAJORITY OF THE AMERICAN PEOPLE WILL BACK YOU UP TO STOP IT.

MAY GOD BLESS AND TAKE CARE OF YOU

THANK YOU FOR YOUR TIME

EUGENE LAU
I203 EAST THIRD
CORDELL, OKLA. 73632

and Apparel Imports—Free Trade or Unfair Trade?"

One of the organizations at the meeting, the National Association of Wheat Growers, urged the rules be recinded immediately and consultation be held with affected textile exporting countries. The NAWG earlier called for a thorough economic impact analysis to take into account the potential loss of wheat exports due to retaliation against the regulations.

If the U.S. continues these selective unfair trade policies, countries exporting textiles, steel and other products to this nation probably, and probably with good reason, will halt their purchases of U.S. products. And because agricultural products are this nation's largest export sales category, American agricultural producers again will take it on the chin and in the pocket book.

In the press at home and abroad, the Chinese have made it quite clear they may seek other sources for agricultural products. The Chinese, and other countries which might be affected by these protectionist interim rules, are aware other exporting countries have sufficient products available to fulfill their requirements. The U.S. isn't the only country in the world with bins of grain and warehouses packed with agricultural, irrigation and industrial equipment and products to sell.

In view of all this flak, and with a Presidential election just a month away, the U.S. Custom Service has announced they are extending the deadline for comments on its interim textile rules from Oct. 2 to Nov. 1.

So the time is short for growers and their organizations to file written comments on the issue. This is an issue that affects every producer of agricultural commodities. If the Customs Service is left unchecked, more rules changes could be forthcoming.

Write today! Let this agency know how it affects your bottom line—past, present and future. The address is: Regulations Control Branch, U.S. Customs Service Headquarters, Room 2426, 1301 Constitution Ave, N.W., Washington, D.C. 20229.—gjh.

# Farmers are crucified

Well, I can see that Eula Bessemer belongs to my club.

It does seem strange that farmers are crucified in order to provide cheap food for the masses. One farmer now feeds 78 people and you. In Italy, farmers are paid $7 a bushel for their corn to insure that the people have an

government has a plan, one that alleviates all but 1 million farmers. Land and machine values are down—foreigners are buying like crazy. So you tell me: Who will control this food supply?

No, we don't have to worry about the arms race. Because the

Rod Turnbull's (well paid) defense of the short gamblers in the commodity futures could well be summed up in one word—baloney!

I just can't get stopped that quick. Turnbull contends these manipulative gamblers are good news for American farmers. I contend they are indeed harmful and have played a great part in placing farmers in the desperate financial situation we now find ourselves.

Turnbull decries the uncertainty and risk a poor exporter would have to take without short selling. Aren't farmers facing even more imposing risks every day and year they operate?

He says, without short sellers, exporters would need very wide margins (for safety): What does he call the 20- to 30-cent flucuations in just hours now on the trade? Supply and demand?

Why did the Chicago Board of Trade clearing corporation president quit recently if everything is so honest and upright? Was this linked to a criminal probe of allegations that he and other high-ranking employees were involved in illegal activities?

Turnbull accuses those of us who complain about short-selling as not understanding. We do, and that is why we complain. We have seen our neighbors, friends and thousands of others get suckered in and lose until they

I would question who Turnbull means when he refers to United

recognized authorities, who will explain the commodity futures market to us unbelievers: phooey.

Isn't it (expert) economists who have guided our government until we are $1.5 trillion in debt? Hasn't it been the self-anointed (experts) from the Land Grant College System who have advised American agriculture to the verge of bankruptcy? Wasn't it the experts directing our educational system the past 20 years who led us to the brink of functional illiteracy?

As a farmer, I say no thanks to the short sellers and would be quite happy if they and all their ilk would get honest and go to Las Vegas.-Stephen Anderson, Alma, Kan.

# Proposal spells doom

Under the new Constitution for the Newstates of America our Constitution is doomed, to be replaced by document which would signal the death of a free republic.

A very small fraction of American people know the existance of this document. The draft of this new proposed constitution was started in 1964 by nearly 100 people under the Center of the Study of Democratic Institutions, funded by taxpayers money to the tune of $2.5 million a year for 10 years. This new document would take the place of our present U.S. Constitution and would dissolve the states as we know them, into newstates, with its regional government, and would bring about an oligarchy at the expense of our Constitutional republic. This form of dictatorship that is planned for America would bring into even more prominence and power the "One Worlders" who want a "New World Government."

Our freedom, provided for by our forefathers in the Bill of Rights, would be destroyed. This document would put America at the mercy of the United Nations. It would open the door to the genocide treaty which has evils too numerous herein to mention. The proposed "Newstates Constitution" is a blueprint for slavery of the American people. It is a document you should know and understand to comprehend the conspiracy that powerful forces in America have entered into to snap the manacles of an international dictatorship on the arms and legs of America. Mr. and Mrs. America read our time tested U.S.A. Constitution. Compare it to the Newstates document. You will see that this document is a complete reversal from the document drawn up by our forefathers who came to the American shores for freedom from domination. It is a plan for dictatorship. God forbid this to happen in our United States of America. What is your opinion Mr. and Mrs. America? Are we still going to ride the trip of disinterest of our free republic's destruction, or are we going to grab for control of our destinies?

Please write your senators at one.

For complete details of the "Newstates Constitution" write: Liberty Lobby, 300 Independence Ave., S.E. Washington, D.C. 20003.—Warren Meyer, North Platte Neb.

U.S. agricultural exports for fiscal 1984 are forecast at $38 billion.

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# The Constitutional Impact on Public Policy: From the Warren Court to the Burger Court and Beyond

by

Philip B. Kurland (White Paper)

The Washington Institute for Values in Public Policy
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Suite 910
Washington, DC 20036
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Telex No. 220759 ICFUR

The Washington Institute for Values in Public Policy is an independent, nonprofit research and educational organization that provides nonpartisan analyses exploring the ethical values underlying public policy issues. The Washington Institute seeks to promote democratic principles which affirm the inherent value, freedom, and responsibility of the individual, the integrity of the family and the interdependence of the community of man. The Institute researches a broad range of public policy options, recognizing that the individual, the government and private social institutions share the responsibility for the common welfare--including the maintenance of a strong national defense. Policy options are generally viewed in light of their impact on the individual and the family. To encourage more informed decision-making on public policy issues, the Institute offers its research and resources to scholars, policymakers and the public.

Philip B. Kurland is the William R. Kenan, Jr. Distinguished Service Professor at the University of Chicago Law School. Educated at the University of Pennsylvania and at Harvard, Dr. Kurland served as president of the Harvard Law Review. Former law clerk to Judge Jerome Frank and to Justice Felix Frankfurter, Dr. Kurland commenced his career as attorney in the U.S. Department of Justice. He was twice awarded a Guggenheim Fellowship and has written extensively on constitutional issues and the United States Supreme Court. Founding editor of The Supreme Court Review, Dr. Kurland's writings include: Politics, the Constitution, and the Warren Court (1970); Felix Frankfurter and the Supreme Court (1970); Watergate and the Constitution (1978). Dr. Kurland has served as consultant to the U.S. Senate Judiciary Committee and the U.S. Department of Justice.

The following paper was delivered by Dr. Kurland before the First Bicentennial Forum on Constitutional Values and Contemporary Policy. This forum series is sponsored by The Washington Institute for Values in Public Policy and moderated by Dr. Nicholas Kittrie, Edwin A. Mooers Scholar and Professor of Law, American University.

To speak on the subject defined by the title of this talk raises a basic problem akin to that of the little boy who said that he knew how to spell "banana" but didn't know when to stop. I have some awareness of each of the elements contained in the subject of my assignment; the problem is to put them together to answer what is in fact the question presented: "What was the constitutional impact on public policy of the three decades of decisions by the Warren and Burger Courts?"

