MKD – FILE

004305
1151
FG051
FG149-04
PP005-01
PP009
PR016-04
F0002

THE WHITE HOUSE

WASHINGTON

DD

February 2, 1981

Dear Ambassador Annenberg:

Thank you for your recent correspondence. I have taken the liberty of forwarding the request from the National Trust for Historic Preservation for Mrs. Reagan to be an honorary member of the National Trust, to Peter McCoy, Mrs. Reagan's Chief of Staff for his consideration and action.

The President found the remarks of Chief Justice Berger (WARREN E.) before the Seminar on Legal History to be most interesting; his suggestions for the conduct of presidential press conferences have been forwarded to the Press Secretary.

Sincerely,

MICHAEL K. DEAVER
Assistant to the President
Deputy Chief of Staff

Ambassador Walter H. Annenberg
P.O. Box 750
100 Matsonford Road
Radnor, PA 19088

cc: Peter McCoy
Jim Brady

Cy to Peter McCoy
info to come on
Nat'l Trust
requested
2/4/81

03 FEB REC'D

THE WHITE HOUSE

WASHINGTON

February 2, 1981

Dear Ambassador Annenberg:

Thank you for your recent correspondence. I have taken the liberty of forwarding the request from the National Trust for Historic Preservation for Mrs. Reagan to be an honorary member of the National Trust, to Peter McCoy, Mrs. Reagan's Chief of Staff for his consideration and action.

The President found the remarks of Chief Justice Berger before the Seminar on Legal History to be most interesting; his suggestions for the conduct of presidential press conferences have been forwarded to the Press Secretary.

Sincerely,

MICHAEL K. DEAVER
Assistant to the President
Deputy Chief of Staff

Ambassador Walter H. Annenberg
P.O. Box 750
100 Matsonford Road
Radnor, PA 19088

✓ cc: Peter McCoy
Jim Brady

WALTER H. ANNENBERG

004305

January 22, 1981

Mr. Michael Deaver
The White House
Washington, D. C.

Dear Mr. Deaver:

The Chief Justice was most anxious that the President be apprised of his recommendation that appears on page 6 of the enclosed speech which he gave on Thursday, September 21, 1978 concerning the President with the media. I am sure you will agree that Chief Justice Burger could have no other purpose than to be constructive.

Sincerely,

Walter Annenberg

Walter Annenberg

Enclosure

P. O. Box 750
100 Matsonford Road
Radnor, Pa., 19088

Walter
See p. 6

Transcript

Remarks of
Warren E. Burger
Chief Justice of the United States
To The Seminar on Legal History
The National Archives
Washington, D.C.
Thursday, September 21, 1978

Remarks of
Warren E. Burger
Chief Justice of the United States
To The Seminar on Legal History
The National Archives
Washington, D.C.
Thursday, September 21, 1978

HOW LONG CAN WE COPE?

IT MAY SEEM PREMATURE TO BE THINKING ABOUT THE NEXT SIGNIFICANT BICENTENNIAL CELEBRATION IN OUR NATIONAL LIFE, BUT OUR EXPERIENCE WITH THE BICENTENNIAL OF 1976 DEMONSTRATES THE DESIRABILITY FOR LONG ADVANCE PLANNING. IT IS NOT TOO SOON TO TURN OUR MINDS TO THE 200TH ANNIVERSARY OF THE DOCUMENT SIGNED IN PHILADELPHIA ALMOST EXACTLY 191 YEARS AGO. WE TAKE CONSIDERABLE PRIDE, AND I THINK APPROPRIATELY, IN THE FACT THAT WE HAVE FUNCTIONED AS A NATION UNDER THIS ONE WRITTEN CONSTITUTION FOR NEARLY TWO CENTURIES. NO OTHER NATION CAN MATCH THAT.

THE EVENTS OF THE PAST 40 YEARS HAVE BROUGHT HOME TO US VERY FORCEFULLY THAT FREEDOM IS FRAGILE. THIS IS PARTICULARLY TRUE OF THE FREEDOM OF OUR OPEN SOCIETY WHERE WE NOT ONLY PERMIT, BUT AT TIMES ALMOST SEEM TO INVITE ATTACKS, BECAUSE OF OUR COMMITMENT TO FLEXIBILITY AND CHANGE AND OUR DEDICATION TO THE VALUES PROTECTED BY THE FIRST AMENDMENT. ERIC HOFFER, WITH HIS UNCOMPLICATED LOGIC AND SIMPLICITY OF STYLE, HAS EXPRESSED HIS DEEP CONCERN THAT OUR SYSTEM OF GOVERNMENT AND OUR FREE SOCIETY MAY BE MORE FRAGILE IN MANY RESPECTS THAN OTHER SOCIETIES, AND HE HAS SUGGESTED THAT "THE SOCIAL BODY" IS PERHAPS MORE VULNERABLE AND FRAGILE THAN THE HUMAN BODY.1/

IT HAS BEEN AN ARTICLE OF FAITH WITH US THAT THE ARTIFICIAL AND MANIPULATED SYSTEMS OF AUTHORITARIAN REGIMES, NO MATTER HOW STRONG THEY SEEM FOR A TIME, DO NOT POSSESS THE POWERS OF RESTORATION OR RECUPERATION POSSESSED BY OUR KIND OF GOVERNMENT. IT IS WITHIN THE MEMORY OF ALL OF US THAT A GREAT MANY PEOPLE IN THE 1930'S, AND EVEN LATER, ACCEPTED HITLER'S BOAST THAT HE WAS CREATING A "1,000 YEAR REICH." THEY REMEMBERED, TOO, THAT EVEN BEFORE HITLER, AS WELL AS IN MORE RECENT TIMES, OTHER PEOPLE SAW SOVIET COMMUNISM AS "THE WAVE OF THE FUTURE." IT WAS LINCOLN STEFFENS WHO SAID AFTER A VISIT TO RUSSIA THAT HE HAD "BEEN OVER INTO THE FUTURE AND IT WORKS."2/

1/ Letter from Eric Hoffer to Warren E. Burger dated March 21, 1969.

2/ Lincoln Steffens, The Autobiography of Lincoln Steffens, (New York: Harcourt, Brace & Co., 1931), p. 799.

SURELY THE EVENTS OF THE LAST 40 OR MORE YEARS IN WORLD HISTORY UNDERSCORE THE IMPORTANCE OF BOTH THE PHILOSOPHY OF FREEDOM AND THE MECHANISMS AND PRACTICES WE HAVE SET UP TO INSURE A CONTINUANCE OF FREEDOM.

WE ARE SURELY COMMITTED TO A SIGNIFICANT CELEBRATION OF THE CREATION OF OUR CONSTITUTIONAL SYSTEM UNDER THE CONSTITUTION, WHICH IN 200 YEARS TOOK US FROM THREE MILLION STRUGGLING PIONEERS INTO A GREAT WORLD POWER, AND INDIVIDUAL INITIATIVE WAS THE SECRET OF THIS SUCCESS. IT IS, THEREFORE, NOT TOO EARLY TO BEGIN THINKING AND PLANNING TO BE SURE THAT WHAT WE DO WILL BE AN APPROPRIATE RECOGNITION OF THE IMPORTANCE OF THE EVENT AND TO SERVE AS A GUIDE TO CORRECT WHATEVER FLAWS WE SEE AND TO PLAN FOR THE YEARS AHEAD.

I SUBMIT THAT AN APPROPRIATE WAY TO DO THIS WILL BE TO REEXAMINE EACH OF THE THREE MAJOR ARTICLES OF OUR ORGANIC LAW AND COMPARE THE FUNCTIONS AS THEY HAVE BEEN PERFORMED IN RECENT TIMES WITH THE FUNCTIONS CONTEMPLATED IN 1787 BY THE MEN AT PHILADELPHIA. THE CONSTITUTION WAS, OF COURSE, INTENDED TO BE A MECHANISM TO ALLOW FOR THE EVOLUTION OF GOVERNMENTAL INSTITUTIONS AND CONSTITUTIONAL CONCEPTS. BUT WE SHOULD EXAMINE THE CHANGES WHICH HAVE OCCURRED OVER TWO CENTURIES AND ASK OURSELVES WHETHER THEY ARE FAITHFUL TO THE SPIRIT AND THE LETTER OF THE CONSTITUTION, OR WHETHER, WITH SOME, WE HAVE GONE OFF ON THE WRONG TRACK.

