Readings

on

The Rule of Law:
Controlling Government
(Seminar in Contemporary Legal Thought)

Volume 4

Professor John Norton Moore
University of Virginia School of Law

Fall 2011
# The Rule of Law: Controlling Government
*(Seminar in Contemporary Legal Thought)*

## Readings
### Volume 4

**Professor John Norton Moore**

**Mon., 7:00-9:00 PM**

**Meeting at Professor Moore’s home**

**824 Flordon Drive, Charlottesville**

**Fall 2011**

**University of Virginia**

**School of Law**

<table>
<thead>
<tr>
<th>Section</th>
<th>Reading</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>[Deleted pages]</td>
<td>273-288</td>
</tr>
<tr>
<td></td>
<td><em>The Lessons of Campaign Reform and the Presidential System: Less is More</em>, Testimony of Professor Larry J. Sabato, University of Virginia to the U.S. Senate Committee on Rules and Administration (May 14, 1997)</td>
<td>289</td>
</tr>
<tr>
<td></td>
<td>[Deleted pages]</td>
<td>312-327</td>
</tr>
<tr>
<td></td>
<td>Draft Constitution of the Republic of Angola, Nov. 28, 1990 (informal internal draft prepared by Professor Moore)</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>[Deleted pages]</td>
<td>36-46</td>
</tr>
<tr>
<td></td>
<td>S.J. Res. 41, 103d Cong., 1st Sess. (1993), “Joint Resolution Proposing an amendment to the Constitution of the United States to require a balanced budget”</td>
<td>47</td>
</tr>
<tr>
<td>IV-B (cont.)</td>
<td>Paul Simon, U.S. Senator, “Why We Need a Balanced Budget Amendment”</td>
<td>52</td>
</tr>
<tr>
<td></td>
<td>Statement of Max Richtman, Executive Vice President, National Committee to Preserve Social Security and Medicare, Submitted to the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 103d Cong., 2d Sess. (Feb. 17, 1994)</td>
<td>63</td>
</tr>
<tr>
<td>Section</td>
<td>Reading</td>
<td>Page</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td></td>
<td>Side-by-Side Comparison of Bi-Partisan Consensus Balanced Budget Amendment and Tax Limitation Balanced Budget Amendment (Contract with America Version)</td>
<td>81</td>
</tr>
<tr>
<td></td>
<td>H.J. Res. 1, Balanced Budget Constitutional Amendment (January 26, 1995)</td>
<td>85</td>
</tr>
<tr>
<td>[Deleted pages]</td>
<td></td>
<td>91-149</td>
</tr>
<tr>
<td></td>
<td>A.E. DICK HOWARD, THE ROAD TO CONSTITUTIONALISM 1-43 (1990)</td>
<td>173</td>
</tr>
<tr>
<td></td>
<td>Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990</td>
<td>233</td>
</tr>
<tr>
<td></td>
<td><em>skim</em> ADVANCE Democracy Act of 2005 (H.R. 1133)</td>
<td>328</td>
</tr>
<tr>
<td></td>
<td>John Norton Moore and Fern Holland, “Promoting The African Institute for Democracy” (draft proposal)</td>
<td>.361</td>
</tr>
</tbody>
</table>
NOTES ON THE LIBERAL CONSTITUTION

James M. Buchanan

No existing or proposed political constitution contains sufficient constraints or limits on the authority of the agencies of government over the activities of individuals and groups, and most notably over their economic activities. There is no liberal constitution in existence or in prospect. In this sense, all existing constitutions are failures, and almost all serious proposals for reform fall short of any promise of full success. I advance this blanket criticism of existing and proposed constitutional structures without knowledge of particular details but in full and conscious awareness of the historical fact that, for well over a century, all political discourse has been informed by, and the institutional results thereby influenced by, the "fatal conceit" (Hayek 1989) that political direction can facilitate rather than retard economic progress. All constitutions that have been put in place since the 18th century, and all that have been "reformed" either explicitly or by usage and interpretation since that time, must reflect, to some degree, the romantic image of the benevolent state, whether actual or potential, the image that was introduced by the political idealists on the one hand and by the visionary socialists on the other.

The constitution that embodies "politics without romance" (Buchanan 1979) exists nowhere today, and no reform proposals that reflect such a realist model of politics enter directly into any ongoing dialogue. Residues of such a vision may be found only in some of the Madisonian elements that remain in the United States documents and records, and in the arguments of the relatively small number of classical liberals now extant. Despite this negative assessment, which may seem to be nearly total in its condemnatory sweep, there may be bases for some optimism as we look far enough forward into the
post-revolutionary epoch, and especially into the next century. Ideas do have consequences, and we have lived with the consequences of false ideas for almost two centuries, far too long to have expected shifts to occur by the early 1990s. But consequences, or rather events, also feed back on ideas, and, after the unpredicted revolutions of 1989-91, the romantic image of the benevolent and capable state must prove increasingly difficult to sustain. The theories of political failure, advanced sparingly by classical liberals throughout the period of socialist hegemony only to have been treated with scorn and derision, have been corroborated by history in what was perhaps the grandest of all experiments in social science. And unless we totally despair of human capacity for rational action, we must anticipate that, sometime in the post-socialist century, men and women will exhibit constructive constitutional capabilities that can now be scarcely imagined.

In this sense, Francis Fukuyama (1992) is surely right. Call it what one will, something of historical note did effectively end with the great revolutions of 1989-91. And Fukuyama is also correct in suggesting that economic science, which explains how the market economy operates independently of politicized direction and control so as to produce the largest bundle of goods and services available within given resource constraints, has finally been vindicated. But is Fukuyama also right when he predicts that this scientific result will be incorporated into institutional-constitutional reform? To agree with him here, we perhaps must think beyond the horizon of a few decades.

As a start, it may be useful to extend our hindsight into the pre-romantic, pre-socialist epoch, back to the 18th century, and to try to recapture the constitutional understanding that so excited the philosophers as well as the politicians. Until and unless such a shift in the modern mind-set is somehow achieved, all efforts at constitutional dialogue aimed at basic reform will essentially be wasted. Governments, no matter how organized, will remain basically unchained, and the politicians-bureaucrats will continue to facilitate the mutual exploitation of each by all, in Anthony de Jasay's "churning state" (1985). Economies will founder, and, increasingly, potentially valued product will disappear into the "black hole" of that which might have been (McGee, Brock, and Young 1989).

The Constitutional Order of Classical Liberalism

The classical liberals of the 18th century, whether represented by the members of the Scottish Enlightenment or by the American Founding Fathers, were highly skeptical about the capability and willingness of politics and politicians to further the interests of the
ordinary citizen. Governments were considered to be a necessary evil, institutions to be protected from, but made necessary by the elementary fact that all persons are not angels (Madison 1966[1787]: 160). Governments, along with those persons who were empowered as their agents of authority, were not to be trusted. Constitutions were necessary, primarily as means to constrain collective authority in all of its potential extensions. State power was something that the classical liberals feared, and the problem of constitutional design was thought to be that of insuring that such power would be effectively limited.

The devices aimed to accomplish this purpose are the familiar ones. Sovereignty was split among several levels of collective authority; federalism was designed to allow for a deconcentration or decentralization of coercive state power. At each level of authority, separate functional branches of government were deliberately placed in continued tension, one with another. In some polities, the dominant legislative branch was further restricted by the constitutional establishment of two bodies, each of which was organized on a separate principle of representation.

It is important to recognize that these basic organizational-procedural elements of political constitutions were designed, discussed, and put in place by the classical liberals within the context of a shared aim or purpose, which was that of checking or constraining the coercive power of the state over individuals. The motivating force was never one of making government “work better” in the accomplishment of some arbitrarily selected “public good,” or even one of insuring that all interests were somehow “more fully represented.”

The organizational-procedural elements of the classical liberal constitution, those listed above and others, were deemed to be less important than those provisions that laid out the range and scope of activities that were appropriately to be undertaken by collective authority. That is to say, the constitutional instructions as to what governments might and might not do were always considered to be much more important than how governments do whatever it is that they, in fact, do. This critical distinction, which was central to the whole classical liberal conception of social order, was essentially lost to the public consciousness during the ascendency of electoral democracy, especially during the 19th and 20th centuries. There was generalized acceptance of the fallacy that equated the emergence of electoral democracy with a reduced need for explicit constitutional constraints on the range and scope of governmental activity.

In the classical liberal constitutional order, the activities of government, no matter how the agents are selected, are functionally restricted to the parameters for social interaction. Governments, ideally, were
to be constitutionally prohibited from direct action aimed at "carrying out" any of the several basic economic functions: (1) setting the scale of values, (2) organizing production, and (3) distributing the product. These functions were to be carried out beyond the conscious intent of any person or agency; they were performed through the operation of the decentralized actions of the many participants in the economic nexus, as coordinated by markets, and within a framework of "laws and institutions" that were appropriately maintained and enforced by government.

This framework-maintenance role, properly assigned to government in the classical liberal order, included the protection of property and the enforcement of voluntary contracts, the effective guarantee of entry and exit into industries, trades, and professions, the insured openness of markets, internal and external, and the prevention of fraud in exchange. This framework role for government also was considered to include the establishment of a monetary standard, and in such fashion as to insure predictability in the value of the designated monetary unit. (It is in this monetary responsibility that almost all constitutions have failed, even those that were allegedly motivated originally by classical liberal precepts. Governments, throughout history, have almost always moved beyond constitutionally authorized limits of their monetary authority.)

A central principle inherent in the classical liberal constitution dictated that, regardless of what governments do, and whether or not collective activities are contained within the indicated limits, all persons and groups are to be treated equally. The generality principle, applicable to the law, was to be extended also to politics. There was no role for governmental action that explicitly differentiated among separate factions or classes of persons. In the classical liberal conception, successful majority coalitions could not impose differential taxation on members of political minorities, even for purposes of "doing good" (Buchanan 1992).

The Constitutional Order of Socialism

The classical liberal vision of a constitutional order did not command widespread public and philosophical acceptance for more than the several decades that straddled the turn between the 18th and 19th centuries. In small part, the reaction against this vision was due to the zeality of those advocates who extended the central laissez-faire precept too enthusiastically, even to the rejection of a collective-governmental role in setting the parameters for economic interaction. But, primarily, the reaction against classical liberalism stemmed from
the generalized unwillingness of participants in the body politic to accept the spontaneous allocative and distributive results generated in the operation of a market economy. These results were not taken to be “natural”; they were not understood to be the working out of the whole complex of separated choices made by persons in their many capacities. The results of market process were taken to be “artifactual”—produced rather than emergent, and hence subject to direct manipulation, change, and redirection by politicized collective action.

The reaction against classical liberalism was specifically stimulated and fueled by two separate sources. First, the genius of Karl Marx lay in his ability to isolate, identify, and publicize those elements in the operation of market capitalism that seemed most open to criticism, especially in the intellectual context of an incompletely classical economic theory, along with prevailing confusion as to the distinction between constitutional and within-constitutional operations of governments. Marx concentrated on the vulnerability of capitalism to financial crises, on the tendency toward concentration in industry, and on the alleged distributive exploitation of the proletariat. Secondly, political idealists for many centuries had implicitly used models of the state that involve presumptive benevolence and omniscience. Any failures of markets could, under this presumption of the idealized collectivity, be fully corrected by directed political action. The generalized Marxist critique, along with the presumption of idealized political governance, essentially destroyed the intellectual-scientific basis that had been constructed in justification of the classical liberal constitutional order.

From the middle of the 19th century, some vision of a socialist order emerged to capture, in varying degrees of enthusiasm, the minds of persons in all developed societies, even in those societies where Marxism, as such, was able to secure relatively little direct support. At base, the socialist vision categorically rejected the classical liberal conception of a self-regulating economy that operates within a set of constitutional limits enforced by government which, in turn, is itself limited largely, if not totally, to the enforcement role. And, if the self-regulating, or politicized, economy is rejected as the basic organizing principle, the controlled or regulated economy becomes a necessary component of any alternative model for social organization. This shift from the self-regulating model of an economy to that of a controlled or regulated economy may be, but need not be, directly related to issues that involve organizational-procedural changes involving ways and means that agents and agencies of governance are selected, along with constitutional dictates concerning how the control and regulatory functions are to be performed.
The socialist constitutional order, whether this be defined in application to a single party, a self-appointed authoritarian regime, or a social democratic parliamentary majority, necessarily extends the range and scope for politicization well beyond the narrowly defined limits of collective authority under the classical liberal order. If the whole economy is opened up for control and regulation “in the general interest,” there can be, by definition, little or no prior constitutional constraint on the definition of what such interest is by those agents and agencies charged with the responsibility for allocative and distributive results. Whereas governments in a classical liberal constitutional order have only a limited responsibility for the results that emerge from the interaction of persons in many capacities, governments in the socialist constitutional order have full or total responsibility for all results, including the size, composition, and the distribution of the “bundle of value” generated in the whole system. This ultimate responsibility remains with government even if the market, as a means of organization, is allowed to operate without detailed direction over wide areas of interaction. In the socialist model of government, there is, and can be, no constitutional guarantee offered to economic actors, whether persons or firms, against politically generated intrusions into liberty of commerce, whether this be marginal or total. In a genuine sense, with reference to the structure of the economy, the very term “socialist constitution” is oxymoronic. At best the constitutional order of socialism embodies constraints only on the procedures of politics and the behavior of political agents in carrying out those procedures; it cannot extend to include constraints on politicization of the economy, as such.

As we now know, as we have been informed by the great revolutions in central and eastern Europe in 1989-91, as well as by the cumulative historical experience from other parts of the world, as supplemented by analytical argument, the central principle for socialist order is fatally flawed and has been from the outset of its promulgation. The presumption that politicized control-regulation of economic relationships can, and will, generate a satisfactorily large bundle of goods and services, as valued by participants themselves, has been shown to be grounded in fallacy. In sum, the grand socialist experiments of the century did not work, and improved variants on these experiments cannot work, given the motivational, epistemological, and imaginative limits of the human animal. There is now generalized acceptance of the proposition that only market organization of the economy, which exploits the human potential, can produce an acceptably adequate aggregate of economic value.
The Post-Socialist Constitutional Contradiction

The set of public, professional, political, and philosophical attitudes that seem most descriptive of the immediate post-socialist years of the 1990s is internally contradictory. The socialist vision of politicized control-regulation of economic interaction has by no means been exercised from the modern mind-set despite the evidence from reason or from history. The belief that persons, acting jointly through their membership in collectivities, can effectively “improve” on the spontaneously generated outcomes of market processes remains imbedded in the modern psyche. Despite the overwhelming strength of the evidence, and despite supporting argument, persons cannot readily acquiesce in the stance suggested by post-socialist reality. The romance of socialism, which is dependent both on an idealized politics and a set of impossible behavioral presuppositions, has not yet disappeared.

Whether or not the romance will, in fact, fade away as we move further beyond the post-revolutionary turbulence of the 1990s and into the next century, cannot be settled outside futuristic speculation. Several questions may be posed: Will truth finally triumph over romance? Will the constitutional order of classical liberalism return, in some form, and come to command acceptance as the only order that combines personal liberty and economic prosperity? Will the public’s interest in aggregative economic growth, in economic progress itself, finally carry the day and be reflected in genuine constitutional reforms? Or, may we expect the emergence of some new ideology that will offer renewed sustenance to a romantic image of collectivized utopia? Without the emergence of such an ideology, can we expect public acquiescence in authoritarian grabs for power? Without some equivalent of the Marxist class struggle as an ideological crutch for sloganeering, can the politicians escape skeptical censure by the public, even if there is little understanding of the functioning of the market? Is some tacit knowledge of constitutionalism likely to surface as the 21st century approaches?

The politics of my own country, the United States, in 1993 does not offer much basis for short-term optimism in putative response to these questions. The rhetoric of class warfare is now used to generate support for an enlargement of the already swollen governmental sector of the economy, and the provisional skepticism of the 1980s about the efficacy of regulatory efforts seems to have been replaced by reversion to nostrums of a half-century past. “Socialism in the small” is on the ascendancy, as if the demise of “socialism in the large” is totally irrelevant. Politics aimed at “improving” on the outcomes of market processes is presumed capable of succeeding, despite the working of the selfsame incentive incompatibilities, knowledge limita-
tions, and entrepreneurial disregard that produced the background for the great revolutions of 1989-91.

As noted earlier, if we are to find grounds for constitutional hope, it may be necessary to extend our sights, both temporally and locationally. We must recall Keynes’ insistence on the long-range influence of ideas. Perhaps the post-socialist period is simply too short for us to have expected shifts in public and political attitudes, and especially in those societies that did not themselves go through the revolutionary upheavals. Perhaps any rebirth of classical liberalism must be expected to occur in those societies that did indeed suffer the revolutions; perhaps only in those countries has there been a sufficient loss of belief in politics and politicians to allow some reconstruction of the 18th century ideal of constitutional order. Only one prediction seems safe here. The constitutional prospect for the next century will be one of surprises.

Conclusion

I have discussed only briefly the whole set of constitutional issues that involves organizational and procedural alternatives of governance. I have not addressed such issues as republican versus parliamentary forms of government; proportional representation versus two-party structures; effective federalism versus political centralization. But my neglect of these issues has been quite deliberate. All such organizational-procedural matters fade into insignificance by comparison with the constitutional challenge of placing constraints on the authority of government over the operation of the economy. Until and unless the government is severely constrained in its economic overreaching, along more or less classical liberal principles, including the principle of generality, the particular choices made among the organizational and procedural alternatives becomes relatively insignificant.

A democratically elected parliamentary majority imbued with socialist ideas and vision can destroy the potential value that might be forthcoming from an unfiltered market economy as much or more than the activities of an authoritarian regime. To the extent that constitutional constraints do effectively limit governments in their regulatory, financial, and taxing powers, the particular constitutional form for governance itself assumes secondary rank. To the extent that the powers of government remain open-ended and nonconstrained, the forms of government may seem to matter. But in some final sense, the overextended politics must surely fail, regardless of structural particulars.

In almost all countries, the continuing dialogue and discussion is centered on the establishment, maintenance, and preservation of
"constitutional democracy." My central argument may be summarized in the statement that "constitutional" is the critically important one of the two words here. Economic prosperity and progress, as measured in value produced and consumed, can only occur in settings where the activities of government are constitutionally constrained, quite independently of how governmental agents are selected.

References
November 28, 1990

DRAFT

CONSTITUTION OF THE REPUBLIC OF ANGOLA

We the people of Angola, determined to secure for ourselves and our posterity the blessings of multi-party representative democracy, the celebration of human freedom and dignity in all its dimensions and to provide an example to mankind of good government, fulfillment of human development for all, and peace and freedom, adopt the following Constitution of the Republic of Angola.

It is understood that the preservation of this Constitution as a living embodiment of the Nation is the highest trust of public office and citizenship in Angola. It's adoption is a triumph in Angola of the persistence of the human spirit in the struggle for human freedom and dignity.

PART I

FUNDAMENTAL PRINCIPLES

Article I
(Independence)

The Republic of Angola is an independent, free and sovereign state founded on the fundamental principles of representative democracy, liberty, human rights and the rule of law as set out in this Constitution.

Article II
(multi-party democracy)

Angola is a democratic Nation rooted in government of the people, by the people and for the people. Sovereignty resides in the people from whom emanate the powers of the state and who elect by secret ballot representatives through universal free and direct suffrage in regular multi-party elections. To protect the foundation of Angola as a multi-party pluralist democracy there shall be no merger of a political party with the state or any element of the state nor shall any political party exercise any governmental function under this Constitution.

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1531
Article III
(human freedom and dignity)

Angola is founded on the celebration of human freedom and dignity in all its dimensions. The Angolan people recognize that the maintenance of human freedom and dignity is the primary function of government. To that end there shall be no abridgement of the declaration of fundamental rights and freedoms contained in this Constitution. The Angolan people adhere to the Universal Declaration of Human Rights as an inalienable standard of human rights for all mankind.

Article IV
(separation of powers and checks and balances)

The Government of Angola is structured around a permanent separation of powers and checks and balances. To that end it is composed of separate legislative, executive and judicial branches. The legislative branch shall not exercise executive or judicial powers as enumerated in this Constitution nor shall the executive or judicial branches exercise such powers of the other branches. The preservation of a separation of powers and checks and balances as enumerated in this Constitution is an essential element of the maintenance of democratic freedoms for Angolan posterity.

Article V
(the rule of law and an independent judiciary)

Angola is founded on the rule of the law. As such, the laws and their interpretations by an independent judiciary are to be made public and disseminated. Maintenance of secret laws is abolished. There shall be an independent judiciary which is empowered to preserve and protect the provisions of this Constitution, including the principles of representative democracy, fundamental rights and freedoms of the individual, and the separation of powers. This Constitution shall be the supreme law of Angola.

Article VI
(equality before the law)

All Angolans are equal before the state and the law. There is to be no discrimination under the law based on race, tribe, ethnicity, sex, religion, language, sect, place of birth, parentage, or social level. All are subject to the same rights and obligations consecrated in the Constitution.
Article VII
(economic freedom)

Angola, reflecting African cultural tradition, the Universal Declaration of Human Rights, and global historic experience concerning democratic freedoms and economic development, respects and promotes economic freedom, individual entitlements and property rights. Accordingly the Government will seek to encourage and protect a vital private sector, individual economic initiative, and the integrity of contract and agreement. The Government of Angola welcomes enhanced domestic and international trade and investment based on freely negotiated agreement.

Article VIII
(limited powers and federalism)

The Government of Angola is a Government of limited powers as enumerated in this Constitution. It is founded on protecting and preserving the autonomy in local affairs of the ____________, _____________ and _____________. The powers not given in this Constitution to the Government of Angola, nor prohibited by it to local units of government, are reserved for such units or to the people, who may expand or limit the powers of the Government through the Amendment process.

Article IX
(protection of environmental heritage)

The Government of Angola shall seek to protect and preserve the unique environmental heritage of Angola as it encourages fulfillment of human development for all.

Article X
(civilian control of the military)

Angola is founded on democratic principles. As such, the Government will assure civilian control of the military. An essential element in military training of Angolans will be the importance of civilian control of the military as a fundamental principle of Angolan life as well as training in the Constitution of Angola generally.

Draft--3
Article XI
(foreign policy based on peace, human rights
and mutual cooperation)

The foreign policy of Angola is based on the principles of the Charter of the United Nations and the Charter of the Organization of African Unity. In particular, Angola regards as fundamental the universal realization of human rights and freedoms and the principle of non-aggression in international relations as embodied in the Charter of the United Nations. Foreign policy shall seek peace, cooperation, good neighborliness between states based on friendship, mutual benefit, mutual respect for sovereignty, equality, national territorial integrity and non-interference in the internal affairs of other countries.

Pursuant to its policy of friendship and cooperation in international relations, the Republic of Angola will seek close relations with Portugal, the official Portuguese speaking countries (PALOPS), the neighboring states, the members of the Organization of African Unity (OAU), fellow democratic nations, and with all countries of the world which recognize the independence and sovereignty of Angola on the basis of mutual respect and reciprocal interests.
PART II

DECLARATION OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

Article XII
(protection of fundamental rights and freedoms)

This declaration of fundamental and inalienable human rights and freedoms is inviolable and may not be abridged by any branch or agency of Government. These rights and freedoms are elements in the basic compact between the people of Angola and their Government as established by this Constitution. As such this declaration is enforceable by the Courts.

Article XIII
(protection of life)

The role of the state is to respect and protect human life, which constitutes a fundamental right to the individual. No law of Angola may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Angola.

Article XIV
(protection of liberty)

No person shall be deprived of personal liberty without due process of law.

Article XV
(respect for human dignity)

(1) The dignity of all persons shall be inviolable.

(2) Respect for human dignity shall be guaranteed in all governmental actions, including proceedings before any organ of the State and during the enforcement of a penalty.

(3) No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Draft--5
Article XVI
(equality and freedom from discrimination)

(1) All Angolans shall be equal before the law and are entitled to equal protection of the law.

(2) No persons may be discriminated against on the grounds of sex, race, color, ethnic origin, religion, creed, place of birth, parentage, or social or economic status.

Article XVII
(prohibition against slavery or servitude)

No person shall be held in slavery or servitude.

Article XVIII
(privacy)

(1) No person shall be subject to interference with the privacy of their homes or residences, correspondence, or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety, the protection of health, the prevention of disorder or crime or the protection of the rights or freedoms of others.

(2) Searches of the person or the homes or residences of individuals shall only be justified:

(a) where these are authorized by a competent judicial officer based on probable cause,

(b) where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by an Act of the National Assembly to preclude abuse are properly satisfied.

Article XIX
(fairness in criminal process)

(1) No person shall be subject to arrest or detention without probable cause. No person arrested or detained shall be detained in custody without being promptly informed of the grounds for such arrest and without being brought before the nearest Magistrate or other judicial
officer within a period of forty-eight (48) hours of their arrest or detention for an independent examination of the probable cause for the arrest or detention.

(2) In all criminal prosecutions the accused shall have the right to a speedy, impartial and public trial, to be informed of the nature of the accusation, to be confronted with the witnesses against them, to have compulsory process for obtaining witnesses in their favor, to have the right of cross-examination, and to have the assistance of counsel for their defense.

(3) In all criminal prosecutions the accused shall be presumed innocent until proven guilty. The standard of proof for conviction shall be at least that of proof beyond a reasonable doubt.

(4) No person shall be subject to be twice put in jeopardy for the same offence.

(5) No person shall be compelled in a criminal case to be a witness against themself;

(6) No person shall be tried, convicted or held accountable for any act or omission not previously made an offense at the time it was committed through publicly promulgated and generally available law. Nor shall a penalty be imposed exceeding that which was applicable at the time an offence was committed.

(7) There shall be a strict separation of prosecutorial and judging functions in all criminal trials and judges shall be independent. There shall be a right of appellate review of criminal convictions.

(8) Sentences shall be reasonable and proportional in relation to the conviction.

(9) Anyone held in detention shall have a right of habeas corpus to review the lawfulness of their detention.

Article XX
(the family)

(1) The family is a natural and fundamental unit of society and is entitled to protection by society and the State.

Draft--7
(2) Men and women of full age, as defined by the National Assembly, without any limitation due to race, color, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.

(3) Marriage shall be entered into only with the free and full consent of the intending spouses.

Article XXI
(Children’s rights)

(1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.

(2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that interferes with their compulsory education as protected in Article XXVI of this Part, or is likely to be hazardous or harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this Sub-Article children are persons under the age of sixteen (16) years.

(3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by an Act of the National Assembly. Nothing in this Sub-Article shall be construed as derogating in any way from Sub-Article (2) hereof or Article XXVI of this Part.

Article XXII
(Economic freedom)

(1) All persons shall have the right to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequest their property to their heirs or legatees. The National Assembly, however, may by legislation prohibit or regulate the right to acquire property by persons who are not Angolan citizens.
(2) The State or a competent body authorized by law may expropriate property in the public interest subject to the payment of full and just compensation.

(3) Workers shall have the right to organize freely, to form labor unions, and to enter into collective bargaining.

(4) The Government should protect and enhance the economic creativity and opportunity of its citizens. Accordingly, tax based on personal income shall never exceed a top rate of one-third of that income.

Article XXIII
(participation in political activity)

(1) All citizens have the right to participate in peaceful political activities and to form and join political parties.

(2) Every citizen who has reached the age of eighteen (18) years shall have the right to vote and who has reached the age of twenty-one (21) years to be elected to public office, unless otherwise provided herein.

(3) Political parties shall be instrumental in the expression of the suffrage. They shall be formed freely and shall carry on their activities freely. All parties must respect the democratic and Constitutional order, and there shall neither be a merger of a political party with the state nor any prevention of political pluralism. No party shall receive financial or other support from the state that is not equally granted to all parties.

Article XXIV
(administrative justice)

Administrative bodies and administrative officials shall act fairly and reasonably and shall comply with the requirements imposed upon such bodies and officials by law. Persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Draft---9

1539
Article XXV
(Protection of cultural diversity)

Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion, subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others.

The official language is Portuguese, notwithstanding the use of other languages in regional affairs. The State shall promote the use of and education in Portuguese. Due regard shall be given, however, to the preservation of linguistic heritage as part of the cultural heritage of Angola.

Article XXVI
(education)

(1) All persons shall have the right to education.

(2) Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Angola by establishing and maintaining State schools at which primary education will be provided free of charge.

(3) Children shall not be allowed to leave school from the age of six (6) until they complete their primary education or have attained the age of sixteen (16) years, whichever is the sooner, except in so far as this may be authorized by an Act of the National Assembly on grounds of health or other considerations pertaining to the public interest.

(4) All persons shall have the right, at their own expense, to establish and to maintain private schools, colleges or other institutions of education provided that:

(a) the standards maintained by such schools, colleges or institutions are not inferior to the standards maintained in comparable schools, colleges or institutions of education funded by the State;

(b) no restrictions of whatever nature are imposed with respect to the admission of pupils based on race, color or creed.

(c) no restrictions of whatever nature are imposed with respect to the recruitment of staff based on race or color.

Draft--10
Article XXVII
(no establishment of religion or irreligion)

There shall be no state establishment of religion or irreligion in Angola.

Article XXVIII
(fundamental freedoms)

(1) All persons shall have the right to:
   (a) freedom of speech and expression, which shall include freedom of the press and other media;
   (b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning;
   (c) freedom to practice any religion of individual choosing and to manifest such practice;
   (d) assemble peaceably and without arms;
   (e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;
   (f) withhold their labor without being exposed to criminal penalties;
   (g) move freely throughout Angola.

(2) All Angolans shall have the right to:
   (a) reside and settle in any part of Angola;
   (b) leave and return to Angola.

Draft--11
Article XXIX
(health)

The Angolan Government shall seek to promote public health in Angola and to ensure that Angola achieves the highest standards of public health and health care.

Article XXX
(war victims)

The Angolan Government will give special protection to handicapped or maimed victims of war, and to all the families of those missing or who perish in war. It will also seek to appropriately assist veterans.

Article XXXI
(incorporation of Universal Declaration of Human Rights)

Mindful of Article III of Part I, Angola stands in the forefront of Nations dedicated to human rights and dignity. Accordingly it incorporates into this Declaration of Fundamental Human Rights and Freedoms the provisions of the Universal Declaration of Human Rights as minimum guarantees of the rights and freedoms of persons within Angola. Nothing in the Universal Declaration, however, shall remove or reduce the human rights and freedoms enumerated in this Constitution.
Part III

THE NATIONAL ASSEMBLY

Article XXXII

The National Assembly exercises the legislative power of the state, approves its budgets, and has the other competencies granted by this Constitution.

Article XXXIII

The National Assembly is composed of two Chambers, which are the Congress and the Council. Bills shall be introduced in the National Assembly by Members of each Chamber or the President. The Congress and the Council shall debate the merits of a bill and shall vote on its adoption. A bill adopted by absolute majorities of each Chamber shall be forwarded to the President for signature, unless the bill concerns taxation or appropriation in which case a two-thirds majority of the Congress and a simple majority of the Council is required. Upon signature by the President the bill shall become a law unless the law specifies a later effective date. If the President vetoes the legislation, it shall return to the National Assembly where it shall be voted on again. If the bill is passed by a two-thirds majority of each Chamber it shall become law over the President's veto. If any bill shall not be signed nor vetoed by the President within ten days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it.

The Congress shall be considered the appropriating Chamber of the National Assembly. All bills of authorization and appropriation must originate in the Congress. It shall be comprised of ninety (90) members directly elected by the eligible voters of Angola. In each of the eighteen regions of the country, elections shall be held in which five (5) members of Congress shall be elected. Those elected shall be the five candidates with the greatest number of votes. Immediately after they shall be assembled in consequence of the first election, the ninety members of the Congress shall be divided as equally as may be into three classes. The seats of the Congressmen of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be elected every second year. All terms of office for Congressmen with the exception of those in the initial set of the first two classes shall be for six years. Congressmen shall be limited to two terms in office. The Congress, upon impeachment of any member of the other two branches of the Government by the Council, shall have the sole power to try all impeachments. Conviction of all impeachable offenses requires a three-fourths vote of the Congress. Judgement
in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust of profit under the Republic of Angola. The Convicted party shall nevertheless be liable and subject to indictment, trial, judgement, and punishment according to law.