The provisions of the Constitution and their origins have been the central focus of my work for about forty years. I know, perhaps, somewhat more about the crimes committed in the name of the Constitution by the Supreme Court, especially over the last thirty years. That has provided my livelihood along with some sadistic pleasure. However, this knowledge and a smattering about public policy cannot be brought together in such a way as to give a straightforward answer to what appears to be a straightforward question. I shall, therefore, offer some ruminations on each of the elements of the problem in the context suggested by the Constitution's bicentennial celebration.

First, note the point of view from which I speak. I am a lawyer who teaches, not a scholar whose discipline is law, not a practitioner, and certainly not a statesman. I learned my law in an old-fashioned school. My mentors, from whom I learned an attitude toward constitutional law more than its content, were Thomas Reed Powell, Learned Hand, and Felix Frankfurter, themselves students in the same way as Oliver Wendell Holmes--the judge, not the autocrat of the breakfast table.

Paul Freund once began a lecture on Mr. Justice Brandeis in this fashion:

> A critic, as unperceptive as he was unfriendly, once remarked that Charles Evans Hughes possessed one of the finest minds of the eighteenth century. A more plausible observer might maintain that Louis D. Brandeis had one of the finest minds of the nineteenth century. It is certain that most of the central features of the

twentieth century were antipathetic to his view of man and man's potentialities.[1]

I think of myself as the critic did of Hughes or perhaps as Freund did of Brandeis. I find the problems of the mass urbanized society in which the individual is subordinated to the class to which he is assigned highly uncongenial. Except for modern plumbing and sanitation, I cannot think of much real progress over the recent centuries. Indeed, I am so antediluvian as to be unable to use a word processor or to understand any computer more complex than an abacus. And so, one may very well attest that I am viewing my subject through the wrong end of the telescope.

Let me begin then by attempting to speak of the Constitution itself as an expression of public policy. Just as with law, I am informed,[2] public policy may be divided into the two categories of the substantive and the procedural. And when one looks at the text of the Constitution, it is readily apparent that the public policy expressed there is essentially procedural rather than substantive. In effect, it assigns or allocates to different parts of government the functions of making substantive public policy and it specifies the manner in which that policy must be made if it is to be legitimate. It does not, generally, say what the substantive policy thus created should be.

It is also evident from the text that the lion's share of the substantive policy-making function in the national government was assigned to the legislative branch, largely by Article I, section 8, although provision was made for recommendations to the legislature by the President in Article II. As examples of the assignments of policy-making power, we find that the authority to declare war, to raise and support armies and navies, and to provide for calling forth the militia were given to the Congress. The appointment of militia officers and the training of the militia were left to the state governments. And the command of the armed forces was allotted to the President as commander-in-chief. The Constitution says naught about what an army or navy should consist of nor how the commander-in-chief is to employ the armed forces at his command. These matters were left to the decision of those specified in the Constitution.

So, too, the power to raise revenues was given to Congress, reserving to the House of Representatives the exclusive power of originating all bills for

raising revenue. The power to borrow money on the credit of the United States, like the power to regulate commerce among the several States, was to be exercised by the legislative branch. But all such congressional policy-making was to be exercised only in accordance with the provisions of Article I, section 7, that is, by passage of a bill by a majority vote in each House subject to the veto of the President, which may be overturned by a two-thirds majority in each House.

I mention these as examples, but a reading of the basic document will confirm my proposition that almost all of the Constitution is procedural and not substantive in nature. It makes provision for how and by whom and in what areas public policy may be made rather than provision for what the substantive rules of governance are to be. Of course, there are exceptions to this generalization. The Constitution defines the crime of treason, putting that subject beyond the reach of any branch of government, and it specifies the grounds for impeachment. And in the Thirteenth Amendment it outlaws slavery and peonage. But generally, the substantive policy is left to be made by a branch of government authorized to do so by the Constitution. If it says who shall make the rules and how they should be made, it does not ordinarily say what those rules should be.

Except to a seventeenth-century or eighteenth-century mind, this may come as a surprise. We now have in excess of 460 volumes of United States Supreme Court Reports which are full to bursting with substantive constitutional commands. But, for the most part, these are inventions or concoctions of the Supreme Court rather than commands of the Constitution. Unquestionably there are ambiguities and interstices in the constitutional text which have to be resolved by some authority and the Supreme Court is as good as any agency to charge with this function. But it is one thing to fill a gap that the founders left and another to make a gap. It is one thing to resolve an ambiguity and quite another to create an ambiguity in order to resolve it. My revered master, Mr. Justice Frankfurter, found John Marshall's dictum in M'Culloch v. Maryland,[3] that "it is a constitution we are expounding," "the single most important utterance in the literature of constitutional law--most important because most comprehensive and comprehending."[4] When a great mind, like Marshall's, communicates with another great mind, like Frankfurter's, the communication may be charged with meaning that it is not given to ordinary mortals to comprehend. While it is fully understood that a constitution is not to be construed as a contract, or

even as a statute, because of its function as a limit on government, Marshall's proposition signifies to me that the words of the Constitution may be freely deconstructed to suit the desires of the interpreter. Thus, Marshall's words may indeed be the most important of all judicial dicta on the Constitution, but if so they are also the most destructive of the notion of the Constitution as a limitation on governmental authority. And surely the founders thought that they were creating a national government of limited powers, limited by constitutional provision, in order to assure the liberty of the people. It will be remembered that in M'Culloch, Marshall's opinion read the words "necessary and proper" to mean not required and authorized but only reasonable and relevant; i.e., necessary = reasonable, proper = relevant. A more potent formula than $E = mc^2$. All this rested on the idea that it would be illogical to establish a great nation with limited powers, although that is exactly what the creators had in mind in 1787.

The enforcement of the procedural public policy expressed in the Constitution was evidently left to the judiciary by way of the power of judicial review. This is, I think, a valid assumption both from legislative history and the structure of the instrument. That is what Marshall held in Marbury v. Madison.[5] And that is all that he held in Marbury, however much the Court likes to quote his more expansive words: "It is emphatically the province and duty of the judicial department to say what the law is."[6] The Court has, however, taken it upon itself to convert some of the clearly procedural public policy of the Constitution into a license for itself to write substantive constitutional rules at will. The most egregious examples of this transmutation are to be found in the Court's readings of the due process clauses of the Fifth and Fourteenth Amendments and the equal protection clause of the Fourteenth.

There is no suggestion in the origins of these provisions that they had substantive rather than procedural meaning. In effect they were restatements of what our English cousins call "the rule of law." Rules of substantive public policy were not to be arbitrarily imposed but were to be created only through observation of long-established legislative or judicial processes. Indeed, many of the elements of due process are specifically enunciated in Article I and in the Bill of Rights. Moreover, as the equal protection clause says, the same substantive rules were to be applied to all persons within the jurisdiction. No one was to be above the law, none to be below it. But that's not the way the Justices read these provisions.

Nor were they alone. For example, listen to Professor Felix Frankfurter, as he then was, writing in The New Republic in 1924:

> ...these broad "guarantees" in favor of the individual are expressed in words so undefined, either by their intrinsic meaning, or by history, or by tradition that they leave the individual Justice free, if indeed they do not actually compel him, to fill in the vacuum with his own controlling notions of economic, social, and industrial facts with reference to which they were invoked. These judicial judgments are thus bound to be determined by the experience, the environment, the fears, the imagination of the different Justices.[7]

I am always tempted to substitute: "These judicial judgments are thus bound to be determined by the experience, the environment, the fears, the imagination of a majority of nine wilful men who would make themselves--indeed, have made themselves--the prime policy-makers of the national government, at least, in domestic affairs." I do not gainsay the accuracy of the Frankfurter description of the judicial process under the Fifth and Fourteenth Amendments. I merely decry it.