THIS UNDERTAKING IS TOO SERIOUS, TOO BROAD IN SCOPE AND TOO IMPORTANT TO BE ACCOMPLISHED WITHIN ONE YEAR. I SUGGEST FOR YOUR CONSIDERATION, AND TO THOSE WITH SIMILAR INTERESTS, THAT WE SET ASIDE, NOT ONE YEAR OR EVEN TWO YEARS, BUT THREE YEARS FOR THIS ENTERPRISE. ALTHOUGH THE SEQUENCE NEED NOT BE RIGID, I WOULD SUGGEST THAT IN 1985 WE DEVOTE OURSELVES TO AN EXAMINATION OF ARTICLE I; IN 1986, WE SHOULD ADDRESS THE POWERS DELEGATED BY ARTICLE II; IN 1987, WE SHOULD ADDRESS ARTICLE III. LET ME BRIEFLY SUGGEST A FEW OF THE DIFFERENCES BETWEEN THE EXPECTATIONS OF THE FRAMERS AND PRESENT-DAY PRACTICES, BEARING IN MIND MARSHALL'S STATEMENT THAT THE CONSTITUTION WAS "INTENDED TO ENDURE FOR AGES TO COME, AND CONSEQUENTLY, TO BE ADAPTED TO THE VARIOUS CRISES IN HUMAN AFFAIRS."

ARTICLE I

UNDER ARTICLE I, ALL LEGISLATIVE POWERS WERE VESTED IN THE CONGRESS OF THE UNITED STATES, OR AS JEFFERSON SAID, "THE GREAT COUNCIL OF THE NATION." IT DOES NOT REQUIRE THE SKILLS OF HISTORIANS OR POLITICAL SCIENTISTS TO OBSERVE THAT CONGRESS IN 1978 IS A VERY DIFFERENT INSTITUTION FROM WHAT WAS CONTEMPLATED IN 1787. BUT WE MUST DO MORE THAN STUDY HOW THE CONGRESS OF TODAY IS DIFFERENT; WE SHOULD PROCEED TO ASSESS WHETHER THE CONGRESS IS FUNCTIONING ACCORDING TO THE SPIRIT OF THE FOUNDING FATHERS, EVEN AS WE RECOGNIZE THAT CHANGES WERE INEVITABLE WITH CHANGING TIMES AND NEW PROBLEMS.

WHAT ARE THE KIND OF CHANGES THAT OUGHT TO BE LOOKED AT? SURELY, THE GROWTH FACTOR IS ONE. THE HOUSE OF REPRESENTATIVES HAS GROWN FROM 45 TO 435; THE SENATE FROM 26 TO 100. IN THE ORIGINAL CONTEMPLATION, MEMBERSHIP IN THE CONGRESS WAS NOT TO BE A FULL-TIME OCCUPATION. THE FRAMERS ANTICIPATED PART-TIME PUBLIC SERVICE OF THE LEADING CITIZENS OF EACH STATE. THEY WERE TO COME TO PHILADELPHIA (AND LATER TO WASHINGTON) FOR ONLY A FEW MONTHS OUT OF THE YEAR AND SPEND THE REMAINING SEVEN OR EIGHT MONTHS BACK HOME ON A FARM OR AT A LAW PRACTICE OR LUMBER MILL. NOW, IT IS A FULL-TIME PROFESSION -- AND NECESSARILY SO -- GIVEN WHAT WE ASK OF THEM.

OBVIOUSLY MEMBERS OF THE CONGRESS CANNOT BE EXPECTED TO FUNCTION TODAY AS THEY DID IN THE TIME OF CLAY, CALHOUN AND WEBSTER WHEN THERE WERE NO TYPEWRITERS, NO COMPUTERS, AND WHEN BOTH COMMUNICATION AND TRAVEL WERE VERY DIFFERENT FROM THE PRESENT DAY. BUT SOME OF THE CHANGES WHICH WE NOW OBSERVE IN THE FUNCTIONING OF THE CONGRESS ARE SO FUNDAMENTAL THAT THEY CAN PROFITABLY BE REEXAMINED IN LIGHT OF ORIGINAL EXPECTATIONS ABOUT THE FUNCTIONING OF THE LEGISLATIVE BRANCH. FOR AT LEAST THE FIRST 100 YEARS, EACH MEMBER OF CONGRESS COULD DO ALL HIS OWN HOMEWORK VERY LARGELY AS MEMBERS OF THE BRITISH HOUSE OF COMMONS STILL DO. EACH DILIGENT MEMBER OF CONGRESS COULD READILY READ EVERY BILL PROPOSED AND UNDERSTAND WHAT WAS BEING PRESENTED. MEMBERS OF CONGRESS ARE NOW TORN BETWEEN THEIR MOUNTING OBLIGATIONS TO ASSIST INDIVIDUAL CONSTITUENTS IN THEIR DEALINGS WITH THE BUREAUCRACY -- TO RESPOND TO MAIL -- AND THE DEMANDS OF THE NUMEROUS SUBCOMMITTEES AND COMMITTEES UPON WHICH THEY SERVE. THE MAIL IS INCREASED -- PERHAPS -- BY NEW WORD PROCESSING EQUIPMENT AVAILABLE TO INTEREST GROUPS, WITH ONE SET OF WORD PROCESSING MACHINES COMMUNICATING WITH ANOTHER MACHINE. ADDED TO ALL THIS IS THE CONSTANT NEED TO MEND POLITICAL FENCES -- WHICH, OF COURSE, IS DEMOCRACY AT WORK.

THESE CROSS-PRESSURES, THE IMMENSE INCREASE IN THE VOLUME OF LEGISLATIVE BUSINESS AND THE NEED TO MATCH THE SIZE AND SPECIALIZED CAPABILITIES OF THE EXECUTIVE BRANCH EXPERTS ACCOUNTS IN LARGE MEASURE FOR THE ENORMOUS EXPANSION OF CONGRESSIONAL STAFFS. INDEED, SOME SAY THAT CONGRESS IS NOW NOT 535 PERSONS BUT RATHER 535 PLUS THOUSANDS OF STAFF MEMBERS IN THE HOUSE AND SENATE. THE CONGRESSIONAL QUARTERLY WEEKLY REPORT TELLS US THAT CURRENTLY THE CONGRESSIONAL STAFFS AGGREGATE ABOUT 16,500.3/ THE INCREASE IN THE SIZE OF STAFFS SEEMS TO HAVE INDUCED SOME PROLIFERATION OF THE NUMBER OF LOBBYISTS -- OR PERHAPS IT WAS THE OTHER WAY AROUND. THE NUMBER OF CORPORATIONS MAINTAINING OFFICES IN WASHINGTON HAS GROWN IN 15 YEARS FROM ABOUT 50 TO 300. MORE THAN 16,000 TRADE ASSOCIATIONS AND LABOR UNIONS HAVE OFFICES IN THIS CAPITAL.

3/ The Congressional Quarterly Weekly Report, Feb. 11, 1978.

BUT THE CENTRAL FOCUS IN REEXAMINATION OF THE OPERATIONS UNDER ARTICLE I ARE THE NEW PROBLEMS WHICH HAVE ADDED TO THE BURDENS OF THE CONGRESS. OBSERVERS SAY THAT FLOOR DEBATE NO LONGER OCCUPIES THE ROLE IT DID IN TIMES PAST. MEMBERS OF CONGRESS TEND TO BECOME SPECIALISTS -- CONCENTRATING ON THE WORK OF THEIR OWN COMMITTEES -- RATHER THAN THE GENERALISTS OF AN EARLIER DAY. A LARGE PART OF THE WORK OF CONGRESSIONAL STAFFS IS DEVOTED TO "SERVICING" CONSTITUENTS ENTIRELY APART FROM THE LEGISLATIVE PROCESS ITSELF. THIS MAY BE AN APPROPRIATE PART OF THE DEMOCRATIC ETHOS, BUT IT IS SURELY SOME DISTANCE FROM WHAT THE AUTHORS OF THE CONSTITUTION INTENDED. THIS IS NOT SAID CRITICALLY BUT RATHER AS THE REALITY OF PRESENT DAY LIFE. INDEED MY REFLECTIONS ON THIS SUBJECT REST ON WHAT MEMBERS OF CONGRESS HAVE SAID -- PUBLICLY AND PRIVATELY.

A WELL-INFORMED AND HIGHLY SOPHISTICATED JOURNALIST, ELIZABETH DREW, RECENTLY DESCRIBED THE DILEMMA OF MEMBERS OF CONGRESS ATTEMPTING TO COPE WITH THE FLOOD OF BILLS SUBMITTED AND THE LESSER BUT STILL OVERWHELMING FLOOD OF PROPOSALS EMERGING FROM COMMITTEES.4/ MANY MEMBERS OF CONGRESS HAVE STATED THAT IT IS ALMOST IMPOSSIBLE FOR ANY MEMBER TO READ ALL THE PROPOSED LEGISLATION. SOME CRITICS SUGGEST THAT THE INCREASE IN STAFFS HAS LED DIRECTLY TO THIS INCREASE IN THE NUMBER AND LENGTH OF PROPOSED BILLS AND COMMITTEE REPORTS. I DO NOT KNOW. BUT IT IS POSSIBLE THAT A SENATOR WITH A STAFF OF 50 OR 60 OR 70 PERSONS MAY HAVE MORE BURDENS THAN BENEFITS GIVEN THE INEXORABLE WORKINGS OF PARKINSON'S LAW. I DO OBSERVE THAT RATHER THAN HAVING THEIR WORKLOAD LESSENED, CONGRESSMEN SEEM TO FIND THEMSELVES OVERWHELMED AND MANY ARE RETIRING PREMATURELY. WE ALSO SEE WHAT PERHAPS IS ANOTHER RESULT OF CURRENT OPERATIONS, AND THAT IS A LEGISLATIVE PRODUCT WHERE, ALL TOO OFTEN, THE MEANING AND INTENT OF CONGRESS ARE BLURRED AND THE ENTIRE POLICY ISSUE WINDS UP IN THE COURTS FOR RESOLUTION.5/ AND OFTEN THE COURTS HAVE GREAT DIFFICULTY DISCERNING THE TRUE INTENT OF CONGRESS.