The Council shall be comprised of one hundred and eighty (180) members whose identity shall be determined by the electorate based on the lists of the political parties of Angola. At the time of election, eligible voters shall vote not only for members of Congress directly but for a political party. All political parties who receive at least five percent (5%) of the vote shall be represented in the Council and their seats shall be determined by the percent of the vote their party receives. The parties shall make available before the election a list of their top two hundred (200) candidates for the Council and shall select their representatives from this list in the order of their appearance. The term of office for Councilmen shall be two years. Councilmen shall be limited to three terms. The Council shall have the sole power, by a two-thirds vote of its Chamber, to impeach any member of the other two branches of the Government on account of willful violation of this Constitution or a major offense or crime.

The Congress and the Council shall establish their own regulations and internal policing authority.

Article XXXIV

All sessions of the National assembly shall be public, recorded, and published in the Official Bulletin except if there is an agreement against making specific sessions public on the grounds of national security.

Article XXXV

Every member of the National Assembly shall take an oath administered by a Justice of the Supreme Court before being allowed to assume his place in either Chamber. The members shall swear or affirm that they will uphold the Constitution and strive to secure the blessings of multi-party representative democracy, the celebration of human freedom and dignity in all its dimensions and to provide an example to mankind of good government, fulfillment of human development for all, and peace and freedom.

Article XXXVI

No person can be elected as Member of the National Assembly if they:

(a) are not a citizen of Angola,
(b) have been declared by a competent Court to be of unsound mind,
(c) hold any other office in the Public Service, the judicial branch, or the executive branch of Angola, or
(d) have been convicted by Court of a major offense or crime, if such conduct is under the current law of Angola threatened with imprisonment of more than twelve months without the option of a fine.

Article XXXVII

Any candidate for election to the National Assembly shall be entitled to the leave necessary for their election campaign, and may not be given notice of dismissal nor be dismissed from employment on this ground. No candidate may be prevented from accepting or exercising the office of Member.

Article XXXIII

The National Assembly shall appoint an independent Elections Committee for every election, that shall guarantee and watch over the undisturbed election process, and be composed of members of all parties represented within the Council. Details shall be regulated by an Act of the National Congress.

Article XXXIX

The Members of the National Assembly shall be the representatives of the people of Angola, and shall in the performance of their duties be only bound by the Constitution, the public interest and their conscience.

Article XL

The vote of Members is personal and cannot be delegated.

Article XLI

The Members shall receive a sufficient remuneration which shall be determined by the National Assembly with the approval of the President pursuant to the normal legislative process.
Article XLII

Every person shall have the right to address individually or jointly with others requests, complaints, or petitions to the Congress, the Ombudsman, or to the appropriate state agencies. The National Assembly shall appoint a Petitions Committee to deal with requests, complaints, or petitions addressed to the National Assembly. The powers of the Petitions Committee shall be regulated by Act of the Congress.

Article XLIII

The National Assembly shall have the right to require any senior official thereof to appear before a committee of the National Assembly to account for and explain executive programs.

Part IV

THE EXECUTIVE BRANCH

Article XLIV

(1) The executive power of the Government of Angola is vested in the President of the Republic of Angola who, as Chief of State, is charged with monitoring compliance with the Constitution and taking care that the laws be faithfully executed. To this end, the President represents the state and government in the conduct of the foreign relations of the Republic. The President also is responsible for the conduct of activities essential for the maintenance of the government and its internal order. The President is the representative of the Republic of Angola in foreign affairs and has the power to make treaties with other nations on the consent of a majority of the Congress.

(2) The President shall be the Commander-In-Chief of the Armed Forces; the President also shall direct the Council of State and may require the opinion in writing of the principal members of the Council of State, upon any subject relating to the duties of their respective offices.

(3) The President nominates individuals to become members of the Council of State, who will assume such duties upon confirmation by majority vote of the Congress. The President also nominates ambassadors, extraordinary envoys, and other officers of the Republic.
of Angola, who will assume such duties upon confirmation by majority vote of the Congress. The President shall have the power to dismiss any person holding a position in the Executive Branch that was obtained through the above-mentioned nomination process. The President is also responsible for the accreditation of foreign diplomats. The President shall have the power to fill all vacancies that may occur in the Congress by granting commissions which shall expire at the end of the next session.

(4) The President has the power to grant clemency and commute punishments. The President alone is authorized to sign acts of the National Assembly into law and may exercise the right of veto of acts passed by the National Assembly. If such veto is exercised, the act shall return to the National Assembly where it will be considered again. If it again is passed by the National Assembly by a two-thirds majority of both houses, the act shall become the law of the Republic of Angola without the signature of the President. The President shall also have the power of a line item veto for all legislation concerning taxation, spending and foreign affairs.

(5) The President shall from time to time give to the National Assembly information on the state of the Republic, and recommend to their consideration such measures as he shall judge necessary and expedient. The President may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper not to exceed a period of three months.

**Article XLV**

(1) The President of the Republic of Angola is elected by universal, direct and secret suffrage by all Angolan citizens who are at least eighteen (18) years of age and who enjoy full civic and political rights.

(2) The President must be an Angolan citizen, of at least thirty-five (35) years of age.

(3) The President shall serve a term of office for five years, and if reelected may serve a second term of five years.
Article XLVI

(1) The President of the Republic is elected by an absolute majority of the votes certified valid. If no candidate obtains an absolute majority of votes in the first ballot, within 20 days a second vote will be taken between the two candidates with the most votes from the first ballot.

(2) The President of the Republic of Angola is to be elected 45 days before the end of the term of the current President.

Article XLVII

(1) The term of the first President shall begin ten (10) days subsequent to the confirmation of the election results by the Supreme Court and will run for five years from the March 20th following the initial election. All subsequent terms of office will run from the 20th of March until that date at the end of the President's term.

(2) Before entering on the execution of his office, the President of the Republic-elect shall render the following oath or pledge of honor:— "Before the nation and the Angolan people, I swear to faithfully carry out the office of President of the Republic of Angola, scrupulously obey the principles established in the Constitution, recognizing that it is the embodiment of the highest trust of public office and citizenship in Angola. I consecrate and dedicate all my efforts in the support of national independence and the preservation of human rights."

(3) Upon taking the oath of his office, the President shall begin to receive a compensation established by the National Assembly which shall neither be increased nor diminished during his term of office. At no time shall the President receive compensation less than that given to members of the National Assembly. During his term of office, the President shall receive no other income from any other public or private position.

(4) In case of absence, death, resignation, inability to discharge the duties of his office, or removal through Constitutionally recognized procedures, the President shall be substituted for by the President of the Congress. Succession to the office of the President beyond this level is to be determined by the National Assembly within one year of their initial session.
Article XLVIII

(1) The Council of State is the executive advisory and operating body of the Office of the President. As such it meets at the request of the President and its membership is determined by the President, though it is assumed that the Heads of the Executive Departments, which are sanctioned by the National Assembly, are regular members.

(2) The members of the Council of State are installed by the President upon confirmation by an absolute majority vote of the Congress, and may be removed at his discretion. The meetings of the Council of State are not endowed with a public character.

Article XLIX

The President, members of the Council of State, and all civil officers of the Republic of Angola shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

Part V

THE JUDICIAL BRANCH

Article I

Judicial power is independent of legislative and executive power. It constitutes the guaranty of the rights and liberties defined in this Constitution and the law. As such it applies to all cases and controversies arising under this Constitution, the laws of the Republic of Angola, and the Treaties made under their authority. The judicial power of the Republic of Angola shall be vested in one Supreme Court and courts of First and Second Jurisdiction. The judges of these courts shall hold their offices during good behavior. In the carrying out of their functions the judges are independent and only have to be obedient to the authority of the law.

Article LI

There shall also exist military courts, administrative courts and municipal courts subject to creation and definition of powers by the National Assembly. Upon creation, these legislatively created courts shall be independent of the other branches of government. The composition, organization, competence and function of all courts shall be recorded in the competent organic law.

Draft--19

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Article LII

Upon taking the oath of his office, the judges of all courts shall begin to receive a compensation established by the National Assembly which shall neither be increased nor diminished during their term of office. At no time shall the compensation received by judges of the Supreme Court and the courts of First and Second Jurisdiction be less than that received by the members of the National Assembly. During the term of office, judges of the Supreme Court and the Courts of First and Second Jurisdiction shall receive no other income from any other public or private function. The applicability of this limitation on the source of income to other courts is subject to legislation.

Article LIII

The Supreme Court shall be a court of appellate jurisdiction only, both to law and fact, subject to exceptions made by Congress to give the Supreme Court original jurisdiction of types of cases or controversies. The Supreme Court shall have the power to grant or deny certiorari. The opinions of the Supreme Court shall have force over all including the President and the National Assembly. The Chief Justice shall sit at all impeachment hearings.

Article LIV

All members of the Supreme Court and Courts of First and Second Jurisdiction shall be nominated by the President and confirmed by an absolute majority vote of the Congress.

Part VI

THE OMBUDSMAN

Article LV

The President of State shall appoint an Ombudsman on the recommendation of the National Assembly. The Ombudsman shall be independent and subject only to the Constitution and law, and shall have the legal qualifications to practice in the Courts of Angola. No member of the National Assembly, the Executive, or any other person shall interfere with the Ombudsman in the exercise of his or her functions, and all organs of the State shall accord such assistance as regarded necessary by the Ombudsman for the exercise of his or her functions and for the protection of his or her independence, dignity and effectiveness.

Draft--20
Article LVI
(functions of the Ombudsman)

The functions of the Ombudsman are to be defined and prescribed by an Act of the National Assembly and shall include the following:

(a) the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant of Angola by an official in the employ of any organ of Government (whether national or local), manifest injustice, or corruption or conduct by such official which would properly be regarded as unlawful, oppressive or unfair in a democratic society;

(b) the duty to investigate complaints concerning the functioning of the administrative organs of the State, the defense force, the police force and the prison service in so far as such complaints relate to the failure to achieve a balanced structuring of such services or equal access by all to the recruitment of such services or fair administration in relation to such services;

(c) the duty to investigate complaints concerning the degradation and destruction of ecosystems and failure to protect the beauty and character of Angola;

(d) the duty and power to take appropriate action to call for the remedying, correction, and reversal of instances specified in the preceding sub-articles through such means as are fair, proper and effective, including negotiation, proper reporting, referring to proper authorities, and the bringing of judicial proceedings;

(e) to investigate vigorously all instances of alleged or suspected corruption and the misappropriation of public monies by officials and to take action pursuant to findings of impropriety. It shall be an important function of the Ombudsman to ensure that government officials and the government itself avoid corruption. Accordingly, the Ombudsman shall maintain a vigorous anti-corruption program and shall from time to time recommend appropriate measures to the National Assembly for the purpose of avoiding conflict of interest and protecting government integrity; and

Draft--21
(f) to report annually to the National Assembly on the exercise of its powers and functions.

Article LVII
(powers of investigation of the Ombudsman)

The powers of the Ombudsman shall be defined by Act of Parliament and shall include:

(a) the power of subpoena requiring the attendance of any person before the Ombudsman and the production of any document or records relevant to any investigation by the Ombudsman and the power to question those before the Ombudsman under subpoena;

(b) the power to cause any person contemptuous of any such subpoena to be prosecuted before a Court of competent jurisdiction.

Article LVIII
(meaning of "official")

For the purposes of this Part the word "official" shall, unless the context otherwise indicates, include any elected or appointed official or employee of any organ of the central or local Government, any official of an enterprise owned or managed or controlled by the State (or in which the State or the Government has substantial interest) or any officer of the defense force, the police force and the prison service, but shall not include a Judge of the Supreme Court or the Courts of First and Second Jurisdiction, or in so far as a complaint concerns the performance of a judicial function, any other judicial officer.

Article LIX
(removal from office)

The Ombudsman may be removed from office before the expiry of his or her term of office by the President acting on the recommendation of the Council of State. The Ombudsman may only be removed from office on the grounds of mental incapacity, gross misconduct, or for the conduct of high crimes.

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Part VII

FISCAL INTEGRITY

Article LX
(maintaining fiscal integrity and stability)

It is recognized that currency inflation both restricts long term economic growth and constitutes a severe burden on many groups in society. Accordingly, fiscal and monetary policy shall be designed to maintain the stability of the currency of Angola. To this end the National Assembly shall create by legislation an independent Angolan Reserve Board empowered to control monetary policy. The National Assembly shall also establish a procedure whereby tax and appropriations measures presented to the Assembly for approval are accompanied by an independently prepared report of the Angolan Reserve Board as to the economic impact of the proposed fiscal measures, including their impact on currency stability.

[Alternative Article LX]
(freely convertible currency)

The currency of Angola shall be freely convertible with the currency of [Portugal] [or alternatively some other country with a stable currency such as Germany].

Part VIII

LOCAL AUTONOMY

Article LXI
(regional and local government)

The Republic of Angola is divided into eighteen regions, each responsible for the creation of local laws by which the region shall be governed. No local law shall compromise the fundamental principles established in this Constitution. Each region shall give full faith and credit to the public acts, records, and judicial proceedings of every other region. The National Assembly may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.
Part IX

AMENDMENT

Article LXII
(amenment of the Constitution)

This Constitution of the Republic of Angola constitutes the fundamental law of the state. Parts I and II of this Constitution, concerning respectively fundamental principles and fundamental human rights and freedoms, shall not be detracted from. All other Amendments to the Constitution are permitted if they receive the confidence of the National Assembly by being approved by a three-quarters vote of each house and if they receive the approval of the people by being approved by a majority of those voting in a national referendum. No other means of amending this Constitution shall be considered valid.

Part X

MISCELLANEOUS

Article LXIII
(miscellaneous provisions)

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the Republic of Angola under this Constitution, as under previous embodiments of Angolan government.

The Constitution and the laws of the Republic of Angola which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the Republic of Angola, shall be the supreme law of the land; and the judges in every region shall be bound thereby, any thing in the Constitution to the contrary notwithstanding.

[Possible additional paragraph for consideration]

The National Assembly may at its first session consider what part, if any, of the non-constitutional law of Portugal shall be incorporated into Angolan law as initial law of Angola. Nothing in any such incorporation, however, shall alter the status of this Constitution as the supreme law of Angola.
The Members of the National Assembly before mentioned, and the members of the executive and judicial branches, both of the Republic of Angola and the local regions, shall be bound by Oath or affirmation to support this Constitution; but no other test shall ever be required as a qualification to any office or public trust under the Republic of Angola.

**Article LXIV**
(ratification)

This ratification of this Constitution shall occur upon the acceptance of a majority of those voting in a national Constitutional referendum.
Calendar No. 245

103D CONGRESS
1ST SESSION

S. J. RES. 41

[Report No. 103-163]

Proposing an amendment to the Constitution of the United States to require a balanced budget.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4 (legislative day, JANUARY 5), 1993

Mr. Simon (for himself, Mr. Hatch, Mr. DeConcini, Mr. Thurmond, Mr. Heflin, Mr. Craig, Mr. Kohl, Mr. Grassley, Ms. Moseley-Braun, Mr. Brown, Mr. Daschle, Mr. Cohen, Mr. Bryan, Mr. Pressler, Mr. Shelby, Mr. Bennett, Mr. Graham, Mr. Smith, Mr. Kempthorne, Mr. Mathews, Mr. Nickles, Mr. Campbell, Mr. Lugar, Mr. Murkowski, Mr. Gregg, Mrs. Feinstein, Mr. Chafee, Mr. Warner, Mr. Simpson, Mr. Robb, Mr. Boren, Mr. Bingaman, Mr. Jeffords, Mr. Roth, Mr. McConnell, Mr. Burns, Mr. Coverdell, Mr. Gramm, Mr. Mack, Mr. McCain, Ms. Hutchison, Mr. Packwood, Mr. Exon, Mr. Dorgan, Mr. Bond, Mr. Hollings, Mr. Gorton, Mr. D'Amato, Mr. Helms, Mr. Faircloth, Mr. Lott, Mr. Wallop, Mr. Coats, Mr. Cochran, Mr. Dole) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

OCTOBER 21 (legislative day, OCTOBER 13), 1993

Reported by Mr. BIDEN, without amendment

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to require a balanced budget.

1 Resolved by the Senate and House of Representatives

2 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, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission to the States for ratification:

"ARTICLE—

"SECTION 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote.

"SECTION 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a rollcall vote.

"SECTION 3. Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year, in which total outlays do not exceed total receipts.

"SECTION 4. No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a rollcall vote.
"SECTION 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law.

"SECTION 6. The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts."
The power of any court to order relief pursuant to any case or controversy arising under this article shall not extend to ordering any remedies other than a declaratory judgment or such remedies as are specifically authorized in implementing legislation pursuant to section...
"SECTION 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.

"SECTION 8. This article shall take effect beginning 2001 with fiscal year 2000 or with the second fiscal year beginning after its ratification, whichever is later."
Why We Need A Balanced Budget Amendment

Essay By Senator Paul Simon

[Paul Simon, Democrat of Illinois, is chief Senate sponsor of the Balanced Budget Constitutional Amendment, scheduled for debate in the U.S. Senate beginning on Feb. 22.]

Few question the economic assumption that the United States has a deficit problem of major proportion, a problem that has already caused serious harm to our economy and will continue to cause damage until corrected.

What is at question is whether a constitutional amendment is the proper vehicle for forcing us to deal with the deficit. I believe that the overwhelming body of evidence suggests that without a constitutional amendment, we will not face the difficult political decisions that must be made, and the nation's economic future will be in peril. We need structural budget reform. Those of us who hold public office generally like to get reelected and, faced with a choice of unpopular decisions or simply drifting, we will choose the more popular but infinitely more harmful course of drifting.

In order to determine whether the nation needs a constitutional amendment, a first question must be addressed:

What is the purpose of a constitutional amendment?

A constitutional amendment both expresses philosophy and restrains governmental abuse. We could easily pass a statement of philosophy that we should have a balanced budget and not [P.1/MORE]
impose our burdens on future generations, but it's the possibility that such a statement will actually be enforced that frightens the abusers.

="We don't need a constitutional amendment to balance the budget," is one of the oft-repeated platitudes. Theoretically, that is true, just as it is true for every constitutional amendment.

Take, for example, the First Amendment to the Constitution:
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ..."

That expresses philosophy and prevents governmental abuse. There were those who argued more than two centuries ago that no constitutional amendment was needed, that Congress could simply refrain from making such laws. In theory that is true, but practical experience taught our founders the amendment was needed.

"Thomas Jefferson was not in the United States when our Constitution was written in 1787, but after he returned, he said that if he could add one amendment to the Constitution, it would be to prohibit the federal government from borrowing money: "We should consider ourselves unauthorized to saddle posterity with our debts, and morally bound to pay them ourselves."

Jefferson and Alexander Hamilton frequently disagreed, but as secretary of the Treasury in 1795, Hamilton called for "incorporating as a fundamental maxim . . . that the creation of Debt should always be accompanied with the means of

[P.2/MORE]
extinguishment." In explaining the need, he observed this about political leaders: "It is no uncommon spectacle to see the same men clamouring ... against a Public Debt, and for the reduction of it as an abstract thesis; yet vehement against any plan of taxation ... [or] defraying expenses."

Even the lead witness against the amendment in a 1992 hearing, Professor Laurence Tribe of Harvard, said: "Despite the misgivings I expressed on this score a decade ago, I no longer think that a balanced budget amendment is, at a conceptual level, an ill-suited kind of provision to include in the Constitution ... The Jeffersonian notion that today's populace should not be able to burden future generations with excessive debt, does seem to be the kind of fundamental value that is worthy of enshrinement in the Constitution. In a sense, it represents a structural protection for the rights of our children and grandchildren ..."

Can the deficit problem be handled without a constitutional amendment?

In theory it can. There is nothing to prevent different Congresses and administrations from facing the deficit. To his credit, President Bill Clinton made significant but modest steps in the right direction after assuming the presidency. But that came only with a new president in his "honeymoon period" and a Congress of his own political party -- and then this step barely passed. It is of more than casual interest that even this limited measure was greeted by the financial markets with drops in interest rates that stimulated the economy.

[P.3/MORE]
But that unusual confluence of factors will not often be repeated, certainly not on a regular basis. Attempts to deal with the problem statutorily have met with only limited success. The most dramatic example was the passage of the Gramm-Rudman-Hollings amendment which set specific targets that would have moved us gradually toward a balanced budget. But the problem with a statutory approach is that whenever the problems get a little difficult politically, we simply amend the statutes. The year in which we in theory were to have a balanced budget under Gramm-Rudman-Hollings, 1991, we actually had a deficit of $270 billion. On a subsequent plan, we ended up $357 billion short of the target.

As the total debt mounts each year, the deficit becomes more and more difficult for public officials to deal with. Statutory changes look good on paper, but they will not solve the problem. Public officials faced with the choice of pleasing the public or serving the public, too often decide to please the public.

There is an old joke asserting that there were so many heroes at the Alamo because there was no back door. Congress needs a situation where there is no easy way to escape. We need the constraint of a constitutional amendment to force us to do what we know is in the national interest. A constitutional amendment gives office-holders political cover for doing our unpleasant and unpopular duty.

How serious is the deficit problem?
Extremely serious.

First, the deficit is sharply retarding economic growth.
The New York Federal Reserve Board study shows that conservatively the lack of savings in our nation, almost entirely because of the deficit, resulted in a loss of five percent growth in our national income during the decade of the 1980s. The Congressional Budget Office calculates one percent loss means 650,000 jobs. Five percent, then, is roughly three and a quarter million jobs lost, many of them in the highly-paid manufacturing sector. Unless we signal to the financial markets that we are serious about the deficit, it is fair to conclude that the loss during the coming decade will be at least as great, if not greater.

The General Accounting Office study of June, 1992, suggests that if we continue to simply "muddle through" on our present course, the nation will experience either no growth or small growth by the year 2020. However, if by the year 2001, we balance the budget, by the year 2020, there should be an increase in inflation-adjusted income per capita of approximately 36 percent.

Second, the deficit alters fiscal policy in an unreasonable way. Neither conservatives nor liberals would intentionally adopt a policy of spending a larger portion of our tax dollars on interest and a decreasing portion on goods and services. Yet that is the policy that we have stumbled into. In inflation-adjusted dollars, for example, from fiscal years 1981 to 1993, education expenditures dropped one percent while gross interest spending went up 97 percent. The federal government now spends eight times as much on interest as on education, twice as much on

[P.5/MORE]
interest as all the poverty programs combined. Interest is an 
$800 million-a-day "welfare" program that takes from people of 
omest means and gives to those who are more fortunate and, 
increasingly, those who are more fortunate beyond our borders. 
The heading of an article by a Tokyo-based economist, in the 
magazine International Economy, tells part of the story: 
"America's Budget Deficits: They Redistribute Income to the 
Rich."

The General Accounting Office projects that for the year 
2020, under a "no action scenario," interest will consume twice 
as much of each federal dollar than it does presently, Social 
Security and health will increase by one-fourth. In contrast, 
other non-defense items will drop by almost one-third and defense 
expenditures will drop by two-thirds. That is under the 
optimistic scenario that we can continue to stumble through for 
more than two decades with present policies.

Third, continuation on the present course will lead to 
monetizing the debt -- that is, printing more money to "solve" 
our problems.

The General Accounting Office forecast simply says that an 
"economic and fiscal catastrophe" awaits us if our policies are 
not changed but does not spell out the catastrophe. But the 
histories of nations spell it out. Except for strenuous steps 
taken as a result of a major war, no industrial nation has faced 
the economic debt burden which we are expected to face without 
debasing its currency, that is, simply putting the printing 
presses to work printing more and more dollars, which are worth

[P.6/MORE]
less and less. That would devastate Social Security, retirement trust funds, the savings of people and the economy. History suggests that this is not a threat to be taken lightly. Warren Buffet, one of the most watched and respected financiers in the world, recently wrote to me: "Monetizing the debt is where we will end up unless Congressional behavior is modified by amending the Constitution."

There are some who believe it is already too late, that a balanced budget amendment cannot help us avoid economic disaster. I disagree. A course correction that forces us to make the difficult decisions can save the nation's economy, which, except for our fiscal imprudence, remains basically healthy. But a course correction is essential. Remember this reality: Every other generation of Americans took care of its current needs and invested in the future. We are the first generation of Americans to partially take care of our current needs and borrow from the future.

How would the balanced budget amendment to the Constitution work?

Two years after the last of 38 states required to ratify it acts, or in 1999 (and that may be changed to 2001), whichever is later, income must match outlays by the federal government unless there is a 60 percent vote of both the House and Senate to agree to a deficit. That gives us greater flexibility than Thomas Jefferson wanted but makes it difficult to have a deficit. To make sure that Congress and an administration do not play games, it also takes a three-fifths majority to authorize an increase in
the national debt. That precludes any "off-budget" manipulation. Some critics charge that the three-fifths safety-valve makes it too easy to run a deficit, while others say it becomes impossible to have one in hard economic times when we should have one. The truth rests in the middle. It will be difficult, but not impossible, and that is how it should be.

But don't families and businesses borrow? Why shouldn't the federal government do the same?

First, the federal government will be able to borrow with a 60 percent majority of both houses, but, with rare exceptions, it would be unwise to do so.

Second, families and businesses do not borrow if they have the resources to handle their purchases on a pay-as-you-go basis. The largest expenditure the federal government makes these days is for a nuclear carrier. It takes about six years from planning to completion. If we want another nuclear carrier, we can pay for it at a little less than $1 billion a year. That is not that much in a $1.6 trillion budget.

The largest single expenditure on a public works project in the history of nations was our Interstate Highway System. President Eisenhower had the vision to request it, but he suggested that we issue bonds to pay for it. Senator Albert Gore Sr., the father of our Vice President, urged that rather than issuing bonds, we increase the gasoline tax a few cents and have the system on a pay-as-you-go basis. He prevailed, and that action saved the nation hundreds of billions of dollars that would have been wasted on interest and harmed our economy.

[P.8/MORE]
In fact, historically we have been able to maintain high levels of public investment without running serious deficits. In the first 20 years after World War II we embarked on an ambitious program of federal investments, all financed on a pay-as-you-go basis. During those years we ran minimal deficits. Over the last 15 years, as the federal government accumulated $3 trillion of added debt and ran unprecedented federal deficits, we engaged in minimal federal investments in our people or our infrastructure. Clearly, it is not investments that cause our deficits, and fiscal responsibility does not preclude investing in our people or our future.

What are the chances of the passage of the amendment?

The candid answer is that there will be a close vote in the Senate, one of the most important in the history of the Senate. The last time the Senate voted on a version of this amendment was in 1986, and it lost by one vote. The debt of the nation then was $2 trillion. "We can solve the problem without a constitutional amendment" was the cry heard over and over. Today the debt stands at $4.4 trillion, and we will hear the same litany from opponents. If we lose, by the time we vote on this again, the debt may have doubled again. No one knows how close you can come to the edge of the economic cliff before you fall off.

Passage requires a two-thirds majority in the Senate, 67 votes. If the vote were today, I believe we would have the votes to win. But the principal opponent, Senator Robert Byrd -- a veteran of many battles -- is fighting it hard. And when the

[P.9/MORE]
chairman of the Appropriations Committee approaches a member, it
is not easy to say no. If we pass the amendment in the Senate,
everyone concedes it has more than enough votes to pass in the
House. Then it must be ratified by three-fourths of the states,
and my sense is that would happen quickly.

What is clear is that each year we postpone facing our
fiscal problems, they grow. The national deficit is like a
cancer. The sooner we act to restrict it, the healthier our
fiscal body will be and the more promising our future.

But wouldn't a constitutional amendment be easy for Congress
to evade?

The amendment is carefully drawn to avoid problems like off-
budget items and on-budget items. The amendment states that
"total outlays for any fiscal year shall not exceed total
receipts for that fiscal year," and to lock into the process the
seriousness of all of this, it requires that the debt limit of
the United States cannot be increased except by three-fifths
votes in both houses.

The reality is that if the amendment were easy to evade, my
friend Senator Robert Byrd would not be working so assiduously
against it.

It is true that with a three-fifths majority of both houses
there can be a deficit, and some criticize the proposal because
that makes it too easy. But the political reality is that a
three-fifths majority is not easy to achieve and should not be
easy to achieve.

But shouldn't Congress be able to have a deficit to deal
with a recession?

I agree, and the 60 percent option permits that, though I also agree with those who say that generally by the time Congress gets around to acting on a recession, the immediate need has often passed. A mechanism for stimulating jobs more quickly in a recession should be devised, and nothing in this amendment will stop that.

More and more observers are coming to the conclusion that a constitutional amendment is essential to avoid eventual economic chaos. Professor David Calleo of Johns Hopkins University, now a supporter of the amendment, has written: "Financially, the United States is fast growing into a giant banana republic."

A constitutional amendment is not a cure-all, not a panacea. It is simply this: a procedure for forcing us to take the difficult steps our popularity-prone public officials now duck.

# # # # #
Statement of

Max Richtman
Executive Vice President
National Committee to Preserve
Social Security and Medicare

Submitted to the
Committee on the Judiciary
Subcommittee on the Constitution
U. S. Senate

Regarding
The Balanced Budget Amendment
to the Constitution

February 17, 1994
Mr. Chairman and members of the Committee, I am Max Richtman, Executive Vice President of the National Committee to Preserve Social Security and Medicare. The National Committee's approximately six million members and supporters agree with you that the future economic growth of this nation as well as financing of Social Security will be enhanced if the budget of the United States is brought into balance. But on behalf of our membership, I must respectfully disagree that balancing the budget requires putting Social Security at risk by including it in the budget.

Balancing the budget requires reasoned decision making and the courage to face up to hard choices. It also requires recognizing the source of the problem. And that, by definition, excludes Social Security. Social Security is not part of the problem; it should not be part of the solution. The general revenue budget of the United States is not in balance because general budget expenditures are not matched by general budget revenues.

Amending the Constitution is a drastic and unnecessary step. Instead of forcing Congress to face up to its responsibilities, a balanced budget amendment could enable policy makers unwilling or unable to work out solutions to defer action until the amendment was ratified by 38 states. If the amendment passes Congress but is not ratified within the prescribed time limit, the deficit could continue to balloon with the justification that the public does not support a balanced budget. If ratified, decision making could be circumvented by leaving programs essentially unchanged but shifting responsibility for paying for them to the 50 state legislatures. Or the constitutional mandate could be ignored leading to even greater public cynicism about politics and politicians than currently exists. Alternatively, the budget could be brought into balance in a reasoned and responsible manner.

The public wants the budget balanced. However, public support for a constitutional amendment may be more a measure of public dissatisfaction with
Congress' failure to work steadfastly toward a balanced budget than it is of support for changing the constitution. But if you really want to see the public dissatisfied, try including Social Security in the budget. The public wants and believes Social Security is independent of the government.

Four years ago, Social Security was taken out of the budget. It is bad enough that policy makers all but ignore current law and continue to rely on annual surpluses to mask a portion of the annual federal deficit. Worse yet, proposals for a balanced budget amendment currently before Congress would reinstate Social Security in the budget as part of the Constitution.

A balanced budget amendment including Social Security would hurt seniors. It would place annual COLAs at risk, limit consideration of any improvements no matter how badly needed and even threaten current benefits. Assuming that deficit reduction is spread evenly between taxes and spending, the Treasury Department estimates Social Security benefits would be cut an average of $605 in the year 2000. The cut could be over $1,000 if deficit reduction does not increase taxes.¹

This proposal does more than just threaten cuts in Social Security benefits. By treating Social Security as just one more federal expenditure, it would alter the very character of the program. Social Security is not a super-collider or a Hubble telescope or a next-generation B-1 bomber. Social Security today is exactly what it was established to be almost sixty years ago—a publicly administered, compulsory, contributory retirement program with benefits paid as a matter of earned right.