I should much prefer the Holmesian proposition:

> I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.[8]

Let you not misunderstand me or, of more importance, do not misunderstand Mr. Justice Holmes. None knew better than he that judicial judgments, and certainly those that changed existing rules were, in fact, expressions of public policy. His opinions and his writings are replete with acknowledgments of the role of policy-making in the judicial function. Thus, he wrote, while still on the Supreme Judicial Court of Massachusetts:

> The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody

> disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely are capable of unanswerable proof. They require a special training to enable anyone even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defense is ready.[9]

To say that the judicial process is, like the legislative process, simply a process of formulation of public policy, however, does not acknowledge the limited area in which the judiciary is charged with making substantive policy. Within the realm of the common law, in the absence of Constitution and statute, Holmes noted, "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[10] That is a far different notion from the conception of the judicial function assumed by the Supreme Court under the due process clauses and the equal protection clause.

Indeed, at the common law--and the common law is the rock on which the Constitution was erected--it was long recognized that the making of substantive public policy is primarily a legislative and not a judicial function. Baron Parke, in the House of Lords, put the classic attitude in these terms:

> "Public policy" is a vague and unsatisfactory term and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean "political expediency," or that which is best for the common good of the community; and in that sense there may be every variety of opinion according to education, habits, talents, and disposition of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman and not of the lawyer to discuss and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law, to declare public policy as he finds it in the written and unwritten law. Public policy is a proper ground for a decision only in the sense of the policy of the law, not in the sense of mere judicial

notions as to what is best for the public good.[11]

Let me invoke a more contemporary and less alien voice on why the Supreme Court is not an appropriate forum for the formulation of substantive public policy. I refer here to Robert H. Jackson, whose book, The Struggle for Judicial Supremacy was published almost simultaneously with his appointment as a Justice of the Supreme Court in 1941. In a chapter entitled "Government by Lawsuit," he wrote:

> Judicial justice is well adapted to ensure that established legislative rules are fairly and equitably applied to individual cases. But it is inherently ill-suited, and never can be suited, to devising or enacting rules of general social policy....
>
> Custom decrees that the Supreme Court shall be composed only of lawyers, though the Constitution does not say so. Those lawyers on the bench will hear only from lawyers at the bar. If the views of the scientist, the laborer, the business man, the social worker, the economist, the legislator, or the government executive reach the Court, it is only through the lawyer, in spite of the fact that the effect of the decision may be far greater in other fields than jurisprudence. Thus government by lawsuit leads to a final decision guided by the learning and limited by the understanding of a single profession--the law.
>
> It is no condemnation of that profession to doubt its capacity to furnish single-handed the rounded and comprehensive wisdom to govern all society....
>
> In stressing this I do not join those who seek to deflate the whole judicial process. It is precisely because I value the role that the judiciary performs in the peaceful ordering of our society that I deprecate the ill-starred adventures of the judiciary that have recurringly jeopardized its essential usefulness.
>
> Nor am I unmindful of the hard-won heritage of an independent judiciary which for over two hundred years has maintained the "rule of law" in England, the living principle that not even the king is above the law. But again, the rule of law is in unsafe hands when courts cease to function as courts and become organs for control of policy.[12]

Of course, all this was said before our law schools were taught by the Leonardo da Vincis who have mastered all knowledge and who turn out students of such wisdom and omniscience that, on graduation, they can produce Supreme

Court opinions that establish our fundamental social policies.

Supreme Court opinions (as I tell my undergraduate students; I needn't tell my law students because they already know everything when they arrive) are made up, in varying proportions, of four elements, in addition to the statement of facts which may or may not resemble those in the record. First, there are the propositions or principles allegedly derived from constitutional or statutory language; second, judicial precedents, which these days are more likely to refer to lengthy obiter dicta than to holdings in previous cases; third, the practicalities of the situation which license or inhibit the scope of judicial adventurism; and finally, and not least, the personal predilections of each of the judges, for it must be understood that, in Hamiltonian terms, the judiciary now exerts "will" as well as "judgment" if not yet "force."[13] Each of the four elements, separately or in combination, may be subsumed under the rubric of public policy. So, too, may the opinions reflect opinions of the press, whether in the news columns or on the editorial pages, as when the Court turned turtle in the so-called "released time cases"[14] and when the Court resorted to what it called "public policy" to decide the recent Bob Jones tax exemption for racially segregatory religious school cases.[15] Of course, the personal predilections and the pressures of the press are dealt with sub silentio. Most often, the opinions, both majority and minority, claim to be compelled by constitutional or statutory language and judicial precedents.

The only point I am making here is that the Court has little to rely on in the Constitution itself as a basis for its substantive policy-making decision. As Mr. Justice Holmes wrote to Frederick Pollock as long ago as 1924: "The 14th Amendment is a roguish thing."[16] There is, however, much in the Constitution to legitimate the Court's policy-making in procedural areas, especially those marked by the Fourth through the Eighth Amendments and sections 9 and 10 of Article I. It should be noted, moreover, that with regard to civil and criminal procedure, the Court operates in fields in which judges and lawyers may legitimately claim both the necessary experience and expertise on which to base its judgments. So, too, the allocation of policy-making powers among the branches of government and the specific limitations can be found in the constitutional text. It would be logical for each branch of government to decide for itself which powers of policy-making were allotted to it by the Constitution. But the founding fathers did speak in the conventions, both originating and ratifying, as if the courts would have

the power of judicial review specifically to cabin each branch within its constitutional limits, lest any arrogate to itself more than its entitlement. Thus, while it is not properly the Court's role to substitute its judgment on the merits of public policy for those of the elected branches, it has been the accepted judicial task to determine when one of them exceeded its authority.

So much for the public policy made by the Constitution itself. It created a structure of government, not a code of governance. The structure was to be self-regulating, largely through the check by frequent popular elections. The Court was not envisioned as, in Learned Hand's terms, a group of Platonic Guardians to supply the ultimate wisdom if and when the others failed.[17] But all that I have said is based on the notions held only by troglodytes these days: that we are governed by the Constitution, as it was composed by the 1787 Convention and by the amendments thereto, rather than by constitutional law which is a product of the cerebrations of the Justices of the Supreme Court. You should note that even that keen "eighteenth-century mind," Charles Evans Hughes, reported as early as 1908: "We are under a Constitution but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and our property under the Constitution."[18] Perhaps the eighteenth-century aspect of his statement is to be found in his reference to the Court as a guardian of property rights as well as liberty.

There is, however, another view of public policy that has to be considered if we are to be led to the work of the Warren and Burger Courts. This is public policy not in the sense of making the rules of governance for our society but public policy as the ambience within which those rules are to be made: what Mr. Justice Holmes called, in a different context, "a brooding omnipresence in the sky,"[19] and what an earlier generation might have referred to as the Zeitgeist, which the Oxford English Dictionary defines as "the spirit or genius which marks the thought or feeling of a period or age."

If there is one consistent theme that has dominated the efforts of the Supreme Court of the United States throughout our history it is revealed in its persistent devotion to nationalization of all government power. There can be no doubt that what the Constitution-writers created was a federalism, a new kind of federalism, perhaps, because it provided for the national government to rule directly and not through the States, in the areas where it

was to function and it provided that the national government should be chosen directly by the people rather than through the state governments (except originally for the choice of Senators). But the general governance of the people was left mostly to the States, whose sovereignty was diminished but not destroyed by the Constitution. Certainly a graph of the Court's opinions over time would not show an absolutely straight line toward centralization, but if there are hesitations, there are never substantial retrogressions.

Protest as you will, and as politicians do, federalism is now totally gone from the American constitutional structure. There are today no governmental powers that can be exercised by state governments except by acquiescence or authority of the national government. Surely today state government is only a reminder of our earlier Constitution, "just as" to use a Holmesian metaphor, "the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful."[20] Oh, there are remnants of state sovereignty: each State has two representatives in the Senate and the electoral college continues an all but useless function in terms of States. In fact, we are no less a unitary government than France or Japan. Administrative functions are left to the States and some would like to return some national burdens to them. Policy-making is, however, here in Washington, D.C., and it is exercised down to the lowest levels of the police power, even with regard to maximum highway speed and minimum drinking age. And, while the Court has been the effective means of bringing this result about, it should be remembered that the Court did not thrust power on the national government, it only legitimated it. But legitimate it, it did.

