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## How Long Can We Cope?

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# How Long Can We Cope?

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## **Abstract**

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.

**KEYWORDS:** Cope, First Amendment, Social

## How Long Can We Cope?\*

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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.<sup>1</sup>

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

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\* Remarks to the Seminar on Legal History, The National Archives, Washington, D.C., Thursday, September 21, 1978.

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

into the future and it works.”<sup>2</sup>

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.”

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2. LINCOLN STEFFENS, *THE AUTOBIOGRAPHY OF LINCOLN STEFFENS* (New York: Harcourt, Brace & Co., 1931), p. 799.

## 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 legis-

lative 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.<sup>3</sup> 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.

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.<sup>4</sup> 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 to 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

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3. *The Congressional Quarterly Weekly Report*, February 11, 1978.

4. Elizabeth Drew, “A Tendency to Legislate,” *The New Yorker*, June 26, 1978, pp. 80-86.

meaning and intent of Congress are blurred and the entire policy issue winds up in the courts for resolution.<sup>5</sup> 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 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.<sup>6</sup> 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.<sup>7</sup> Communication between the first Executive and the Legislative Branch was casual and informal.<sup>8</sup>

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

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5. See Carl McGowan, *Congress and the Courts*, 62 AMERICAN BAR ASSOCIATION JOURNAL at 1588-90 (Dec. 1970); and see *TVA v. Hill*, 98 S. Ct. 2279 (1978); *SEC v. Sloan*, 98 S. Ct. 1702 (1978).

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).

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. 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 total 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, 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 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.

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.<sup>9</sup> We see, 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

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9. Excluding 2,902 probation officers.

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 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—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.