Many of the supporters of the Balanced Budget Constitutional Amendment in fact are in favor of means testing Social Security and Medicare. Other supporters like yourself do not in any way want to harm Social Security beneficiaries.

¹Department of the Treasury, "The United States and the Balanced Budget Amendment."
Unfortunately, this amendment inevitably will breach the protective wall around Social Security and make means testing more likely.

Congress has acted with fiscal prudence in the financing of the Social Security trust funds. The surplus in 1994 will be $60 billion. Balancing the budget with the Social Security surplus compromises the Social Security trust fund, making it less likely rather than more likely that this money will be there when it is needed.

Borrowing will not be counted as a government receipt under this amendment. Borrowing is how the government finances its deficit. The Senate Committee report explains, however, that money borrowed from Social Security "should be included in receipts." The National Committee has warned the public that this is what the government has been doing, but never has it been so explicitly stated.

National Committee members are not blind to economics and demographics. They are as aware as you, Mr. Chairman, of the need for responsible decision making regarding the future role of Social Security in meeting the nation's retirement income needs. But our members believe in and support the concept of Social Security benefits as an earned right. They want to know that the program will be there for their children and grandchildren. And they are deeply concerned at the ever-recurring threats of delayed or cancelled COLAS and predictions of imminent collapse that has so undermined their children and grandchildren's faith in the system.

Confidence in the future of Social Security can be restored by open and informed discussion followed by any changes found necessary. If the program is to fill its current role, former Social Security Commissioner Robert Ball and Henry Aaron

2Committee on the Judiciary, United States Senate, "Balanced Budget Constitutional Amendment: Report together with additional views to accompany S. J. Res. 41" (S. Report 103-163), p. 12.
of Brookings Institution believe a modest payroll tax increase in 2025 is sufficient. Other voices suggest further increases in the age for full retirement benefits or modest adjustments in the ratio of benefits to pre-retirement earnings. These are issues that should be thoughtfully debated in a public forum such as the hearings and deliberations of the quadrennial Social Security Advisory Commission. If the Balanced Budget Constitutional Amendment is passed, it is much more likely that decisions to reduce the Social Security COLA will be made in a conference committee to pay for disaster relief or another worthy cause.

This is not idle rhetoric or fear mongering. Social Security pays its own way. It does not belong on the same table as other government expenditures. Yet if the balanced budget amendment becomes a part of the Constitution and general revenue taxes and general revenue spending are not in balance, the weight of meeting the shortfall could fall on Social Security. Social Security would be on the chopping block with every other program or project in the budget to meet the constitutional mandate that the budget be balanced.
Testimony of Rep. Joe Kennedy (D-MA)
Constitution Subcommittee
Senate Judiciary Committee

Mr. Chairman, I want to thank you for holding these important hearings on the Balanced Budget Amendment. This is the type of open discussion we must have if we are to get our nation on the permanent path to prosperity.

Much of the debate on the Balanced Budget Amendment has centered around two basic issues:

First, opponents say the Amendment is just a gimmick for a gutless Congress to circumvent their responsibility. These opponents claim that the Amendment will not only fail to bring down the federal deficit, it also allows the Congress to take meaningless action without making any of the tough, real world decisions necessary to bring the budget into balance.

Second, liberal Democrats who are most concerned with protecting the poor and working people of this country fear that the Balanced Budget Amendment will hurt the very programs that benefit these Americans most.

Both arguments, though appealing, are dead wrong.

There's been much attention focused on the President's successful deficit reduction efforts -- $500 billion in deficit reduction, over 100 programs eliminated, hundreds more cut back, and a much more equitable tax system.

I applaud the President and I supported him.

But let no one think we are getting close to a balanced budget.

Even the President readily admits this. In fact, over the next four years the President's own budget projections show we will add about $750 billion to the national debt over the next several years.

Why is this bad? What does borrowing from one generation for spending on another really mean?

Perhaps on the face of it, this seems harmless enough. But if you peel back the facade, this is not only bad economics, it is one of the greatest acts of immorality in the nation's history. We are borrowing from our children so that we can live in greater luxury today. We are sacrificing their future standard of living simply to elevate our own. This is shameful.

So, why can't we just pass a budget that balances our books?
The answer is simple. All of us have plans to cut the deficit. But any proposal needs 218 votes in the House of Representatives and 51 votes in the Senate.

My package to increase taxes on the wealthy, cut defense spending and some wasteful domestic programs would not get 218 votes. Nor would conservative Republicans' proposals to cut spending for poor and working people without raising any taxes on the rich muster the necessary majority.

Any compromise in between is too politically painful for many members of Congress to act on without being thrown out of office.

So, many of us offer a plan and vote for budget cuts, but no cuts are ever made. We go home and posture to the press about all the cuts we voted for, knowing all the while that nobody is being forced to make any sacrifices. A balanced budget amendment, far from being a gimmick, will put an end to these gimmicks.

With regards to the argument that the Balanced Budget Amendment will hurt the poor and working families of this country — they have been hurt more by the huge run-up in the debt and continuing deficit spending of the past twelve years than any other group in America.

In a decade when defense spending skyrocketed and middle class entitlements (for which beneficiaries pay too little in comparison to their benefits) spun out of control, the real budget winner has been interest payments on the debt, which increased by about 90%.

Who pays makes these interest payments?

For the past ten years the working people of America paid an increasing share of their incomes in taxes while the richest 5% of Americans saw their relative tax rates fall. This means that it is the working people and the poor people of this country that are paying a disproportionately large share of the interest on the debt.

This is no different than going to a bank to get a mortgage — the bankers or investors are making money off of the borrowers.

In the mean time, funding for most non-entitlement domestic programs have been level at best and, in many cases such as housing, education, and crime, actually been reduced.

It is far past the time when we must have an open and honest debate in the Congress on how we will balance the budget. But without the foundation of a balanced budget amendment, the debate will go on forever without any results.

I believe it is time for a change. I believe it is time to balance the budget. And I believe it is time to ask the American people to give the resolve their elected officials need so that we can create the incentive to have an open, honest, and clear debate about our priorities in this nation.
If we do, I am confident that Americans will question why we are still spending over $3 billion for Star Wars, $2 billion for another Seawolf submarine, and why our defense budget is $30 billion larger than the defense budgets of all 15 NATO allies, Japan, and Russia combined. They will question why better-off Americans are getting more from social security than they ever paid in.

Rather than shrink from this debate, Mr. Chairman, I welcome it.

Again, Senator, I thank you for all your efforts on this important issue. I look forward to working with you in the future.
BALANCED BUDGET CONSTITUTIONAL AMENDMENT

OCTOBER 21 (legislative day, OCTOBER 13), 1993.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT
together with

ADDITIONAL VIEWS

[To accompany S.J. Res. 41]

The Committee on the Judiciary, to which was referred the bill (S.J. Res. 41) to propose an amendment to the Constitution relating to a Federal balanced budget, having considered the same, reports favorably thereon, and recommends that the bill do pass.

CONTENTS

I. Purpose ......................................................... 1
II. Legislative history ....................................... 2
III. Discussion ................................................. 4
IV. Vote of the committee .................................... 6
V. Text of S.J. Res. 41 ........................................ 6
VI. Section-by-section analysis .............................. 7
VII. Cost estimate .............................................. 13
VIII. Regulatory impact statement ........................ 14
IX. Additional views of Mr. Biden ....................... 15
X. Changes in existing law ................................ 18

1. PURPOSE

The Balanced Budget Constitutional Amendment sets forth, in the Nation's government document, the basic principle that the Federal Government must not spend beyond its means. This principle, Thomas Jefferson once said, is of such importance "as to place it among the fundamental principles of government. We should consider ourselves unauthorized to saddle posterity with our
debts, and morally bound to pay them ourselves.” Thomas Jefferson’s words ring true today. The discipline imposed by a balanced budget amendment may be the only way to avoid leaving future generations of Americans with an overwhelming legacy of debt.

II. LEGISLATIVE HISTORY

In 1936, Representative Harold Knutson of Minnesota proposed the first constitutional amendment to balance the budget (H.J. Res. 579, 74th Cong.). This proposal would have established a per capita limitation on the Federal public debt. Since that time, numerous constitutional provisions have been proposed to require a balanced budget.

S.J. Res. 41 derives from work begun in the Senate Judiciary Subcommittee on the Constitution in the 96th Congress. Throughout 1979 and early 1980, the subcommittee held a series of hearings across the country—eight in total—on the subject of a balanced budget amendment. Senators Hatch, Thurmond, DeConcini, Hefflin, and Simpson introduced S.J. Res. 126, which was reported out of the subcommittee on December 18, 1979, by a vote of 5 to 2. On March 15, 1980, the full Committee on the Judiciary defeated S.J. Res. 126 by a vote of 9 to 8.

The same principal sponsors reintroduced S.J. Res. 126 in the 97th Congress as S.J. Res. 58. During the early part of 1981, the subcommittee held four additional days of hearings. On May 6, 1981, the subcommittee voted 4 to 0 to report out the amendment, but only after adopting an amendment in the nature of a substitute offered by Senator Hatch. On May 19, 1981, the full Committee on the Judiciary favorably reported S.J. Res. 58 by an 11-to-5 vote.

On July 12, 1982, the Senate began consideration of S.J. Res. 58. On August 14, 1982, following the adoption of a package of amendments by Senators Domenici and Chiles and the acceptance of an amendment by Senators Armstrong and Boren, the Senate passed S.J. Res. 58 by a 69-to-31 vote. This marked the first time either House of Congress had approved such a measure.

On October 1, 1982, following a successful discharge petition effort, the House of Representatives considered H.J. Res. 350, the House counterpart to S.J. Res. 58. Although a substantial majority of the House voted in favor of the amendment, the 236-to-187 margin fell short of the necessary two-thirds vote.

In the 98th Congress, the Subcommittee on the Constitution held 2 days of hearings of S.J. Res. 5. On March 15, 1984, the subcommittee approved S.J. Res. 5 by a 4-to-1 vote and referred the measure to the full committee. On September 13, 1984, following the adoption of an amendment offered by Senator DeConcini, the full Committee on the Judiciary approved S.J. Res. 5 by a vote of 11 to 4. However, the full Senate did not vote on the measure before the 98th Congress came to a close.

S.J. Res. 13 was introduced by Senator Thurmond on the first day of the 99th Congress. Following a hearing, the Subcommittee on the Constitution held a markup of S.J. Res. 13 on May 15, 1985, at which the subcommittee adopted as amendment in the nature of a substitute offered by Senator Thurmond, and then approved S.J. Res. 13, as amended, by an unanimous 5-to-0 vote. After considering S.J. Res. 13 during May, June, and July, the full Judiciary Committee reported it favorably on July 11, 1985, by a vote of 11 to 7. At the same time, the committee approved S.J. Res. 225, a simplified proposed amendment introduced by Senators Thurmond, Hatch, DeConcini, Hefflin, and Simon, by a vote of 14 to 4.

On March 25, 1986, the Senate defeated S.J. Res. 225 by a vote of 68 to 34, thus failing to achieve the constitutional two-thirds requirement by a single vote.

In the 100th Congress, the Subcommittee on the Constitution held hearings on S.J. Res. 11, S.J. Res. 112, and S.J. Res. 116, on March 23, 1987. On May 25, 1988, the subcommittee approved S.J. Res. 11, with an amendment in the nature of a substitute, by a vote of 3 to 2, and reported the measure to the full Committee on the Judiciary. The committee considered S.J. Res. 11 in a markup session on August 10, 1988, but no action was taken.

In the 101st Congress, Senator Simon chaired a hearing on S.J. Res. 2, S.J. Res. 9, and S.J. Res. 12 on July 27, 1989, before the Subcommittee on the Constitution. On the same day, Senator Simon introduced, and the subcommittee approved, S.J. Res. 183, which incorporated ideas from each of the other three bills. By a vote of 4 to 2, the subcommittee reported S.J. Res. 183 to the full Committee on the Judiciary.

On June 14, 1990, the committee accepted an amendment in the nature of a substitute offered by Senators Simon, Thurmond, DeConcini, Hatch, and Hefflin, and then approved S.J. Res. 183, as amended, by a vote of 11 to 3. Following a successful discharge petition effort, the House of Representatives considered H.J. Res. 268, the House counterpart to S.J. Res. 183, on July 17, 1990. The House fell seven votes short of the two-thirds majority required to approve the constitutional amendment, failing by a vote of 279 to 150. S.J. Res. 183 did not come before the full Senate for consideration in the 101st Congress.

In the 102d Congress, S.J. Res. 18 was introduced by Senator Simon on January 14, 1991. The measure, identical to the bill reported out of the full committee in the previous Congress, was originally sponsored by Senators Thurmond, DeConcini, Hatch, Hefflin, Simpson, and Grassley. Senator Specter also became a co-sponsor.

The Subcommittee on the Constitution, chaired by Senator Simon, reported S.J. Res. 18 favorably to the full Committee on the Judiciary by a vote of 4 to 2, on March 8, 1991. S.J. Res. 5, a similar measure introduced by Senator Specter, was also reported out.

On May 23, 1991, the communities adopted, by a vote of 10 to 4, an amendment to S.J. Res. 18 offered by Senator Hefflin regarding military conflict. The committee then approved S.J. Res. 18, as amended, by a vote of 11 to 3. S.J. Res. 5, amended to include a three-fifths vote requirement for tax increases, was defeated by a vote of 6 to 8.

On June 9, 1992, after a series of procedural votes, the House of Representatives took up S.J. Res. 290, a balanced budget proposal introduced by Representative Stenholm. After extensive negotiations among key House and Senate sponsors, a bicameral, bipartisan, consensus version of the bill was submitted as a substitute amendment. On final passage, the vote in favor of the amendment was 280 to 153, nine votes short of the two-thirds necessary for
adoption. Following this defeat, Senate leaders stated that they would not call up S.J. Res. 18 before the full Senate. Accordingly, the Senate did not vote on S.J. Res. 18 during the 102nd Congress.

S.J. Res. 41 was introduced into the 103rd Congress by Senators Simon and Hatch on February 4, 1993. The measure is virtually identical to the bicameral, consensus proposal hammered out during the summer of 1992. Twenty-one Senators joined Senator Simon and Senator Hatch as original sponsors, including Senators DeConcini, Thurmond, Helfin, Craig, Moseley-Braun, Grassley, Kohl, Brown, Daschle, Cohen, Bryan, Pressler, Shelby, Bennett, Mankiewicz, Smith, Campbell, Kempthorne, Graham, Nickles, and Lugar. In addition, Senators Murkowski, Gregg, Chafee, Feinstein, Warner, Simpson, Robb, Boren, Bingaman, Jeffords, and Roth subsequently joined as cosponsors.

On March 16, 1993, Senator Paul Simon chairman a hearing on S.J. Res. 41 before the Subcommittee on the Constitution. In addition to Senators Thurmond, Graham, Craig, and Danforth, those testifying included James Davidson, National Taxpayers Union; Pro. David Callao, Johns Hopkins University; Kenneth Ashby, Utah Farm Bureau Federation; Kent Colton, National Association of Home Builders; Max Sawicky, Economic Policy Institute; Rudy Oswald, AFL-CIO; and Robert Greenstein, Center on Budget and Policy Priorities. Soon after the hearing, the subcommittee reported the measure favorably to the full committee by a vote of 4 to 2.

On July 22, 1993, the Senate Committee on the Judiciary approved S.J. Res. 41 by a vote of 15 to 3, the largest margin of any balanced budget amendment yet reported out of the Committee on the Judiciary.

III. DISCUSSION

While Congress has the ability to balance the Federal budget, it lacks the discipline to make the difficult, but necessary, decisions. The national debt is now over $4 trillion, over three times what it was 10 years ago. Although persistent deficits threaten the Nation's long-term prosperity, the Federal Government has shown itself unwilling or unable to act in a fiscally responsible way. The search for popular, painless ways to limit deficit spending has proved to be futile. A balanced budget amendment to the Constitution may be the only way to provide the fiscal discipline the Nation desperately needs.

Interest on national debt

Gross interest on the national debt is now the second largest expenditure in the entire budget—higher than defense spending. Interest payments are the fastest growing item in the budget. Up from $75 billion in fiscal year 1980, this year the Federal Government will spend an estimated $295 billion on interest, an increase of nearly 400 percent. Even controlling for inflation, interest payments have grown by over 95 percent during the past 12 years. By 1994, Social Security and interest payments on national debt will account for more than social security payments as the single largest government expense.

Every day, the Government throws away over $800 million on interest payments. None of this money goes toward education, health care, or the battle against drugs and crime. Spending more and more on interest leaves fewer and fewer resources to spend on the goods and services needed to address other, serious problems facing the Nation.

Furthermore, interest payments work to redistribute income in the wrong direction. The money for these payments comes out of the pockets of taxpayers, primarily low- and middle-income families. These same working families are also burdened by the high interest rates that the deficit sustains. On the other end of the scale are the more fortunate and well-off, who can afford to invest in Treasury bonds and receive high interest payments. Increasingly, these payments are going overseas, to wealthy investors in other countries.

Statutory efforts

Critics of the balanced budget amendment argue that Congress does not need a constitutional amendment to balance the budget; Congress can achieve that goal statutorily, right now, without waiting to ratify a constitutional amendment. Technically, these arguments are, of course, correct. The balanced budget amendment provides no new authority to cut spending or raise revenues. However, recent efforts have shown that Congress does not have the will to balance the budget.

The Federal Government has not run a budget surplus in 25 years; the last one was in 1969. And that is the only time in 30 years that we have achieved a balanced budget. Enacting responsible budgets is not easy. While a spending program often has a particular constituency that strongly supports it, the general interest in restricting spending is diffuse.

Statutory efforts to balance the budget previously have failed because it is too easy for Congress simply to change its mind and rescind its previous declarations. Statutory efforts are vulnerable to change of heart or a weakening of resolve. Deficit reduction targets in such legislation can be continually changed, and the legislation can be several years in operation before the budget must be balanced. An amendment to the Constitution forces the Government to live within its means. S.J. Res. 41 requires a balanced budget by 1999 or 2 years after the amendment is ratified by the States, whichever is latest.

Implementation and enforcement

S.J. Res. 41 contains the flexibility that an amendment to the Constitution must have. It does not prescribe a particular mechanism that Congress must employ in order to achieve a balanced budget. Instead it leaves political decisions to the political system. The amendment contemplates that Congress will execute its responsibilities under the amendment through the exercise of its currently existing authority. The Constitution already empowers Congress to do what is necessary to implement the balanced budget amendment. Section 8 of article I grants Congress the power “[t]o make all Laws which shall be necessary and proper for carrying [the Constitution] into Execution.” Furthermore, members of Congress are required by article VI generally to “support this Constitution” while the President is required by article II, section 1, clause 7, to “preserve, protect, and defend the Constitution.”
The committee expects fidelity to the Constitution, as does the American public. Both the President and Members of Congress swear an oath to uphold the Constitution, including any amendments thereto. Honoring this pledge requires respecting the provisions of the proposed amendment. Flagrant disregard of the proposed amendment's clear and simple provisions would constitute nothing less than a betrayal of the public trust. In their campaigns for reelection, elected officials who flout their responsibilities under this amendment will find that the political process will provide the ultimate enforcement mechanism.

It is the committee's view that: (1) the language and the intent of S.J. Res. 41 are clear; (2) Congress and the President are to abide by this language and intent; and (3) where necessary, Congress is to enact legislation that will better enable the Congress and the President to comply with the language and intent of the amendment.

The experience in the States

In contrast to Federal fiscal policies, continued deficit spending by the states has been a rarity. More States incur general surpluses than incur general deficits. Forty-eight States have constitutional provisions limiting their ability to incur budget deficits. While there are significant differences in the problems and resources that the State and Federal Governments face, the state experience is nonetheless instructive. The constitutional constraints have proven to be workable in the states and have not inhibited their ability to perform their most widely accepted functions. Because it has been required, State legislatures have learned to operate effectively within the external limitation of their constitutions.

Conclusion

A balanced budget amendment steers a disciplined course which protects our future economic strength and national standard of living. Both flexibility and a strong mandate are needed for a fiscally responsible path for our Nation. Senate Joint Resolution 41 provides both these elements. A constitutional balanced budget amendment can serve as a moral and legal beacon to guide the nation in the fundamental choices of governance.

IV. VOTE OF THE COMMITTEE

On July 22, 1993, with a quorum present, the Committee on the Judiciary, by a vote of 15 to 3, ordered the bill, S.J. Res. 41, favorably reported.

V. TEXT OF S.J. RES. 41

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States to require a balanced budget

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of

the several States within 7 years after its submission to the States for ratification:

"ARTICLE

"Section 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote.

"Sec. 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a rollcall vote.

"Sec. 3. Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year, in which total outlays do not exceed total receipts.

"Sec. 4. No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a rollcall vote.

"Sec. 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law.

"Sec. 6. The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts.

"Sec. 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.

"Sec. 8. This article shall take effect beginning with fiscal year 1999 or with the second fiscal year beginning after ratification, whichever is later."

VI. SECTION-BY-SECTION ANALYSIS

Section 1

The core provision of Senate Joint Resolution 41 is contained in section 1, which establishes as a fiscal norm the concept of a balanced Federal budget. This section mandates that "Total outlays for any fiscal year shall not exceed total receipts for that year * * *"

The section does not specify the process that Congress must follow in order to achieve a balanced budget. The committee recognizes that there may be many equitable means of reaching that goal; it is therefore not the committee's intent to dictate any particular fiscal strategy upon the Congress. Rather, the committee expects the Congress to use its full range of legislative powers in order to comply with the amendment.

Section 1 also contains an exception; the balanced budget requirement applies ** * unless three-fifths of the whole number
of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote. This provision preserves Congress' flexibility and capacity to respond to economic crises without sacrificing accountability.

It is the intent of the committee that the Congress and the President, pursuant to legislation or through exercise of their powers under the first and second articles of the Constitution, shall ensure that outlays do not exceed receipts for a fiscal year. This neither anticipates nor requires any alteration in the balance of powers between the legislative and executive branches, but merely imposes an additional responsibility upon each, to be fulfilled through the exercise of existing authorities.

"** * * *" is intended as a term defined by statute and, as such, is to have no constitutional standing independent from its statutory definition. The amendment does not require an immutable definition; other fiscal years could be defined without necessarily straining the intent of the amendment.

"* * * shall not exceed ** * * *" is a clear mandate: a command. It means that outlays may not be greater than receipts for any given fiscal year. Receipts may exceed outlays.

"** * * unless three-fifths ** * *" identifies the minimum proportion of the total membership of each House needed for action by the Congress. Under current law, three-fifths of the Senate membership is 60, and three-fifths of the House of Representatives is 261. Vacancies would reduce the minimum majority.

"** * * the whole number of each House ** * *" is intended to be consistent with the phrase "the whole number of Senators" in the twelfth amendment to the Constitution, denoting the entire membership of each individual House of Congress in turn.

"** * * for a specific excess of outlays over receipts ** * *" means that the maximum amount of deficit spending to be allowed must be clearly identified. The committee intends that the vote to permit deficit spending be limited to the issue of such a deficit. By forcing Congress to identify and confront any particular deficit, this clause will promote accountability.

"** * * rollcall vote."

Section 2 provides that "The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a rollcall vote." Section 2 works in tandem with section 1 to enforce the balanced budget requirement.

Section 2 focuses public attention on the magnitude of government indebtedness. To run a deficit, the Federal Government must borrow funds to cover its obligations. Section 2 removes the borrowing power from the Government, unless three-fifths of the total membership of both Houses votes to raise the debt limit. As a result, whenever the Government exceeds the debt ceiling, it runs a theoretical risk of default, a powerful incentive for balancing the budget. The committee expects that the three-fifths vote to increase borrowing will be the exception, not the norm.

Votes to suspend the balanced budget requirement under section 1 and to raise the debt-ceiling under section 2 need not be made separately. The committee recognizes that, in certain cases, both decisions could be approved together, in one piece of legislation, by the required three-fifths vote.

"** * * the limit on the debt ** * *" assumes the establishment of a new statutory limit on the measure of government indebtedness. This limit may be established in addition to, or as a replacement for, any present statutory limit on the debt held by the public.

"** * * debt of the United States held by the public ** * *" is a widely used and understood measurement tool. The General Accounting Office, in its "Glossary of Terms Used in the Federal Budget Process" (Exposure Draft, January 1993) defines "Debt Held by the Public" as "That part of the gross federal debt held outside the Federal Government. This includes any Federal debt held by individuals, corporations, State or local governments, the Federal Reserve System, and foreign governments and central banks. Debt held by Government trust funds, revolving funds, and special funds is excluded from debt held by the public." The current, accepted meaning of "debt ** * * held by the public" is intended to be the controlling definition under this Article.

Section 3

Section 3 requires that "Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the U.S. Government for that fiscal year, in which total outlays do not exceed total receipts."

This section reflects the committee's belief that sound fiscal planning should be a shared governmental responsibility. The section is not intended to grant the President additional formal authority or power over budget legislation or spending. It is the committee's expectation that, charged with like responsibilities, the President and the Congress will more readily collaborate in fiscal planning.

"Prior to each fiscal year ** * *" is intended to ensure that the President transmits a budget proposal before the first day of the statutory fiscal year.

"** * * the President shall transmit to the Congress ** * *" is intended to impose on the President a constitutional duty to communicate to the Congress a proposed budget that is balanced. Article II enumerates several duties currently required of the President, including delivering the State of the Union address, receiving foreign ambassadors, and commissioning Officers of the United States. It is the committee's belief that this new duty similarly merits Constitutional status.

"** * * a proposed budget ** * * in which total outlays do not exceed total receipts." is intended to require a responsible proposal that should anticipate a level of outlays no greater than the level of receipts. Such a proposal necessarily requires a projection of future events. The committee anticipates good faith on the part of the President with respect to projected economic factors.
Section 4

By requiring approval "* * *" by a majority of the whole number of each House by a rollcall vote for any "bill to increase revenue * * *" section 4 improves congressional accountability for revenue measures.

"* * * bill to increase revenue * * *" is intended to include those measures whose intended and anticipated effect will be to increase revenues to the federal government.

"* * * by a majority of the whole number of each House by a rollcall vote." is intended, like similar provisions in Section 1, to identify the minimum proportion necessary to approve the relevant measure. Here the requirement is a majority. The terms relating to "the whole number of each House" and "rollcall vote" are intended to have the same meaning as in Section 1.

Section 5

This section, as amended, guarantees that Congress will retain maximum flexibility in responding to clear national security crises such as a declared war or imminent military threat to national security.

"* * * may waive * * *" is intended to provide Congress with discretionary authority to operate outside of the provisions of this article in the event of declarations of war. The waiver specified in the first sentence of this section would require a concurrent resolution of Congress, but would not have to be submitted to the President for approval.

"* * * the provisions of this article * * *" is intended to refer primarily to sections 1, 2, 3, and 4 of the amendment. The Congress may waive any or all of these provisions.

"* * * declaration of war * * *" is intended to be construed in the context of the powers of the Congress to declare war under article 1, section 8. The committee intends that ordinary and prudent preparations for a war perceived by Congress to be imminent would be funded fully within the limitations imposed by the amendment, although Congress could establish higher levels of spending or deficits for these or any other purposes under section 1.

"* * * for any fiscal year * * *" is intended, in the first sentence of this section, to require a separate waiver of the provisions of the amendment each year. Congress may not adopt a waiver resolution which applies to more than one fiscal year. Rather, Congress must annually adopt a separate waiver for the fiscal year in question.

"The provisions of this article * * *" in the second sentence has the same meaning as in the first sentence of this section. See above.

"* * * may be waived * * *" is intended to provide Congress with discretionary authority to operate outside of the provisions of this article in the event the United States is engaged in certain kinds of military conflict. The waiver specified in the second sentence of this section would require a joint resolution rather than a simple concurrent resolution of Congress.

"* * * for any fiscal year * * *" in the second sentence has the same meaning as in the first sentence of this section. See above.

"* * * is engaged in military conflict * * *" is intended to limit the applicability of this waiver to situations involving the actual use of military force, which nonetheless do not rise to the level of a formal declaration of war.

"* * * imminent and serious military threat to national security * * *" is intended to define those situations in which Congress, in order to respond to urgent national security crises with additional outlays for the defense of the nation, needs more flexibility than the three-fifths vote requirement in Section 1 would provide.

"* * * so declared by a joint resolution * * *" which becomes law." is so declared by a joint resolution, rather than a simply or concurrent resolution, and to specify that the resolution must be enacted into law before it can be effective for the purposes of this section.

"* * * a majority of the whole number of each House of Congress * * *" has the same meaning as the similar provision in Section 4. See above.

Section 6

Section 6 states that "[the Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts." This section makes explicit what is implicit, that Congress has positive obligation to fashion legislation to enforce this article.

Section 6 underscores Congress' continuing role in implementing the balanced budget requirement. The provision precludes any interpretation of the amendment that would result in a shift in the balance of powers among the branches of government.

The Congress shall enforce and implement * * * creates a positive obligation on the part of Congress to enact appropriate legislation to implement and enforce the article. This section recognizes that an amendment dealing with subject matter as complicated as the federal budget process must be supplemented with implementing legislation.

"* * * which may rely on estimates of outlays and receipts." confirms that Congress has the authority to use reasonable estimates, where appropriate, as a means of achieving the normative result required in section 1. "Estimates" means good faith, responsible, and reasonable estimates made with honest intent to implement section 1, and not evade it.

This provision gives Congress an appropriate degree of flexibility in fashioning necessary implementing legislation. For example, Congress could use estimates of receipts or outlays at the beginning of the fiscal year to determine whether the balanced budget requirement of section 1 would be satisfied, so long as the estimates were reasonable and made in good faith. In addition, Congress could decide that a deficit caused by a temporary, self-correcting drop in receipts or increase in outlays during the fiscal year would not violate the article. Similarly, Congress could state that very small or reasonable deviations from a balanced budget would not represent a violation of section 1. If an excess of outlays over receipts were to occur, Congress can require that any shortfall must be made up during the following fiscal year.
Section 7

Section 7 is intended to clarify further the relevant amounts that must be balanced.

* * * total receipts * * * is intended to include all moneys received by the Treasury of the United States, either directly or indirectly through Federal or quasi-Federal agencies created under the authority of acts of Congress, except those derived from borrowing. In present usage, "receipts" is intended to be synonymous with the definition of "budget receipts", which are not meant to include offsetting collections or refunds.  

* * * except those derived from borrowing * * * is intended to exclude from receipts the proceeds of debt issuance. To borrow is to receive money with the intention of returning the same or equivalent. It is intended that those obligations the title to which can be transferred by the present owner to others, like Treasury notes and bonds, be excluded from receipts. Contributions to social insurance programs, though also carrying an implied obligation, are not transferable and should be included in receipts.

* * total outlays * * * is intended to include all disbursements from the Treasury of the United States, either directly or indirectly through Federal or quasi-Federal agencies created under the authority of acts of Congress, and either "on-budget" or "off-budget", except those for repayment of debt principal.

Among the Federal programs that would not be covered by S.J. Res. 41 is the electric power program of the Tennessee Valley Authority. Since 1959, the financing of that program has been the sole responsibility of its own electric ratepayers—not the U.S. Treasury and the Nation's taxpayers. Consequently, the receipts and outlays of that program are not part of the problem S.J. Res. 41 is directed at solving.

* * * except for those for repayment of debt principal." is intended to exclude from outlays the repurchase or retirement of Federal debt. Debt principal is intended to be distinguished from interest payments, which are not excluded from outlays, and refers to a capital sum due as a debt.

Section 8

This section states that the amendment will take effect some specified time after it is adopted, so as to allow Congress a period to consider and adopt the necessary procedures to implement the amendment, and to begin the process of balancing the budget.

* * * beginning with fiscal year 1999 * * * states that, once ratified, the amendment will go into effect no earlier than fiscal year 1999.

* * * or with the second fiscal year * * * provides that the amendment will go into effect 2 years after ratification by the states, so long as that period is later than 1999.