I don't need to tell you that ancient battles are still rehearsed from time to time in the Supreme Court. In some manner or other Mr. Justice Rehnquist persuaded his brethren to bow in favor of state exemption from compliance with federal wage and hour regulations for its own employees in National League of Cities v. Usury.[21] But what was hailed as a watershed proved no more than a hillock. And if the 1976 decision was not overruled in 1983 in EEOC v. Wyoming[22] it was reduced to insignificance. "Equal Justice under Law" reads the facade of the Supreme Court building, but its true motto should be "e pluribus unum."

No doubt our children, who are taught no American history, would be most surprised to learn that the members of the federal and state conventions of 1787-88 fought heatedly over the question whether provision should be made

for any area over which no State would have sovereignty and where a national capital could be established. There was strong objection to exclusive jurisdiction for the national government over any territory within the boundaries of the United States. For, to them, the absence of state government meant the absence of liberty. There was also a great fear that a national capital would mean a national court in the sense of a Versailles, where the inhabitants would be totally aloof from the people and where government would exist only to benefit the courtiers. I wonder whether, if these disputants of 1787-88 could return for a visit to Washington today, they would feel that their fears about a national capital had been baseless.

The principal judicial means for nationalization was the persistent reconstruction of the commerce clause, first, by expanding the meaning of commerce and then by expanding the meaning of interstate commerce, and finally by including local commerce if it could be said to affect or compete with interstate commerce. So far as substantive public policy is concerned, it would be possible for the national government to enact most of its laws under the Supreme Court's version of the commerce clause. And the negation of the reserved powers of the States was pretty well marked by the legitimation of the grant-in-aid as means of formulating policy of and for the States. The Sixteenth Amendment had created the deep pocket that Uncle Sam could use to bribe States to bring their public policies in line with the desires of the central government. In 1923, in an opinion by the arch-conservative Mr. Justice Sutherland, the extortion implicit in grants-in-aid was validated as not contravening the Tenth Amendment.[23] The ultimate primacy of Washington over the States is not a recent innovation of our judicial Constitution-makers.

No other doctrine has brooded so omnipresently over the Court as its commitment to nationalization, whatever the Constitution might say or its authors may have intended. But there have been almost equally strong policies more influential on Supreme Court decisions than the mere words of the basic document. Consider the notion of laissez-faire which together with social Darwinism provided the Zeitgeist for the late nineteenth and early twentieth centuries. The label "freedom of contract" was invoked in substitution for the words of the Constitution. The zenith of laissez-faire public policy was probably reached in Lochner v. New York,[24] where the Court struck down, by a vote of five to four, a state law setting a maximum ten-hour day and 60-hour week for bakery workers. (I am reminded here of Thomas

Reed Powell's dictum that five-to-four decisions are won by having half a judge more than half of the judges.) It was in this case that Mr. Justice Holmes uttered what is probably his most famous dissent:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with the theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think injudicious or if you like as tyrannical as this, and which equally interfere with liberty of contract. Sunday laws and usury laws are ancient examples. A modern one is the prohibition of lotteries....The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics....a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.[25]

The fact is that Holmes was wrong. As of 1905, the Constitution did embody Mr. Herbert Spencer's Social Statics, just as surely as if it had been included in haec verba in the terms of the document. That was the public policy of the day, prevailing as a higher law than the Constitution. And perhaps it will give some of you some comfort to realize that many of the academics recently appointed to the federal appellate courts by President Reagan--at least some of whom stand in line for promotion to the high court, would think that a renaissance of Lochner would not be a bad thing. Indeed, much of our history seems to show an oscillation between an overriding belief that wealth is virtue and poverty is sin and its opposition that wealth is sin and poverty is virtue. In any event, so far as laissez-faire is concerned, it died a resounding death with the Great Depression. What its phoenix-like qualities may be remains to be seen.

If, however, Supreme Court intolerance of economic regulation is to be reversed, it is going to take some doing. Modern Supreme Courts do nothing by halves and, with a single exception that was later overruled, the Warren and Burger Courts' scutcheons remain unblotted by any case in which economic

regulations have been invalidated as violative of the due process or equal protection clauses. At the moment, it would seem that, however arbitrary the economic regulation, it does not violate the Constitution.

After the demise of economic due process, which followed the Roosevelt Court-packing plan, no equivalently broad jurisprudential spirit hovered over the judicial policy-making function. The Stone Court was prone to favor labor unions, but that was in accord with the directions of Congress. It showed greater concern for some rights of criminal defendants, especially with regard to coerced confessions, while revealing the usual ambivalence toward the Fourth Amendment's search and seizure provisions, an ambivalence that has persisted to this day. The equal protection clause remained largely the last resort of desperate litigants. The war powers of both the President and the Congress were exalted, especially while the war was being waged, but even afterwards. (Perhaps the Court had learned a practical lesson from the inept attempts of the Civil War Court to cabin Lincoln's war powers.) The concept of the developing welfare state was defended. The rights of aliens suffered in a xenophobic atmosphere. The Cold War tested the limits of freedom of political speech. Unpopular religious minorities were afforded protection and a strict notion of separation of church and state was born.

On the whole, however, during both the Stone and Vinson Courts, the judiciary stayed in its basket. When it made public policy, it did so interstitially. It mostly paid due homage to the constitutional structure and congressional mandates. The nation no less than the Court worried about the limits of tolerance for those ideologies against which we had done battle. To what degree should we afford freedom to those who, given the chance, would take that very freedom from us? To what degree was the threat to our polity and civility greater from domestic demagogues and bigots than from alien subversion?

The Court was regarded as liberal, if not radical, primarily because it sustained rather than thwarted the public policies of big government. In Clinton Rossiter's unfortunately accurate term, constitutional dictatorship, marked by the expanded power of the executive and the bureaucracy at the expense of Congress, was largely unchallenged by the judiciary, except for the landmark Steel Seizure Case,[26] in which a politically divided Court favored the powers of Congress over the claims of the President. That was probably the last victory for congressional power in any contest waged in the

courts.

The Court performed its tasks during the Stone-Vinson era more or less within the confines marked by the Constitution. Except for the persistent overriding commitment to centralization of government authority, which has never disappeared, there seemed to be no higher law directing its conclusions. With the arrival of the Warren Court, which ironically could be called the Eisenhower Court, after the President whose appointments included its Chief Justice plus Justices Brennan, Stewart, and Harlan, the Justices began to march to a new drumbeat. Egalitarianism replaced laissez-faire as the judicial Zeitgeist and with egalitarianism came the revival of the notion of judicial supremacy which was the essence of economic due process, but this time in an even more virulent form.

I do not propose here to rehearse even the names of the myriad of innovative, not to say revolutionary, decisions of the Warren and Burger Courts. They are all of sufficiently recent memory that the names of a few should suffice to refresh your recollection. Brown v. Board of Education,[27] of course, is probably the single most important decision of the Supreme Court since M'Culloch v. Maryland, although its holding did not change the concept of the equal protection clause, that a State was required not to classify persons according to race. Indeed, Brown probably doesn't even deserve the accolade of spawning the equal protection clause revolution. That kudos properly belongs to a Vinson Court decision, Shelley v. Kraemer,[28] which outlawed enforcement of racial restrictive covenants. But, as Alexander Bickel said, "Brown v. Board of Education was the beginning,"[29] and it was the beginning of the extensive doctrine of egalitarianism that colored so much of the Supreme Court jurisprudence that followed in its wake.[30] Baker v. Carr[31] insinuated the doctrine of one-man, one-vote (now one-person, one-vote) into a Constitution which had clearly left the question of legislative apportionment to state legislatures.