THE PURPOSE OF THESE OBSERVATIONS IS NEITHER TO CHALLENGE NOR TO CRITICIZE THE PROCESS. IT IS SIMPLY TO POINT OUT THE WORLD OF DIFFERENCE BETWEEN FUNCTIONS CONTEMPLATED IN 1787 AND THE REALITY OF 1978. A FULL YEAR IS NEEDED TO MAKE A CONCENTRATED ANALYSIS BY POLITICAL SCIENTISTS, HISTORIANS, AND OTHER SPECIALISTS -- AND MEMBERS OF CONGRESS -- TO STIMULATE A SERIOUS NATIONAL DISCUSSION. SUCH AN ANALYSIS CAN BE MADE IN A MORE ORDERLY AND RATIONAL WAY IF THE DISCUSSION OF ONE BRANCH

4/ Elizabeth Drew, "A Tendency to Legislate", The New Yorker, June 26, 1978, pp. 80-86.

5/ See Carl McGowan, "Congress and the Courts", 62 American Bar Association Journal, pp. 1588-1590 (Dec. 1970); and see TVA v. Hill, 98 S. Ct. 2279 (1978); SEC v. Sloan, 98 S. Ct. 1702 (1978).

IS CONDUCTED ENTIRELY INDEPENDENT OF DISCUSSION OF THE OTHER TWO BRANCHES. IT IS, THEREFORE, DESIRABLE TO SET ASIDE THE YEAR 1985 FOR COMPREHENSIVE REEXAMINATION OF THE ARTICLE I FUNCTIONS.

ARTICLE II

THE OPERATIONS OF THE EXECUTIVE BRANCH, LIKE THOSE OF THE CONGRESS, HAVE ALSO UNDERGONE DRAMATIC EVOLUTION AND CHANGE. IN 1789 THERE WAS ONLY A HANDFUL OF "EXECUTIVES" IN THE EXECUTIVE BRANCH ALONG WITH CUSTOMS COLLECTORS AND POSTMASTERS.6/ THE TOTAL BUDGET OF THE FEDERAL GOVERNMENT IN DOLLARS WAS SMALLER BY FAR AT THE BEGINNING THAN THAT OF A MODEST SIZED CITY -- COLORADO SPRINGS -- FOR EXAMPLE.7/ COMMUNICATION BETWEEN THE FIRST EXECUTIVE AND THE LEGISLATIVE BRANCH WAS CASUAL AND INFORMAL.8/

ALTHOUGH THE MEMBERS OF THE FIRST SUPREME COURT WISELY RESISTED PRESIDENT WASHINGTON'S REQUEST FOR ADVISORY OPINIONS AND DECLINED TO PERFORM OTHER FUNCTIONS WHICH THEY DEEMED TO BE EXECUTIVE IN NATURE, THERE IS LITTLE DOUBT THAT CHIEF JUSTICE JAY GAVE ADVICE TO WASHINGTON OVER THE DINNER TABLE AND EVEN IN WRITING. THE PRESIDENT HAD NO PROFESSIONAL STAFF FOR HIMSELF. HIS CLOSE ADVISORS ALSO INCLUDED THE CABINET SECRETARIES AND THE VICE PRESIDENT.

ALTHOUGH THE EXECUTIVE BRANCH GREW GREATLY FROM 1789 TO THE FIRST WORLD WAR, OUR WARTIME PRESIDENT, WOODROW WILSON, PECKED AWAY AT HIS HAMMOND TYPEWRITER, TURNING OUT SPEECHES AND MESSAGES TO CONGRESS -- AND AN OUTLINE OF THE LEAGUE OF NATIONS.

PRESIDENT HOOVER HAD THREE OR FOUR STAFF AIDES, THEN CALLED "SECRETARIES", WHO ASSISTED HIM WITH HIS PROBLEMS, INCLUDING ONE FORMER CONGRESSMAN WHO PRESUMABLY HANDLED LEGISLATIVE RELATIONS. FRANKLIN ROOSEVELT, AS A CANDIDATE, ATTACKED HOOVER FOR HIS EXCESSIVELY LARGE STAFF. YET, AS WE KNOW, THE GREAT EXPANSION OF THE WHITE HOUSE STAFF BEGAN UNDER PRESIDENT FRANKLIN ROOSEVELT AS THE WHOLE EXECUTIVE BRANCH BURGEONED TO MEET THE EMERGENCIES CREATED BY THE WORLD-WIDE DEPRESSION.

6/ See Leonard White, The Federalists (Toronto: Collier, MacMillan, 1948).

7/ The expenditures of the federal government were 5.1 million dollars in 1792. The expenditures of Colorado Springs in 1977 were 53.7 million dollars.

8/ James S. Young, The Washington Community (New York: Columbia University Press, 1966).

THUS ONE MATTER TO BE REFLECTED UPON IN 1986 IS THE IMPLICATIONS OF THE SIZE OF THE EXECUTIVE BRANCH. ANOTHER QUESTION DESERVING ANALYSIS IS WHAT WE NOW UNDERSTAND FROM THE PROVISION OF ARTICLE II STATING THAT THE EXECUTIVE POWER SHALL BE VESTED IN THE PRESIDENT. TODAY EXECUTIVE POWER IS ACTUALLY IN THE HANDS OF A FEW THOUSAND OF NEARLY THREE MILLION CIVILIAN EMPLOYEES OF THE EXECUTIVE BRANCH. THERE ARE 150,000 EMPLOYEES IN THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE ALONE -- MORE THAN THE STANDING ARMY OF THE COUNTRY IN EARLY PARTS OF THIS CENTURY.

THERE ARE OTHER CHANGES. FOR NEARLY A HALF CENTURY THE EXECUTIVE BRANCH INITIATED MUCH OF THE SIGNIFICANT LEGISLATION. IT IS INTERESTING TO NOTE THAT THE CIVIL SERVICE COMMISSION IS HOLDING A WORKSHOP THIS DECEMBER -- AND I USE THE COMMISSION'S LANGUAGE -- TO "HELP TRAIN AGENCY PERSONNEL WHO WILL BE ASSUMING ASSIGNMENTS IN THE FORMULATION OF LEGISLATION." THIS IS ENTIRELY APPROPRIATE BUT IT PERHAPS IN PART EXPLAINS WHY CONGRESS NEEDED SPECIALIST STAFFS TO COPE WITH THE EXECUTIVE. THE GROWTH IN THE RULE-MAKING ACTIVITY OF THE FEDERAL AGENCIES HAS GIVEN RISE TO CONCERN AND INDEED TO CHALLENGES BY RECENT PRESIDENTS WHO THOUGHT THEIR POLICIES WERE BEING FRUSTRATED.

ONE EXAMPLE OF CHANGES BROUGHT ON IN THE ELECTRONIC AGE IS THE RELATIONSHIP OF PRESIDENT WITH THE MEDIA. PERHAPS WE SHOULD ASK WHETHER ANY PRESIDENT SHOULD BE EXPECTED TO HAVE AT HIS FINGERTIPS, AND ON THE TOP OF HIS HEAD, A COMPREHENSIVE AND TOTALLY ACCURATE RESPONSE TO EVERY QUESTION SUBMITTED FROM AN AUDIENCE CONSISTING OF SEVERAL HUNDRED POLITICALLY SOPHISTICATED MEDIA REPORTERS? AT TIMES WE READ A SUPERFICIAL COMPARISON TO THE BRITISH SYSTEM WHERE THE PRIME MINISTER AND HIS CABINET MINISTERS APPEAR IN THE COMMONS FOR THE QUESTION PERIOD. BUT THE COMPARISON IS FLAWED BECAUSE IN BRITAIN THERE IS A FIXED AGENDA FOR THE QUESTION PERIOD. THE PRIME MINISTER OR ANY MEMBER OF HIS CABINET NEED BE WELL-INFORMED ONLY ON THE SPECIFIC AND LIMITED SUBJECTS COVERED BY THAT AGREED AGENDA.