* * * its ratification * * * is intended to be construed as ratification of this article under article V of the Constitution.

VII. COST ESTIMATE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, DC, October 21, 1993.

HON. JOSEPH R. BIDEN, JR.,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S.J. Res. 41, a joint resolution proposing an amendment to the Constitution relating to a federal balanced budget as ordered reported by the Senate Committee on the Judiciary on July 22, 1993.

S.J. Res. 41 would propose an amendment to the Constitution to require that total outlays of the United States for any fiscal year not exceed total receipts for that year, unless the Congress approves a specific excess of outlays over receipts by a three-fifths vote in each House. The proposed budget submitted by the President would have to be balanced as well. The amendment also would require a three-fifths vote in each House to raise the limit on federal debt held by the public. Such provisions could be waived for any fiscal year in which a declaration of war is in effect or in which the United States is engaged in military conflict that causes an imminent and serious military threat to national security. The amendment would have to be ratified by three-fourths of the states within seven years of its submission for ratification, and would take effect beginning with fiscal year 1999 or the second fiscal year after its ratification, whichever is later.

The impact of this amendment is very uncertain, because it depends on when it takes effect and the extent to which the Congress would exercise the discretion provided by the amendment to approve budget deficits. The earliest the amendment could take effect would be for fiscal year 1999.

The Congress could choose to eliminate the deficit by reducing spending, by increasing revenues, or by some combination of the two. Under CBO's September 1993 baseline projections, the deficit in fiscal year 1999 will be 2.7 percent of the gross domestic product (GDP). If the amendment takes effect and the Congress chooses to balance the budget by reducing outlays, total outlays in 1999 would have to be reduced by about 12 percent to not to exceed revenues. Such a reduction would result in total outlays of about 19 percent of GDP. If, on the other hand, the Congress were to choose to maintain baseline spending levels and to eliminate the deficit by raising revenues, a revenue increase of about 14 percent would be required in 1999. The Congress could choose any one of many combinations encompassing both revenue increases and outlay reductions totaling 2.7 percent of GDP. The changes required in 1999 would be smaller if steps were taken to reduce the deficit in earlier years.

This resolution would not directly affect spending or receipts, so there would be no pay-as-you-go scoring under section 253 of the Balanced Budget and Emergency Deficit Control Act of 1985.

Enactment of this legislation would result in no significant direct cost to state and local governments.
If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER, Director.

VIII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the Senate Joint Resolution 41 will not have direct regulatory impact.

IX. ADDITIONAL VIEWS OF MR. BIDEN

For years we have watched Federal debts spiral to new levels, adding hundreds of billions of dollars annually to our national debt. The financial record of our Government—our own record as public officials—is not one of which we can be proud.

Over the years, we have tried numerous methods for restoring balance to our Federal budgets. All of them have disappointed, raising false hopes and in the end only adding to the cynicism that is now a real threat to our democracy. Of all the deficits created by our reckless budget policies, the declining faith in Government—indeed, in our country's future—may well be the worst.

But we know that deficits hurt us in more tangible ways, as well. They absorb our scarce savings we need for crucial investments in our people and our technology to meet the demands of the new global economy. We will grow more slowly in the future for lack of investment today.

Deficits have also tied our legislative process in knots. While they have gradually forced us to reconsider our priorities, deficits also threaten to sacrifice long-range policy goals to short-term budget savings. Much of the work before us now requires a clear view of the investments we must make for the future. In the grip of huge deficits, we may find ourselves neglecting the future to improve the bottom line today.

So our search for a cure for the deficit disease continues. No one has been more dedicated or persistent in this search than my good friend from the State of Illinois. Senator Simon has been a bulldog on this issue from his first days in the Senate. Once again, he brings before us his proposal for an amendment to the Constitution to prohibit Federal deficits.

Two years ago, when we considered an earlier version of this proposal, I stated my reservations about this approach. Despite my conviction that the deficit problem is every bit as serious as its author claims, I am not entirely convinced that this is the solution we seek. Let me briefly restate those reservations and mention two new points, one raised by a new provision in the proposed amendment, and another raised by what I believe may well be new reason for cautious optimism about the course of federal deficits.

S.J. Res-41 prohibits outlays that exceed receipts, in language that some could argue gives the President the power to impound funds already appropriated by Congress. The crucial separation of powers written into our Constitution, that gives preeminence to the Congress in the appropriations process, would be thrown into doubt with this new constitutional language.

This consideration leads to another: in the absence of any guidance on enforcement, which side would prevail in a dispute between Congress and the Executive on such an issue? Would our budget process be thrown into the courts on this and other ques-
tions? Constitutional scholars, including Lawrence Tribe, are convinced this would be the inevitable result of a constitutional mandate on Federal finances.

Another concern I have is that while we all agree that deficits pose a real threat to the current and future financial health of our country, a balanced budget is only a means by which we hope to achieve other goals. In the face of natural disasters, oil embargoes, and other unpredictable events, our budgets may be thrown out of balance despite the best efforts and estimates.

In addition to the question of how to enforce this amendment in the case of such events, do we really want to restrict ourselves to tax increases or spending cuts during periods of unexpected economic slowdown? Attempts to balance the budget under those conditions may slow the economy even more, requiring additional taxes or spending cuts to meet the constitutional mandate, generating a spiral of self-defeating policies.

As I remarked when we considered an earlier version of this proposal, I am particularly concerned that Social Security and other trust funds, needed to meet future obligations, would be put back on budget, masking the real extent of our annual operating deficits. I supported the removal of Social Security from our operating budget, which is the driving force behind our annual deficits. I see no reason to reverse that decision now, much less to write that reversal into the Constitution.

In addition, S.J. Res. 41 contains a new provision that I find troubling. Section 2 requires a three-fifths majority of the whole number of each House to approve an increase in the national debt. It seems to me that this grants to two-fifths plus one of the members of one House the power to shut down the Government. Control of the decision to pay the legal obligations of the Federal Government could be used to extract concessions from majorities in both Houses and the President.

As my colleagues know, extension of the national debt is not an option, nor a choice to permit further undisciplined spending. Extension of the national debt is needed because unbalanced spending has already occurred and must be paid for by authorizing the sale of additional Treasury notes. Failure to extend the debt is tantamount to not paying one's credit card debt when it comes due, in the name of fiscal prudence.

I find it particularly troubling that we would grant—through a change in the Constitution—to a small minority the power to shut down the Government under the pretense of a false economy.

Finally, I think that it is appropriate to note that for the first time in over a decade, since our national debt began to grow faster than our economy, we have reason to hope that the deficit disease may be easing. Recently both the Congressional Budget Office and the Office of Management and Budget have released projections for future deficits that suggest current budget policy is a real first step toward fiscal sanity.

Both estimates show Federal deficits shrinking as a percentage of our economy from around 5 percent now to half that in 1998. I hasten to add that the deficit picture becomes more threatening after that time, unless we bring entitlement spending, particularly health care costs, under control. But again, we are beginning to take the first steps necessary toward difficult choices that health care cost control will require.

We know that current fiscal policy, by reducing the impact of Federal spending on the economy, will have the effect of slowing down economic activity in the short term. Defense cutbacks provide the most dramatic evidence of the effects of current policies. Communities and industries that supported our country's fight during the Cold War will face serious dislocations as a result of the new role for the United States in the world. Cutbacks in other areas will create similar difficulties.

Under these circumstances, we cannot take for granted that any action toward reducing the deficit will be beneficial to our nation's people and industries. Deficit reduction is the means by which we hope to take control over our economic future. We would not want to turn our priorities upside down, sacrificing real economic progress to the goal of balancing our books.

While a balanced budget amendment to the Constitution may be the only way to keep us on the path toward responsible budgeting, we have taken a few steps down that path already, without the risk of upsetting 200 years of finely balanced constitutional powers among the three branches of our Government.

Despite these reservations, I will vote to send S.J. Res. 41 to the floor of the Senate, where this important issue can have the full hearing that it clearly deserves.
X. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the committee finds no changes in existing law caused by passage of Senate Joint Resolution 41.
<table>
<thead>
<tr>
<th>Issue</th>
<th>H.J.Res.1, Barton-Tauzin Tax Limitation Amendment (Contract with America Version)</th>
<th>H.J.Res.28 Stenholm-Schaefer Consensus Amendment</th>
<th>Analysis of Differences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requirement for balance (Section 1 of both amendments)</td>
<td>Requires Congress and the President to enact a statement of receipts and outlays that is in balance before the fiscal year. A vote of 3/5 of both Houses would be necessary to authorize a specific excess of outlays over receipts in the statement. Congress could revise the statement, provided that revised outlays did not exceed revised receipts. Congress and the President are required to ensure that actual outlays to not exceed the estimated outlays set forth in the statement.</td>
<td>Total outlays may not exceed total receipts. A vote of 3/5 of both Houses would be necessary to authorize a specific excess of outlays over receipts.</td>
<td>The Barton-Tauzin version does not require that actual outlays be balanced against actual receipts, but simply requires that a statement showing a balance of outlays and receipts be enacted at the beginning of the year. Although the amendment directs Congress and the President to ensure that actual outlays do not exceed the estimated outlays in the statement, there is no provision requiring that the estimated receipts in the statement match actual receipts. The government would not be able to spend any funds until a statement for that fiscal year is enacted. The Stenholm-Schaefer version requires a balance of actual outlays against actual receipts. The government could spend funds so long as outlays did not exceed receipts. No additional funds could be spent at the point in which actual outlays would exceed actual receipts.</td>
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<td>Issue</td>
<td>Barton-Tauzin</td>
<td>Stenholm-Schaefer</td>
<td>Analysis of differences</td>
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<td>Tax limitation (Section 4 of H.J.Res 28</td>
<td>A vote of 3/5 of both Houses would be necessary to pass any <em>&quot;bill to increase</em></td>
<td>Requires <em>&quot;a majority of the whole number of each House&quot;</em> on a recorded vote</td>
<td>The Barton-Tauzin version would require a 60 percent supermajority to increase receipts. The term receipts includes all cash accounts of the federal government, including taxes, user fees, Medicare premiums, etc.</td>
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<td>Section 2 of H.J.Res. 1)</td>
<td>*receipts&quot;.</td>
<td>pass any <em>&quot;bill to increase revenues&quot;</em>.</td>
<td>The Stenholm-Schaefer version would require a Constitutional majority (218 in the House, 51 in the Senate) to pass a tax increase. This will make it more difficult to enact tax increases than it is under current law. Unlike the Barton-Tauzin version, this supermajority requirement would not apply to non-tax receipts legislation.</td>
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<td>Debt limit (Section 2 of H.J.Res.28,</td>
<td>The <em>&quot;Federal public debt&quot;</em> would be fixed at its level on the second fiscal</td>
<td>A 3/5 vote of both Houses would be necessary to increase the <em>&quot;limit on the</em></td>
<td>Both versions set a hurdle of a 3/5 vote to increase the debt limit as a penalty and deterrent for allowing total outlays to exceed total receipts. However, the limit on the <em>&quot;Federal public debt&quot;</em> included in the Barton-Tauzin amendment does not directly correspond to the balance between outlays and receipts. The Federal public debt includes government securities held by Federal trust funds, including Social Security. Every surplus dollar credited to the Social Security trust fund or other trust funds is an additional dollar of public debt. By setting a permanent limit on the Federal public debt, the Barton-Tauzin amendment would require a 3/5 vote to increase the debt limit not only when outlays exceed receipts, but whenever the Social Security trust fund runs a surplus as well. The limit on the <em>&quot;debt held by the public&quot;</em> included in the Stenholm-Schaefer amendment increases as a consequence of deficit spending and the related increases in the cost of servicing the debt. The debt held by the public does not include securities held by the Social Security trust fund.</td>
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<td>Section 6 of HJ Res. 1)</td>
<td>year after ratification. A 3/5 vote of both Houses would be necessary to raise</td>
<td><em>debt of the United States held by the public&quot;</em></td>
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<td>the limit after that point.</td>
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<td>Stenholm-Schaefer</td>
<td>Analysis of differences</td>
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<td>President's budget (Section 3 of both amendments)</td>
<td>President would be required to submit a statement of receipts and outlays that is in balance prior to each fiscal year.</td>
<td>Prior to each fiscal year, the President would be required to submit a &quot;budget for the United States Government for that fiscal year in which total outlays do not exceed receipts.&quot;</td>
<td>The President could meet his obligation under Section 3 of the Barton-Tauzin amendment by submitting a one line statement of receipts and outlays for the fiscal year. The President could submit a full budget that includes outlays much higher than receipts along with a Constitutionally mandated statement recommending that outlays be brought in line with receipts. The Stenholm-Schaefer amendment would require the President to submit a complete budget plan that is in balance.</td>
</tr>
<tr>
<td>Use of estimates (Section 6 of HJ Res 28, Section 1 of HJ Res 1.)</td>
<td>Requires that a statement of receipts and outlays be enacted into law before the beginning of a fiscal year, which would require the use of estimates.</td>
<td>Section 8 provides that Congress may rely on estimates in enforcing and implementing the amendment. However, Section 1 of the amendment requires that actual outlays be balanced against actual receipts.</td>
<td>Congress by necessity would be required to use estimates under Barton-Tauzin, and it could -- and presumably would -- use estimates under the Stenholm-Schaefer amendment. Congress and the President would have to rely on estimates to enact the statement of receipts and outlays before the beginning of the fiscal year required under Barton-Tauzin. Congress and the President would be required to agree on the budget estimates to use in the statement and balance estimated outlays against estimated receipts in the statement. Congress would be required to ensure that actual outlays not exceed estimated outlays in the statement, but there is no provision requiring that actual receipts match estimated receipts in the statement. The Stenholm-Schaefer amendment contemplates that Congress may choose to use estimates in planning budgets and measuring compliance with the requirement that actual outlays not exceed actual receipts. Whether or not Congress chooses to utilize estimates in the budget process, the Stenholm-Schaefer amendment requires that actual outlays be balanced against actual receipts.</td>
</tr>
<tr>
<td>Issue</td>
<td>Barton-Tauzin</td>
<td>Stenholm-Schaefer</td>
<td>Analysis of differences</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Waiver for war or threat to national security</td>
<td>The amendment would be waived in case of a declared war. Congress could waive the amendment by a Constitutional majority if the United States &quot;faces an imminent and serious military threat to national security.&quot;</td>
<td>The amendment would be waived in case of a declared war. Congress could waive the amendment by a Constitutional majority if the United States &quot;is engaged in a military conflict which causes an imminent and serious military threat to national security.&quot;</td>
<td>The Barton-Tauzin amendment provides a significantly broader national security exception than the Stenholm-Schaefer amendment does. The Stenholm-Schaefer amendment requires that the U.S. must be engaged in a military conflict before Congress could vote to waive the amendment, while the Barton-Tauzin amendment would allow Congress to vote to waive the amendment if the U.S. faces a military threat. Congress could vote to waive the amendment in circumstances that did not involve active engagement in a military conflict.</td>
</tr>
<tr>
<td>Definitions (Section 7 of HJ Res 28 Section 5 of HJ Res 1)</td>
<td>Defines receipts as all receipts of the federal government except those derived from borrowing and defines outlays as all outlays except those for the repayment of debt principle.</td>
<td>Defines receipts as all receipts of the federal government except those derived from borrowing and defines outlays as all outlays except those for the repayment of debt principle.</td>
<td>No difference.</td>
</tr>
<tr>
<td>Enforcement (Section 7 of HJ Res 28 Section 8 of HJ Res 1)</td>
<td>Directs Congress to implement and enforce amendment through legislation.</td>
<td>Directs Congress to implement and enforce amendment through legislation, which may use estimates.</td>
<td>No difference except language on estimate (see above)</td>
</tr>
<tr>
<td>Roll call votes (Sections 1, 2 and 4 of HJ Res 28; Section 7 of HJ Res 1)</td>
<td>Requires that all votes taken under this article shall be roll call votes.</td>
<td>Requires a roll call vote to authorize outlays in excess of receipts, increase the debt limit, and increase taxes.</td>
<td>In addition to requiring roll call votes to authorize deficit spending, increase the debt limit and increase taxes as the Stenholm-Schaefer amendment would, the Barton-Tauzin amendment would require roll call votes on legislation implementing and enforcing the amendment. This potentially could include spending cuts or other votes within the budget process.</td>
</tr>
<tr>
<td>Effective date (Section 8 of HJ Res 28 Section 9 of HJ Res 1)</td>
<td>Fiscal year 2002 or two years after ratification, whichever is later</td>
<td>Fiscal year 2002 or two years after ratification, whichever is later</td>
<td>No difference.</td>
</tr>
</tbody>
</table>
FULL TEXT OF BILLS

104TH CONGRESS; 1ST SESSION
IN THE SENATE OF THE UNITED STATES
AS PLACED ON THE SENATE CALENDAR

H. J. RES. 1

1995 H.J. Res. 1; 104 H.J. Res. 1

SYNOPSIS:
JOINT RESOLUTION Proposing a balanced budget amendment to the Constitution of the United States.

DATE OF INTRODUCTION: JANUARY 4, 1995

DATE OF VERSION: JANUARY 28, 1995 — VERSION: 4

SPONSOR(S):
Sponsor not included in this printed version.

TEXT:

IN THE SENATE OF THE UNITED STATES

JANUARY 27 (legislative day, JANUARY 10), 1995
Received; read twice and placed on the calendar

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JOINT RESOLUTION
Proposing a balanced budget amendment to the Constitution of the United States.

* 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, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission to the States for ratification:

"ARTICLE-

"SECTION 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote."
"SECTION 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a rollcall vote.

"SECTION 3. Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year in which total outlays do not exceed total receipts.

"SECTION 4. No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a rollcall vote.

"SECTION 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law.

"SECTION 6. The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts.

"SECTION 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.

"SECTION 8. This article shall take effect beginning with fiscal year 2002 or with the second fiscal year beginning after its ratification, whichever is later."


Attest:

ROBIN H. CARLE,
Clerk.*

Calendar No. 18

104TH CONGRESS
1ST SESSION

H. J. RES. 1

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JOINT RESOLUTION
Proposing a balanced budget amendment to the Constitution of the United States.

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JANUARY 27 (legislative day, JANUARY 10), 1995
Received; read twice and placed on the calendar
Calendar No. 16

104TH CONGRESS
1ST SESSION

S. J. RES. 1

Proposing an amendment to the Constitution of the United States to require a balanced budget.

IN THE SENATE OF THE UNITED STATES

JANUARY 4, 1995

Mr. DOLE (for himself, Mr. HATCH, Mr. SIMON, Mr. THURMOND, Mr. HEP-LIN, Mr. CRAIG, Ms. MOSELEY-BRAUN, Mr. BROWN, Mr. KOHL, Mr. SIMPSON, Mr. GRASSLEY, Mr. SPECTER, Mr. KYL, Mrs. FEINSTEIN, Mr. NICKLES, Mr. MURKOWSKI, Mr. BRYAN, Mrs. HUTCHISON, Mr. EXON, Mr. SHELBY, Mr. CAMPBELL, Mr. SMITH, Mr. COHEN, Mr. PRESSLER, Mr. GREGG, Mr. GORTON, Mr. ASHCROFT, Mr. BURNS, Mr. MCCONNEL, Mr. INHOFE, Mr. GRAMM, Mr. LOTT, Mr. DEWINE, Ms. SNOWE, Mr. ROTH, Mr. LUGAR, Mr. BOND, Mr. THOMAS, Mr. COVERDELL, Mr. SANTORUM, Mr. GRAMS, Mr. MACK, and Mr. WARNER) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JANUARY 23 (legislative day, JANUARY 10), 1995

Reported by Mr. HATCH, without amendment

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to require a balanced budget.

1 Resolved by the Senate and House of Representatives

2 of the United States of America in Congress assembled

3 (two-thirds of each House concurring therein), That the fol-
lawing article is proposed as an amendment to the Consti-
tution, which shall be valid to all intents and purposes
as part of the Constitution when ratified by the legisla-
tures of three-fourths of the several States within seven
years after the date of its submission to the States for
ratification:

"ARTICLE—

"SECTION 1. Total outlays for any fiscal year shall
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from borrowing. Total outlays shall include all outlays of
the United States Government except for those for repay-
ment of debt principal.

"SECTION 8. This article shall take effect beginning
with fiscal year 2002 or with the second fiscal year begin-
ning after its ratification, whichever is later."
Calendar No. 16

104TH CONGRESS  
1ST SESSION  

S. J. RES. 1

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to require a balanced budget.

JANUARY 23 (legislative day, JANUARY 10), 1995

Reported without amendment
Pages 91-114 INTENTIONALLY DELETED
THE FOLLOWING PAGES HAVE BEEN INTENTIONALLY DELETED:

36-46
115-149
312-327
TOWARD CONSTITUTIONAL DEMOCRACY:
AN AMERICAN PERSPECTIVE

A. E. Dick Howard*

In recent years I have had the privilege of sitting at the elbows of constitution-makers in countries seeking to lay the foundations of constitutional liberal democracies in those countries. Some years earlier, I cut my teeth in the art of constitution-making when I was involved in the drafting of Virginia's present state constitution. I have also consulted with other American states seeking to revise their constitutions. But no experience has been so instructive as watching constitutions take shape in the context of other lands and cultures.

This experience in comparative constitutionalism has drawn me to ask questions about the extent to which one country can assist in, or make judgments about, another country's constitutional journey. How well do constitutional ideas travel, especially across the boundaries of different cultures or legal systems? Are there universal values by which the relative success of a constitutional system may be measured? Or, as some people argue, must constitutions ultimately be grounded in a country's culture, history, traditions, and circumstances? For Americans, there is the specific question: What relevance does the American constitutional experience have for other countries?

I. THE EXPERIENCE OF CENTRAL AND EASTERN EUROPE

To sharpen these questions, consider the experience of the countries of Central and Eastern Europe. After the collapse of communism, each of those countries set out to write new constitutions and to design institutions thought

* White Burkett Miller Professor of Law and Public Affairs and Roy L. and Huntington Woodruff Morgan Research Professor of Law, University of Virginia. Professor Howard has consulted with constitution-makers in a number of countries, especially in post-Communist Central and Eastern Europe. The text of this statement was prepared at the request of Congress at a joint hearing on "Constitutionalism, Human Rights, and the Rule of Law in Iraq," held by subcommittees of the Senate Committee on Foreign Affairs and on the Judiciary in Washington, D.C., on June 25, 2003. See Constitutionalism, Human Rights, and the Rule of Law in Iraq: Joint Hearing Before the Subcommittees on Near Eastern and South Asian Affairs of the Senate Comm. on Foreign Relations and the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Senate Comm. on the Judiciary, 108th Cong. 68-74 (2003). The original statement had no notes. At the request of the Journal's editors, the author has prepared the notes that appear with the text.

to promote constitutional liberal democracy. Drafters in those countries (Poland, Hungary, etc.) had several sources on which they could draw in devising new constitutions.

(1) In some cases they could look back to their own indigenous sources and experience. For example, Poles recall the traditions of constitutionalism associated with the memorable Constitution of May 3, 1791.2 Hungarians have a strong tradition of the rule of law, having 's roots as early as the Golden Bull of 1222.3 But such traditions are often fragmentary and remote. Few countries in Central and Eastern Europe had any extended experience with either constitutionalism, democracy, or the rule of law before 1989 (Czechoslovakia's vibrant democracy between the world wars was a notable exception).4

(2) Countries in Central and Eastern Europe have been able to look—and have looked—to the experience of Western Europe. Western Europe is, of course, the seat of much of the core of modern constitutional democracy (such as the teachings of the Enlightenment), but also the sources of many of our basic constitutional principles (such as the separation of powers). Moreover, constitutionalism, democracy, and the rule of law have taken hold in manifest ways in Western Europe since World War II. Germany, rising from the ashes of World War II, has become an admirable example of constitutional democracy.5 Spain, moving beyond the legacy of Franco, has become in every respect a modern European state.6 With these and other examples to study, drafters in Central and Eastern Europe have fashioned constitutional systems that in many obvious ways are modeled upon Western Europe. For example, Germany's Constitutional Court has proved the inspiration for the creation of constitutional courts throughout Central and Eastern Europe.7


7 For an admirable account of the importance of constitutional courts in Central and Eastern Europe, see Herman Schwartz, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE (2006).
(3) International norms and documents are an important source for constitution-makers in post-communist Europe, just as they are in other parts of the world. Especially this is true in giving shape and protection to human rights. Thus drafters look to such international documents as United Nations conventions and to regional arrangements such as the European Convention on Human Rights and OSCE’s Helsinki and Copenhagen documents. Also, it is common for post-communist constitutions to state that international law and agreements shall be domestic law within a country.9

(4) One would suppose that constitution-makers in Central and Eastern Europe would study the experience of their neighbors in the region. Especially might this seem helpful when these countries have shared many of the problems of the post-communist world, such as the destruction of civil society during the communist era, the stabilizing effects of command economies, and the cynicism about public life that was spawned by those years.10 It is my impression, however, that drafters in the region have not cared much to study their nearest neighbors’ experience. This may partly be a consequence of historic enmities in the region. But it may also underscore the powerful pull of western models, especially in light of the pervasive wish of countries in Central and Eastern Europe to ‘join’ the family of Europe, in particular, to become members of the European Union.11

(5) Has the post-communist world looked to the American experience and to American ideas and models? A superficial look at new constitutions in the region might suggest that American influence has been slight. Throughout Central and Eastern Europe, one sees, for example, parliamentary systems rather than an American-style congressional system, presidential systems which look more to Western Europe (such as France) rather than to the United States, and constitutional courts resembling that of Germany rather than an American-style Supreme Court.12 The question of American influence—whether in post-communist Europe or in other countries (such as Iraq)—requires, however, a deeper inquiry than this superficial survey might suggest.

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8 For a comprehensive collection of such documents, see the University of Minnesota Human Rights Library (visited Dec. 4, 2003), http://www1.umn.edu/humanrts/.
9 See, e.g., CZECH REP., CONST. art. 1, art. X; HUNG. CONST. art. L, art. VII.
11 See id. at 66-67.
II. THE INFLUENCE OF AMERICAN CONSTITUTIONALISM: AN HISTORICAL PERSPECTIVE

The American revolutionary period was a time of remarkable innovation and accomplishment. Aware of their special place in history, the Founders shaped such ideas as federalism, separation of powers, judicial review, and other concepts that have proved to be among the core principles of modern constitutionalism, not only in the United States, but in many other countries as well.13 American society differed in important ways from that of Europe; there was, for example, no monarchy and no legally entrenched social order.14 Even so, Europeans followed with fascination the evolution of American constitutionalism from the revolution, through the making of the Constitution, and beyond.15

For two centuries and more, there has been intense traffic in constitutional ideas between America and other lands. Highlights of those exchanges include the following.

The founding era in France and America. The French Revolution, in 1789, brought close French attention to American ideas. Benjamin Franklin, immensely popular in Paris, undertook to spread news of what was happening in America, as did his successor, Thomas Jefferson.16 The Virginia Declaration of Rights (1776) influenced the drafting of France’s Declaration of Rights of Man and the Citizen (1789).17 When the French National Assembly debated France’s first constitution, both moderate and radical factions invoked examples drawn from the experience with American state constitutions, especially Massachusetts and Pennsylvania.18 Ultimately, French constitutional development took a markedly different course from that of America, but it is instructive that in many ways it was America’s founding documents that helped frame the debates in France.

18 On the debates in the French National Assembly, including references to the American constitutional experience, see id. at 489-502.
Liberalism in the nineteenth century. In the early decades of the nineteenth century, liberal reformers in Europe and in South America invoked the United States as proof that liberal democracy could survive and flourish. When the revolutions of 1848 broke out in Europe, conventions meeting in France and Germany frequently dissected American institutions in deciding what a liberal constitution might look like in Europe. By this time, Tocqueville’s Democracy in America had heightened interest in the American experience, especially federalism and judicial review. Germany’s Paulskirche Constitution, drafted in Frankfurt, was not in fact implemented, but its principles, building in part on American ideas (e.g., federalism and constitutional review), have reappeared in Germany’s Basic Law of 1949. In South America, the age of Bolivar brought constitutions that were often modeled heavily on the United States Constitution. South American soil was, however, not yet fertile for such transplant, and these experiments were largely failures.

Political evangelism in the early twentieth century. When the United States acquired the Philippines as a result of the Spanish-American War, President McKinley described American policy as “benevolent assimilation.” These plans included gradual development of self-government, the creation of a system of public education, and the transfer of American legal ideas. The Constitution adopted in 1935 owed much to American influence but drew upon other traditions as well. In 1946 the Philippines became independent.

The most famous effort to export American ideas in the early twentieth century was, of course, President Woodrow Wilson’s aim, with the allied

21 See id.
26 The basis for the transfer of sovereignty was the Tydings-McDuffie Act, Pub. L. No. 127, 48 Stat. 94 (1934).
viscory in World War I, to "make the world safe for democracy." Wilson did not think that other countries had to adopt an American-style constitution. But he did emphasize self-determination, free elections, the rule of law, individual rights, and an independent judiciary. The most successful democracy to rise from the ashes of World War I was Czechoslovakia, whose leading founder, Thomas Masaryk, had spent part of the war in the United States, working hard to influence American policy.

**Japan and Germany after World War II.** After the Japanese surrender in 1945, General Douglas MacArthur moved promptly to secure the drafting of a new constitution. Concerned that the Japanese elite, left to their own devices, would make little substantial change from the status quo, MacArthur instructed his military government to draft a constitution, which they did in a matter of days. Debate still continues, especially among Japanese politicians and scholars, over the extent to which the Constitution of Japan was imposed or has become in fact Japanese. By the time drafting got underway on what became Germany's Basic Law of 1949, the Cold War was beginning to dominate American foreign policy. The occupying allied powers had a say, of course, in shaping German post-war policy. But, with the Americans and their allies seeing the Soviet Union as the greater threat, the Germans had a freer hand in the Basic Law's drafting. There are important ways in which the Basic Law has principles familiar to Americans, such as federalism and judicial review. But the 1949 document

31 As early as 1912, Wilson had declared his commitment to the spread of democracy abroad. See THOMAS J. KNOX, TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER 14 (1992).
37 See KOMMER, supra note 5, at 25-45, 205-23.
owes much to Germany's own constitutional tradition, including the
Paulskirche Constitution of 1849.\footnote{See Haubold, supra note 20.}

Waves of democratization in the latter decades of the twentieth century:
The spread of constitutional democracy, and the rule of law came in waves in the closing decades of the twentieth century. The 1970s saw autocratic governments yield to democracy in Mediterranean countries—Greece, Portugal, and Spain.\footnote{On the transition in southern Europe, see JUAN J. LINÉS AND ALFRED STEPHAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSTITUTIONALIZATION IN SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EURASIA (1996), THE NEW MEDITERRANEAN DEMOCRACIES: REGIONAL TRANSITION IN SPAIN, GREECE, AND PORTUGAL (Jeffrey Podhoretz ed., 1984).} Spain's 1978 Constitution is especially important as a model for other post-authoritarian countries.\footnote{On the making of Spain's 1978 Constitution, see BONHEUR-BLANC, supra note 6.} Attention shifted to South America in the 1980s, notably to Argentina and Chile.\footnote{On the making of Chile's constitution, see Francisco Rubio Lerner, THE WRITING OF THE CONSTITUTION OF CHILE, IN CONSTITUTION MAKING IN CONSTITUTION MAKING: THE EXPERIENCE OF EIGHT NATIONS 239 (Robert A. Goldwin & Art Kudisman eds., 1988).} The great year was 1989—the year the Berlin Wall came down and communism collapsed all over Central and Eastern Europe.\footnote{See Edgardo Boevinger, Latin America's Multiple Challenges, In CONSOLIDATING THE THIRD WAVE: DEMOCRACIES 26 (Larry Diamond et al. eds., 1997).} The shock waves also hit South Africa, where the apartheid regime fell, and a new constitution came into effect in 1996.\footnote{The structure on post-communist Central and Eastern Europe is rich. THOMAS D. AUSTIN, JR., THE MAGIC LANTERN: THE REVOLUTION OF '89 WITNESSED IN WARSZAWA, BUDAPEST, BERLIN, AND PRAGUE (1992), is a classic account of the events of 1989. FREDERICK QUINN, DEMOCRACY AT DARWIN NOTES FROM POLAND AND POINTS EAST (1988), is rich in personal insight. For a magisterial analysis of constitution-making in the region, see LIU, supra note 5. DEVELOPMENTS IN CENTRAL AND EASTERN EUROPEAN POLITICS 2 (Stephen White et al. eds., 1998) contains useful country-by-country surveys.} American assistance to constitution-making and democratization in such places as post-communist countries has been underscored both by public and private bodies. Typically the aid has taken the form of technical assistance, such as helping parliaments to update their processes, nurturing an independent judiciary, and assisting in the drafting of new constitutions and laws. An especially effective program is the American Bar Association's Central and Eastern European Law Initiative (now the Central European and Eurasian Law Initiative), which has sent hundreds of experts to work in scores of countries.\footnote{See Peter N. Boudreau, The Negotiated Revolution: South Africa's Transition to a Multinational Democracy, 33 STAN. J. INT'L L. 375 (1997); HELEN DREYFUS, THE ROLE OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA (1998).} Often the efforts of American advisors have been paralleled by

\footnote{For information on the Central European and Eurasian Law Initiative, see its page on the ABA's website, http://www.abanet.org/cerefl/. CEDTI's quarterly updates are posted on this page.}
advice and assistance from European governments and bodies, such as the Council of Europe’s Venice Commission.