Mapp v. Ohio[32] began the conversion of the Supreme Court Reports into the equivalent of a loose-leaf code of criminal procedure to be followed by both the state and federal courts. Miranda v. Arizona[33] marked a technique of enacting so-called prophylactic rules for police behavior, which made it irrelevant to any particular case whether the defendant had been harmed by police misfeasance.

Contrary to newspaper reports, the Burger Court has been largely an extension of the Warren Court both in its activism and its egalitarianism. Again, I would offer here just a few examples. But for a capacity to make constitutional bricks without any constitutional straw, certainly no prior case can be equaled by that of the abortion decision.[34] However much I like the results--and I do--I can find no justification for their promulgation as a constitutional judgment by the Supreme Court. So, too, the gutting of the elements of the common-law jury has been without justification.[35] The devotion to egalitarianism may be found not only in the Burger Court's extension of Brown far beyond its rationale, but in its treatment of the gender discrimination cases,[36] and its favoring--if not always consistently--of expansive notions of affirmative action.[37]

Surely, there have been places where the Burger Court has refused to expand Warren Court notions as its predecessor might have done. It refused to compel States to extend equal contributions to all students in all school districts.[38] And some criminal procedure doctrines have not been carried to their logical conclusions. But, as Professor Vincent Blasi, who would hardly consider himself a conservative on this issue, wrote in his book entitled The Burger Court, The Counter-Revolution that Wasn't: "the 1970s and early 1980s may well be looked upon as the period during which the activist approach to judicial review solidified its position in American judicial practice....By almost any measure the Burger Court has been an activist court."[39]

Geoffrey Gorer has defined the modern egalitarian ethos and also stated its dangers. Egalitarianism is not merely the damnation of invidious discrimination among individuals by governmental agencies. It means rather that: "The more nearly the citizens of a country resemble one another in the amount of money they spend, the goods they own, the education they acquire, and the social deference they receive, the more nearly perfect that country will be."[40] Gorer saw the danger this way: "If mobilized public envy and resentment begrudge any social deference or conspicuous success outside the power hierarchy, then the way is being prepared for a single-value society....Democracy depends on a multiplicity of values; if only a single value is emphasized democracy cannot survive." Egalitarianism is not a concept of the left or the right. It fits equally the ideologies of Fascism and Communism.

The problem with contemporary judicial activism is not, however, merely

in its rejection of legislative and administrative public policy because it conflicts with its own. It lies, rather, in the extension of authority from the power to negate legislative policy--the most that could be claimed for the constitutional authorization of judicial review--to a power to initiate and enforce the legislative policy that it creates. It can no longer be said that the judiciary is merely juridical in its powers. It is now legislative and executive as well.

Courts not only ban racial segregation in schools, they administer school systems, subordinating all other educational values to the attempt to create racially proportional urban schools. They haven't been very effective in achieving their goals, witness Washington, Philadelphia, Chicago, Boston, Atlanta, Los Angeles, etc. But not for lack of trying. They allocate and reallocate federal and state welfare funds. They no longer merely condemn overcrowded prisons, they undertake to mangage them, with about the same success as they have had with the schools. They set priorities in expenditure of state budgets and determine which form of treatment is best for the mentally deranged or retarded. They impose punishments on litigants in civil suits without the requirement of legislative authorization or proof beyond a reasonable doubt. They bind by judgments persons who have never been parties to the lawsuits in which their rights are adjudicated. What the judges have not managed to do is to bring their own dockets under control by rapid and efficient disposition of cases.

The federal judiciary is exercising all the authority that the elected representatives in Congress have, although they are not representative of any constituency nor responsible to any. A legislator is chosen by and removable by his constituency. A federal judge chooses the constituency he wishes to represent and is, for all practical purposes, not removable at all.

There are many among us who have applauded this accretion of power by the judiciary. Some, like Judge J. Skelly Wright, reason from the rightness of the judicial actions to the validity of the judicial power.[41] Presumably, if the courts turn from their egalitarian bent, Judge Wright will no longer justify their authority to act. Some, like Professor Abram Chayes, find the expansion of judicial power justified by the necessity to control government by bureaucracy, which is no more democratic than are the courts.[42]

A. A. Berle, of New Deal Brain Trust fame, reasoned that the expanded

meaning of the equal protection clause requires the assumption of authority to enforce the new meaning. The egalitarian Zeitgeist is thus indissolubly linked with judicial activism. It was in 1969 that Berle wrote:

> Ultimate legislative power within the United States has come to rest in the Supreme Court of the United States....
>
> The process by which a measure of legislative power devolved on the Supreme Court is interesting. It is the product of a mandate contained in the Fourteenth Amendment, multiplied by the forced intrusion of laws into fields of activity originally supposed to be outside statist action....
>
> The second stage of the revolution came when, faced with state "inaction," the federal courts assumed the task of filling the vacuum, remedying the failure. In plain English, this meant undertaking by decree to enact the rules that state legislation has failed to provide. The second phase was the really revolutionary development and, incidentally, set up the Supreme Court as a revolutionary committee.[43]

Berle worried, however, that the Court, having lifted itself by its own bootstraps, might, to change the metaphor, be hoist by its own petard. He acknowledges the problem is one of the Court as a "benevolent dictatorship," and his words are highly reminiscent of James Bradley Thayer's classic argument for judicial restraint, way back in 1893.[44] Berle writes:

> Acquiescent acceptance of any benevolent dictatorship in time deadens the public to its responsibility for apprehending needs and dangers and demanding that their elected executives and legislators take appropriate measures. As John Stuart Mill observed, it compromises the future. Nonacceptance, on the other hand, piles up political pressures focused against the institution itself. Judicial legislation is not a substitute for political and legislative institutional processes. The will of the most enlightened Court is not the same as the will of the elected representatives of the people, and may cease to be the will of the people itself. Acceptance of its mandates based on respect for the Court is not the same as acceptance of active laws commanding popular assent after political date.[45]

I don't think I could have said it better myself.

My conclusion is simple and relatively short. I think that the Justices of the Supreme Court, like all officers of government, suffer from a chronic case of arrogance complicated by the bureaucratic watchword, "the rules don't apply to me." The disease is endemic, especially in Washington. It affects professors and lawyers, social and physical scientists, and certainly candidates for public office, those who run them, and those who serve them. Unfortunately there appears to be no antitoxin. But take heart. As Ralph Waldo Emerson once said: "These times of ours are serious and full of calamity, but all times are essentially the same."[46]

The Supreme Court, over the past thirty years, whether presided over by Warren or Burger, has taken unto itself more and more of the legislative and executive functions. Whether we applaud or deplore such activism seems largely to depend on the ownership of the gored oxen. For myself, I see a danger to our democracy inherent in allowing undue authority to the least democratic, least representative, least equipped, and most politically irresponsible branch of government. I see a threat to our freedoms as well.

I do not decry or deny the necessity for an independent judiciary to keep the other two branches within the limits prescribed by the Constitution and to protect the rights of minorities without adequate representation. But I think it equally important, if the independence of the judiciary is to be maintained, that it, too, observe the constitutional limits placed on its own function.

If the Court needs a guiding philosophy to supplant the currently reigning egalitarianism that has led it so far astray, let them try Learned Hand's spirit of moderation:

> What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens--real and not the factitious product of propaganda--which recognizes their common fate and their common aspirations--in a word, which has faith in the sacredness of the individual.[47]

FOOTNOTES

1. Freund, Mr. Justice Brandeis, in Mr. Justice 177 (Dunham & Kurland, eds., 1956).

2. Freman, Public Policy, 13 Int. Encyc. Soc. Sci. 204 (1969).

3. 4 Wheat. 316, 407 (1819).

4. Kurland, ed., Felix Frankfurter on the Supreme Court 534 (1970).

5. 1 Cranch 137 (1803).