IS IT POSSIBLE THAT THE MEDIA, THE PRESIDENCY, AND THE NATION WOULD BE BETTER SERVED IF PRESIDENTIAL PRESS CONFERENCES WERE -- AT LEAST -- CONFINED TO AGREED SUBJECTS? -- FOR EXAMPLE, THE PROBLEMS OF THE MIDDLE EAST, OR INFLATION OR ENERGY -- RATHER THAN HAVING EVERY PRESS CONFERENCE OPEN TO THE ENTIRE RANGE OF PROBLEMS CONFRONTING THE COUNTRY. THE EVENING NEWS AND THE MORNING PAPERS WOULD BE ABLE TO FOCUS WITH GREATER CLARITY AND IN GREATER DEPTH ON PARTICULAR POLICY ISSUES AND THE MEDIA MIGHT THUS BE BETTER ABLE TO INFORM THE PUBLIC IN THE LONG RUN.

THESE ARE JUST A SAMPLE OF SOME OF THE ISSUES AND PROBLEMS WHICH MIGHT BE DISCUSSED DURING THE YEAR 1986 BY POLITICAL SCIENTISTS, HISTORIANS, JOURNALISTS, AND THOSE WHO HAVE ACTUAL FIRST-HAND EXPERIENCE IN GOVERNMENT. OTHERS HAVING BROADER EXPERIENCE IN GOVERNMENT WILL SEE MANY AREAS FOR INQUIRY.

ARTICLE III

QUESTIONS ABOUT THE PRESENT FUNCTIONING OF THE JUDICIARY COMPARED WITH ORIGINAL EXPECTATIONS COULD BE DEALT WITH IN 1987. SINCE I CANNOT QUALIFY EITHER AS A TOTALLY EXPERT WITNESS ON THE SUBJECT OR AS TOTALLY UNBIASED, I WILL LEAVE IT TO OTHERS TO FLESH OUT THE FULL SCOPE OF THE INQUIRY FOR THERE IS A LONG LIST OF QUESTIONS DESERVING SERIOUS STUDY.

I SUSPECT THAT BY THE TIME THE DELEGATES REACHED ARTICLE III THAT THEY WERE GETTING WEARY IN THE HOT AND HUMID PHILADELPHIA SUMMER. THE ENTIRE JUDICIAL ARTICLE CONTAINS ONLY 369 WORDS. THE FIRST JUDICIARY ACT OF 1789 AUTHORIZED 13 U.S. DISTRICT JUDGES AND SIX MEMBERS OF THE SUPREME COURT. PERHAPS THE FEELING OF THOSE WEARY DELEGATES AT THE CONSTITUTIONAL CONVENTION WAS THAT A BRANCH OF GOVERNMENT WHICH WOULD CONSIST INITIALLY OF ONLY 19 JUDGES DID NOT CALL FOR MUCH RHETORIC -- OR MUCH ATTENTION. THE CONSTITUTION PROVIDED THAT THE FEDERAL COURTS WOULD HAVE A LIMITED AND SPECIAL FUNCTION -- IN THAT DAY LARGELY DECIDING ADMIRALTY CASES.

THE NUMBER OF JUDGES HAS GROWN FROM THOSE FIRST 19 TO 397 AUTHORIZED DISTRICT JUDGES, 97 JUDGES OF THE COURTS OF APPEALS, AND ANOTHER 21 JUDGES OF THREE SPECIALIZED TRIBUNALS -- A TOTAL OF 515. ANOTHER 130 SENIOR JUDGES CONTINUE TO SERVE -- FORTUNATELY FOR US. THIS NUMBER WILL SOON INCREASE BY APPROXIMATELY 150 WHEN CONGRESS PASSES THE OMNIBUS JUDGESHIP BILL -- WHICH MAY HAPPEN THIS WEEK.

THE SUPREME COURT HAS INCREASED FROM SIX JUSTICES TO NINE, REMAINING AT THAT FIGURE FOR OVER A CENTURY. I DO NOT KNOW OF ANYONE ADVOCATING INCREASING THE MEMBERSHIP OF THE SUPREME COURT -- LEAST OF ALL THE PRESENT JUSTICES. ONE WAG COMMENTED THAT NINE MEMBERS OF THE SUPREME COURT HAVE PRODUCED SUFFICIENT MISCHIEF IN THIS COUNTRY AND ANY INCREASE WOULD BE INTOLERABLE.

WITH 19 FEDERAL JUDGES IN 1789 -- AND FOR AT LEAST 100 YEARS -- THERE WERE NO SIGNIFICANT "MANAGEMENT" PROBLEMS. EVEN WITH THE 100 OR MORE JUDGES DURING THE TIME TAFT WAS CHIEF JUSTICE, THE MANAGEMENT PROBLEM WAS NOT ENORMOUS. BUT TAFT SAW INTO THE FUTURE AND FOUGHT FOR THE CREATION OF THE CONFERENCE OF SENIOR CIRCUIT JUDGES (NOW THE JUDICIAL CONFERENCE OF THE UNITED STATES) TO ASSIST IN "MANAGING" THE BUSINESS OF THE COURTS", AS HE CALLED IT. THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS WAS CREATED IN 1939 WITH ESSENTIALLY HOUSEKEEPING FUNCTIONS. THE FEDERAL JUDICIAL CENTER BEGAN OPERATIONS IN 1968 AS THE RESEARCH, DEVELOPMENT AND EDUCATIONAL ARM OF THE JUDICIARY. IN 1971 THE POSITION OF CIRCUIT EXECUTIVE -- A MANAGEMENT ASSISTANT FOR THE CHIEF CIRCUIT JUDGES -- WAS CREATED FOR EACH CIRCUIT. WE MUST ALSO COUNT SUPPORTING PERSONNEL -- COURT CLERKS, BAILIFFS, COURT REPORTERS AND SO FORTH, OR A TOTAL OF 9,377 PERSONS.9/ WE SEE,

---

9/ Excluding 2,902 probation officers.

THEREFORE, THAT THE JUDICIAL BRANCH, WHILE SMALL, HAS INCREASED GREATLY SINCE 1789.

FOR NEARLY NINE YEARS CONGRESS HAS FAILED TO CREATE A SINGLE NEW JUDGESHIP AND THE COURTS HAVE HAD TO COPE WITH THE ENORMOUS INCREASE IN WORKLOAD WITH ADDITIONAL LAW CLERKS AND STAFF LAWYERS. THE PRESSURE OF CASELOADS HAS LED TO AN INCREASE IN THE PROPORTION OF CASES DECIDED WITHOUT ORAL ARGUMENT AND OFTEN WITHOUT A FORMAL, WRITTEN OPINION. LAWYERS OPPOSE THIS.

SOME RESPONSIBLE AND WELL-INFORMED LAWYERS AND SCHOLARS HAVE CRITICIZED THE INCREASING COMPLEXITY OF JUDICIAL PROCEDURE ARGUING THAT OVERUSE OF PRE-TRIAL PROCESSES COMPLICATE AND DELAY TRIALS. OTHERS HAVE ECHOED THE CRITICISM, MADE FIRST BY ROSCOE POUND IN 1906, THAT THE EXCESSES OF THE ADVERSARY SYSTEM HINDER RATHER THAN PROMOTE THE ENDS OF JUSTICE. THE PROCESSES OF ADMINISTRATIVE LAW ARE BEING CHALLENGED AND QUESTIONS ARE RAISED AS TO THE SOUNDNESS OF TRYING COMPLEX ANTI-TRUST CASES BEFORE 12 LAY JURORS PICKED AT RANDOM FROM THE POPULATION.

THESE DEVELOPMENTS INSPIRE A SERIES OF QUESTIONS, QUESTIONS ABOUT THE EFFICIENCY OF COURTS FUNCTIONING UNDER SUCH DEMANDS, QUESTIONS ABOUT THE GROWTH OF A JUDICIAL "BUREAUCRACY", AND EVEN QUESTIONS ABOUT THE DUTIES PLACED ON THE CHIEF JUSTICE ARE EMERGING. SHOULD IT BE EXPECTED THAT THE CHIEF JUSTICE, WITH ALL THE DUTIES OF OTHER JUSTICES OF THE COURT, BE CALLED UPON TO BE THE "CHIEF EXECUTIVE" OF THE JUDICIAL BRANCH. CONGRESS MADE THE CHIEF JUSTICE CHAIRMAN OF THE JUDICIAL CONFERENCE OF THE UNITED STATES WITH DUTIES THAT ABSORB HUNDREDS OF HOURS EACH YEAR. IT MADE HIM CHAIRMAN OF THE FEDERAL JUDICIAL CENTER, WITH SIMILAR TIME DEMANDS. THESE TWO ORGANIZATIONS ARE EXPECTED TO DEVELOP INNOVATIVE PROGRAMS AND MECHANISMS TO IMPROVE AND SPEED UP JUSTICE. BECAUSE CHIEF JUSTICES HAVE SOMEHOW BEEN ABLE TO MANAGE UP TO NOW DOES NOT MEAN THIS CAN CONTINUE TO BE TRUE IN THE THIRD CENTURY UNDER THE CONSTITUTION. SEVEN YEARS AGO A COMMITTEE OF DISTINGUISHED LAWYERS AND SCHOLARS, CHAIRED BY PROFESSOR PAUL FREUND OF HARVARD, RECOMMENDED THAT ANOTHER COURT BE CREATED TO TAKE PART OF THE WORK NOW RESTING ON THE SUPREME COURT. NO ACTION HAS BEEN TAKEN ON THAT PROPOSAL.