III. THE PLACE AND RELEVANCE OF THE AMERICAN CONSTITUTIONAL EXPERIENCE

When other countries write constitutions and set out to shape a constitutional regime, of what relevance is the American constitutional experience? What follows are arguments that lead some to conclude that the American experience is of limited value in other countries and cultures.

(1) Constitutionalism must be understood as an expression of culture. Few would argue with this proposition if it is advanced as a caveat, namely, that one should always take culture into account in thinking about constitutions and constitutionalism. But some observers take the argument further, contending that there are no “universal” elements of constitutionalism. For example, by this view, community or group rights could be valued above individual rights.

(2) American constitutionalism was the result of Enlightenment assumptions, steeped in British constitutionalism, and shaped in the historical settings of America. Some argue, therefore, that the teachings of American constitutionalism cannot be exported to other cultures. Such arguments often cite the failure of Latin American constitutions based on the U.S. model and more recent problems in places such as the Philippines.

(3) Even those who think the American experience is relevant and useful find limits in the United States Constitution as a model for foreign crafters. The document was written in the eighteenth century, reflects the insights of that era, and has required formal amendment (notably the post-Civil War amendments) and extensive judicial interpretation and gloss. Much of the American jurisprudence of rights results from judicial gloss rather than from the explicit constitutional text (for example, the process of “incorporation”

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41 See the Venice Commission’s website, at www.venice.coe.int/als/conventions/conv.html.
doctrine by which guarantees of the Bill of Rights are applied to the states).41 Also, the United States Constitution is, in a sense, an incomplete document, in that its framers assumed the existence and function of the states and therefore of state constitutions (documents which in many ways are rather more like constitutions in other countries).42

All of these observations have force and ought to be taken into account, especially before assuming that what has worked in America must surely work for other peoples. But the problems of comparative constitutionalism ought not to be turned into categorical barriers. The usefulness of the American experience does not lie in the formal text of the United States Constitution. It is to be found in the general principles that are reflected in American constitutionalism and, further, in the practical experience of making constitutional democracy work.

Many of the most basic ideas in American constitutionalism reflect norms that furnish at least presumptive value elsewhere. Examples include the following:

(a) Federalism. Formal federalism, as charted by the Constitution, may or may not be appropriate in other countries. Federalism, however, is a system that has many variants and is found in one form or another around the world. Federalism and its cousins (such as devolution) are associated with values of pluralism, diversity, and local choices about local problems. Such arrangements may be especially important to defuse conflicts of nationality or ethnicity.43

(b) Separation of powers. This principle, celebrated by Montesquieu and refined by Madison, is a way of achieving limited government—one of the ultimate guarantees of individual rights. In its historical uses, it has been employed to counter the tendency of such doctrines as popular sovereignty and legislative supremacy to become arbitrary or tyrannical.44

(c) Judicial review. Various devices have been used in an effort to keep a constitution's promises. These include popular will, separation of powers, and legislation. In the modern world, however, constitutions increasingly look to

41 Much has been written on the extent to which the Constitution should be accompanied by recourse to an original understanding of the document. For an historical perspective, see Jack N. Rakove, Interpreting the Constitution: The Debate over Original Intent? (1990) and Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1995). For a survey of the contemporary debate, see Calvin Helman, Originalism and Interpretivism: Conventions, 70 U. Chi. L. Rev. 519 (2003).


44 For a classic treatise, see M.J.C. Vile, Constitutionalism and the Separation of Powers (1967).
judicial review as a key means to enforce constitutional norms.\textsuperscript{49} John Marshall's insights in \textit{Marbury v. Madison}\textsuperscript{50} have become a familiar part of constitutionalism around the world. One may well suggest that no American contribution to constitutionalism has been more pervasive or important than this one. These ideas and principles are complemented by the practical experience of making American democracy work. Many countries have entered the age of constitutional democracy with little or no experience with such concepts as constitutionalism, democracy, and the rule of law. For example, for a half-century the countries within the sphere of Soviet domination lived in a domain cut off from any such concepts. Thus, American or other advisors can bring the fruits of hands-on experience in organizing political parties, conducting free and fair elections, nurturing a free and responsible press, creating an independent judiciary, and instilling the values of citizenship through civic education.

IV. FACTORS BEARING ON THE PROSPECTS FOR CONSTITUTIONAL LIBERAL DEMOCRACY

It is not enough that a society be democratic. It must also be liberal and constitutional. Democracy seeks to assure that government is based upon the consent of the governed and is accountable to the people. But democracies should also be liberal—that is, committed to individual rights and freedoms, to the Lockean principle that the state depends on the individual, not the other way around.\textsuperscript{51} And democracies must also be constitutional—that is, there must be means to assure the enforcement of constitutional norms, even when that means negating a majoritarian judgment.\textsuperscript{52}

What are some of the factors bearing upon the prospects for the success of constitutional liberal democracy? Each person might draw up his or her own list, and one might debate the relative place and weight of each factor. But a list of factors would likely include at least the following. Note that the list goes well beyond those factors that can be incorporated into the text of a constitution.\textsuperscript{53}

\textsuperscript{49} See generally MARIO CAPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (1989); ALLAN-RANDOLPH BRENNER, CAESAR, JUDICIAL REVIEW IN COMPARATIVE LAW (1989).
\textsuperscript{50} 1 Cranch 137 (1819).
\textsuperscript{52} See Walter F. Murphy, Constitutions, Constitutionalism, and Democracy, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 1 (Douglas Greenberg et al. eds., 1993).
\textsuperscript{53} For a more comprehensive effort to identify salient factors, written for a meeting in Budapest just
(1) A country should have sufficient military strength, as well as social and economic stability, to counter foreign aggression and to guard against internal subversion or unrest. Strength need not come, of course, solely from the country’s own resources. A country may properly look to its allies, as, during the Cold War, so many democracies (not just weak ones) counted on American support in the event of Soviet aggression.

(2) A vibrant constitutional culture often goes hand in hand with a healthy economy. I do not contend that, because countries are rich, they will necessarily be constitutional democracies. There are countries rich in oil, for example, which one would be slow to characterize as constitutional, liberal, or democratic. But it does seem fair to say that poor economic conditions often work to undermine any hope for constitutional democracy.54

(3) There should be a political culture— I would call it a constitutional culture—which encourages the values of constitutionalism, liberalism, democracy, and the rule of law. This implies a high level of literacy. But it also implies circumstances in which citizens have practiced the norms of cooperation, toleration, and forbearance associated with the fluctuating fortunes of causes, candidates, and parties. It means that those who lose an election turn the reins of power over to the winners. It means that those who find that a victory in the legislative process is overturned on constitutional grounds by a court accept the principle of constitutional limits on government.55

(4) An open society, including free and responsible press and media, is the handmaiden of constitutionalism and democracy. There should be the means for open and effective communication both among the people and between them and their government.56

(5) Civil society should flourish. Private organizations—political parties, trade unions, interest groups, clubs, etc.—create an important buffer between the individual and the state. Such organizations offer a place of refuge for those who think that the politics of the moment are not in their favor. They offer training grounds for the qualities that make for effective citizenship and

after the collapse of communism, see A.E. Dick Howard, The Road to Constitutionalism (1990).

54 See Jan Elster, The Necessity and Impossibility of Simultaneous Economic and Political Reform, in CONSTITUTIONALISM AND DEMOCRACY, supra note 52, at 267.

55 For an eloquent appeal for this kind of political culture, see Václav Havel, Address to the Council of Europe (May 10, 1990), in Václav Havel, Toward a Civil Society: Selected Speeches and Writings, 1990–1994, at 74 (1994).

make possible the kind of collective voice and action that precludes the state’s monopoly of power.  

(6) states should be based on the civic, rather than ethnic or national, principle. That is, all citizens should have equal standing in the society. There should not be “insiders” and “outsiders.” If the state is not largely homogeneous in terms of religion, language, ethnicity, or culture, then there needs to be a widely felt commitment to toleration. To make constitutional liberal democracy work, the people must have a level of mutual trust, and ability to cooperate, rather than fragmenting into camps of hate and hostility.

Ultimately, history, culture, and circumstance will tell us much about the prospects for constitutionalism, democracy, and the rule of law in any country.

Those who hope to see these values prosper in Iraq must understand Iraq itself—its people, its history, its culture. Some factors characterize the region, for example, the argument over the extent to which Islam is, or is not, ultimately compatible with constitutional liberal democracy.88 Other factors flow from Iraq’s own history, for example, the question of whether the parliamentary experience of the Hashemite years before 1958 has any useful legacy, or whether the middle class has been sturdy enough to survive the years of Saddam’s repression.89 Experts on Iraq will help inform these judgments.90 But those who would shape events in Iraq should also consult the lessons to be learned from transitions from totalitarian or authoritarian regimes elsewhere. The road to constitutionalism, democracy, and the rule of law takes one through many lands.

87 One of the most persuasive advocates for the importance of civic society, especially in post-authoritarian countries, has been Vaclav Havel, TOWARD A CIVIL SOCIETY, noting 55.


CONSTITUTIONALISM

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Constitutionalism, as I see it, draws upon several strains in constitutional development. Some of those strains are of centuries' standing, for example, the principles associated with England's Magna Carta or Hungary's Golden Bull. Others flowered during the period of the Enlightenment, shaped by natural law thinking. Yet others are of more modern origin.

Any definition of constitutionalism involves obvious value judgments. In speaking of constitutionalism, I propose the following as benchmarks:

Consent of the governed. One mark of constitutionalism is to establish that government derives from the people and exists by their consent. Virginia's 1776 Declaration of Rights declared: "That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them."\(^1\) Massachusetts' 1780 Constitution framed this principle explicitly in social compact terms, reflecting the influence of John Locke: "The body politic is formed by a voluntary association of individuals. It is a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good."\(^2\)

Consent of the governed, however, requires more than a statement of political theory. The test of constitutionalism at work is whether the constitution establishes genuinely representative institutions, bolstered by the freedom to form political parties, ready access to the ballot, and free and robust debate on public issues.

Two hundred years of American constitutionalism has seen a steady trend to more representative institutions. In the early nineteenth century, state constitutions were revised to enlarge the franchise (for example, doing away with property requirements) and reapportioning state legislatures to reflect population shifts.\(^3\) Consent of the governed in American constitutional law has been further bolstered, in modern times, by the Supreme Court's
requiring that legislative apportionment be based on population ("one person, one vote"), by the
abolition of the poll tax, and by congressional legislation aimed at ending practices
discriminating against black and other minority voters.4

Limited government. If the people are to be government's master and not its servants,
one must take particular account of institution and structure of government. Constitutionalism
pays special attention to preventing power from being concentrated in such a way that it
becomes a threat to individual liberty.

Many observers believe the separation of powers to be an admirable device for checking
the abuse of power. In his Spirit of the Law, Montesquieu declared, "When the legislative and
executive powers are united in the same person, or in the same body of magistrates, there can
be no liberty." Moreover, he said, liberty suffers "if the judiciary power be not separated from
the legislative and executive."5

No feature of American constitutionalism is more distinctive than its reliance on the
separation of powers. Those who, like Jefferson, sought revision of the early state constitutions
seized upon the principle of the separation of powers and, as Gordon Wood has said,
"eventually magnified it into the dominant principle of the American political system."6

The open society. Constitutionalism requires the open society. There must be freedom
to believe what one will, to follow what religious beliefs one chooses, to engage in spirited and
full debate, to weigh competing ideas, to understand the past, take stock of the present, and
imagine the future.

Thomas Jefferson caught the spirit of the open society in drafting the Virginia Statute
for Religious Freedom. Truth, he said, "is great and will prevail if left to herself, that she is
the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless
by human interposition disarmed of her natural weapons, free argument and debate, errors
ceasing to be dangerous when it is permitted freely to contradict them." In the modern
Supreme Court, Justice Brennan's opinion in New York Times v. Sullivan (1964) places him
squarely in the Jeffersonian tradition. Overturning a libel judgment brought by a police
commissioner against the New York Times, Brennan declared a "profound national commitment
to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."
Indeed, he added, public officials must accept attacks that may be "vehement, caustic, and
sometimes unpleasantly sharp."4

Sanctity of the individual. A state's respect for human dignity is one of the measures of
whether constitutionalism is a reality. It is no accident that the Universal Declaration of
Rights, adopted in 1948, speaks of everyone's being equally entitled regarding both rights and
dignity. How a state treats those charged with or suspected of criminal activity may well be as
good a test as any of the status of human dignity in that society. The longest and most
concrete of the provisions of the Bill of Rights of the United States Constitution are those that
spell out protections for the criminal defendant. Some of those guarantees are concerned with
assuring that the fact-finding process is reliable; having counsel, for example, aids the defendant
in bringing to the court's attention all the facts and arguments that might bear on the case.5
But the procedural guarantees in the Bill of Rights are concerned, more fundamentally, with
establishing civilized standards for one's treatment by the state. For example, the privilege
against self-incrimination may well prevent relevant and trustworthy evidence from coming to
the attention of the trier of fact. Yet the Fifth Amendment establishes that one is not obliged
to convict himself out of his own mouth; he can put the state to its evidence.6
The twentieth century has brought into focus another index of the sanctity of the individual: personal privacy and autonomy. Here two powerful constitutional traditions come into tension. One is an atomistic, Lockean view of society in which there are areas presumptively reserved for individual choice. The other tradition sees constitutions as depending upon shared values. The same tension may be found in the long-standing debate over the extent to which law may be used to enforce moral values. The classic statement of the limits of state power over individual conduct appears in John Stuart Mill's *On Liberty* (1859), in which Mill declares that the state may use its power over the individual only where one person's conduct threatens harm to another.\textsuperscript{11} England's Lord Devlin would give the state greater power to enforce society's moral values; he sees them as the "cement of society."\textsuperscript{12}

It is never easy to say just where society's interests may legitimately supersede individual preference. Easy or not, judgments about personal privacy and autonomy are part of the matrix of constitutionalism. Sometimes such protection takes specific form; for example, the Fourth Amendment's prohibition on unreasonable searches and seizures protects one kind of privacy. Privacy and autonomy may take more general form. The Supreme Court of the United States has used the Fourteenth Amendment's due process clause to recognize constitutional protection for such decisions as using contraceptives, deciding to have an abortion, getting married, seeking a divorce, and raising one's children.\textsuperscript{13} Such rights may sometimes be absolute, sometimes qualified.

**The rule of law.** The most famous provision in Magna Carter reads, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."\textsuperscript{14} Magna Carter's assurance of proceedings according to the "law of the land" contains
the seeds of one of the central tents of constitutionalism: the idea of a rule of law, a
government of laws and not according to the caprice or discretion of magistrates.

Where Magna Carta spoke of "law of the land," today we are more likely to invoke the
principle of due process of law. Due process connotes fairness — that the law should not play
favorites. In his argument in the Dartmouth College case, Daniel Webster articulated what has
become the most celebrated, and oft quoted, definition of "law of the land": "By the law of the
land is most clearly intended the general law; a law, which hears before it condemns; which
proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen
shall hold his life, liberty, property, and immunities, under the protection of the general rules
which govern society."

That fairness and impartiality matters in criminal procedure is obvious. But it extends to
civil matters as well. The modern state, whatever its political and economic system, whether it
leans to capitalism or socialism, is today the source of a broad range of entitlements.
Sometimes these have constitutional status, more often they depend on statute or administrative
actions. Even where a benefit is not thought to be a "right," it does not follow as a matter of
course that government should be free to extend or withhold benefits on any grounds it may
see fit. Government licenses, welfare, and other programs are, for many individuals, the very
basis of their daily livelihoods or even existence. Thus the United States Supreme Court, in
1970, ruled that due process required that a welfare recipient be afforded a hearing before his
benefits were terminated. It is especially important that government may not be permitted to
use administrative proceedings as a way of punishing individuals for their political views or for
other forms of unorthodoxy.
A corollary of fairness is equality. Liberty and equality may, at times, seem to be competing principles, at least insofar as one takes "liberty" to imply individualism and "equality" to suggest egalitarianism. But liberty and equality, in general, go hand in hand. More than mere symbolism supports the Fourteenth Amendment's dual command that no state may deny any person life, liberty, or property without due process of law, nor deny any person the equal protection of the laws.

The principle of equality as a component of constitutionalism has special force when applied to government actions making distinctions on account of an individual's race or religion. As early as 1938, even as the United States Supreme Court was withdrawing from an activist role in reviewing economic regulations, Justice Stone hinted, in a footnote, that "more searching judicial inquiry" might be called for where legislation is directed at religious or racial minorities or otherwise proceeds from "prejudice against discrete and insular minorities." In the half-century since that suggestion, the Court has created vast areas of jurisprudence in which the justices have indeed paid special attention to cases of invidious discrimination. Racial distinctions are seen to be "constitutionally suspect"; they trigger "strict scrutiny," a standard usually fatal to any governmental actions distinguishing among people according to their race.

Constitutional bans on racial, religious, or similar discrimination thus carry a special moral force. Brown v. Board of Education (1954) is, of course, important for its ruling that separation of the races in public education violates the Fourteenth Amendment. But Brown carries added meaning because of its moral message. Not only did Brown set the stage for judicial decisions extending Brown's holding to areas other than education, it also fueled the civil rights movement, eventually bringing the first major congressional civil rights statutes since Reconstruction. Brown pricked the nation's conscience, reminding America that the distant
sounds of slavery continue to echo in modern problems of relations among the races.

**Adaptability.** Thomas Jefferson, writing to a friend, said: 22

I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.

How should constitutions, then, be changed? One approach is periodically to rewrite a constitution. Indeed, in the same letter, Jefferson proposed that a constitution be revised periodically, by each new generation. 23 Many of the American states have followed, in effect, Jefferson's advice. The historical practice has varied from state to state. New England states, for example, have tended to less frequent revisions. Other states have rewritten their constitutions several times, especially in the South.

A related mode of constitutional change is constitutional amendment. Two hundred years have seen only 26 amendments added to the federal Constitution, ten of these (the Bill of Rights) having been virtually contemporaneous with the original Constitution. But amendments to state constitutions are common. Indeed, in states that employ the initiative and referendum almost any question may appear on the ballot as a proposed constitutional amendment.

Yet another mode of adapting constitutions to changing times is judicial interpretation. A traditional view of the judicial role holds that a judge's job is simply to lay a challenged law side by side with the Constitution and see whether it squares with that document. But anyone who reads Supreme Court opinions will see just how much organic growth may be found in those judgments. Once again John Marshall pointed the way: "A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can
Those are not the words of one who thinks the judge's function to be a narrowly constricted one.

Examples of change through judicial interpretation are common in American constitutional law. The Fourteenth Amendment, adopted with the immediate historical purpose of protecting the newly freed slaves, has been extended to impose heightened judicial scrutiny of other classifications, such as those based on gender. The Congress that enacted the same amendment may not have "intended" its use to outlaw racial segregation in public schools, but 86 years after the amendment's adoption the Supreme Court held it did just that. In capital punishment cases, there seems near unanimity among the justices, however they rule on the death penalty, that the Eighth Amendment's prohibition on "cruel and unusual punishment" creates an "evolving standard," one that takes on changing form with the passage of time.

A nation may simply write a new constitution when times seem to call for change; France, which in 200 years has had five republics, has had 17 constitutions. Or one may use the amending process, as the American states have done so often. Or judges may interpret, and thus adapt, the basic law. The modes vary, but the central fact is the same: constitutional law is not static.

Enforcement of the Constitution. Writing a constitution is one thing; enforcing it is another. In Hungary's Golden Bull, Andrew II was forced to concede that, if he or any of his successors violated promises made in that charter, the prelates and nobles were free to "resist and withstand" such violation without imputation of high treason -- a jus resistendi. Clumsy and awkward though it was, this provision in the Golden Bull addressed a problem still with us: how to enforce a constitution. What safeguards are there to ensure that constitutionalism is a reality and not simply and empty promise?
During the two centuries since the adoption of the first state constitutions in America and of the Philadelphia Constitution of 1787, several modes of safeguarding constitutionalism have emerged. Some have proved more successful than others. Moreover, the several modes of making reality of the constitution have often operated side by side. To depend upon one mode is not necessarily to exclude the others. Indeed, which mode is used depends in good part upon the nature of the right being asserted.

(1) Popular control of government. Popular sovereignty – the people’s will grounded in Rousseau’s notion of the “general will” – was a powerful force in revolutionary France. As the National Assembly debated the new constitution, French intellectuals were divided on the extent to which democratic institutions should be checked by devices such as a bicameral legislature or an executive veto. If authority be focused in the legislative branch, how would one avoid the legislature’s using its powers in such a way as to undermine the constitution? Condorcet, like Turgot, wanted the nation to be represented in a single assembly. His formula for avoiding tyranny was to have frequent elections and to spell out the people’s rights in a declaration of rights.²⁹

Those who agreed with Condorcet could point, for precedent, to the early American state constitutions, the documents drafted in the 1770’s. The state constitutions often gave lip service to the separation of powers. But, for the most part, in drafting the state constitutions, Americans tended to give expansive power to the legislature and to slight the other two branches. To ensure the safeguarding of the constitution, the framers of the early state constitutions looked to principles of republicanism, in particular, to frequent elections, small electoral districts, frequent turnover in office, and the moral force of the bills of rights. Direct
popular control of government was taken to be the means of protecting constitutional
government and individual rights.\textsuperscript{30}

Such arrangements might well serve as a vehicle for democratic government. But the
defects soon became obvious. What protection would the individual have if, in the passion of
the moment, a legislature enacted a law patently in conflict with the constitution? In particular,
what protection would there be for racial, religious, or other minorities for whom the recourse
to the polls was in reality no safeguard at all?

Thomas Jefferson, ever the keen student of government, saw the defect in the early
state constitutions. Criticizing Virginia's 1776 Constitution, he declared, "All the powers of
government, legislative, executive, and judiciary, result to the legislative body. The
concentrating of these in the same hands is precisely the definition of despotic government. It
will be no alleviation that these powers will be exercised by a plurality of hands, and not by a
single one. 173 Despots would surely be as oppressive as one."\textsuperscript{31}

(2) \textit{Separation of powers}. Virginia's Constitution of 1776 stated the principle of the
separation of powers in language of unprecedented clarity: "The legislative, executive, and
judiciary departments shall be separate and distinct, so that neither exercise the powers properly
belonging to the other: nor shall any person exercise the powers of more than one of them at
the same time."\textsuperscript{32} As other states drafted constitutions, several of them wrote in language
explicitly proclaiming the separation of powers.\textsuperscript{33}

Theory and practice in fact diverged in the early state constitutions. During colonial
times, legislative assemblies had come to exercise a broad range of functions, blurring the
distinction between legislative, executive, and judicial activities.\textsuperscript{34} The drafters of the early state
constitutions tended, as already mentioned, to enhance legislative powers at the expense of the other branches.

The principle of the separation of powers was, all the same, available as a vehicle for reforming the state constitutions by making the three branches more nearly co-equal. Moreover, the state constitutions typically had statements of popular sovereignty, such as that in Virginia's 1776 Declaration of Rights: "That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."35 Once Americans had proclaimed that power derives from the people and that magistrates serve the people, it was easy for reformers to invoke the separation of powers as grounds for enhancing the prerogatives of the executive and judicial power, the better to place a check upon legislative power.

By the time the framers of the federal Constitution went to work in the summer of 1787, the principle of the separation of powers had become firmly established as one of the indicia of American constitutionalism. The federal Constitution does not, in so many words, speak of a separation of powers. The principle is nevertheless an obvious linchpin of the document. Articles I, II, and III speak of legislative, executive, and judicial powers as being "vested" respectively in a Congress, a President, and a Supreme Court and such inferior courts as Congress may establish.

James Madison was the new Constitution's chief architect. In the Federalist No. 47, one of a series of essays written to urge ratification of the Constitution, Madison sought to rebut the charge, leveled by the Constitution's opponents, that the proposed Constitution violated the principle of the separation of powers. Invoking Montesquieu, Madison asserted, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of
one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.\textsuperscript{36}

In fact, there is more to separation of powers than meets the eye. Securing liberty by limiting government's power requires more than simply keeping the branches of government separate. The separation of powers is complemented by the principle of checks and balances. By requiring that, for certain important decisions, one branch must concur in the action of another, the Constitution seeks to curb excessive concentrations of power. Madison said that unless the several branches of government "be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."\textsuperscript{37}

Examples abound of ways in which one branch checks the actions of another. The President may veto a bill which has passed both houses of Congress; they, in turn, can override the veto by a two-thirds vote. The President makes treaties, but they require the advice and consent of the Senate. The President nominates justices to sit on the Supreme Court, but the Senate must approve the appointment.\textsuperscript{38}

(3) Federalism. Participation in government at the local level is an education in citizenship. To execute the laws of a distant government -- even a government for whose legislators one has voted -- is a remote exercise. It is deliberating together, making choices about government policy, that educates the citizen.

Federalism seeks to achieve national unity while also preserving diversity. The federal Constitution and laws place limits, of course, on the extent to which local customs may prevail. But insofar as federalism permits diverse manners and mores to flourish, it encourages idiosyncrasies, experimentation, and self-expression.
Of the values furthered by federalism, perhaps the most basic is that of choice. No value is more basic to self-government. Federalism reinforces this value, and it does so at levels closer to the people, where the consequences of choices are more likely to be seen and to have meaning.

Federalism, in any country, carries within it certain dangers. Countries adopting a federal structure risk devolution that, carried to an extreme, undermines national unity or allows local majorities to deny the rights of racial, religious, or other minorities in their midst. Anyone who has studied American history would be foolish to deny the ills perpetrated by states and localities upon such minorities. But the remedy for such wrongs, under the U.S. Constitution, is judicial enforcement of such constitutional guarantees as the Fourteenth Amendment's equal protection clause and congressional enactments under such provisions as section 5 of the Fourteenth Amendment. Likewise, there are judicial and legislative safeguards against state acts that would prefer local economic interests over the free flow of interstate commerce.39

Once national interests and individual rights have been assured through other constitutional means, federalism remains an important constitutional value. Federalism — like the separation of powers and checks and balances — is one of the structural devices to protect liberty.

(4) Judicial review. Article VI of the federal Constitution states that the Constitution and laws made "in Pursuance thereof" shall be the "supreme Law of the Land." The Constitution does not, however, say just how this precept is to be enforced. Nor could one, by reading the debates in the convention of 1787, prove beyond doubt that the Constitution's framers intended the courts to enforce the Constitution by invalidating inconsistent legislation.
Judicial review soon proved to be an idea whose time had come. In Federalist No. 78, Alexander Hamilton submitted that the courts are "designed to be an intermediary body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." In 1803 came the authoritative judgment in Marbury v. Madison, in which Chief Justice John Marshall declared that "a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." 40

Is judicial review essential to ensuring the Constitution's supremacy? A constitution's drafters might choose, one supposes, to depend entirely on institutional checks and balances, on structure and process, to keep constitutional government on course. An eighteenth-century theorist, seeing the universe in Newtonian terms, might have found this approach attractive, conceiving a constitution to be like a self-regulating machine.

Two centuries' experience has taught us, however, of the singular value of an independent judiciary, free of political pressures, to enforce at least those constitutional provisions -- the bill of rights being the most obvious example -- protecting the individual. The political branches (legislative and executive) might possibly be left to struggle over their respective prerogatives. But leaving individual rights to the political process is surely to negate a central thesis of a constitution's purpose. If such rights as free expression and peaceful assembly are left to the whim of a legislative majority or an executive's discretion, then the bill of rights is nothing more than advice or admonition.

Not every question is appropriate for a court's resolution. Even John Marshall acknowledged the existence of "political questions": "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this
court. Thus judges are reluctant to intervene where war and foreign affairs are concerned. In deferring to the political branches, courts may give various reasons, among them a demonstrable commitment to one of the other branches, the hazards (as in foreign relations) of having the nation seem to speak with more than one voice, or a lack of manageable standards.

One should not suppose that, because a claim involves politics, it will be held to be "political" in the sense of being nonjusticiable. In 1962 the Supreme Court, in *Baker v. Carr*, held that a state's apportionment of seats in the state legislature (challenged on grounds that a vote in one district counted more than that in another) presented a justiciable question. Likewise the Court has struck down state laws that place undue burdens in the path of forming new political parties or of gaining a place on the ballot. The Court has even intervened to rule on a Congressman's challenge to the refusal of the House of Representatives to seat him. Article I, Section 5, of the Constitution states, "Each House shall be the Judge of the . . . Qualifications of its own Members." This, lawyers for the House argued, concluded the matter. But Chief Justice Earl Warren, finding the case to be justiciable, ruled that the House could deny a seat to a member only on one of three grounds (age, citizenship, and residence) set out elsewhere in Article I.

Efforts to have a court declare and enforce social and economic rights run into particular difficulty. A judge enforcing a traditional right, such as free speech, will typically be able to act by way of a negative order, for example, by enjoining an official from taking action that would interfere with the individual's right of expression. But the implementation of social and economic rights typically entails an affirmative decree. The problem of enforcement is especially acute when it would require the court to decide how public funds are to be spent -- which worthy objective is to be preferred in a world in which resources are not infinite. If a
constitution says that everyone shall have a job, what mandate can a court enforce upon a legislature when the underlying problem is a slack economy or an economic depression?

Even in those areas, such as enforcing traditional individual rights, in which courts have an obvious role to play, there are factors that counsel careful consideration of the bounds of judicial activism. The very existence of judicial review creates a tension between two important constitutional principles, each of which is important to constitutionalism. One principle is that of democracy itself; consent of the governed presumes that, in a democracy, the norm will be political decisions made by accountable organs of government. The other principle is the existence of an independent arbiter to enforce the Constitution's terms even against the will of a political majority. Constitutional theory teaches, of course, that, in enforcing the Constitution, a judge is understood to be acting in the name of the people's ultimate will — that the Constitution be the fundamental law. But, in the more immediate context of litigation, judicial review raises tensions that must be understood and reconciled.

Judges are wise, therefore, to keep in mind considerations of the legitimacy of their decisions and the limits of their competence in exercising the power of judicial review. If the courts' decisions can be articulated as resting on discernable and satisfying principles, the chances of those decisions becoming an accepted part of the social fabric are all the greater.

The teaching value of constitutions

Civic education is essential to constitutionalism's health. A people who do not understand the basic precepts of free government are unlikely to keep it alive and vibrant. Constitutionalism thus rests upon a foundation of an aware, informed populace.