6. Id. at 177.

7. Kurland, supra note 4, at 168.

8. Tyson Bros. v. Banton, 273 U.S. 418, 446 (1927) (dissenting).

9. Vegelahn v. Guntner, 167 Mass. 92, 106 (1896) (dissenting).

10. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) (dissenting).

11. Egerton v. Brownlow, 4 H.L. Cas. 1, 123 (1853).

12. Jackson, The Struggle for Judicial Supremacy, p. 288, 301, 321-23 (1941).

13. The Federalist, No. 78.

14. Compare McCollum v. Bd. of Education, 333 U.S. 203 (1948), with Zorach v. Clausen, 343 U.S. 306 (1952).

15. Bob Jones University v. United States, 76 L. Ed. 2d 157 (1983).

16. 2 Holmes-Pollock Letters 137 (Howe ed. 1942).

17. E.g., Hand, The Bill of Rights 73 (1964).

18. Hughes, Addresses and Papers 189 (1908).

19. Southern Pacific Co. v. Jenson, 244 U.S. 305, 222 (1917) (dissenting).

20. Holmes, Book Notices and Uncollected Letters 9 (1936).

21. 426 U.S. 833 (1976).

22. 460 U.S. 226 (1983).

23. Massachusetts v. Mellon, 262 U.S. 447 (1923); Frothingham v. Mellon, ibid.

24. 198 U.S. 45 (1905).

25. Id. at 75.

26. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

27. 347 U.S. 483 (1954).

28. 334 U.S. 1 (1948).

29. Bickel, The Supreme Court and the Idea of Progress 7 (1970); see Kurland, "Brown v. Board of Education was the Beginning": The School Desegregation Cases in the United States Supreme Court: 1945-79, 1979 Wash. U.L.Q. 309.

30. See, e.g., Kurland, "Equal in Origin, Equal in Title to the Legislative and Executive Branches of the Government," 78 Harv. L. Rev. 143 (1964).

31. 369 U.S. 186 (1962).

32. 367 U.S. 643 (1961).

33. 384 U.S. 436 (1966).

34. Roe v. Wade, 410 U.S. 133 (1973).

35. E.g., Williams v. Florida, 399 U.S. 66 (1970); Colgrove v. Battin, 412 U.S. 145 (1973); Ballew v. Georgia, 435 U.S. 223 (1978).

36. E.g., Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Mississippi University for Women v. Hogan, 102 S. Ct. 331 (1982).

37. E.g., Fullilove v. Klutznick, 448 U.S. 448 (1980); Steelworkers Union v. Weber, 443 U.S. 193 (1979).

38. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

39. P. 198.

40. Gorer, The Danger of Equality 63 (1966).

41. Wright, Professor Bickel, The Scholarly Tradition and the Supreme Court, 84 Harv. L. Rev. 769 (1971).

42. Chayes, Public Law Litigation and the Burger court, 96 Harv. L. Rev. 4 (1982).

43. Berle, Power, 345, 347, 350 (1969).

44. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).

45. Berle, supra note 43, at 402.

46. Emerson, Public and Private Education, in Uncollected Lectures 14 (1932).

47. Hand, The Spirit of Liberty 164 (3d ed. 1960).

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# WHITE HOUSE
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| CU Holland | | ORIGINATOR | 85/01/09 | | C | 85/03/25 PY |
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| CWAT09 | | A | 85/01/10 | | C | 85/03/25 |
| | | Referral Note: | | | | |
| CWAT18 | | A | 85/03/25 | NAN | C | 86/04/11 PY |
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F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
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LE ____.__ __ ____.__

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|---|---|---|---|
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C __ __ _____ Time: _____ P- _____

DSP _____ Time: _____ Media: _____

SIGNATURE CODES:

CPn - Presidential Correspondence
- n - 0 - Unknown
- n - 1 - Ronald Wilson Reagan
- n - 2 - Ronald Reagan
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- n - 6 - Ronald
- n - 7 - Ronnie

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- n - 2 - Nancy
- n - 3 - Mrs. Ronald Reagan

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- n - 2 - Ron - Nancy

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- O - Memo
- P - Photo
- R - Report
- S - Sealed
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- V - Telephone
- X - Miscellaneous
- Y - Study

284410 CU

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CABLE ADDRESS: WICRING LONDON

LLOYD N. CUTLER
DIRECT LINE (202)
872-6100

January 8, 1984 85

The Honorable Fred F. Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Dear Fred:

In accordance with our discussion after yesterday's meeting with the President, I am enclosing a draft proposal being considered by our Committee on the Constitutional System for a constitutional amendment creating a 4-year term for the House of Representatives and an 8-year term for the Senate with two classes of Senators instead of three. The result would be a single election every 4 years for President and Vice President, all members of the House and half of the Senate.

You may also be interested in a second proposal we are considering, which does not require any amendment. It is a federal statute providing that the presidential election be held several weeks before the congressional election, so that when the public voted in the congressional election, voters would know whom they had chosen to occupy the White House for the next 4 years. This might reduce ticket splitting and maximize the President's chances of winning a majority in both houses of Congress so that his party program could be carried out. A copy of this proposal is also attached.

Best regards,

Lloyd

Lloyd N. Cutler

Attachments

## Two-Phase Elections

### Draft Federal Statute Providing For Two-Phase Elections

§ 101(A) The electors of President and Vice-President shall be appointed, in each State, on the third Tuesday in October, in every fourth year succeeding every election of a President and Vice-President.

(B) The third Tuesday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the third day of January next thereafter.

(C) At the regular election held in any State next preceding the expiration of the term for which any United States Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected for the term commencing on the third day of January next thereafter.

## Discussion

This proposed federal statute sets dates for Presidential and Congressional elections which would require that elections to the House and Senate be held four weeks after Presidential elections. This change will permit voters to cast their ballots in Congressional elections after learning the identity and party affiliation of the incoming President. The statute's purpose is to allow voters who wish to avert governmental deadlock to support Congressional candidates belonging to the incoming President's party. Voters will remain free to vote for a House candidate of the party opposing the newly elected President, but they will possess the essential information necessary to avoid this result (the identity of the new President) if they wish to do so. The proposed statute could increase the likelihood that the party winning the Presidency would also win a majority of the House of Representatives. The statute might also strengthen party bonds between candidates for President and for the House, by linking the electoral fate of the latter more closely to the electoral fate of the President. For both these reasons, the statute would make it more feasible for the successful party to legislate and execute its program for governing.

Two principal objections have been raised to the proposed statute. First, voters might still choose not to support Congressional candidates belonging to the incoming President's party. Rather, the electorate may be swayed by its appraisal of the contesting candidates and their positions on local as well as national issues or even by a desire to check one party's control of the Presidency by granting control of Congress to the other party. This is of course true, but it is not a valid argument against the statute. By allowing a voter in Congressional elections to vote with knowledge of the incoming President's identity, the statute permits the voter to make an informed choice, without requiring him to guess the effect of his Congressional vote on the likelihood of creating executive-legislative deadlocks.

Second, opponents of the proposed statute contend that there might be a falloff in voter turnout in Congressional elections held after Presidential elections, just as there is generally a 20-30% falloff in voter turnout in off-year Congressional elections held at the middle of the Presidential term. However, this may not occur as is suggested by the lack of any comparable decline in the French run-off system of the "Deuxienne Tour."

## Draft Constitutional Amendment Providing for Four-Year Terms for Representatives and Eight-Year Terms for Senators

### Joint Resolution

Proposing an amendment to the Constitution of the United States to establish four-year terms for Members of the House of Representatives and eight-year terms for Members of the Senate; and to provide that these terms will commence at the same time and date as the term of the President.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following article is proposed as an amendment to the Constitution of the United States to be valid only if ratified by the legislatures of three-fourths of the several states within ten years of the date of its submission by Congress:

Article ___

Section 1. The House of Representatives shall be composed of Members chosen every fourth year by the people of the several states.