THERE ARE SERIOUS QUESTIONS AS TO HOW LONG JUSTICES CAN WORK A SIXTY HOUR WEEK AND MAINTAIN APPROPRIATE STANDARDS.

AT LEAST AS IMPORTANT AS THE NEED TO EXAMINE THE INCREASE IN THE SIZE OF THE JUDICIAL BRANCH IS THE NEED TO EXAMINE THE POWERS EXERCISED BY THE JUDICIARY. THE AUTHORS OF THE CONSTITUTION DID NOT CONTEMPLATE THAT THE JUDICIARY WOULD BE AN OVERSEER OF THE OTHER TWO BRANCHES. AT MOST, THEY EXPECTED THAT THE JUDICIAL FUNCTION WOULD BE CONFINED TO INTERPRETING LAWS AND DECIDING WHETHER PARTICULAR ACTS OF THE CONGRESS OR OF THE EXECUTIVE WERE IN CONFLICT WITH THE CONSTITUTION, BUT EVEN THAT WAS NOT EXPLICIT. SURELY, THAT IS ALL MARSHALL'S OPINION IN MARBURY V. MADISON MEANS.

PARADOXICALLY, IN RECENT YEARS, THE SUPREME COURT HAS BEEN SUBJECTED TO CRITICISM FROM BOTH ENDS OF THE SPECTRUM. ON THE ONE HAND, THERE ARE CRITICS WHO SUGGEST THAT THE SUPREME COURT, LIKE THE OTHER TWO BRANCHES, HAS BECOME "IMPERIAL" IN THE SENSE OF EXERCISING POWERS NOT ASSIGNED TO IT BY THE CONSTITUTION. ON THE OTHER HAND, THERE ARE THOSE WHO SAY THAT THE SUPREME COURT HAS BEEN TOO PASSIVE AND HAS NOT UNDERTAKEN TO ENGAGE IN WIDE RANGING SOCIAL AND POLITICAL ACTIVISM THOUGHT BY SOME TO BE CALLED FOR BY CONTEMPORARY PROBLEMS. IT WILL BE FOR OTHERS TO EVALUATE THESE CONTENTIONS. ALL THIS IS RICH FODDER FOR SYMPOSIA IN 1987.

* * * * *

WE MAKE A LARGE POINT OF THE INDEPENDENCE AND SEPARATENESS OF THE THREE BRANCHES, BUT THE AUTHORS OF THE CONSTITUTION ALSO CONTEMPLATED THAT THERE WOULD BE COORDINATION BETWEEN THE BRANCHES DERIVING FROM A COMMON PURPOSE. THAT THEY SHOULD CONSULT ON SOME MATTERS IS BEYOND DOUBT. HOW FAR THAT SHOULD GO IS A SUBJECT FOR CAREFUL STUDY.

THE UNIQUENESS AND TRUE GENIUS OF THE DOCUMENT IS THAT IT HAS PRECLUDED ANY ONE OF THE BRANCHES FROM DOMINATING ANY OTHER. THIS WILL CONTINUE SO LONG AS WE ARE FAITHFUL TO THE SPIRIT AND LETTER OF THE CONSTITUTION.

PROJECT '87 IS ALREADY UNDERWAY AND THE JUDICIAL CONFERENCE OF THE UNITED STATES LAST YEAR AUTHORIZED THE APPOINTMENT OF A SPECIAL COMMITTEE TO PREPARE FOR AN OBSERVANCE OF THIS SIGNIFICANT HISTORIC EVENT. IF WE -- COLLECTIVELY -- USE THE "LEAD TIME" NOW AVAILABLE TO US, WE CAN DEVELOP A PROGRAM WORTHY OF THE IMPORTANCE OF THE OCCASION.

ALTHOUGH NONE OF US CAN ALONE DETERMINE THE TOTALITY OF WHAT THE BICENTENNIAL OF 1787 SHOULD BE, YOU -- HERE TODAY -- ARE UNIQUELY QUALIFIED TO EVALUATE THE MERITS OF THIS PROPOSAL AND TO HELP WITH ITS IMPLEMENTATION IF YOU FIND MERIT IN IT.

IF WE CONCENTRATE ALONG THESE LINES FOR ONE YEAR ON EACH OF THE THREE BRANCHES AND THEIR FUNCTIONS, PERHAPS WITH THE LATTER PART OF THE THIRD YEAR DEVOTED TO AN OVERVIEW OF ALL THAT HAS BEEN DISCUSSED, DEBATED AND ANALYZED IN THE PRECEDING YEARS, CONCEIVABLY WE MAY PRODUCE A SERIES OF PAPERS COMPARABLE IN UTILITY, IF NOT IN QUALITY, WITH THE FEDERALIST PAPERS OF 200 YEARS AGO.

WHATEVER THE PROGRAM IS TO BE, THE TIME TO BEGIN PLANNING IS NOW.

004943
1310
FG051
JL003
American Bar Associat

EF

Public Information Office
Supreme Court of the United States
Washington, D. C. 20543

February 12 1981

Mr. James Brady

Press Secretary to the President

White House

Dear Mr. Brady,

I enclose for your interest the Chief Justice's remarks this month at the ABA convention on the problems of crime and justice in America.

With kind regards,

Barrett McGurn

Barrett McGurn, director

ANNUAL REPORT TO THE AMERICAN BAR ASSOCIATION

TRANSCRIPT OF REMARKS BY

WARREN E. BURGER
CHIEF JUSTICE OF THE UNITED STATES

Houston, Texas

February 8, 1981

Today, for the twelfth time, you allow me this opportunity to lay before you problems concerning the administration of justice, as I see them from my chair. For this, Mr. President and Fellow Members of the Association, I thank you.

On previous occasions I have discussed with you a range of needs of our system. Your responses beginning in 1969 were a major factor in bringing into being the Institute for Court Management, The National Center for State Courts, The Provision for Court Administrators in the Federal System, and many other changes. And in light of my subject today, I should also mention the important contributions made beginning in 1970 by your Commission on Correctional Facilities and Services. The value of these improvements is beyond precise calculation. But the value is great. We do not always agree, but our differences are few indeed. All I ask for is equal time.

The new President who has just taken office is confronted with a host of great problems, domestic and worldwide: inflation, unemployment, energy, an overblown government, a breakdown of our educational system, a weakening of family ties, and a vast increase in crime. As he looks beyond our shores, he sees grave, long-range problems, which begin ninety miles off the shores of Florida and extend around the globe.

Today I will focus on a single subject, although one of large content. Crime and the fear of crime have permeated the fabric of American life, damaging the poor and minorities even more than the affluent. A recent survey indicates forty-six percent of women and forty-eight percent of Negroes are "significantly frightened" by pervasive crime in America.

Seventy-five years ago, Roscoe Pound shook this association with his speech on "The Causes of Popular Dissatisfaction with the Administration of Justice." In the 1976 Pound Conference, we reviewed his great critique but also examined criminal justice. My distinguished colleague, Judge Leon Higginbotham, carefully noted the imperative need for bal-

ance, in criminal justice, between the legitimate rights of the accused and the right of all others, including the victims. And, of course, we are all victims of every crime.

When I speak of "Crime and Punishment" I embrace the entire spectrum beginning with an individual's first contact with police authority through the stages of arrest, investigation, adjudication and corrective confinement. At every stage the system cries out for change, and I do not exclude the adjudicatory stage. At each step in this process the primary goal, for both the individual and society, is protection and security. This theme runs throughout all history.

When our distant ancestors came out of caves and rude tree dwellings thousands of years ago to form bands and tribes and later towns, villages and cities, they did so to satisfy certain fundamental human needs: Mutual protection, human companionship, and later for trade and commerce. But the basic need was *security*—security of the person, the family, the home and of property. Taken together, this is the meaning of a civilized society.

Today, the proud American boast that we are the most civilized, most prosperous, most peace-loving people leaves a bitter aftertaste. We have prospered. We are, and have been, peace-loving in our relations with other nations. But, like it or not, today here at home we are approaching the status of an impotent society—a society whose capability of maintaining elementary security on the streets, in schools, and for the homes of our people is in doubt.

I thought of this recently in a visit to the medieval city of Bologna, Italy. There, still standing are walled enclaves of a thousand years ago with a high corner tower where watch was kept for roving hostile street gangs. When the householder left his barricaded enclave he had a company of spearmen and others with cross-bows and battle-axes as guards.

Possibly some of our problem of behavior stems from the fact that we have virtually eliminated from public schools and higher education any effort to teach values of integrity, truth, personal accountability and respect for others' rights. This was recently commented on by a distinguished world

statesman, Dr. Charles Malik, former president of the U. N. General Assembly. Speaking to a conference on education, he said:

> "I search in vain for any reference to the fact that character, personal integrity, spiritual depth, the highest moral standards, the wonderful living values of the great tradition, have anything to do with the business of the university or with the world of learning."