Thomas Jefferson understood the connection between an educated people and free government. In his Notes on the State of Virginia, Jefferson described his Bill for the More
General Diffusion of Knowledge (1777). Its ultimate purposes, he said, was "rendering the people the safe, as they are the ultimate, guardians of their own liberty . . . . Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories."

Constitutionalism rests on shared values, on a sense of community. Constitutions, like nations themselves, are not artificial bodies, unconnected to reality. Through their constitution, a people voice their hopes and aspirations.

Virginia's 1776 Declaration of Rights declares: "That no free government, or the blessing of liberty, can be preserved to any people but by . . . a frequent recurrence to fundamental principles." This language speaks, not just to the eighteenth century, but to our time as well.
NOTES


7. 12 Hening's Statutes at Large 84. On the Virginia Statute, see Merrill D. Peterson and


9. The Sixth Amendment provides that an accused shall "have the assistance of counsel for his defence."

10. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself . . . ."

11. When one's conduct "affects the interests of no persons besides himself," Mill contends that "there should be perfect freedom, legal and social, to do the action and stand the consequences." Mill, On Liberty, Chap. IV ("Of the Limits to the Authority of Society over the Individual").


23. Id., p. 43.


27. All nine justices wrote opinions in the seminal capital punishment case, Furman v. Georgia, 408 U.S. 238 (1972).


33. See Constitutions of Georgia (1777), Maryland (1776), Massachusetts (1780), and North Carolina (1776).


36. Federalist No. 47.

37. Federalist No. 48.

38. Article I, Section 7; Article II, Section 2.


40. 1 Cranch (5 U.S.) 137, 179 (1803) (emphasis in original).
41. 1 Cranch at 164.


43. In Baker v. Carr, 369 U.S. 186 (1962), Justice Brennan attempted to identify those factors that would lead the Court to forego review of decisions made by the executive or legislative branches.

44. 369 U.S. 186 (1962).


48. Section 15.
The Road to Constitutionalism

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in Central Europe
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the Virginia Commission on the Bicentennial of the United States Constitution.
On March 3, 1848, the Lower House of the Hungarian Diet adopted its famous Address to the Crown. Petitioning the Hapsburg king, Ferdinand V, the delegates lamented that, on “taking a retrospective view of our history, we acquire the sad conviction that for the last three centuries” Hungarians had been “unable to render our constitution conformable to the spirit of modern times.” The delegates were convinced that, for the nation’s intellectual and material welfare, there must be “a national Government, totally independent and free from any foreign influence whatsoever,” a government that, “in conformity with constitutional principles, must be a responsible Government, and the result of a majority of the people.”

At Pest’s Cafe Pilvax—a gathering place of law students, younger politicians, and literati—many saw the Address as just a beginning. Led by the poet Sandor Petofi and others, the cafe’s clientele collected signatures for a petition to be sent to the Diet. At a public meeting, Josef Ilinsky read the “Twelve Points.” Under the title, “What Does the Hungarian Nation Desire?” the petition included demands for freedom of the press, equal civil and religious rights for all, popular representation, trial by jury, and the taking of an oath to the Constitution by Hungarian soldiers. Two days later, on March 14, at a second public meeting, public signing of the petition began. Unknown to those who assembled in Pest, that same day both houses of the Diet had voted final approval of the Address to the Crown. Its wording notably strengthened to include at least some of the demands of the Pest petition.

A historian of the 1848 revolutions has commented on the strong thread of constitutionalism in Hungary’s efforts.

Of all the peoples and nations engaged in revolutions in 1848, Hungary was the single one which kept its demands strictly on a legal basis. If the Hapsburgs had had any respect for their oaths, Hungary could have used its ancient constitution as a neat springboard from which to leap over absolutism into the . . . more modern camp of democratic constitutional states like England and France.

That development, as of the nineteenth century, was not to be. Hungarians found themselves fighting to achieve their goals. Despite
some remarkable battlefield victories, the Hungarian forces were ultimately overwhelmed by the Intervention of the armies of the Russian Czar. On August 11, 1949, the Hungarian general, Artur Gough, declared, "What the Inescapable decision of God Almighty shall we bear with manly resolve in the blissful hope and knowledge that a just cause can never be lost forever."4

That "just cause" flared again in 1990. After decades of one-party rule, imposed by foreign armies, Hungarians voted in free elections. The newly free Parliament unanimously elected Árpád Göncz as the president of a reborn Hungary. The new chief executive's credentials symbolize the country's modern travails. A Nazi fighter in World War II, Árpád Göncz spent six years in prison for his part in the 1956 uprising. While in prison, he taught himself English, which he employed to translate, into Hungarian, the works of well-known American writers such as William Styron and John Updike.5

On Constitution Day, September 17, 1990, President Göncz inaugurated a year-long celebration of the bicentennial heritage of the United States Bill of Rights, a document whose bicentennial Americans marked in 1991. President Göncz spoke in the Rotunda of the University of Virginia, founded by Thomas Jefferson. He paid appropriate homage to James Madison, the drafter of the Bill of Rights, and then went on to draw parallels between the events of the founding era in the United States and the changes being wrought in his own country.

During the revolution of 1848, President Göncz said, Hungary's hopes were thwarted by Russian Intervention. "She rose a hundred years later—in 1956—only to be trampled again... but at the same time she started a historical process of global importance which has come to fruition since then and will perhaps deeply influence the fate of the whole Europe...." President Göncz took pride in pointing to Hungary's new Constitution—"a Constitution which—like yours—bears the mark of the citizen's spirit and not that of the subject."6

Drafting a Constitution

Not every country has a written constitution. A few nations—the United Kingdom is the best-known example—do without such a document, preferring instead to look to custom, tradition, and convention, augmented by positive law, to furnish the society's basic norms.

Most countries, however, following the example set by the United States in 1787, undertake the drafting of a written constitu-
tion. The constitutional draftsman does not want for models. There are literally hundreds of constitutions, some in force, others superseded or abandoned, which drafters may consult for precedents.

Each nation will ultimately devise a document suited to its own traditions and aspirations. One does not consult a formbook and, in the manner of an apprentice clerk, copy out such provisions as may catch one's eye. There are, nevertheless, fundamental questions that those who propose to draft, adopt, and implement a constitution would do well to ask. They include the following:

A sense of purpose. Should the constitution reflect a particular philosophy? Will it be a frame of government—emphasizing structure, institution, and process—or will it reflect an ideology? Constitutions typically contain a preamble, in which the document's drafters seek to express a society's basic aspirations. Infusing a constitution with a sense of purpose and direction is surely appropriate, as it articulates basic values for the guidance of those who must implement and interpret the document. But drafters should be wary lest purpose give way to ideology in such profusion that the constitution becomes, in effect, a political party program.

Inclusion and exclusion. One often speaks of a constitution as being "fundamental." Viewed from a legislative perspective, such usage implies that the constitution is a form of superior law, a norm by which other laws are to be measured. To speak of "fundamentals," however, is also to raise the question: what values does a society esteem so highly that they ought to be thought of as fundamental—and thus worthy of inclusion in a constitution?

Drafters should keep in mind the distinction between a constitution and a code of laws. Constitutions are not lawbooks. There is virtue in brevity. Excessive detail invites rigidity and early obsolescence. American state constitutions, especially those drafted in the early years of the twentieth century, are textbook examples of confusing constitutions with ordinary legislation. Oklahoma's 1907 Constitution (still in force) defines theflashpoint of kerosene—hardly the kind of "fundamental" value most people would associate with a constitution.

Particularism and universality. Should a constitution be based on an understanding of a country's own history, traditions, and politics? Or should it draw upon the experience of other countries, other places and times? Is the drafting of a constitution an exercise in particularism, or does it have a comparative or universal quality?
The constitution's drafters would do well to look both within and beyond their country's borders. One begins by searching for the nation's own experience, its history, traditions, and cultures—those strands that will ground the constitution in historical and social reality. A constitution for Bulgaria must draw upon and respect Bulgaria's history and experiences.

Draftsmen should look, as well, to the experience of other countries, especially those aspiring to common values. The nations of Central and Eastern Europe, such as Hungary, Poland, and the Czech and Slovak Federal Republic, would naturally want to know about the constitutional experience of the western, liberal democracies. It is hard to imagine constitutional commissions in the region having no curiosity about constitutionalism in the United States or France. It may be especially useful, for Central and Eastern European draftsmen, to consider the experiences of nations (such as Spain and Portugal) that have established stable constitutionalism in the wake of authoritarian regimes.

Consensus and community. Theorists sometimes argue that a constitution, to survive, requires social consensus, a sense of community. Without such underlying consensus, the argument runs, the constitution cannot be enforced and becomes a dead letter. Concern about community has special force where issues of nationality and ethnicity are most prominent. Draftsmen in Central and Eastern Europe cannot escape the problems of creating constitutional norms for an entire country while also being sensitive to the claims of ethnic, religious, and other minorities.

Laying aside the question of the extent to which a constitution reflects community, it is useful to note that constitutions can also foster or reinforce community and consensus. The first genuine national political debate in the United States was over ratification of the proposed Constitution (in 1787-88). It may be said that, rather than the nation creating the Constitution, the Constitution created the nation.

Those who drafted the early American state constitutions, in the period after 1776, understood the uses of constitutions as fostering a sense of the common good. Those documents often rectified the principles essential to republican government and called upon citizens to learn and practice civic virtues.9

The political factor. Drafting a constitution is, in part, a legal and technical exercise. Lawyers should be involved, the better to ensure that the document will be a coherent blueprint for legislators, administrators, judges, and others. Drafting also calls for the insights of scholars, for example, historians who can illuminate the constitution-making process with lessons from the past.

There is, however, also a political dimension to the drafting of a constitution. It is important, therefore, that the process of making a constitution involve those who understand the public or political arena.10 This does not require that politicians be put in charge of deciding what the constitution will say; many would argue that, in the countries of Central and Eastern Europe, the experience of the postwar period counsels against such a course. There are many ways, however, to have gained a sense of public life other than having held office. Presidents in Hungary and the Czech and Slovak Federal Republic served in prison for their political views; no one can doubt the insights these men have into the ultimate question about a nation's public life.

Draftsmanship. After the constitutionmakers have made the great judgments—about the good society, the state and the individual, and other aspects of a constitution—the framers should not neglect the essential principles of draftsmanship. Those tenets may seem prosaic, but they are important. Logic should govern the constitution's organization. Drafters should use plain language (remembering that ordinary citizens have a stake in the document as much as does any official). Coherence is vital, in light of the interdependence of provisions.

Constitutions blend poetry and prose. They are poetry insofar as they appoint a vision for today and tomorrow. They are prose insofar as they lay down the technical rules for legislators and magistrates. However their language be described, constitutions are not ordinary legal documents. Contracts, wills, deeds, and the like may have overtones for those who are not privy to them, but they are fashioned essentially for private parties directly affected by them. A constitution, however, ultimately touches the lives of all who live under its reach. By a constitution, people articulate their faith in living together under conditions of ordered liberty.

Constitutionalism

Reading the texts of national constitutions is an invitation to cynicism. The constitution of any nation, east or west, north or south, typically contains glowing promises—assurances of justice and plenty,
visions of the good life in which human dignity is cherished and individual rights are guaranteed. But we know that many such "constitutions" bear little relation to reality. What, then, are the principles that make possible, not merely a constitution, but constitutionalism? Constitutionalism, as I see it, draws upon several strains in constitutional development. Some of those strains are of centuries' standing, for example, the principles associated with England's Magna Carta or Hungary's Golden Bull. Others flowered during the period of the Enlightenment, shaped by natural law thinking. Yet others are of more modern origin.

Any definition of constitutionalism involves obvious value judgments. In speaking of constitutionalism, I propose the following as benchmarks: Consent of the governed. One mark of constitutionalism is to establish that government derives from the people and exists by their consent. Virginia's 1776 Declaration of Rights declared: "That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them." Massachusetts' 1780 Constitution framed this principle explicitly in social compact terms, reflecting the influence of John Locke: "The body politic is formed by a voluntary association of individuals. It is a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good."" We the People of the United States... do ordain and establish this Constitution for the United States of America." Such declarations are common in the preambles to constitutions. But consent of the governed requires more than a statement of political theory. The test of constitutionalism at work is whether the constitution establishes genuinely representative institutions, bolstered by the freedom to form political parties, ready access to the ballot, and free and robust debate on public issues.

Two hundred years of American constitutionalism has seen a steady trend to more representative institutions. In the early nineteenth century, state constitutions were revised to enlarge the franchise (for example, doing away with property requirements) and reapportioning state legislatures to reflect population shifts. Consent of the governed in American constitutional law has been further bolstered, in modern times, by the Supreme Court's requiring that legislative apportionment be based on population ("one person, one vote"), by the abolition of the poll tax, and by congressional legislation aimed at ending practices discriminating against black and other minority voters.

Meeting in Copenhagen in June, 1990, representatives of the participating states of the Conference on Security and Cooperation in Europe (CSCE) formulated a statement of principles for democratic societies. In agreeing to the declaration, the representatives welcomed "the commitment expressed by all participating States to the ideals of democracy and political pluralism as well as their common determination to build democratic societies based on free elections and the rule of law." Consent of the governed is central to the Document of the Copenhagen Meeting:

The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes.

The Document specifies some of the ways in which free and fair elections are to be achieved, among them, elections at reasonable intervals, universal and equal suffrage for adults, secret ballot or its equivalent, honest counting and reporting of votes, campaigns free of intimidation, and unimpeded access to the media. Genuinely representative government cannot exist where a single party has a monopoly on power. Recognizing this fact, the framers of Hungary's provisional Constitution declared their intention "to promote a peaceful political transition to a constitutional state implementing a multi-party system, parliamentary democracy, and social market economy." In order to make a clean break with one-party authoritarian rule, the Constitution requires a complete distinction between state and party. It would be hard to imagine language more definitive than the Hungarian statement:

The Parties shall not directly exercise public power. Accordingly, no Party shall have the right to guide any state body. In order to separate the Parties and public
power from each other, the functions and public offices
which shall not be held by a member or official of any
Party shall be specified by law.\textsuperscript{21}

Immediately upon adopting the new Constitution, Hungary's Parliament passed a law requiring that the Socialist Party (the successor to the Communist Party) must immediately disband its cells in all courts, parliamentary offices, and prosecutors' offices and, at least ninety days before the 1990 elections, in private workplaces.\textsuperscript{22}

Limited government. If the people are to govern the government's master and not its servants, one must take particular account of the institution and structure of government. Constitutionalism pays special attention to preventing power from being concentrated in such a way that it becomes a threat to individual liberty.

Many observers believe the separation of powers to be an admirable device for checking the abuse of power. In his Spirit of the Laws, Montesquieu declared, "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." Moreover, he said, liberty suffers "if the judiciary power be not separated from the legislative and executive.\textsuperscript{23}

No feature of American constitutionalism is more distinctive than its reliance on the separation of powers. Those who, like Jefferson, sought revision of the early state constitutions seized upon the principle of the separation of powers and, as Gordon Wood has said, "eventually magnified it into the dominant principle of the American political system.\textsuperscript{24}

The open society. Constitutionalism requires the open society. There must be freedom to believe what one will, to follow what religious beliefs one chooses, to engage in spirited and full debate, to weigh competing ideas, to understand the past, take stock of the present, and imagine the future. Czechoslovakia's 1920 Constitution recognized the place of these values in a free society by including provisions for protection of liberty of conscience, religious creed, expression, freedom of the press, and rights of peaceable assembly, association, and petition.\textsuperscript{25}

Thomas Jefferson caught the spirit of the open society in drafting the Virginia Statute for Religious Freedom. Truth, he said, "is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the

conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them.\textsuperscript{26} In the modern Supreme Court, Justice Brennan's opinion in New York Times v. Sullivan (1964) places him squarely in the Jefferson tradition. Overturning a libel judgment brought by a police commissioner against the New York Times, Brennan declared a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open...'. Indeed, he added, public officials must accept attacks that may be 'vehement, caustic, and sometimes unpleasantly sharp.'\textsuperscript{27}

At Copenhagen, the participating states reaffirmed the tenets of the open society, including the right to receive and impart information and ideas "regardless of frontiers," unlimited access to the means of reproducing documents (respecting, however, rules of copyright and intellectual property), the rights of peaceful assembly and demonstration, the right of association, freedom of religion, and the right to travel abroad.\textsuperscript{28} One who reviews these provisions of the Copenhagen Document will quickly find echoes of the very things tyrannical regimes fear (such as the impact of copying machines) and the means used by dissident leaders and ordinary citizens alike to undermine the authority of one-party rule in the countries of Central and Eastern Europe (such as the assembling of hundreds of thousands of people in Prague's Wenceslas Square).

Sanctity of the Individual. The legacy of the natural rights tradition has been a powerful force in shaping constitutionalism. Virginia's Declaration of Rights of 1776 opens with the classic statement of inalienable rights: "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.\textsuperscript{29}

The force of natural rights thinking is equally evident in France's Declaration of Rights of Man and Citizen, which speaks of men "naiscent et demeurent libres et égaux en droits." The Declaration asserts that the object of society is to preserve "des droits naturels et impréscriptibles." And the Declaration enumerates those rights: "la liberté, la propriété, la sûreté, et la résistance à l'oppression." In Virginia's Declaration the legacy of John Locke is evident; in that of
France, the Influence of Rousseau. One leans more to an atomistic view of society, the other to a more communitarian attitude. But the approaches overlap in their insistence on natural and inalienable rights.30

A state’s respect for human dignity is one of the measures of whether constitutionalism is a reality.31 It is no accident that the Universal Declaration of Rights, adopted in 1948, speaks of everyone being equally entitled with respect to both rights and dignity. How a state treats those charged with or suspected of criminal activity may well be as good a test as any of the status of human dignity in that society. The longest and most concrete of the provisions of the Bill of Rights of the United States Constitution are those that spell out protections for the criminal defendant. Some of those guarantees are concerned with assuring that the fact-finding process is reliable: having counsel, for example, aids the defendant in bringing to the court’s attention all the facts and arguments that might bear on the case.32 But the procedural guarantees in the Bill of Rights are concerned, more fundamentally, with establishing civilized standards for one’s treatment by the state. For example, the privilege against self-incrimination may well prevent relevant and trustworthy evidence from coming to the attention of the trier of fact. Yet the Fifth Amendment establishes that one is not obliged to convict himself out of his own mouth; he can put the state to its evidence.33

The Copenhagen Document calls for the rules of criminal procedure to contain “a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution.” The declaration then specifies some of the rights to which a criminal defendant is entitled, among them, fair and public hearing by an impartial tribunal, right to counsel (including appointed counsel for those of limited means), clear definitions of the elements of an offense, and presumption of innocence.34

Few practices of arbitrary governments are more reprehensible than the use of torture. The Copenhagen declaration takes up the problem of torture at great length. The participating states affirm their commitment “to prohibit torture and other cruel, inhuman, or degrading treatment or punishment…” There are “no exceptional circumstances whatsoever”—whether state of war, threat of war, internal unrest, or other emergencies—that may be invoked as justifying torture.35

The twenty-first century has brought into focus another index of the sanctity of the individual: personal privacy and autonomy. Sometimes the claim sounds of personal freedom, sometimes of economic initiative. Indeed, economic and non-economic claims were intertwined in the provision of Czechoslovakia’s 1920 Constitution that every citizen “may take up his abode wheresoever he will in the Czechoslovak Republic, may acquire there real property and carry on any calling for the purpose of earning profits within the limits of the law.”36 This language bears a striking resemblance to that used by Justice McReynolds in a 1923 case in the United States Supreme Court. Of Fourteenth Amendment “liberty,” he said, “Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations in life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”37 Collectively this cluster of freedoms has manifested parallels in the 1920 Constitution of Czechoslovakia, which bracketed personal freedoms, property rights, and rights of expression and conscience with “special protection” for wedlock, family, and motherhood.38

Hungary’s provisional Constitution protects various aspects of personal autonomy. Among these are the right to move and to select one’s residence (including the right to leave the country), protection of reputation, domicile, and private secrets, and freedom of thought, conscience, expression, and religion. Parents are guaranteed the right to choose the fashion in which their children should be raised and educated.39

Any observer of the changes which have been sweeping over Eastern Europe cannot but mark the connection with political reform, including constitutional revision, and economic aspirations. The hope for economic betterment goes hand in hand with—indeed, sometimes seems the engine of—goals for political change. This linkage becomes apparent in Hungary’s provisional Constitution, which declares Hungary’s economy to be “a market economy” with “public and private ownership enjoying equal rights and protection.” Rights of “undertaking and free competition” are explicitly recognized. Private property may be expropriated only upon “full, uncon-
ditional, and immediate compensation." The Copenhagen declaration specifies everyone's "right peacefully to enjoy his property either on his own or in common with others." 34

Claims regarding personal autonomy rights bring two powerful constitutional traditions into tension. One is an atomistic, Lockean view of society in which there are areas presumptively reserved for individual choice. The other sees constitutions as depending upon shared values. The same tension may be found in the long-standing debate over the extent to which law may be used to enforce moral values. The classic statement of the limits of state power over individual conduct appears in John Stuart Mill's On Liberty (1859), in which Mill declares that the state may use its power over the individual only where one person's conduct threatens harm to another. 43 England's Lord Devlin would give the state greater power to enforce society's moral values; he sees them as the "cement of society." 44

It is never easy to say just where society's interests may legitimately supersede individual preference. Easy or not, judgments about personal privacy and autonomy are part of the matrix of constitutionalism. Sometimes such protection takes specific form; for example, the Fourth Amendment's prohibition on unreasonable searches and seizures protects one kind of privacy. Privacy and autonomy may take more general form. The Supreme Court of the United States has used the Fourth Amendment's due process clause to recognize constitutional protection for such decisions as using contraceptives, deciding to have an abortion, getting married, seeking a divorce, and raising one's children. 44 Such rights may sometimes be absolute, sometimes qualified. But, taken together, they stand, in constitutional terms, for a striking vindication of John Stuart Mill.

The rule of law. The most famous provision in Magna Carta reads, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." 45 Centuries later, Blackstone observed, in his Commentaries, that this provision "would have merited the title that it bears, of the great charter." 46 Although excessively generous claims have been made for this chapter of the Charter (for example, that "judgment of his peers" is to be identified with trial by jury), Magna Carta's assurance of proceedings according to the "law of the land" does contain the seeds of one of the central tenets of constitutionalism: the idea of a rule of law, a government of laws and not according to the caprice or discretion of magistrates. 47

Where Magna Carta spoke of "law of the land," today we are more likely to invoke the principle of due process of law. 48 Due process connotes fairness—that the law should not play favorites. In his argument in the Dartmouth College case, Daniel Webster articulated what has become the most celebrated, and oft quoted, definition of "law of the land": "By the law of the land is most clearly intended the general law; a law, which bears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern a society." 49

That fairness and impartiality matters in criminal procedure is obvious. 50 But it extends to civil matters as well. The modern state, whatever its political and economic system, whether it leans to capitalism or socialism, is today the source of a broad range of entitlements. Sometimes these have constitutional status, more often they depend on statute or administrative actions. Even where a benefit is not thought to be a "right," it does not follow as a matter of course that government should be free to extend or withhold benefits on any grounds it may see fit. Government licenses, welfare, and other programs are, for many individuals, the very basis of their daily livelihoods or even existence. 51 Thus the United States Supreme Court, in 1970, ruled that due process required that a welfare recipient be afforded a hearing before his benefits were terminated. 52 It is especially important that government may not be permitted to use administrative proceedings as a way of punishing individuals for their political views or for other forms of unorthodoxy. The Copenhagen Document calls for everyone to have "an effective means of redress against administrative decision." 53

A commentator on Czechoslovakia's 1920 Constitution caught the spirit of fair and impartial administration of the laws as a crucial aspect of constitutional government:

The good quality of administration doesn't depend only on the good quality of juridical rules: in reality everything depends on the moral and intellectual qualities of those who are charged with the administration. . . . The most effective measure here is the duty imposed on a state
official or on the State itself to make good any damage caused to a citizen through the illegal exercise of public power.

He called attention to the role of the Supreme Administrative Court in seeing "to the legality of the public administration when claims or complaints are advanced from any quarter"—asserting Czechoslovakia "the attributes and means of a State based upon Right."[34] Tracing this tribunal to 1867 (when Czechoslovakia was, of course, still part of the Austrro-Hungarian Empire), Edward Taborsky called the Court the "child of the struggle of the Central European peoples against a despotic government" and declared that it represented "the triumph of law over despotism."[35]

Beginning in the Scandinavian countries, the idea of an ombudsman—an advocate for ordinary citizens seeking to complain of administrative actions—has become an increasingly popular vehicle for ensuring fairness in the administration of the laws. Hungary's own provisional Constitution creates a Parliamentary Commissioner of Citizens' and National and Ethnic Minorities' Rights. The Commissioner is charged with "examining the shortcomings coming to his/her notice concerning procedures affecting constitutional rights, or having them examined, and taking general or individual measures for the remedy thereof."[36]

A corollary of fairness is equality. Liberty and equality may, at times, seem to be competing principles, at least insofar as one takes "liberty" to imply individualism and "equality" to suggest egalitarianism. But, liberty and equality, in general, go hand in hand. More than mere symbolism supports the Fourteenth Amendment's dual command that no state may deny any person life, liberty, or property without due process of law, nor deny any person the equal protection of the laws. Indeed, Blackstone believed that the very idea of law assumed it being of general application; if it singled out individuals, it was a sentence, not a law.[37] Well before the enactment of the Fourteenth Amendment, state courts interpreted due process of law of the land provisions of state constitutions to require laws of general application.[38] In today's constitutions, this principle typically finds form in prohibitions (often quite specific) on a legislature's enacting various kinds of special, local, or private bills.[39]

The principle of equality as a component of constitutionalism has special force when applied to government actions making distinctions on account of an individual's race or religion. As early as 1938, even as the United States Supreme Court was withdrawing from an activist role in reviewing economic regulations, Justice Stone hinted, in a footnote, that "more searching judicial inquiry" might be called for where legislation is directed at religious or racial minorities or otherwise proceeds from "prejudice against discrete and insular minorities."[40] In the half-century since that suggestion, the Court has created vast areas of jurisprudence in which the justices have indeed paid special attention to cases of invidious discrimination. Racial distinctions are seen to be "constitutionally suspect," they trigger "strict scrutiny," a standard usually fatal to any governmental actions distinguishing among people according to race.[41]

Constitutionalism's moral fabric is put to a special test by discrimination based on race, religion, or like factors. Many of the world's bitterest conflicts—in Lebanon, for example—turn on religious or racial animosities. Often the conflicts cost human lives; Catholics and Protestants shoot each other down in Northern Ireland. Even when no bullets fly, racial and religious differences can place severe strains on the social fabric.

Constitutional bans on racial, religious, or similar discrimination thus carry a special moral force. Brown v. Board of Education (1954) is, of course, important for its holding that separation of the races in public education violates the Fourteenth Amendment.[42] But Brown carries added meaning because of its moral message. Not only did Brown set the stage for judicial decisions extending Brown's holding to areas other than education, it also fueled the civil rights movement, eventually bringing the first major congressional civil rights statutes since Reconstruction. Brown pricked the nation's conscience, reminding America that the distant sounds of slavery continue to echo in modern problems of relations among the races.

Few problems invite more sensitive attention in the countries of Central and Eastern Europe than the ones flowing from race, ethnicity, nationality, language, and religion. Having made common cause against Nicolae Ceausescu, inhabitants of Romanian and Hungarian nationality in Transylvania then went on to clash violently over such issues as language and education.[43] Empires have come and gone, but problems of nationality and race remain to test the staying power of constitutionalism. The drafters of Czechoslovakia's 1920 Constitution sought to address such issues by laying it down that all persons residing in the country would have "in
equal measure with the citizens of this Republic complete and absolute security of life and liberty without regard to origin, nationality, language, race, or religion. On the civil and political rights of citizens, the 1920 Constitution contained elaborate guarantees. The basic principle was found in the declaration: "All citizens of the Czechoslovak Republic shall be in all respects equal before the law and shall enjoy equal civic and political rights whatever be their race, their language, or their religion." Further provisions laid down guarantees as to entry into public office, the exercise of trades or callings, the use of and instruction in one's own language, and the establishment of philanthropic and other institutions.

Hungary's provisional Constitution recognizes collective rights of the republic's national and linguistic minorities. Such groups are entitled to collective participation in public life, promotion of their own cultures, use of, and instruction in, their mother tongue as well as the right to use their names in their own languages. The Constitution guarantees human and civil rights to all persons residing in Hungarian territory, "without any discrimination, namely, without prejudicially differentiating by race, colour, sex, language, religion, political or other opinion, nationality or social origin, by property status, birth, or other condition."

The Copenhagen Document pays particular attention to the need to work out problems of nationality within a democratic political system. No issues get more space in the declaration—about twenty percent of the document's text. Both individual and group rights are recognized. As to individuals: "Persons belonging to national minorities have the right to exercise freely and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law." Those who identify with a national minority are entitled freely to express, preserve, and develop their ethnic, cultural, linguistic, or religious identity, and to maintain their culture, free of attempts at assimilation. The communal exercise of rights is made explicit: "Persons belonging to national minorities can exercise and enjoy their rights individually as well as in community with other members of their group."

The participating states take on affirmative obligations toward national minorities, including seeking to ensure that members of such minorities have the opportunity for instruction in their mother tongue and, where possible, for its use before public authorities. The document even raises the prospect (albeit in quite tentative language) of "appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities." The states also "clearly and unequivocally condemn racial and ethnic hatred in its various forms, and they undertake to promote understanding and tolerance to protect individuals against hate-based acts."

Adaptability. Thomas Jefferson, writing to a friend, said, "I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."

How should constitutions, then, be changed? One approach is periodically to rewrite a constitution. Indeed, in the same letter, Jefferson proposed that a constitution be revised periodically, by each new generation. Many of the American states have followed, in effect, Jefferson's advice. The historical practice has varied from state to state. New England states, for example, have tended to less frequent revisions. Other states have rewritten their constitutions several times, especially in the South (where the Civil War and Reconstruction, followed by periods of Bourbon democracy, produced additional occasions for revisions).

A related mode of constitutional change is constitutional amendment. Two hundred years have seen only twenty-six amendments added to the federal Constitution, ten of these (the Bill of Rights) having been virtually contemporaneous with the original Constitution. But amendments to state constitutions are common. Indeed, states that employ the Initiative and referendum seem to have epidemics. In those states almost any question may appear on the ballot as a proposed constitutional amendment. Some amendments—California's Proposition 13—have become household words even in other states.

Yet another mode of adapting constitutions to changing times is judicial interpretation. A traditional view of the judicial role holds that a judge's job is simply to lay a challenged law side by side with the Constitution and see whether it squares with that document. But
anyone who reads Supreme Court opinions will see just how much organic growth may be found in those judgments. Once again John Marshall pointed the way: "A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it." Those are not the words of one who thinks the judge’s function to be a narrowly restricted one.

Examples of change through judicial interpretation are common in American constitutional law. The Fourteenth Amendment, adopted with the immediate historical purpose of protecting the newly freed slaves, has been extended to impose heightened judicial scrutiny of other classifications, such as those based on gender. The Congress that enacted the same amendment may not have "intended" its use to outlaw racial segregation in public schools, but eighty-six years after the amendment’s adoption the Supreme Court held it did just that. In capital punishment cases, there seems near unanimity among the Justices, however they rule on the death penalty, that the Eighth Amendment’s prohibition on “cruel and unusual punishment” creates an “evolving standard,” one that takes on changing form with the passage of time.

A nation may simply write a new constitution when times seem to call for change; France, which in two hundred years has had five republics, has had seventeen constitutions. Or one may use the amending process, as the American states have done so often. Or judges may interpret, and thus adapt, the basic law. The modes vary, but the central fact is the same: constitutional law is not static.