Section 2. The terms of Members of the House of Representatives shall end at noon on the third day of January in

those years in which the term of the President ends; and the terms of their successors shall then begin.

Section 3. The Senate shall be composed of two Senators from each state chosen every eighth year by the people of several states.

Section 4. In the year of the first election of a President and Vice-President after this article takes effect, the Senate shall be divided as equally as may be into two classes. The first class shall consist of the Senators whose terms expire in the following year, plus those Senators of other states whose terms expire two years later. The second class shall consist of the remaining Senators. The seats of the Senators of the first class shall be vacated at noon on the third day of January of the year following such election of a President and Vice-President. The seats of the Senators of the second class shall be vacated four years later.

Section 5. This Article shall take effect on the first day of January of the year of the first election of a President and Vice-President occurring one year or more after the ratification of this article.

## Discussion

The proposed amendment changes the length of terms of Members of the House of Representatives from two years to four years, running concurrently with the term of the President. The proposed amendment also changes the length of terms of Senators from six years to eight years and divides Senators into two classes, with one class being elected every four years. Senate terms would begin and end in the same years as Presidential terms (and, under the amendment, Congressional terms). The amendment could be accompanied by a federal statute providing that elections of Members of the House and of Senators would be held two to six weeks after Presidential elections.

The proposed amendment is intended to serve several important interests. By establishing concurrent four-year terms for Representatives and the President, the amendment would link the political fortunes of a party's Presidential and Congressional candidates more closely than currently is the case. Moreover, a four-year term running simultaneously with the Presidential term would give House members the same electoral time horizon as the President, and permit members to support Presidential initiatives requiring sacrifices for one or two years in order to achieve favorable results within four

years. For both these reasons, Presidents and legislators of the same party might be expected to achieve greater party cohesion and thereby enact the party's legislative program. The amendment could have similar effects in the Senate, since all Senators would be chosen in elections held at the time of Presidential elections and would not face new elections before the President. The enhanced party unity resulting from the amendment might lessen executive-legislative deadlock, at least in situations where the same party controlled both the White House and Capitol Hill.

The proposed amendment would also permit Representatives to devote greater time and attention to legislative responsibilities, and less to the currently unending task of campaigning for reelection. The increasing range and complexity of subjects dealt with by Congress add particular weight to this point. Moreover, the longer term could attract the most qualified persons to the House, and might permit them greater freedom to support party positions opposed by a powerful single-issue interest group. In addition, a reduction by half in the number of elections faced by Representatives would reduce expenditures on campaigns and would give persons of moderate means a better chance of winning election to the House.

Reelection pressures experienced by Senators might also be marginally diminished by the lengthening of Senate terms, and, as with House seats, election costs might be reduced. By dividing the Senate into two, rather than three, classes the proposed amendment relieves Senators from facing new elections before the President. By holding the Presidential, House and Senate elections in the same year, the amendment increases the voting public's opportunity to elect a President and legislature responsive to its desires. The longer lifespan of each Congress resulting from the amendment (four years rather than two) would provide greater time for each Congress to complete its legislative tasks, and to do so without the distraction of upcoming biennial elections.

A number of objections can be raised to the proposed amendment. Since the House of Representatives is meant to be close to the people, the present system of biennial elections is the surest way to accomplish this goal. Biennial terms require a member to stay in touch with and be responsive to his or her constituency. Opponents also reject the notion that the President and the legislators of the same party should work more closely to carry out the party's legislative program, on the ground that party cohesion is less important than a legislator's independence and responsiveness to his or her constituents. Opponents also reject the argument that two-year terms

deter qualified persons from running for the House. Opponents also reject the argument that four-year elections will reduce election costs, reasoning that the higher stakes in each election will be reflected in increased campaign expenditures. In any event, they believe, the added cost of frequent elections is simply the price of a legislative body truly responsive to the popular will.

Critics of the proposed amendment also argue that by reducing the staggered character of senatorial terms the amendment dilutes an important constitutional safeguard. By providing for three staggered classes of Senators with one class being elected every two years, the Framers sought to minimize the dangers that a transitory electoral sweep could entirely dominate the government. Since the proposed amendment allows election of the Senate in only two stages, it increases the danger of pendulum-like swings in legislative programs.

ID # 284410 CU

FE002

# WHITE HOUSE
# CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
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☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

**Name of Correspondent:** Lloyd Cutler

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

**Subject:** 6-yr Presidential term, 4-yr. term for House 8-yr Senate term proposals by the Committee on the Constitutional System

**ROUTE TO:** / **ACTION** / **DISPOSITION**

| Office/Agency (Staff Name) | Action Code | Tracking Date YY/MM/DD | Type of Response | Code | Completion Date YY/MM/DD |
|---|---|---|---|---|---|
| CUTHOLL | ORIGINATOR | 85/06/14 | | C | 86/04/11 PY |
| | Referral Note: | | | | |
| CUAT 18 | D | 85/06/14 | NAN | C | 86/04/11 PY |
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## PRESIDENTIAL REPLY

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|---|---|---|---|
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| DSP | _____ | Time: _____ | Media: _____ |

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- O - Memo
- P - Photo
- R - Report
- S - Sealed
- T - Telegram
- V - Telephone
- X - Miscellaneous
- Y - Study

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CABLE ADDRESS: WICRING LONDON

LLOYD N. CUTLER

DIRECT LINE (202)
872-6100

June 12, 1985

The Honorable Fred F. Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Dear Fred:

As agreed in our discussion Monday, I am enclosing a copy of the letter I sent to Pat Buchanan, together with its attachments.

I would appreciate an opportunity to discuss this with you at your convenience.

Best regards,

Lloyd

Lloyd N. Cutler

Enclosure

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LLOYD N. CUTLER
DIRECT LINE (202)
872-6100

May 21, 1985

The Honorable Patrick Buchanan
Assistant to the President for Communications
The White House
Washington, D.C. 20500

Dear Pat:

As you may know, Senator Nancy Kassebaum, Douglas Dillon and I are Co-Chairmen of a group called the Committee on the Constitutional System. The Committee is trying to develop some proposals for reversing the continuing decline in party loyalty among voters and party cohesion between the President and legislators of the President's party, in an effort to correct the present drift toward deadlock on major issues like the budget and foreign policy. A brief paper describing the Committee is attached.

My purpose in writing is to call your attention to one of our proposals, in which the President expressed considerable interest at a meeting I attended January 7. Jim Baker, Ed Meese, Dick Darman, Fred Fielding and John Svahn were also present. The meeting was held with members of Charlie Bartlett's Committee on a Single Six-Year Presidential Term of which I am also a member, but a lukewarm one.

At the meeting the President was reserved about the six-year presidential term but expressed very warm enthusiasm for a four-year term for House members, running simultaneously with the presidential term. At the end of the meeting, he said he would keep an open mind on the six-year presidential term, but that his mind was "made up" in favor of the four-year House term.

At a meeting to be held this September our Committee on the Constitutional System intends to propose the four-year term for House members, combined with an eight-year Senate term with two classes of Senators instead of the present three, one class to be elected at the time of each presidential election.

As a result there would be a single election every four years for President, Vice President, all of the House and half of the Senate.

A paper outlining the text of the proposal and the arguments for and against it is also attached. Its major advantage is that it would give all Congressmen and Senators the same political time horizon as the President and provide a three-year period after each election in which Congress could do its legislative job without the time, money and political distractions of preparing for the biennial election which always seems to be just a few months away. As one example, it is a political maxim that Congress cannot address the budget in an election year which now means, at a minimum, every other year.

I would very much appreciate an opportunity to discuss this idea with you and explore the possibility that the President might be willing to endorse some version of the proposal.