Perhaps what Dr. Malik said is not irrelevant to what gives most Americans such deep concern in terms of behavior in America today.

I pondered long before deciding to concentrate today on this sensitive subject of crime, and I begin by reminding ourselves that under our enlightened Constitution and Bill of Rights, whose bicentennials we will soon celebrate, we have established a system of criminal justice that provides more protection, more safeguards, more guarantees for those accused of crime than any other nation in all history. The protective armor we give to each individual when the State brings a charge is great indeed. This protection was instituted—and it has expanded steadily since the turn of this century—because of our profound fear of the power of Kings and States developed by an elite class to protect the status quo—their status above all else—and it was done at the expense of the great masses of ordinary people.

Two hundred years ago we changed that. Indeed, in the past 30 or 40 years we have changed it so much that some now question whether the changes have produced a dangerous imbalance.

I put to you this question: Is a society redeemed if it provides massive safeguards for accused persons including pretrial freedom for most crimes, defense lawyers at public expense, trials, and appeals, re-trials and more appeals—almost without end—and yet fails to provide elementary protection for its law-abiding citizens? I ask you to ponder this question as you hear me out.

Time does not allow—nor does my case require—that I

burden you with masses of detailed statistics—I assure you the statistics are not merely grim, they are frightening. Let me begin near home: Washington, D. C., the capital of our enlightened country, in 1980 had more criminal homicides than Sweden and Denmark combined with an aggregate population of over twelve million as against 650,000 for Washington, D. C. and Washington is not unique. From New York City, to Los Angeles, to Miami the story on increase in violent crime from 1979 to 1980 is much the same. New York City with about the same population as Sweden has 20 times as many homicides. The United States has one hundred times the rate of burglary of Japan. Overall violent crime in the United States increased sharply from 1979 to 1980, continuing a double-digit rate. More than one-quarter of all the households in this country are victimized by some kind of criminal activity at least once each year.

The *New York Times* recently reported that one documented study estimated that the chances of any person arrested for a felony in New York City of being punished in any way—apart from the arrest record—were 108 to 1! And it is clear that thousands of felonies go unreported in that city as in all others.

For at least ten years many of our national leaders and those of other countries, have spoken of international terrorism, but our rate of routine, day-by-day terrorism in almost any large city exceeds the casualties of all the reported "international terrorists" in any given year.

Why do we show such indignation over alien terrorists and such tolerance for the domestic variety?

Must we be hostages within the borders of our own self-styled enlightened, civilized country? Accurate figures on the cost of home burglar alarms, of three locks on each door—and sadly, of handgun sales for householders—are not available but they run into hundreds of millions of dollars.

What the American people want is that crime and criminals be brought under control so that we can be safe on the streets and in our homes and for our children to be safe in schools and at play. Today that safety is fragile.

It needs no more recital of the frightening facts and statistics to focus attention on the problem—a problem easier to define than to correct. We talk of having criminals make restitution or have the State compensate the victims. The first is largely unrealistic, the second is unlikely. Neither meets the central problem. Nothing will bring about swift changes in the terror that stalks our streets and endangers our homes, but I will make a few suggestions.

To do this I must go back over some history which may help explain our dilemma.

For a quarter of a century I regularly spent my vacations visiting courts and prisons in other countries, chiefly Western Europe. My mentors in this educational process were two of the outstanding penologists of our time: the late James V. Bennett, Director of the United States Bureau of Prisons and the late Torsten Ericksson, his counterpart in Sweden, where crime rates were once low, poverty was nonexistent, correctional systems enlightened and humane. Each was a vigorous advocate of using prisons for educational and vocational training.

I shared and still share with them the belief that poverty and unemployment are reflected in crime rates—chiefly crimes against property. But if poverty were the principal cause of crime as was the easy explanation given for so many years, crime would have been almost nonexistent in affluent Sweden and very high in Spain and Portugal. But the hard facts simply did not and do not support the easy claims that poverty is the controlling factor; it is just one factor. America's crime rate today exceeds our crime rate during the great depression.

We must not be misled by cliches and slogans that if we but abolish poverty crime will also disappear. There is more to it than that. A far greater factor is the deterrent effect of swift and certain consequences: swift arrest, prompt trial, certain penalty, and—at some point—finality of judgment.

To speak of crime in America and not mention the drugs and drug-related crime would be an oversight of large dimension. The destruction of lives by drugs is more frightening

than all the homicides we suffer. The victims are not just the young who become addicts. Their families and, in turn, their victims and all of society suffer over a lifetime. I am not wise enough to venture a solution. Until we effectively seal our many thousands of miles of borders—which would require five or ten times the present border guard personnel and vastly enlarge the internal drug enforcement staffs, there is little else we can do. Our Fourth and Fifth Amendments and statutes give the same broad protection to drug pushers as they give to you and me, and judges are oath-bound to apply those commands.

It is clear that there is a startling amount of crime committed by persons on release awaiting trial, on parole, and on probation release. It is not uncommon for an accused to finally be brought to trial with two, three or more charges pending. Overburdened prosecutors and courts tend to drop other pending charges when one conviction is obtained.* Should we be surprised if the word gets around in the "criminal community" that you can commit two or three crimes for the price of only one and that there is not much risk in committing crimes while awaiting trial?

Deterrence is the primary core of any effective response to the reign of terror in American cities. Deterrence means speedy action by society, but that process runs up against the reality that many large cities have either reduced their police forces or failed to keep them in balance with double-digit crime inflation.

A first step to achieve deterrence is to have larger forces of better trained officers. Thanks to the F. B. I. Academy we have the pattern for such training.

---

*The official D. C. reports show that in the last quarter of 1975, *i. e.*, October, November and December 1975 569 of all the persons arrested for serious crimes were, *at the time of their arrest*, awaiting trial on one or more prior indictments. In that same period *402* persons who were arrested were, at the time of arrest, at large either on parole from a penal institution, on probation after a judgment of conviction, or on a conditional release other than the traditional parole. Remarks of Warren E. Burger at the ALI Opening Session, May 18, 1976.

A second step is to re-examine statutes on pre-trial release at every level. This requires that there be a sufficient number of investigators, prosecutors, and defenders—and judges—to bring defendants to trial swiftly. Any study of the statistics will reveal that "bail crime" reflects a great hole in the fabric of our protection against internal terrorism.

To change this melancholy picture will call for spending more money than we have ever before devoted to law enforcement, and even this will be for naught if we do not re-examine our judicial process and philosophy with respect to finality of judgments. The search for "perfect" justice has led us on a course found nowhere else in the world. A true miscarriage of justice, whether 20-, 30- or 40-years old, should always be open to review, but the judicial process becomes a mockery of justice if it is forever open to appeals and retrials for errors in the arrest, the search, or the trial. Traditional appellate review is the cure for errors, but we have forgotten that simple truth.

Our search for true justice must not be twisted into an endless quest for technical errors unrelated to guilt or innocence.

The system has gone so far that Judge Henry Friendly, in proposing to curb abuses of collateral attack, entitled his article, "Is Innocence Irrelevant?"

And Justice Jackson once reminded us that the Constitution should not be read as a "suicide pact."

Each of these men, of course, echoed what another great jurist, Justice Benjamin Cardozo, wrote more than fifty years ago in his essays on "the nature of the judicial process."

I am not advocating a new idea but merely restating an old one that we have ignored. At this point, judicial discretion and judicial restraint require me to stop and simply to repeat that governments were instituted and exist chiefly to protect people. If governments fail in this basic duty they are not excused, they are not redeemed by showing that they have established the most perfect systems to protect the claims of defendants in criminal cases. A government that fails to protect both the rights of accused persons and also

all other people has failed in its mission. I leave it to you whether the balance has been fairly struck.

Let me now try to place this in perspective: first, the bail reform statutes of recent years, especially as to non-violent crimes, were desirable and overdue; second, the provisions for a lawyer for every defendant were desirable and overdue; third, statutes to insure speedy trials are desirable but only if the same legislation provides the means to accomplish the objective.

Many enlightened countries succeed in holding criminal trials within four to eight weeks after arrest. First non-violent offenders are generally placed on probation, free to return to a gainful occupation under close supervision. But I hardly need remind this audience that our criminal process often goes on two, three, four or more years before the accused runs out all the options. Even after sentence and confinement, the warfare continues with endless streams of petitions for writs, suits against parole boards, wardens and judges.

So we see a paradox—even while we struggle toward correction, education and rehabilitation of the offender, our system encourages prisoners to continue warfare with society. The result is that whatever may have been the defendant's hostility toward the police, the witnesses, the prosecutors, the judge and jurors—and the public defender who failed to win his case—those hostilities are kept alive. How much chance do you think there is of changing or rehabilitating a person who is encouraged to keep up years of constant warfare with society?

The dismal failure of our system to stem the flood of crime repeaters is reflected in part in the massive number of those who go in and out of prisons. In a Nation that has been thought to be the world leader in so many areas of human activity our system of justice—not simply the prisons—produces the world's highest rate of "recall" for those who are processed through it. How long can we tolerate this rate of recall and the devastation it produces?