Enforcement of the Constitution. Writing a constitution is one thing; enforcing it is another. When the barons forced King John, at Runnymede, to agree to the terms of Magna Carta, they obviously worried whether the monarch would honor the bargain. Manifestly unwilling to take the king’s adherence for granted, they devised language—it occupies about one-ninth of the length of the entire Charter—providing for the barons to select twenty-five of their number to act as the Charter’s keepers. The twenty-five barons were to judge whether the king had breached the Charter and, if he did, to "distain and distress" the king, including the seizure of his castles or lands. In Hungary’s Golden Bull, Andrew II was forced to concede that, if he or any of his successors violated promises made in that charter, the prelates and nobles were free to “resist and withstand” such violation without imputation of high treason— a jus resistendi. Clumsy and awkward though they were, such provisions in Magna Carta and the Golden Bull addressed a problem still with us: how to enforce a constitution. What safeguards are there to ensure that constitutionalism is a reality and not simply an empty promise?

Safeguarding Constitutionalism

During the two centuries since the adoption of the first state constitutions in America and of the Philadelphia Constitution of 1787, several modes of safeguarding constitutionalism have emerged. Some have proved more successful than others. Moreover, the several modes of making reality of the constitution have often operated side by side. To depend upon one mode is not necessarily to exclude the others. Indeed, which mode is used depends in good part upon the nature of the right being asserted.

Popular control of government. France’s most famous contribution to constitutionalism is the Declaration of the Rights of Man and the Citizen, adopted in 1789. Grounded in the natural rights concept that characterized that age, the Declaration’s Preamble speaks of “une déclaration solennelle” setting forth “les droits naturels, inaliénables, et sacrés de l’homme.” Rights having been thus declared, the next step for France’s National Assembly was the framing of a constitution.

Popular sovereignty—the people’s will grounded in Rousseau’s notion of the "general will"—was a powerful force in revolutionary France. As the National Assembly debated the new constitution, French intellectuals were divided on the extent to which democratic institutions should be checked by devices such as a bicameral legislature or an executive veto. The Abbé Mably, a friend of John Adams, liked the American idea of the separation of powers. Turgot disagreed. He preferred a single legislative chamber, the better to avoid the political community’s will being undermined by particular orders or classes.

In the National Assembly J. J. Mounier argued for a balance of powers—two chambers and an executive veto. The Abbé Steytes wanted a single assembly, in which the nation’s will would be reflected, unchecked by a second chamber or an executive veto. Ultimately the Assembly adopted a version of Steytes’ approach—a single house and only a suspensive veto.

If authority be focused in the legislative branch, how would one avoid the legislature’s using its powers in such a way as to undermine the constitution? Condorcet, like Turgot, wanted the nation to be represented in a single assembly. His formula for avoiding tyranny was
to have frequent elections and to spell out the people's rights in a declaration of rights.81

Those who agreed with Condorcet could point, for precedent, to the early American state constitutions, the documents drafted in the 1770s. The state constitutions often gave lip service to the separation of powers. But, for the most part, those constitutions established de facto legislative supremacy. When they were drafting their first state constitutions, Americans had fresher in their memories their experience with royal governors and royal judges. In the American colonies, it was the lower house of the colonial assemblies that reflected popular attitudes. Hence, in drafting the state constitutions, Americans tended to give expansive power to the legislature and to slight the other two branches. Some of the state constitutions (that of Pennsylvania, for example) had a unicameral legislature. Typically a state's governor was elected by the legislature and depended upon the advice and consent of a privy council (a rare exception was New York, in which the people elected the governor).82

TheDraftsmen of America's state constitutions were, to be sure, concerned with preserving liberty and curbing power. A decade before the French adopted their Declaration of the Rights of Man and Citizen, Virginia and some of the other American states drafted bills of rights. Those bills of rights assumed limits on government's power. Virginia's 1776 Declaration of Rights quite explicitly states "That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."83

To ensure the safeguarding of the constitution, the framers of the state constitutions looked to principles of republicanism. In particular, to frequent elections, small electoral districts, frequent turnover in office, and the moral force of the bills of rights. Direct popular control of government was taken to be the means of protecting constitutional government and individual rights.84

Such arrangements might well serve as a vehicle for democratic government. But the defects soon became obvious. What protection would the individual have if, in the passion of the moment, a legislature enacted a law patently in conflict with the constitution? In particular, what protection would there be for racial, religious, or other minorities for whom the recourse to the polls was in reality no safeguard at all?

Thomas Jefferson, ever the keen student of government, saw the defect in the early state constitutions. Criticizing Virginia's 1776 Constitution, he declared, "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating of these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred seventy-three Despots would surely be as oppressive as one."85

Separation of powers. After Britain's Glorious Revolution (1688), commentators and observers often praised the notion of "mixed" government. Calling the British Constitution "the most stupendous fabric of human invention," John Adams admired the notion that government by King, Lords, and Commons blended the three classical forms of government—monarchy, aristocracy, and democracy.86

The idea of a mixed government was, in fact, not suited to American soil. Society in America was far more fluid and egalitarian than that of the mother country. Lacking orders and classes, America was an unlikely place for governmental arrangements based on the social structure of the Old World.

The idea of a tripartite arrangement did, however, take root in America. Indeed, the separation of powers was to become one of the most distinctive features of American constitutionalism. Virginia's Constitution of 1776 stated the principle of the separation of powers in language of unprecedented clarity: "The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other: none shall any person exercise the powers of more than one of them at the same time."87 As other states drafted constitutions, several of them wrote in language explicitly proclaiming the separation of powers.88

Theory and practice in fact diverged in the early state constitutions. During colonial times, legislative assemblies had come to exercise a broad range of functions, blurring the distinction between legislative, executive, and judicial activities.89 The drafters of the early state constitutions tended, as already mentioned, to enhance legislative powers at the expense of the other branches.

In speaking of the separation of powers, the early state constitutional draftsmen were concerned, above all, with insulating the legislature (and, to a lesser extent, the courts) from executive inter-
ference. The principle of the separation of powers was, all the same, available as a vehicle for reforming the state constitutions by making the three branches more nearly co-equal. Moreover, the state constitutions typically had statements of popular sovereignty, such as that in Virginia’s 1776 Declaration of Rights: “That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.” Once Americans had proclaimed that power derives from the people and that magistrates serve the people, it was easy for reformers to invoke the separation of powers as grounds for enhancing the prerogatives of the executive and judicial power, the better to place a check upon legislative power.

By the time the framers of the federal Constitution went to work in the summer of 1787, the principle of the separation of powers had become firmly established as one of the indicta of American constitutionalism. The federal Constitution does not, in so many words, speak of a separation of powers. The principle is nevertheless an obvious linchpin of the document. Articles I, II, and III speak of legislative, executive, and judicial powers as being “vested” respectively in a congress, a president, and a supreme court and such inferior courts as Congress may establish.

James Madison was the new Constitution’s chief architect. In the Federalist No. 47, one of a series of essays written to urge ratification of the Constitution, Madison sought to rebut the charge, leveled by the Constitution’s opponents, that the proposed Constitution violated that principle of the separation of powers. Invoking Montesquieu, Madison asserted, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

In fact, there is more to separation of powers than meets the eye. Securing liberty by limiting government’s power requires more than simply keeping the branches of government separate. The separation of powers is complemented by the principle of checks and balances. By requiring that, for certain important decisions, one branch must concur in the action of another, the Constitution seeks to curb excessive concentration of power. Madison said that unless the several branches of government “be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”

Examples abound of ways in which one branch checks the actions of another. The president may veto a bill which has passed both houses of Congress; they, in turn, can override the veto by a two-thirds vote. The president makes treaties, but they require the advice and consent of the Senate. The president nominates Justices to sit on the Supreme Court, but the Senate must approve the appointments.

Checks and balances can operate within a branch of government as well as between branches. Bicameral legislatures had their origin in the need to represent different interests (for example, Lords and Commons in Great Britain). In the modern age, however, bicameralism is often justified by the argument that having two houses operates as a check on haste or passion in legislation. Thus unicameralism, a feature of several of the early American constitutions, soon died out (only one state has a unicameral legislature today). Bicameralism in Czechoslovakia’s 1920 Constitution was explained as making the Chamber of Deputies “the political factor par excellence” and the Senate the place for “amendment and moderation.”

One of the risks inherent in the separation of powers and checks and balances is that the branches will come to deadlock. This risk is especially obvious when the legislative and executive branches are in the hands of opposing political parties, as has been more often the case than not in recent decades in the United States. Reformers have sought to adjust the structure of government so as to permit a more unified approach to policy. Some adjustment may indeed be in order, but there is no doubt that the very wariness and antagonism engendered by separation of the branches, and by checks and balances, does work against a concentration of power.

Federalism. Participation in government at the local level is an education in citizenship. To execute the laws of a distant government—even a government for whose legislators one has voted—is a remote exercise. It is deliberating together, making choices about government policy, that educates the citizen.

Federalism seeks to achieve national unity while also preserving diversity. The federal Constitution and laws place limits, of course, on the extent to which local customs may prevail. But insofar as federalism permits diverse manners and mores to flourish, it encourages idiosyncrasies, experimentations, and self-expression.

Of the values furthered by federalism, perhaps the most basic is that of choice. No value is more basic to self-government. Federalism
reinforces this value, and it does so at levels closer to the people, where the consequences of choices are more likely to be seen and to have meaning.

Federalism, in any country, carries within it certain dangers. Countries adopting a federal structure risk devolution that, carried to an extreme, undermines national unity or allows local majorities to deny the rights of racial, religious, or other minorities in their midst. Anyone who has studied American history would be foolish to deny theills perpetrated by states and localities upon such minorities. But the remedy for such wrongs, under the United States Constitution, is judicial enforcement of such constitutional guarantees as the Fourteenth Amendment's equal protection clause and congressional enactments under such provisions as section 5 of the Fourteenth Amendment. Likewise, there are judicial and legislative safeguards against any state act that would prefer local economic interests over the free flow of interstate commerce.

Once national interests and individual rights have been assured through other constitutional means, federalism remains an important constitutional value. Federalism—like the separation of powers and checks and balances—is one of the structural devices to protect liberty.

Judicial review. In Dr. Bonham's Case (1610), Sir Edward Coke ruled that, if an Act of Parliament "is against Common Right and Reason," then it must be deemed void. Judicial review—a court's power to invalidate laws on constitutional grounds—did not take root in England. By the time of the American Revolution, Parliament was deemed to be supreme; even today English courts lack the power to strike down parliamentary acts on the grounds of their being unconstitutional.

Judicial review did, however, find fertile soil in America. The early state constitutions did not provide expressly for judicial review. Even before 1787, however, some state courts took at least tentative steps towards declaring themselves to have that power. In 1782, George Wythe affirmed, in dictum, the power of Virginia's Court of Appeals to declare a legislative act unconstitutional when he said, "Nay more, if the whole legislature, an event to be deprecated, should attempt to overlap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and hither, shall you go, but no further."

Article VI of the federal Constitution states that the Constitution and laws made "in Pursuance thereof" shall be the "supreme Law of the Land." The Constitution does not, however, say just how this precept is to be enforced. Nor could one, by reading the debates in the convention of 1787, prove beyond doubt that the Constitution's framers intended the courts to enforce the Constitution by invalidating inconsistent legislation.

Judicial review soon proved to be an idea whose time had come. In Federalist No. 78, Alexander Hamilton submitted that the courts are "designed to be an intermediary body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." In 1803 came the authoritative judgment in Marbury v. Madison, in which Chief Justice John Marshall declared that "a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." Is judicial review essential to ensuring the Constitution's supremacy? A constitution's drafters might choose, one supposes, to depend entirely on institutional checks and balances, on structure and process, to keep constitutional government on course. An eighteenth-century theorist, seeing the universe in Newtonian terms, might have found this approach attractive, conceiving a constitution to be like a self-regulating machine.

Two centuries' experience has taught us, however, of the singular value of an independent judiciary, free of political pressures, to enforce at least those constitutional provisions—the bill of rights being the most obvious example—protection the individual. The political branches (legislative and executive) might possibly be left to struggle over their respective prerogatives. But leaving individual rights to the political process is surely to negate a central thesis of a constitution's purpose. If such rights as free expression and peaceful assembly are left to the whim of a legislative majority or an executive's discretion, then the bill of rights is nothing more than advice or admonition.

The founders of post-World War I Czechoslovakia foresaw a role for judicial review in safeguarding the Constitution. A commentator describing the Importance of the Constitutional Court noted, "It is appropriate here to point out that the Charter of the Constitution is placed in its entirety under the special and effective protection of a Constitutional Court. It is intended that the Charter of the Constitution be the foundation stone of the whole life of the state,
the foundation of the rights of all citizens. An ordinary law may not conflict with the Constitution without becoming null and void. . . . This institution likewise serves as a protection of the rights of minorities whether racial or religious.101

The founders understood, as well, that judicial review must be exercised by independent judges. Thus the Constitution of 1920 declared that judges were to be appointed permanently and provided for judges to be appointed permanently, and it declared, "All judges shall be independent in the exercise of their conscience and they shall be bound only by law."103

Adopting the theory of judicial review is, however, not the same thing as accomplishing its reality. Edward Taborsky, reviewing Czechoslovakia's democratic experience between 1918 and 1938, noted, "Not once was the Constitutional Court asked to adjudicate upon the constitutionality of any statute." A chief reason for the Court's inactivity was that only a small number of collegial bodies could refer questions to the Court; three of such bodies were themselves organs of legislation and, as Taborsky observed dryly, "could scarcely be expected to accuse themselves of unconstitutional procedure." Critics of the existing arrangement recommended that more persons or bodies be entitled to appeal to the Constitutional Court.104

Hungary's provisional Constitution establishes a Constitutional Court, with the authority to annul acts or other legal rules if finds to be unconstitutional. The Constitution seeks to insulate the Court's judges from political influence by declaring that its members shall not belong to any political party and shall not carry on any political activities. The Constitution appears to create the basis for rather generous standing to take a case to the Constitutional Court: "Everybody shall have the right to initiate the procedure of the Constitutional Court in cases provided by law."105

Not every question is appropriate for a court's resolution. Even John Marshall acknowledged the existence of "political questions": "Questions, in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court."106 Thus judges are reluctant to intervene where war and foreign affairs are concerned.107 In deferring to the political branches, courts may give various reasons, among them a demonstrable commitment to one of the other branches, the hazards (as in foreign relations) of having the nation seem to speak with more than one voice, or a lack of manageable standards.108

One should not suppose that, because a claim involves politics, it will be held to be "political" in the sense of being nonjusticiable. In 1962 the Supreme Court, in Baker v. Carr, held that a state's apportionment of seats in the state legislature (challenged on grounds that a vote in one district counted more than one in another) presented a justiciable question.109 Likewise the Court has struck down state laws that place undue burdens in the path of forming new political parties or of gaining a place on the ballot.110 The Court has even intervened to rule on a congressman's challenge to the refusal of the House of Representatives to seat him. Article I, Section 5, of the Constitution states, "Each House shall be the Judge of the . . . Qualifications of its own Members." This, lawyers for the House argued, concluded the matter. But Chief Justice Earl Warren, finding the case to be justiciable, ruled that the House could deny a seat to a member only on one of three grounds (age, citizenship, and residence) set out elsewhere in Article I.111

Efforts to have a court declare and enforce social and economic rights run into particular difficulty. A judge enforcing a traditional right, such as free speech, will typically be able to act by way of a negative order, for example, by enjoining an official from taking action that would interfere with the individual's right of expression. But the implementation of social and economic rights typically entails an affirmative decree. The problem of enforcement is especially acute when it would require the court to decide how public funds are to be spent— which worthy objective is to be preferred in a world in which resources are not infinite. If a constitution says that everyone shall have a job, what mandate can a court enforce upon a legislature when the underlying problem is a slack economy or an economic depression? This is not to suggest the unimportance of social and economic guarantees. No modern state can fail to address problems of unemployment, occupational hazards, labor relations, poverty, housing, and the like. The point simply is to note the difference among various kinds of rights and entitlements, particularly as regards the manner of their enforcement.

Czechoslovakia's 1920 Constitution had little to say about social and economic rights. They were, as one commentator has suggested, "merely hinted at" in that document. "Faithful to their western models and having other urgent problems on their minds, the framers of the Constitution did not attempt to cut through the tangle of complex economic and social questions but left them for the deliberation of future legislators."112
Even in those areas, such as enforcing traditional individual rights, in which courts have an obvious role to play, there are factors that counsel careful consideration of the bounds of judicial activism. The very existence of judicial review creates a tension between two important constitutional principles, each of which is important to constitutionalism. One principle is that of democracy itself; consent of the governed presumes that, in a democracy, the norm will be political decisions made by accountable organs of government. The other principle is the existence of an independent arbiter to enforce the Constitution's terms even against the will of a political majority. Constitutional theory teaches, of course, that, in enforcing the Constitution, a judge is understood to be acting in the name of the people's ultimate will—that the Constitution be the fundamental law. But, in the more immediate context of litigation, judicial review raises tensions that must be understood and reconciled.

Judges are wise, therefore, to keep in mind the legitimacy of their decisions and the limits of their competence in exercising the power of judicial review. If the courts' decisions can be articulated as resting on discernible and satisfying principles, the chances of those decisions becoming an accepted part of the social fabric are all the greater.

Legislative Implementation of the Constitution. A constitution is not a code of laws. It cannot do the work of general legislation. Rather, it sets forth a society's fundamental precepts and norms. Making constitutionalism work requires legislation, complementing and building upon the basis laid down in the constitution.

Protection of civil rights in the United States illustrates the point. The Fourteenth Amendment to the Constitution, ratified in 1868, places direct restraints on the states. No state may abridge the privileges and immunities of citizens, or deprive any person of life, liberty, or property without due process of law, nor deny any person the equal protection of the laws. The Amendment also enlarges Congress' legislative power: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Together with the Thirteenth Amendment (which banned slavery) and the Fifteenth Amendment (which protected the right to vote), the Fourteenth Amendment sought to protect the newly freed slave "from the oppressions of those who had formerly exercised unlimited dominion over him." Between 1866 and 1875, Congress passed a series of civil rights statutes creating civil and criminal penalties for violations of civil rights.

For decades Congress made little additional use of its legislative power under the Fourteenth Amendment. The civil rights movement of the 1950s and 1960s reminded the nation of unresolved problems of racial discrimination. Lawsuits were filed seeking desegregation of schools and other public facilities. Blacks marched and demonstrated, complaining that they were being treated like second-class citizens. For about a decade, from 1954 to 1964 (beginning with the Supreme Court's decision in Brown v. Board of Education), most of the action was in the courts. Federal district courts, especially in the South, were the advance guards of promoting civil rights.

In 1964, Congress enacted the first comprehensive civil rights law of this century—the Civil Rights Act of 1964. That statute decreed that all persons shall be entitled to be served by public accommodations (inns, hotels, restaurants, and the like, as defined in the statute) without discrimination on the grounds of race, color, religion, or national origin. In 1965 Congress enacted a major voting rights act. Such acts of Congress go well beyond simply creating remedies for violations of the Constitution. The statutes often create new substantive rights. The prohibitions of the Fourteenth Amendment, recited above, begin with the phrase "No State shall..." Thus, on its face, the Amendment limits its reach to those actions that can, in some fashion, be traced to a state's action. The Amendment does not reach private actions as such (unless the state is somehow involved). Private discrimination, however odious, is not the subject of the Amendment's prohibitions. It is through statutes like those enacted in 1964 and 1965 that Congress, building upon the Constitution, extends the ambit of protection against racial or other discrimination.

The countries of Central Europe have a strong tradition of enacting statutes that are treated as a part of the constitutional framework. Thus statutes enacted in Czechoslovakia in 1920 dealt with such basic matters as elections to the Chamber of Deputies and to the Senate, election procedures, an electoral court, and the Constitutional Court. On its face, the 1920 Constitution treated a number of subjects as appropriate for legislative implementation. For example, the Constitution stated, in general terms, that matter entrusted to the mail was to be inviolable; "details," it said, "were to be determined by enactment." The parity between the Constitution and implementing laws was made explicit in the provision that "domestic rights" were to be inviolable; details were to be laid down by a law "which shall form part of this Constitutional Charter."
Hungary's provisional Constitution also reflects this tradition of distinguishing between ordinary statutes and those of constitutional significance. For example, the exercise of a fundamental right may be restricted only by "an Act of constitutional force." It is Parliament that enacts the Constitution itself and also Acts of constitutional force. A two-thirds majority is required to amend the Constitution or to pass Acts of constitutional force. In other instances, for example, to establish the rules for the organization and operation of the Constitutional Court, there are provisions requiring that certain actions be taken by a two-thirds vote of those members present at a session.

The teaching value of constitutions. Civic education is essential to constitutionalism's health. A people who do not understand the basic precepts of free government are unlikely to keep it alive and vibrant. Constitutionalism thus rests upon a foundation of an informed populace.

Thomas Jefferson understood the connection between an educated people and free government. In his Notes on the State of Virginia, Jefferson described his Bill for the More General Diffusion of Knowledge (1777). Its ultimate purpose, he said, was "rendering the people the safe, as they are the ultimate, guardians of their own liberty . . . . Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositaries." Four years before Jefferson drafted his bill, Poland established a National Commission for Education. A French scholar has commented on the "magnificent team" who directed the Commission's work. Their curricular reforms gave a greater place to natural history, Poland's geography and history, the Polish language, and civic education. One author has commented that, despite the survival of its old social structure, "Poland under Stanislaus was one of the most active centers of the Age of Reason in Europe." Stimulated by the ideals of the Enlightenment, Poles who led the national commission saw the role education about values would have in shaping the nation. In 1791, Poland adopted its first constitution, a bold experiment in reform that proved short-lived (in 1795, Prussia, Austria, and Russia accomplished the third partition, and Poland disappeared from the face of Europe, not to reappear until the twentieth century).

Constitutionalism rests on shared values, on a sense of community. Constitutions, like nations themselves, are not artificial bodies, unconnected to reality. Through its constitution, a people voice hopes and aspirations.

Thomas Masaryk understood that, if democracy is to survive and flourish, it requires "the constant development and extension of public spirit." Individualism is the handmaiden of democracy. But, as Dr. Masaryk put it, that does not mean "capricious individualism," but a sense of Individual responsibility.

Virginia's 1776 Declaration of Rights declares: "That no free government, or the blessing of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by a frequent recurrence to fundamental principles." This language speaks, not just to the eighteenth century, but to our time as well.

A healthy polity. In late October 1918, only days before the armistice stiffened the guns of World War I, representatives of eighteen nationalities, unofficially speaking for 65,000,000 people, met in Philadelphia. Calling themselves the Mid-European Democratic Union, these men met to debate the future of Central and Eastern Europe in the post-war period.

Thomas Masaryk, the Union's chairman, announced the results of their deliberations. Symbolically, the delegates met in Independence Hall. As Masaryk reports in his memoirs of the years leading to the establishment of Czechoslovakia as a free state, "then, in the courtyard, I read out a joint declaration while the Bell of Independence was rung in accordance with historical precedent."

Dr. Masaryk did not make light of the difficulties of building the new nation. While the various nationalities might be of common purpose in looking to see the Austrians and Germans curbed, Masaryk saw the new state's greatest challenge to be creating a general understanding of "democracy and a federated government." Masaryk saw the Philadelphia conference as pointing to a "Declaration of Independence" for the people of Czechoslovakia—the nation's "Magna Carta."

Seventy-one years after Masaryk spoke in Philadelphia, another man of letters, Vaclav Havel, was elected as president of Czechoslovakia. Like Masaryk, Havel took the nation's helm at a time of new beginnings. Addressing the Congress of the United
States, Havel could point to the breakdown of a totalitarian system that had kept so many peoples in thrall. Speaking “as the representative of a country that has set out on the road to democracy,” President Havel called for morality to be the guide for political action in an age in which states “large and small, former slaves and former masters, will be able to create what your great President Lincoln called the family of man.”

A nation needs good laws, but laws can do only so much in assuring that citizens enjoy peace, prosperity, opportunity, and the other benefits of civilization. Likewise, a good constitution can foster, but cannot assure, the benefits implicit in the concept of constitutionalism. Belligerent neighbors may wage war, a country’s own military leaders may refuse to accept civilian oversight, ethnic quarrels may rend the social fabric, political leadership may prove inept, poverty and economic ills may make constitutional government impossible.

In the final analysis, what makes constitutionalism a reality? Professor Walter F. Murphy has sought to catalogue the “prerequisites” for constitutional democracy. canvassing both external and internal conditions, he includes among the latter “military neutrality, civilian support, communications and literacy, peaceful pluralism, economic promise, and political culture,” but warns—recalling the insight of John Stuart Mill—that crossnational comparisons are shaky, the factors influencing development are many and varied, the effects are complex as well as interactive, and the sampling of relevant national experiences is small.

In 1787, Europe watched as a small assembly of Americans fashioned the basis for a constitutional democracy. In 1789, France was at stage center, as revolutionaries proclaimed the “rights of man and the citizen.” The ensuing two centuries have brought yet further chapters—1848–49 in Europe, nationhood for former colonies in the years after World War II, democratic Institutions in nations where fascism, nazism, or other ideologies had held sway.

Now the peoples of Central and Eastern Europe, emerging at last from alien rule, build constitutional edifices for themselves. The problems are many and serious—decades without genuine political experience, the passions of nationality, the pains of economic readjustments, among others.

Zdenek Deyl, of the Czech Ministry of Education, has painted this graphic picture: “Imagine that you have people who have been deprived of any democratic education for their whole lives. They simply heard that something like democracy exists, but this was a negative pseudosystem of the capitalist world, so they never even have seen how to behave and how to get involved in a democratic system.”

In September 1990, educators from Hungary, Poland, and the Czech and Slovak Federal Republic joined their American counterparts at James Madison’s home, Montpeller, to discuss “Preserving a Nation’s Constitutional Heritage Through Education.” The participants’ comments illustrate the hurdles to be surmounted. The director of teacher training of Poland’s ministry of education stated, “Teachers of history [in the socialist era] were either indoctrinated or repressed. We have to start completely over and train the teachers of the teachers. We are trying to fill an empty well with an empty bucket in a very great hurry.” Bertalan Andrasfalvy, Hungary’s minister of education, lamented that, under the old order, humanists were not allowed to teach; only the natural scientists were allowed to pursue their research, publish, and travel abroad. A Slovak educator concurred: humanists were “really devastated” in the last three decades.

“Between Christmas and New Year,” he said, “we had to completely rewrite a civic education curriculum!”

Despite such problems, the countries of Central and Eastern Europe have important assets. Many an established democracy would be pleased to have the moral leadership of a Gönner or a Havel. The intellectual insights of professors in Warsaw or Budapest can match any to be found in the west. And, above all, despite economic vicissitudes and other burdens, the peoples of the region have a vision of what has been denied them but is now within reach.

The drafting of a constitution is only a start, but it is an important beginning. May the constitutions of the twentieth century’s last decade in Central and Eastern Europe come to rank with such storied documents as the Golden Bull and the May 3 Constitution.

2. Stroup, Hungary in Early 1848, pp. 100, 102.


6. Text of President Göncz's address, pp. 8–9 (emphasis in the original).

7. Brazil's 1988 Constitution has thirty-four sections devoted to the rights of workers.


11. Professor Walter F. Murphy distinguishes between two norms: democracy and constitutionalism. He sees these two theories as sometimes reinforcing each other and sometimes being in conflict. He seeks a synthesis of the two theories in a paper, "Constitutional Democracy in Eastern Europe," presented to the Conference on Constitutionalism and Constitutional Change in East Central Europe, Pecs, Hungary, June 18–20, 1990. In the present paper, I subsume democratic institutions under my "benchmarks" of constitutionalism.

12. Portions of this paper draw upon a paper on "Constitutionalism" presented at a conference on the Revision of the Czechoslovak Constitution, Salzburg and Prague, April 1990.

13. In his address to the Congress of the United States, President Havel concluded by observing, "When Thomas Jefferson wrote that governments are instituted among men deriving their just powers from the consent of the governed, it was a simple and important act of the human spirit." New York Times, February 22, 1990, p. A14.


19. Id., p. 5.

20. Id., pp. 5–6.

22. New York Times, October 20, 1989. The statute further requires that party cells must be disbanded in other branches of the civil service by the end of 1990 and in the armed forces by the end of 1991. Ibid.


25. See Constitution of 1920, sections 113 through 125.


29. This language appears today in the Virginia Constitution, Article I, § 1.

30. Edward Taborsky commented that, in articulating the rights and obligations of the citizens of Czechoslovakia, the framers of the 1920 Constitution were inspired "by the ideals embodied in the eighteenth-century American constitutions and in the declaration of the rights of man proclaimed in the French Revolution." Taborsky, Czechoslovak Democracy at Work (London, 1945), p. 129. "In its political and ideological content the Constitution [of 1920] is perhaps nearest to the French individualistic republican liberalism so admired by the Czechoslovak Constituent Assembly, and which was looked upon at the time as the most developed system of republican parliamentary democracy." Ibid.

31. Hungary's provisional Constitution explicitly recognizes "human dignity" as being an inherent right, of which no one shall be arbitrarily deprived (Section 54).

32. The Sixth Amendment provides that an accused shall "have the assistance of counsel for his defence."

33. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself..."

34. Document of the Copenhagen Meeting, p. 4.

35. Id., pp. 9–10. The participating states undertake to protect individuals from any psychiatric or other medical practices that violate human rights.

36. Section 108.


38. See sections 107 through 126. In contrast to the Fifth Amendment to the United States Constitution, which states that it is not to be taken away, Czechoslovakia's 1920 Constitution permitted Parliament to decide against compensation (Section 109). Despite this proviso, Edward Taborsky concluded that the Constitution "left no doubt that the whole Czechoslovak economic order is based upon private capital and private enterprise." Taborsky, Czechoslovak Democracy at Work, p. 130.

39. Sections 58, 59, 60, 61, 67.

40. Sections 9, 13.


42. When one's conduct "affects the interests of no persons besides himself," Mill contends that "there should be perfect freedom, legal and social, to do the action and stand the consequences." Mill, On Liberty, Chapter IV ("Of the Limits to the Authority of Society over the Individual").


45. Chapter 39.


47. When constitutional changes were introduced in the Hungarian Parliament, in October 1989, the ultimate aim was described as being "a constitutional state of democratic structure, governed by law and order, i.e., a Rechtstaat," whose components would include "a democratically elected, effectively sovereign Parliament, a Government..."


50. Hungary's provisional Constitution guarantees that an accused be judged in a "just and open hearing by an independent and unprejudiced court set up by law," that the accused has the right to defense (and that defense council shall not be accountable for opinions advanced during the course of the trial), and that there be no ex post facto punishments (Section 57).


55. Taborsky, Czechoslovak Democracy at Work, p. 132. The Court's prestige appears to have been enhanced by a mechanism by which a ruling could become binding upon the whole administration, including the Cabinet. Id., p. 133.

56. Section 32/B. The extension of the parliamentary commissioner's title to include national and ethnic minorities was affected by Act XL of 1990.

57. Blackstone's Commentaries, I, p. 44.

58. See, e.g., Vanzant v. Waddell, 10 Tenn. 259, 270 (1829), stating that "law of the land" requires "a general and public law equally binding upon every member of the community."

59. See, e.g., Virginia Constitution, Art. IV, § 14, listing 20 classes of cases in which the General Assembly may not enact any local, special, or private law. The Copenhagen Document states that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law." Document of the Copenhagen Meeting, p. 4.


63. Transylvania came under Hapsburg rule in 1691, was annexed by Austria in 1867, and remained in the Austro-Hungarian Empire until 1918, when it was given to Romania as part of the settlement of World War I. Transylvania is a traditional center of Hungarian culture, but as a result of resettlement since World War II (including Romanians from Moldavia) Romanians now constitute about three-quarters of Transylvania's population. After Ceausescu's fall, the interim government sought to extend better treatment to Romania's Hungarians. Concessions to ethnic Hungarians, however, produced a backlash among the region's Romanian majority. In March 1990, army troops had to be called into Targu Mures, a city in Transylvania, to curb rioting in which three people were reported killed and 300 injured. See New York Times, March 22, 1990, p. A17, col. 3.