Best regards,

Lloyd

Lloyd N. Cutler

Attachments

## Committee on the Constitutional System

The Committee is a non-partisan, non-profit corporation devoted to the study and analysis of our Constitutional system as it nears its 200th anniversary in 1987. The Committee's participants include present and former Senators and Congressmen, members of the Cabinet and White House staff, officials of the national and state political parties, state governors, university and college presidents, journalists, lawyers, labor officials, business and financial leaders, and other interested citizens across the nation.

The Committee's co-chairmen are Senator Nancy Landon Kassebaum (R-Kan.), C. Douglas Dillon, former Secretary of the Treasury and Under Secretary of State, and Lloyd N. Cutler, former Counsel to the President.

The three main components of our Constitutional system are the basic charter, the election laws and the political parties that present candidates for election and serve as the organizing links among the elected officials who conduct the government. This system has served remarkably well for much of our history. But in recent decades the system has displayed characteristics that many regard as threatening the government's ability to perform effectively and responsively in a rapidly changing world. Among these weaknesses are:

who sought another term were returned to office. Since World War II over 90% of each party's incumbent legislators who sought another term have been reelected, even in years when their party lost the White House.

The Committee is examining the causes of these problems and considering whether their consequences justify some change in any of the system's three main components -- the charter, the election laws, and the political parties. Among the causes being studied are (1) the Constitutional sharing of power between the executive and legislative branches and within the legislative branch, (2) the Constitutional terms in office of the President, Senators and Representatives and the timing of their elections, (3) the explosion of campaign costs and the increasing dependence of candidates on well-financed single-issue interest groups, (4) the laws and party rules for nominating federal candidates, (5) the advent of TV as our primary means of conveying and receiving political information, (6) the rules and procedures of Congress and (7) the division of responsibilities among federal, state and local units of government. Most of these factors contribute to the prevalence of divided government and the lack of cohesiveness among elected officials of the same party.

The Committee recognizes that the constitutional distribution of legislative and executive power and the timing of Congressional and Presidential terms of office have many of the positive virtues the framers foresaw. They require a substantial popular majority to adopt a new legislative policy or abandon an old one. They inhibit the abuse of power by an arbitrary or corrupt executive. They

# APPENDIX

Partial List of Proposals Under Consideration by

the Committee on the Constitutional System

## A. Changes in Party Rules, Congressional Rules and Federal Statutes

- Amending party rules so as to entitle all winners of the party nominations for the House and Senate, plus the holdover Senators, to seats as voting delegates in the Presidential nominating convention. This would tend to build greater interdependence and closer party cohesion between the presidential and congressional wings of each party.

- Amending the campaign financing laws to create a Congressional Broadcast Fund, similar to the existing Presidential Campaign Fund. This fund would be available to each party and its Congressional candidates in the general election for broadcast expenses, on condition that they not expend any other funds on campaign broadcasts. Half or more of each party's share would go to the party itself, which could place its bets among its candidates so as to maximize its chances to win a majority. This would relieve candidates from excessive dependence on funds from single-issue interest groups and build party loyalty among those elected with the help of party-allocated funds.

B. Constitutional Amendments

- Providing for four-year terms for House members running simultaneously with the Presidential terms and synchronized with eight-year terms for the Senate. (There would be two classes of Senators, instead of the present three, and one class would be elected in each Presidential election.) Simultaneous elections for all or most federal offices every four years would reduce the dependence of candidates on interest group contributions, increase the potential for party government, give incumbents more time to discharge their legislative duties, and lengthen their political time horizons to the same four years as the President's, thereby improving the chances of party cohesion.

- Alternatively, creating a simultaneous five-year term for President and for Members of the Senate and House (or a six-year Presidential term combined with a three-year House term and six-year two-class Senate terms).

- Compensating for the longer terms by allowing a majority of both houses, or the President plus a majority of one house, to call at any time for new national elections for the Presidency and Congress for new full terms. This provision could assist in avoiding or resolving major deadlocks and in removing a weak but non-impeachable President from office.

## Draft Constitutional Amendment Providing for Four-Year Terms for Representatives and Eight-Year Terms for Senators

### Joint Resolution

Proposing an amendment to the Constitution of the United States to establish four-year terms for Members of the House of Representatives and eight-year terms for Members of the Senate; and to provide that these terms will commence at the same time and date as the term of the President.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following article is proposed as an amendment to the Constitution of the United States to be valid only if ratified by the legislatures of three-fourths of the several states within ten years of the date of its submission by Congress:

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Section 1. The House of Representatives shall be composed of Members chosen every fourth year by the people of the several states.

Section 2. The terms of Members of the House of Representatives shall end at noon on the third day of January in

those years in which the term of the President ends; and the terms of their successors shall then begin.

Section 3. The Senate shall be composed of two Senators from each state chosen every eighth year by the people of several states.

Section 4. In the year of the first election of a President and Vice-President after this article takes effect, the Senate shall be divided as equally as may be into two classes. The first class shall consist of the Senators whose terms expire in the following year, plus those Senators of other states whose terms expire two years later. The second class shall consist of the remaining Senators. The seats of the Senators of the first class shall be vacated at noon on the third day of January of the year following such election of a President and Vice-President. The seats of the Senators of the second class shall be vacated four years later.

Section 5. This Article shall take effect on the first day of January of the year of the first election of a President and Vice-President occurring one year or more after the ratification of this article.

## Discussion

The proposed amendment changes the length of terms of Members of the House of Representatives from two years to four years, running concurrently with the term of the President. The proposed amendment also changes the length of terms of Senators from six years to eight years and divides Senators into two classes, with one class being elected every four years. Senate terms would begin and end in the same years as Presidential terms (and, under the amendment, Congressional terms). The amendment could be accompanied by a federal statute providing that elections of Members of the House and of Senators would be held two to six weeks after Presidential elections.

The proposed amendment is intended to serve several important interests. By establishing concurrent four-year terms for Representatives and the President, the amendment would link the political fortunes of a party's Presidential and Congressional candidates more closely than currently is the case. Moreover, a four-year term running simultaneously with the Presidential term would give House members the same electoral time horizon as the President, and permit members to support Presidential initiatives requiring sacrifices for one or two years in order to achieve favorable results within four

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The proposed amendment would also permit Representatives to devote greater time and attention to legislative responsibilities, and less to the currently unending task of campaigning for reelection. The increasing range and complexity of subjects dealt with by Congress add particular weight to this point. Moreover, the longer term could attract the most qualified persons to the House, and might permit them greater freedom to support party positions opposed by a powerful single-issue interest group. In addition, a reduction by half in the number of elections faced by Representatives would reduce expenditures on campaigns and would give persons of moderate means a better chance of winning election to the House.

Reelection pressures experienced by Senators might also be marginally diminished by the lengthening of Senate terms, and, as with House seats, election costs might be reduced. By dividing the Senate into two, rather than three, classes the proposed amendment relieves Senators from facing new elections before the President. By holding the Presidential, House and Senate elections in the same year, the amendment increases the voting public's opportunity to elect a President and legislature responsive to its desires. The longer lifespan of each Congress resulting from the amendment (four years rather than two) would provide greater time for each Congress to complete its legislative tasks, and to do so without the distraction of upcoming biennial elections.

A number of objections can be raised to the proposed amendment. Since the House of Representatives is meant to be close to the people, the present system of biennial elections is the surest way to accomplish this goal. Biennial terms require a member to stay in touch with and be responsive to his or her constituency. Opponents also reject the notion that the President and the legislators of the same party should work more closely to carry out the party's legislative program, on the ground that party cohesion is less important than a legislator's independence and responsiveness to his or her constituents. Opponents also reject the argument that two-year terms

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Critics of the proposed amendment also argue that by reducing the staggered character of senatorial terms the amendment dilutes an important constitutional safeguard. By providing for three staggered classes of Senators with one class being elected every two years, the Framers sought to minimize the dangers that a transitory electoral sweep could entirely dominate the government. Since the proposed amendment allows election of the Senate in only two stages, it increases the danger of pendulum-like swings in legislative programs.