What I suggest now—and this association with its hundreds of State and local affiliates can be a powerful force—is a "damage control program." It will be long; it will be controversial; it will be costly—but less costly than the billions in dollars and thousands of blighted lives now hostage to crime.

To do this is as much a part of our national defense as the Pentagon budget.

Sometimes we speak glibly of a "war on crime." A war is indeed being waged but it is a war by a small segment of society against the whole of society. Now a word of caution: That "war" will not be won simply by harsher sentences; not by harsh mandatory minimum sentence statutes; not by abandoning the historic guarantees of the Bill of Rights. And perhaps, above all, it will not be accomplished by self-appointed armed citizen police patrols. At age 200, this country has outgrown the idea of private law and vigilantes. Volunteer community watchman services are quite another matter.

Now let me present the ultimate paradox: After society has spent years and often a modest fortune to put just one person behind bars, we become bored. The media lose interest and the individual is forgotten. Our humanitarian concern evaporates. In all but a minority of the States we confine the person in an overcrowded, understaffed institution with little or no library facilities, little if any educational program or vocational training. I have visited American prisons built more than 100 years ago for 800 prisoners, but with two thousand crowded today inside their ancient walls.

Should you look at the records you will find that the 300,000 persons now confined in penal institutions are heavily weighted with offenders under age thirty. A majority of them cannot meet minimum standards of reading, writing, and arithmetic. Plainly this goes back to our school systems. A sample of this was reflected in a study of pupils in a large city where almost half of the third graders failed reading. This should not surprise us, for today we find some

high school graduates who cannot read or write well enough to hold simple jobs.

Now turn with me to a few steps which ought to be considered:

(1) Restore to all pretrial release laws the crucial element of dangerousness to the community based on a combination of the evidence then available and the defendant's past record, to deter crime-while-on-bail;

(2) Provide for trial within weeks of arrest for most cases, except for extraordinary cause shown;

(3) Priority for review on appeal within eight weeks of a judgment of guilt;

(4) Following exhaustion of appellate review, confine all subsequent judicial review to claims of miscarriage of justice;

and finally:

A. We must accept the reality that to confine offenders behind walls without trying to change them is an expensive folly with short term benefits—a "winning of battles while losing the war";

B. Provide for generous use of probation for first nonviolent offenders, with intensive supervision and counseling and swift revocation if probation terms are violated;

C. A broad scale program of physical rehabilitation of the penal institutions to provide a decent setting for expanded educational and vocational training;

D. Make all vocational and educational programs mandatory with credit against the sentence for educational progress—literally a program to "learn the way out of prison," so that no prisoner leaves without at least being able to read, write, do basic arithmetic and have a marketable skill;

E. Generous family visitation in decent surroundings to maintain family ties, with rigid security to exclude drugs or weapons;

F. Counseling services after release paralleling the

"after-care" services in Sweden, Holland, Denmark, and Finland. All this should be aimed at developing the prisoner's respect for self, respect for others, accountability for conduct and appreciation of the value of work, of thrift, and of family.

G. Encourage religious groups to give counsel on ethical behavior and occupational adjustment during and after confinement.

The two men I spoke of as my mentors beginning twenty-five years ago—James V. Bennett and Torsten Eriksson of Sweden, were sadly disappointed at the end of their careers, on their great hopes for rehabilitation of offenders. A good many responsible qualified observers are reaching the stage that we must now accept the harsh truth that there may be some incorrigible human beings who cannot be changed except by God's own mercy to that one person. But we cannot yet be certain and in our own interest—in the interest of billions in dollars lost to crime and blighted if not destroyed lives—we must try to deter and try to cure.

This will be costly in the short run and the short run will not be brief. This illness our society suffers has been generations in developing, but we should begin at once to divert the next generation from the dismal paths of the past, to inculcate a sense of personal accountability in each schoolchild to the end that our homes, schools and streets will be safe for all.

011568

1110

WS FG051

FG 055

FG 054

THE WHITE HOUSE

WASHINGTON

February 6, 1981

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN R. ERICKSON

SUBJECT: Nomination of Federal Judges Other Than Circuit and District Judges

Supreme Court

No procedure has been established for identifying Supreme Court nominees, according to Phil Modlin at the Department of Justice (633-2107)

Court of International Trade, Court of Customs and Patent Appeals, and Court of Claims

Executive Order 11992 (Attachment 1) established the Committee on Selection of Federal Judicial Officers. The Order directs the Committee, when requested by the President, to conduct inquiries to identify persons qualified to serve as federal judicial officers, other than as circuit judges or district judges.* The Committee is further directed to conduct investigations of those persons to determine their qualifications. Vacancies on these courts are relatively infrequent. The Order will terminate on December 3, 1982.

The President or the Attorney General may establish procedures for the Committee to follow and selection criteria to be applied. No generalized guidelines have been issued. Phil Modlin advised me that the oral advice that has been given to this Committee has tracked that contained in the guidelines for the Circuit Court panels and District Court commissions.

The Committee is required to submit a report listing no more than five persons within 60 days from the date it is notified by the President of his need for its assistance. The Attorney General screens the list, confers with the ABA's Standing Committee on Federal Judiciary, and usually recommends a single person to the President.

*It is the position of the Department of Justice that this Order does not apply to Supreme Court vacancies. It is applicable to the Court of International Trade (formerly Customs Court), the Court of Customs and Patent Appeals, and the Court of Claims. Note that a bill has been introduced in Congress to consolidate the latter two courts.

The language of Executive Order 11992 clearly indicates that the Committee is a continuing body which is activated as needed. However, Phil Modlin advised me that each time a vacancy arises he appoints new Committee members, i.e., he treats this Committee the same as Circuit Judge Nominating Panels are treated under Executive Order 12059. This something that we should straighten out with Modlin. It would save a lot of time and effort to pick just one panel and use it as needed.

Tax Court

Three new Tax Court judgeships were approved by Congress last year. The positions have not yet been filled.

Executive Order 12064 (Attachment 2) established the United States Tax Court Nominating Commission. It was recently extended, so that the Commission will terminate on December 31, 1982. The Order provides that when notified by the President that he desires its assistance in filling a vacancy, the Commission shall conduct inquiries to identify persons who may be qualified to serve and shall conduct further inquiries to determine those persons' qualifications.

The Commission's recommendations go to the President, with no involvement of the Attorney General. The practice has been to list three people for each vacancy in order of preference. A check has been made with the ABA's Tax Section before sending names to the President. The Tax Court is an Article I court, and the President's nomination goes to the Senate Finance Committee rather than to the Judiciary Committee.

The Commission is a continuing body. The Chairman and only permanent member is the General Counsel of the Treasury Department. That position is vacant but, presumably, the Acting General Counsel is the Acting Chairman. Individuals holding the positions of the Commissioner of the Internal Revenue Service and Assistant Attorney General in charge of the Tax Division were members of the Commission, but they have left government service. The Commission also had three private members, Ruth E. Schapiro, Sherwin P. Simmons, and Lawrence M. Stone. All five of these people serve at the pleasure of the President, and it is arguable that they are still on the Commission.

Dick Brennan (566-2977), the Acting General Counsel at the Treasury Department, suggested to me that if changes in the membership of the Commission are made, one person should be reappointed in order to provide some continuity to the Commission's efforts. The Commission met privately, so that only the members know how the system worked.

Prior to the establishment of the Tax Court Nominating Commission, the Secretary of the Treasury sent recommendations to the President. This practice would probably be reinstituted if the Commission were abolished.

Court of Military Appeals

Executive Order 12063 established a commission to identify and screen nominees for the Court of Military Appeals. This Order was allowed to terminate on December 31, 1980; however, the terms of the current members of the court do not expire until after the next presidential election.

Nominations for this court are considered by the Senate Armed Services Committee rather than by the Judiciary Committee. President Carter nominated one judge using the procedure established by Executive Order 12063. Prior to that Order, persons having close ties to the Senate and House Armed Services Committees became judges on this Court. The Attorney General does not become involved with these nominations. The link is between Congress and the White House. The court clerk reports that, to his knowledge, none of the nominees were ever reviewed by the ABA.

therance of the purpose and policy of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), the Environmental Quality Improvement Act of 1970 (42 U.S.C. 4371 *et seq.*), and Section 309 of the Clean Air Act, as amended (42 U.S.C. 1857h–7), it is hereby ordered as follows:

SECTION 1. Subsection (h) of Section 3 (relating to responsibilities of the Council on Environmental Quality) of Executive Order No. 11514, as amended, is revised to read as follows:

"(h) Issue regulations to Federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332(2)). Such regulations shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. They will be designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives. They will require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses. The Council shall include in its regulations procedures (1) for the early preparation of environmental impact statements, and (2) for the referral to the Council of conflicts between agencies concerning the implementation of the National Environmental Policy Act of 1969, as amended, and Section 309 of the Clean Air Act, as amended, for the Council's recommendation as to their prompt resolution.".

SEC. 2. The following new subsection is added to Section 2 (relating to responsibilities of Federal agencies) of Executive Order No. 11514, as amended:

"(g) In carrying out their responsibilities under the Act and this Order, comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements.".

JIMMY CARTER

THE WHITE HOUSE,
May 24, 1977.

Executive Order 11992 • May 24, 1977

Establishing the Committee on Selection of Federal Judicial Officers

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in accordance with the provisions of the Federal Advisory Committee Act (5 U.S.C. App. I), it is hereby ordered as follows:

SECTION 1. *Establishment of the Committee.* There is hereby established the Committee on Selection of Federal Judicial Officers, hereinafter referred to as the Committee. The Committee shall consist of a Chairman and six other members to be appointed by the President.

SEC. 2. *Functions.*
inquiries to identify pe
other than United St
gations of those person

SEC. 3. *Procedures*
assistance in filling a
Court or District Cou
persons who may be qu
to determine those pers

(b) In conductin
lished by the President
on behalf of the Presid

(c) The Committ
within 60 days from th
a report listing the nam
well qualified to serve i
the Committee shall a
General acting on beha

(d) The Committ
additional reports as m

(e) The Committ
President to assist him i

SEC. 4. *Ineligibility*
be eligible to be nomin
to which the Committee

SEC. 5. *Cooperatio*
request, through its Cha
mation or assistance as t
this Order. Each depart
such information or assi
to request from any Sta
deems necessary, and to
by State law.

SEC. 6. *Travel Exp*
the Committee shall ser
Committee, members ma
sistence, as authorized by

(b) The Attorney G
facilities and other admin

(c) All necessary ex
tee, to the extent permitt
General.

SEC. 2. *Functions.* When requested by the President, the Committee shall conduct inquiries to identify persons who may be qualified to serve as Federal judicial officers, other than United States Circuit Judges or District Judges, and shall conduct investigations of those persons to determine their qualifications.

SEC. 3. *Procedures; Report.* (a) When notified by the President that he desires its assistance in filling a Federal judicial vacancy, other than a United States Circuit Court or District Court vacancy, the Committee shall conduct inquiries to identify persons who may be qualified to serve in the position and shall conduct further inquiries to determine those persons' qualifications.

(b) In conducting its inquiries the Committee shall follow any procedures established by the President in his letter of notification or by the Attorney General acting on behalf of the President.

(c) The Committee shall submit to the President and to the Attorney General, within 60 days from the date it is notified by the President that he desires its assistance, a report listing the names of no more than five persons whom the Committee considers well qualified to serve in the position. In determining which persons are well qualified the Committee shall apply criteria established by the President or by the Attorney General acting on behalf of the President.

(d) The Committee shall conduct such additional inquiries and submit such additional reports as may be requested by the President.

(e) The Committee shall perform no function except when requested by the President to assist him in filling a vacancy.

SEC. 4. *Ineligibility of Committee Members.* No member of the Committee shall be eligible to be nominated to fill a position as a Federal judicial officer with respect to which the Committee's assistance has been requested.

SEC. 5. *Cooperation by Executive Agencies.* The Committee is authorized to request, through its Chairman, from any Executive department or agency such information or assistance as the Committee deems necessary to carry out its functions under this Order. Each department or agency shall, to the extent permitted by law, furnish such information or assistance to the Committee. The Committee also is authorized to request from any State agency such information and assistance as the Committee deems necessary, and to obtain such information and assistance to the extent permitted by State law.

SEC. 6. *Travel Expenses; Administrative Support; Financing.* (a) Members of the Committee shall serve without compensation. While engaged in the work of the Committee, members may receive travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 5702 and 5703).

(b) The Attorney General shall furnish to the Committee necessary staff, supplies, facilities and other administrative services.

(c) All necessary expenses incurred in connection with the work of the Committee, to the extent permitted by law, shall be paid from funds available to the Attorney General.

SEC. 7. *Federal Advisory Committee Act Functions.* Notwithstanding the provisions of any other Executive order, the functions of the President under the Federal Advisory Committee Act (5 U.S.C. App. I), except that of reporting annually to the Congress, which are applicable to the Committee, shall be performed by the Attorney General in accordance with the guidelines and procedures established by the Office of Management and Budget.

SEC. 8. *Termination of the Committee.* The Committee shall terminate on December 31, 1978, unless sooner extended.

JIMMY CARTER

THE WHITE HOUSE,
May 24, 1977.

Executive Order 11993 • May 24, 1977

Relating to the United States Circuit Judge Nominating Commission

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, Section 3 of Executive Order No. 11972 of February 14, 1977, is amended by redesignating the present text as subsection (a), redesignating the present lettered subsections as numbered paragraphs (1), (2), (3), and (4), and by adding the following new subsection (b):

"(b) The Panel for the District of Columbia Circuit shall have the additional function of recommending nominees for the United States District Court for the District of Columbia, in accordance with the standards and procedures prescribed by this order for recommending nominees for circuit judges.".

JIMMY CARTER

THE WHITE HOUSE,
May 24, 1977.

Executive Order 11994 • June 1, 1977

United States Foreign Intelligence Activities

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the National Security Act of 1947, as amended, and as President of the United States of America, in order to conform certain references in Executive Order No. 11905 to organizational changes made by Executive Order No. 11985 with respect to the direction and control of intelligence activities, it is hereby ordered as follows:

1–4. *General Provisions.*

1–401. No member of the Commission shall, while serving on the Commission or for a period of one year thereafter, be eligible to be nominated to fill a position as a judge on the Court of Military Appeals.

1–402. Notwithstanding the provisions of any other Executive order, the functions of the President under the Federal Advisory Committee Act (5 U.S.C. App. I), except that of reporting annually to the Congress, which are applicable to the Commission, shall be performed by the Secretary of Defense in accordance with the guidelines and procedures established by the Administrator of General Services.

1–403. The Commission shall terminate on December 31, 1978, unless sooner extended.

JIMMY CARTER

THE WHITE HOUSE,
June 5, 1978.

Executive Order 12064 • **June 5, 1978**

United States Tax Court Nominating Commission

By the authority vested in me as President by the Constitution and statutes of the United States of America, and in order to create in accordance with the Federal Advisory Committee Act (5 U.S.C. App. I) an advisory commission on the membership of the United States Tax Court, it is hereby ordered as follows:

1–1. *Establishment of the Commission.*

1–101. There is established the United States Tax Court Nominating Commission. The Commission shall be comprised of six members appointed by the President.

1–102. Not more than three members shall be officials of the Federal government. The Federal members shall include the General Counsel of the Department of the Treasury, who shall chair the Commission. The private members shall have special expertise in the field of Federal taxation.

1–2. *Functions of the Commission.*

1–201. When notified by the President that he desires its assistance in filling a vacancy on the United States Tax Court, the Commission shall conduct inquiries to identify persons who may be qualified to serve in the position and shall conduct further inquiries to determine those persons' qualifications.

1–202. In conducting its inquiries the Commission shall follow any procedures or criteria established by the President in his letter of notification or by the Secretary of the Treasury acting on behalf of the President.

1–203. The Commission shall submit a report to the President and to the Secretary of the Treasury within 60 days from the date it is notified by the President

that he desires its assistance. The report shall list the names of no more than five persons whom the Commission considers well qualified to serve in the position.

1-204. The Commission shall conduct such additional inquiries and submit such additional reports as may be requested by the President.

1-205. The Commission shall perform no function except when requested by the President to assist him in filling a vacancy.

1-3. *Administrative Provisions.*

1-301. The Commission is authorized to request from any Executive agency such information or assistance as the Commission deems necessary to carry out its functions under this Order. Each agency shall, to the extent permitted by law, furnish such information or assistance to the Commission.

1-302. The Commission is authorized to request from any State agency such information and assistance as the Commission deems necessary. It is authorized to obtain such information and assistance to the extent permitted by State law.

1-303. Members of the Commission shall serve without compensation. While engaged in the work of the Commission, members may receive travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 5702 and 5703).

1-304. The Secretary of the Treasury shall furnish to the Commission necessary administrative support.

1-305. All necessary expenses incurred in connection with the work of the Commission, to the extent permitted by law, shall be paid from funds available to the Secretary of the Treasury.

1-4. *General Provisions.*

1-401. No member of the Commission shall, while serving on the Commission or for a period of one year thereafter, be eligible to be nominated to fill a position as a judge on the Tax Court.

1-402. Notwithstanding the provisions of any other Executive order, the functions of the President under the Federal Advisory Committee Act (5 U.S.C. App. I), except that of reporting annually to the Congress, which are applicable to the Commission, shall be performed by the Secretary of the Treasury in accordance with the guidelines and procedures established by the Administrator of General Services.

1-403. The Commission shall terminate on December 31, 1978, unless sooner extended.

JIMMY CARTER

THE WHITE HOUSE,
June 5, 1978.