64. Section 106.

65. Sections 128 through 134.

66. Sections 68, 70A.


68. Id., pp. 17-19.


70. Id., p. 43.

71. Proposition 13 limited local government's ability to raise property taxes.


73. Craig v. Boren, 429 U.S. 190 (1976) (gender classifications must serve "important government objectives" and must be "substantially related" to achievement of those objectives).


75. All nine justices wrote opinions in the seminal capital punishment case, Furman v. Georgia, 408 U.S. 238 (1972).
76. Chapter 61.
78. For Adams’ views of Mably, see John Adams, Works (Boston, 1851), I, pp. 350, 354, 360.
79. Id., IV, p. 279. It was in reply to Turgot that Adams wrote his Defence of the Constitutions of Government of the United States (London, 1794).
83. Today this language appears in Virginia Constitution, Art. 1, § 1.
84. On popular sovereignty in the early state constitutions, see Adams, First American Constitutions, pp. 129–49.
88. See constitutions of Georgia (1777), Maryland (1776), Massachusetts (1780), and North Carolina (1776).
92. Federalist No. 47.
93. Federalist No. 48.
94. Article I, section 7; Article II, section 2.
97. I discuss these features of American constitutionalism in subsequent portions of this paper.
100. Commonwealth v. Caton, 8 Va. 5, 8 (1792).
101. 1 Cranch (5 U.S.) 137, 179 (1803) (emphasis in original).
103. Sections 98, 99.
105. Section 32/A.
106. 1 Cranch (5 U.S.) at 164.
108. In Baker v. Carr, 369 U.S. 186 (1962), Justice Brennan attempted to identify those factors that would lead the Court to forego review of decisions made by the executive or legislative branches.
112. Taborsky, Czechoslovak Democracy at Work, p. 130.
113. Slaughter-House Cases, 16 Wall. (83 U.S.) 36, 77 (1873).
119. Section 116.
120. Section 112.
121. Section 8.
122. Section 24. The Constitution requires that the two-thirds majority be two-thirds of Parliament's membership, not merely two-thirds of those attending. Section 24 states that resolutions may be adopted by a vote of "more than half of the votes of the Members attending," but, as to constitutional amendments and Acts of constitutional force, section 24 says that a "two-thirds majority of the votes of the Members of Parliament shall be required . . . ."
123. Section 32/A (as amended by Act XL of 1990).
126. Id., p. 137.
128. Section 15.
132. President Havel's credentials in the world of arts and letters are well known. It is interesting to recall that Masaryk, a towering figure in the political history of Czechoslovakia, often looked to the arts and to literature in seeking insights on questions of society and politics. See Eva Schmidt-Hartmann, Thomas G. Masaryk's Realism (Munich, 1984), p. 193.
135. Id., p. 13.
136. This and the quotations in the following paragraph were transcribed at the conference Preserving a Nation's Constitutional Heritage Through Education, which met at James Madison's Montpelier, in Virginia, on September 15–16, 1990.
STATEMENT OF AMERICAN CONSTITUTIONAL SCHOLARS

ON THE HISTORIC OCCASION OF THE FRAMING

OF THE NAMIBIAN CONSTITUTION

JANUARY 26, 1990
STATEMENT OF AMERICAN CONSTITUTIONAL SCHOLARS ON THE HISTORIC OCCASION OF THE FRAMING OF THE NAMIBIAN CONSTITUTION

We congratulate the people of Namibia at this historic time of preparing a national constitution and imminent independence. The independence of Namibia as a free and democratic nation based on equal rights for all is a triumph of the human spirit and the rule of law.

It has been an honour and a privilege to observe the development of a Constitution for Namibia at the invitation of the Foundation for Democracy in Namibia. We are particularly appreciative of the opportunity to have met with all political parties represented in the newly elected Constituent Assembly as they have participated in the historic framing of the Constitution.

The preparation of a national constitution is one of the most important events in the life of any nation. It is essential that it takes place in an atmosphere of careful and full deliberation. Indeed, such an atmosphere conducive to full embodiment of the principles of democracy, fundamental rights of mankind and the rule of law, which are a reflection of the basic principles in the Namibian struggle for independence, can only facilitate the immediate realization of full independence. Moreover, a careful process of consensus building in the preparation of the Constitution would begin an important tradition in the national life of Namibia and would greatly strengthen the first national government. As such, we would emphasize a point repeatedly made to us in our discussions with national leaders that it is strongly in the interest of the new Nation to proceed carefully and with full deliberation in its preparation of a Constitution.

As we observe the historic process of Constitution building in Namibia - itself an important milestone in progress toward universal realization of freedom and human dignity - we are mindful of the framing of our own Constitution by the founding fathers some 200 years ago and of the great debt our Nation owes to their work. In 1987 the United States proudly celebrated the bicentennial of our Constitution and next year we will celebrate the bicentennial of the Bill of Rights. In great measure the enduring of the Republic is due to the sound principles of democratic governance bequeathed by our constitutional framers enabling progressive realization of human freedom and dignity for all in a government genuinely of the people, by the people and for the people.

We believe that all nations must develop their own Constitution and law. Experiences and circumstances differ and constitutions must reflect those differences. Moreover, as non-nationals of Namibia we are cognizant that we are certainly not aware of significant considerations which affect the negotiations and the choices the founders of the Nation must make. Nevertheless, we are mindful of certain constitutional principles underlying our own experience which we believe are broadly reflective of the successful experience of many democratic nations throughout human history. The most important of these are that democratic governments should be constructed around a system of separation of powers, checks and balances and division of powers encouraging both consensus building in government and democratic responsiveness to the people; that a just constitutional system must be rooted in the rule of law rather than decree by might; that an effective democracy must guarantee fundamental rights and human dignity for
all, and that government which encourages freedom in the economic sphere, as it encourages freedom elsewhere, will be far more successful in unleashing the creative potential of its citizens and realizing its developmental aspirations.

Separation of powers and checks and balances between strong legislative, executive and judicial branches and a proper concern for local and regional autonomy within a national system are necessary for lasting freedom under a government of laws. Such structures encourage consensus building, broad democratic participation in decision by affected groups, deliberative care in solemn governmental processes, and a check on unconstrained power. Such mixed governmental structures are not a tool to restrain government but rather to channel it in the path of common interest and thus to make it more effective and just.

The rule of law is a second fundamental principle of democratic government. It is a prerequisite for ensuring democratic governance and the preservation of inalienable fundamental rights and freedoms for all the people - whose welfare must be the object of government. And it depends, of course, on a strong and genuinely independent judiciary empowered to protect and defend the national constitution even against government action.

An effective democracy must also guarantee fundamental rights and human dignity. Thus, a central component of a democratic constitution is to enumerate inalienable fundamental protected rights of all the people, such as the rights to life, personal liberty and freedom of movement; freedom of conscience, including academic freedom; freedom of expression, including freedom of speech and a free media; freedom of assembly and association, including political parties and trade unions; freedom of religion; due process and equality before the law; protection from arbitrary deprivation of private property or deprivation of property without just compensation; and freedom from racial, ethnic, religious or sexual discrimination. These rights and others must be non-derogable and must be protected as the very foundation of the governmental compact with the people.

Finally, successful democracies have encouraged human freedom in the economic sphere as they have encouraged freedom elsewhere. A system which builds upon the creative spirit of citizens in economic affairs seems both to achieve greater economic development for all and greater stability in governmental structures. The worldwide record in this respect is striking as has been dramatically evident from recent events.

As we have observed the historic Constitution building in Namibia we are mindful of these fundamental principles and heartened by the trends we see. The basic thrust of the draft Constitution to date reflects the determination of the people of Namibia for a multiparty democratic Nation with equal opportunity and human dignity for all. We are also heartened by the consensus building at work in the Constitutional drafting process. And we are encouraged to see innovations which will put Namibia in the forefront of the liberal democracies of the world in providing for particular rights. Those provisions concerning protection of the family and recognition of the rights of children are particularly of note.
The specific comments which follow on the draft Constitution as tabled are presented in the spirit of what we hope are constructive suggestions and in a spirit of admiration for the strong support for fundamental democratic principles repeatedly expressed to us by many leaders in the Constitution drafting process. These comments, of course, are made solely in our individual capacities as scholars supportive of democracy, human dignity and the rule of law. They will be grouped into the following categories reflective of these basic principles:

I. Suggestions Concerning Fundamental Rights and Freedoms
   - General Regime
   - Substance of Rights and Freedoms

II. Suggestions Concerning an Independent Judicial Branch and the Rule of Law

III. Suggestions Concerning Separation of Powers and Checks and Balances in Government Structures

IV. Miscellaneous Suggestions

V. Suggestions Concerning Constitutional Implementation in the Post-Independence Period

Before turning to specific comments we would particularly call attention to our strong recommendation that the current sweeping provisions on "Derogation", "State of Emergency, War and Martial Law", and "Preventive Detention" be deleted. In our judgement, as these provisions interact they are fundamentally inconsistent with a democratic regime premised on human dignity and the rule of law. Indeed, if permitted to remain they would stand as a dagger aimed at the democratic heart of the new Nation. Moreover, they would convey an unfortunate image internationally which would undercut the hope that the Constitution of Namibia will be a leader in safeguarding fundamental human rights and freedom and that the new Nation will enjoy stable democratic governance and peace. We also believe that as they interact these provisions are inconsistent with the 1982 Principles Concerning the Constitution for an Independent Namibia. Perhaps most importantly, these provisions seem alien to the fundamental principles underlying the struggle for independence of the new Nation of Namibia. The Constitutional experience of democratic nations suggest that they have the internal resilience to weather periods of emergency without setting aside their basic principles and that they need not focus their most basic national compact with the people on settings of emergency. And when democratic nations do set aside their basic principles in emergencies or war, as in the sad experience in our own country with the unnecessary internment of Japanese-Americans during World War II, such incidents are remembered with regret. Our specific suggestions are as follows:
I.

SUGGESTIONS CONCERNING FUNDAMENTAL RIGHTS AND FREEDOMS

General Regime

* Delete the language "in the manner hereinafter prescribed" at the end of Article 5 so as not to inadvertently limit the enforceability of the fundamental rights and to be fully consistent with paragraph 5 of the 1982 Principles.

* In Article 21 on "Fundamental Freedoms" delete the language in paragraph 2 to make this Article fully consistent with protection of fundamental freedoms in paragraph 5 of the 1982 Principles. The Courts can adjudicate the consistency of any law of Namibia with these fundamental freedoms and the very purpose of enumerating basic freedoms is to limit any contrary government actions.

* In Article 18 on "Administrative Justice" add the words "this Constitution", before "common law" so that administrative bodies are also clearly limited by the Constitution.

* In our judgement Article 24 on "Derogation" should be struck in its entirety as should the Article on "States of Emergency, War and Martial Law". As they interact, these sweeping articles seem fundamentally inconsistent with meaningful guarantees of human rights as well as with paragraph 5 of the 1982 Principles. The provision for general detention in the "Derogation" Article seems particularly inconsistent with human rights and the right to personal liberty as enumerated in paragraph 5 of the 1982 Principles. In addition, the Article on "State of Emergency, War and Martial Law" seems inconsistent with a democratic government based on separation of powers and checks-and-balances and with paragraph 3 of the 1982 Principles which specifies that the legislative branch "will be responsible for the passage of laws" and that an independent judicial branch "will be responsible for the interpretation of the Constitution and for ensuring its supremacy and the authority of the law."

* We believe that Article 25 on "Enforcement of Fundamental Rights and Freedoms" should be edited by striking the beginning phrase "Save in so far as it may be authorized to do so by this Constitution". This introductory phrase seems to weaken the guarantees of fundamental rights and freedoms. Such fundamental rights and freedoms are intended to protect against governmental action, including action of Parliament, any subordinate Legislative authority, the Executive or any other agency of government.

* We believe that the provision in Article 80 which implicitly provides that a constitutional decision of the highest court can be overridden "by an Act of Parliament lawfully enacted" should be rewritten by adding the phrase "in matters other than constitutional interpretation" before the language "...is
contradicted by an Act...". This change would prevent Parliament from overriding a constitutional decision of the Supreme Court but would still leave the Parliament free to contradict a Supreme Court decision in matters of Legislative interpretation. As currently drafted, however, this provision would seriously erode the protection for fundamental freedoms which are intended to be binding even on the Parliament. This provision would also seem inconsistent with paragraph 5 of the 1982 Principles as well as with paragraph 3 of the 1982 Principles that "an independent judicial branch ... will be responsible for the interpretation of the Constitution and for ensuring its supremacy."

* Preferably, the provision on amendment of the Constitution should contain a provision such as: "No amendment to this Constitution shall derogate from or otherwise diminish the fundamental human rights and freedoms guaranteed by this Constitution." Failure to have such a provision could be seen as inconsistent with paragraph 5 of the 1982 Principles.

Substance of Rights and Freedoms

* We believe that Article 11 on "Arrest and Detention" should be rewritten to strike the provisions on preventive detention. These provisions are not consistent with the protection of human rights in a democracy and would also seem inconsistent with the right to "personal liberty" set out in paragraph 5 of the 1982 Principles. In addition, this article might be edited to add a normative requirement at the end of paragraph 3 in language such as: "based on a prima facie case that a crime has been committed by the accused."

* Article 12 on "Fair Trial" should be edited in paragraph 1(c) to delete reference to the language "of state security" and the language "of morals". Secret judgements in criminal cases do not seem compatible with due process and democratic principles.

* Paragraph 2 of Article 13 on "Privacy" might be rewritten as: "Searches of the person or homes of individuals or of associations or other private entities shall only be justified where authorized by a competent judicial officer based upon a prima facie case and specifically describing the person or place to be searched."

* Paragraph 2 of Article 16 on "Property" might be edited to delete everything after the words "just compensation". As currently drafted, the remaining qualifying phrase can only limit the right, seems inconsistent with the treatment of other fundamental rights, and to the extent that it limits the requirement of payment of "just compensation" it would be inconsistent with the specific "just compensation" requirement in the first sentence of paragraph 5 of the 1982 Principles. On the other hand, if this phrase does not limit the "just compensation" standard then it is not needed, as it would fall within the general legislative authority of
Parliament. In the alternative, the phrase "subject to the payment of just compensation" might be moved to the end of this paragraph if the real intent is to have the phrase "in accordance with requirements and procedures to be determined by Act of Parliament" modify expropriation in the public interest.

* Article 19 on the protection of culture and tradition is a commendable expression of the desirability of protecting cultural pluralism. As written, however, this article seems somewhat weak. One possible change to strengthen this article would be to delete the concluding language "or the national interest." This concluding language could easily be misinterpreted to automatically uphold any Act of Parliament in the area sought to be protected by this Article. If so, the Article would have served no purpose and indeed could even undercut the fundamental freedoms, such as the protection of freedom of religion, expressed elsewhere in the Constitution.

* We believe that a provision should be adopted specifically protecting academic freedom in institutions of higher learning. This is an important component of a democratic society and of protecting freedom of thought, conscience and belief. While this principle seems implicit in the Fundamental Freedoms already enumerated, we believe that it would be universally acclaimed if this important Fundamental Freedom were specifically recognized. One way of incorporating this principle might be to add language to the end of Article 21 (1)(b) such as "including academic freedom in institutions of higher learning."

II.

SUGGESTIONS CONCERNING AN INDEPENDENT JUDICIAL BRANCH AND THE RULE OF LAW

* We strongly believe that in Article 80 concerning the binding effect of decisions of the highest Court the clause implicitly permitting an Act of Parliament to override a decision of the Court in decisions concerning the interpretation of the Constitution should be rewritten to remove this feature. An appropriate rewrite might add the phrase "in matters other than constitutional interpretation" before the language "...is contradicted by an Act..." to prevent this result. As currently drafted, this provision amounts to a potential power to effectively amend the Constitution by a simple majority vote of the Parliament and would seem inconsistent both with an independent judiciary and the provisions on constitutional amendment. This provision would also severely undercut an important constitutional check and the authority of the rule of law. And it seems inconsistent with paragraph 3 of the 1982 Principles providing for "an independent judicial branch which will be responsible for the interpretation of the Constitution and for ensuring its supremacy and the authority of the law." The suggested redraft would still permit Parliament to contradict a Supreme Court decision in matters of legislative interpretation.
* Judges might be appointed and removed or suspended for cause by the President only on the recommendation of an independent Judicial Service Commission whose members serve for a fixed period. To ensure an independent judiciary and recommendations rooted in professionalism, it should be made clear that the professional organisation mentioned in Article 84 is that of the practising bar. Whatever the precise mechanism, it is important for an effectively functioning judiciary that the appointment and removal or suspension of judges be isolated from partisan politics.

* We believe that judges should hold their office for life (or some fixed age such as 70) and once appointed should not be subject to diminution or extension of their term by either the President or the Parliament. To permit diminution or extension of terms of appointment could undercut the independence of the judiciary. It should also be provided that Judges salaries may not be reduced while they are serving in office and that they should not be lower than that of a cabinet minister.

* The number of judges on a court should not be subject to change for purposes of considering individual cases. This principle is important for the maintenance of an independent judiciary in avoiding "court packing" as a way of controlling specific judicial decisions and would seem applicable even if an appointment is requested by the Chief Justice, since the Court itself may reflect different views.

* We believe that the Attorney-General, as the chief legal officer, should be independent in rendering legal advice and performing the other specified duties of the office. To this end he or she also might be appointed by the President on the recommendation of the Judicial Service Commission.

III.

SUGGESTIONS CONCERNING

SEPARATION OF POWERS AND CHECKS AND BALANCES

IN GOVERNMENT STRUCTURES

A significant factor in creating and maintaining effective democracy is to provide for means whereby each constituent element of government is enabled to check the use of power by all other elements. This provides a check against tyranny of majorities, minorities and individuals who may abuse their office in any branch. While the state must be sovereign no element of its government may be.

To achieve the ability of one element of government to check all other elements each must have an independence in authority and responsibility so as to provide a balance in the governing process. Yet each must have limited but significant opportunities to monitor and check the activities of the other branches of government. The
totality of these competitive provisions in a constitution constitute a necessary paradox - powers which are and must be separate, yet are able to check and balance all others.

While much has been done in the draft of the Namibian Constitution to achieve these ends, in our judgement more can be done to achieve separation of the branches of government and their ability to check each other. In this connection we would specifically offer the following suggestions:

* To establish independent authority for the legislative branch of government, it should be made clear that the Parliament, rather than the President, should determine the times when it meets. This does not preclude the President from summoning the legislative bodies for extraordinary sessions, but it does preclude the President from limiting the times when the legislature meets.

* The draft Constitution provides that a member of the National Assembly shall vacate his or her seat if the political party which placed him or her in the Assembly informs the Speaker that he or she is no-longer a member of the party. In our judgement this allows a party undue influence over a legally established entity of government and undercuts the role of the legislature as an independent branch of government and a check on other branches. At worst a party could change all its assembly members to enforce a change in policy choice which was not assented to by the people in any election. Once a member of the Assembly is seated he or she should be secure in that position for the term elected except for constitutionally established "good and sufficient reasons". Then the procedure for removal should require a two-thirds vote for removal by the whole body of the Assembly, again to prohibit, at least, majority party imposition of will upon its members. Legislators must be secure and independent in office, otherwise a legislature would only need one member from each party with a designated number of votes to count. The next election is the time and occasion for disciplining party membership. And if the Executive is simultaneously the leader of the majority party in Parliament, a power to remove those legislators constituting a majority of Parliament would clearly undercut the role of the legislature as a check. We are aware that substantial arguments have been advanced for this provision but believe that the cost is to substitute parties for an independent legislature and that this cost is too high. Perhaps one alternative to this provision without its substantial cost to the independence of the National Assembly, would be to provide for disqualification and party replacement of members in settings of violation of conflict of interest and ethics rules to be formulated by the Assembly for the proper conduct of its members.

* The concept of a second body of the legislature continues to evolve. In principle the concept of bicameralism is to be commended and encouraged. The obvious benefits to democratic government are many. A second body of the legislature provides an additional opportunity for check and control of government abuse. It provides an additional source of policy initiation. It provides another
means of representing public interests. It slows the processes of
government so that more deliberate consideration is given to
governmental actions. It broadens democratic participation in the
life of the Nation. And, perhaps most importantly, it is an
important mechanism for building and ensuring broad support for
government policies. Even where a second legislative body
represents directly or indirectly the same citizens represented in
the Assembly, experience in other countries has shown that the
second body often reacts differently to policy initiatives.
Interests are agglomerated in a different way because of the size
of the second body, a different term of office, a larger or
smaller constituency, or, as suggested in the provision for a
Namibian National Council, a secondary constituency. Ideally, we
recommend the establishment of a second house National Council with
full authority and responsibility in the legislative process. Its
assent would be required on all legislation. It would confirm all
appointments which the National Assembly would also confirm. Its
assent would be required of all constitutional amendments. What the
Assembly did it would do in the same way by the same requirements,
except the cabinet would not sit in it nor be required to answer
its questions. At least the National Council should be established
by the Constitution now. Perhaps a short period (a few months)
would be allowed for the establishment of the Delimitation
Commission and for it to establish the districts to be represented,
and subsequently for the districts to name their representatives.
The National Council should set its own rules. Perhaps the times
for sitting established by the National Assembly could also apply
to the National Council so they would meet in tandem.

* Though not separate branches of government, there are offices
and commissions which are proposed in the draft Constitution for
specific commendable purposes which must necessarily have an
independent existence and at the same time be seen as being free
from partisanship and responsible to the public interest. To
clearly indicate their independent judgment and independent
existence and their responsibility to all the people we believe
that the appointment of the following offices of the Nation should
be assented to by a two-thirds vote of the National Assembly or
alternately by a majority vote of both the National Assembly and
the National Council:

- the Delimitation Committee
- the Ombudsman
- the Auditor-General
- the Governor General of the Central Bank

* To ensure the independence and professionalism of the judiciary
and to check its power the President should appoint all judges on
the recommendation of an independent Judicial Service Commission.
And judges should only be removed or suspended through the same
procedure by which they are appointed. In like fashion, the
Ombudsman, Auditor-General, the Governor General of the Central
Bank and the Attorney-General should only be removed or suspended
from office by a procedure identical to that of their appointment.
* To strengthen the role of the National Assembly and also to provide additional checks on governmental power we recommend that the National Assembly should approve the appointment of the Prime Minister and all Ministers by a majority vote. We realize that in essence, these officials are named by the President of the same party that holds a majority of the National Assembly. But it again establishes the principle that the legislature embodies the responsibilities of governance of the Nation by the people. Also, there are provisions in the draft Constitution for ministers to be named who are not members of the National Assembly. It would seem that they should be accepted by and held accountable to the National Assembly.

* Furthermore, we believe that the National Assembly, or alternately the National Assembly and the National Council, should at least establish and disestablish Cabinet level ministries and agencies of government as well as terms of tenure and conditions of service for such ministries and agencies. To allow Cabinet level ministries and agencies to be created without check is to too broadly bypass legislative power. And to allow ministries and agencies to be abolished without agreement by the legislative bodies invites the diminution of legislative intent.

* We believe that succession to the Presidency should include the Prime Minister and the Speaker of the National Assembly, then the Chairman of the National Council followed by persons designated by the National Assembly. This would seem to better fulfill the requirement of executive accountability to the legislative branch.

* We believe that the power to declare war and the power to approve the use of the armed forces abroad beyond a limited period such as 30 days should be entrusted to a majority vote in both houses of the Parliament. The war powers, as opposed to the Commander-in-Chief power to direct the actual conduct of hostilities, is normally subject to a legislative check. It might also be considered whether it would be useful for such an Article to specify that the armed forces may only be used consistent with the United Nations Charter. Such a provision affirming one of the most fundamental provisions of the Charter would put Namibia in the forefront of support for the United Nations and world order; and

* We believe that commissions for officers in the armed forces should also be confirmed by the National Assembly following their nomination by the President. This would affirm an important principle of civilian control of the military.

IV.

MISCELLANEOUS SUGGESTIONS

* Consideration should be given to adding the language "individual liberty and dignity" in Article 1(1) after the language "the rule of law". This would strengthen the provision and would also seem more consistent with the Preamble and the principles underlying the Namibian struggle for independence.
* Consideration might be given to an additional provision in Article 1 that Namibia is an independent democratic State based on a multiparty system and that there should be no state establishment of a political party or merger of a political party with any organ, arm or symbol of the State. The draft Constitution clearly seems premised on an independent multiparty democracy. A provision specifically embodying this principle, however, would assist greatly in instilling international confidence in the new Constitution.

* We note that the Principles of State Policy, Chapter 11, most of which seem commendable and progressive and all of which are choices consistent with democratic principles, are not the kind of provisions typically included within a Constitution. Moreover, to the extent that they have any direct legal effect as part of the Constitution, that effect could include diminishing the flexibility of future governments of Namibia to adopt social and other covered programs for the Nation in some subsequent interpretive settings. We recognise, however that there may be a strong desire to express principles of state policy as the new nation becomes independent. As one alternative procedure, if the Constituent Assembly agrees to these principles as an indication of national policy they could be enacted as such by the National Assembly as a statement of principles.

* Paragraph 3 of Schedule 2 to the Constitution should reflect that the voters of the Nation have the right to know the order of the persons put on the electoral lists by the political parties indicating that this order would not be shifted after the election.

* To ensure an orderly transition, Article 131 on "Courts and Pending Actions" might specify that the Judge-President of the High Court of Namibia should also assume the functions of the Chief Justice of the Supreme Court of Namibia until the appointment of a Chief Justice. Without some such transition pending the appointment of a Chief Justice, the mechanism of the Judicial Service Commission could not function to recommend appointments of judges - including the Chief Justice - since the draft Constitution provides that the Chief Justice is a member of the Judicial Service Commission.

* The provision for membership on the Public Service Commission now allows for unpopular recommendations by the Commission to be overturned by changing the membership of the Commission. Whatever size is desired should probably be stated in the Constitution. A Commission of a chairperson and two members should be adequate, but in any event the size should not be subject to change without constitutional amendment.

* The provisions for a management committee of the regional councils appear to be cumbersome. Would not a chairperson be sufficient to act as an executive and to preside over the meetings of the councils?
V.

SUGGESTIONS CONCERNING CONSTITUTIONAL IMPLEMENTATION IN THE POST INDEPENDENCE PERIOD

* Because of the importance of a strong rule of law it is recommended that the new Nation consider early establishment of a faculty of law for the legal training of Namibians in Namibia. This may be an area in which there would be substantial international interest.

* We believe that continuation of the tradition of consensus building as reflected in the process of constitutional drafting would greatly strengthen the first government as it begins its task of governing and developing the new Nation. We found the evidence of consensus building and unity evident on the part of all participants in the constitutional drafting process encouraging for the future of Namibia.

Dennis L. Thompson  
Associate Academic  
Vice President and  
Professor of Political Science at Brigham Young University

John Norton Moore  
The Walter L. Brown Professor of Law and Director of the Graduate Program at the University of Virginia School of Law

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

**ARTICLE 1**

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

**ARTICLE 2**

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

**ARTICLE 3**

Everyone has the right to life, liberty and the security of person.
No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the pro-

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to
hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

**Article 20**

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

**Article 21**

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

**Article 22**

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

**Article 23**

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

**Article 24**

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

**Article 26**

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

**Article 27**

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

**Article 28**

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

**Article 29**

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Hundred and eighty-third plenary meeting,
10 December 1948.
COMMISSION ON SECURITY AND COOPERATION IN EUROPE

101st Congress
Second Session

THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE

5 June - 29 June 1990

A REPORT PREPARED BY THE STAFF OF THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE

August 1990
TABLE OF CONTENTS

1. Executive Summary ........................................ 1
2. Background to and Organization of the Meeting .......... 7
5. Opening of the Meeting and Implementation Review .... 11
6. The Human Dimension Mechanism ........................ 17
7. Congressional Participation ............................... 19
8. Non-Governmental Attendance and Activities ............ 20
   a. Free Elections and the Rule of Law ................... 23
   b. Minority Rights ....................................... 25
   c. Other Human Rights and Fundamental Freedoms .... 28
   d. The Human Dimension Mechanism ................... 29
10. Conclusions ............................................... 30

(III)
1. Executive Summary

In accordance with the mandate of the Vienna Concluding Document, the thirty-five states participating in the Conference on Security and Cooperation in Europe (CSCE) met in Copenhagen from 5 through 29 June 1990 for the second meeting of the Conference on the Human Dimension (CHD) of the CSCE. The first CHD meeting was held in Paris from 30 May through 23 June 1989, while the third meeting is scheduled to take place in Moscow from 10 September through 4 October 1991. The meetings of the CHD address the full range of human rights and humanitarian concerns encompassed within the Helsinki process.

At the Copenhagen Meeting, Albania joined the CSCE process for the first time as an observer. In contrast, requests by the three Baltic States to be granted observer status were not acted upon favorably.

The U.S. objectives for the Copenhagen Meeting were largely accomplished. The main elements of the meeting are summarized below.

Level of Representation: With strong urging from the Helsinki Commission, Secretary of State James A. Baker attended the opening of the Copenhagen Meeting, along with the Foreign Ministers of most of the other participating States. The U.S. delegation was ably chaired by Ambassador Max Kampelman, who had led the U.S. delegation to the Madrid Follow-up Meeting (1980-83).

Implementation Review: There was a review of the implementation of existing CSCE commitments by the United States, along with
other delegations, throughout the meeting. Dramatic improvements in many countries were noted, although the U.S. as well as other delegations also raised continuing human rights problems and humanitarian concerns. Nevertheless, delegations evidenced considerable uncertainty regarding how implementation issues should be approached in what was agreed to be a markedly different political climate.

The Human Dimension Mechanism: The so-called "human dimension mechanism" was established in the Vienna Concluding Document in order to provide a formal diplomatic framework for participating States to raise cases and situations with each other. In the six months prior to the Copenhagen Meeting and in the wake of the Eastern Europe's "revolutions," it was rarely used. Nevertheless, the participating States concluded that the mechanism was still a valuable tool and agreed on ways to improve its functioning. The United States used the mechanism during the meeting to request information from the Romanian delegation regarding the use of force to break up peaceful demonstrations in Bucharest in mid-June. The Romanian delegate responded by reading a cable prepared in Bucharest, apparently in anticipation of the condemnation by CSCE governments which the use of force would elicit.

Public Members: Ten private citizens, respected for their involvement in the promotion of human rights and their expertise relating to the CHD, were appointed as Public Members to the U.S. delegation. They were active in all phases of the meeting and added considerable expertise and insight to the delegation's efforts. Their work exemplified the interdependence of the U.S. public and the U.S. Government in CSCE affairs.

NGO Activities: Representatives of numerous non-governmental organizations (NGOs) attended the Copenhagen Meeting, including many from the United States. For the first time in a CSCE human rights meeting, there was significant uninhibited participation by NGOs from Central and Eastern Europe as well as the Soviet Union. NGOs engaged in numerous activities, including press conferences and an extensive series of human rights-related "parallel activities" (conferences, seminars, etc.) organized by Danish NGOs. Individuals from all participating States were able to travel to Denmark to attend the meeting, with the exception of one refugee who was denied an exit visa by the Soviet government.

The U.S. delegation worked closely with NGOs, listening to their views and concerns, briefing them about developments in the meeting, and assisting them in gaining access to the conference center, in arranging press conferences, and in meeting with other delegations. There were very few problems regarding openness and access to the conference center. A Chairman's statement underscored the importance of openness and access to CSCE meetings for NGOs and the press was adopted at the end of the meeting.

Public Diplomacy: The United States made a strong effort to publicize the Copenhagen Meeting. While there was relatively little coverage by the general media in the United States, the meeting was extensively covered by the NGO press, Radio Free Europe/Radio Liberty, and the European press.

Commission Involvement: The Helsinki Commission played an active role both in the preparations for the Copenhagen Meeting as well as during the meeting. Co-Chairman Steny H. Hoyer led a congressional delegation to Copenhagen. During the visit, he addressed a plenary meeting, and his delegation held several
bilateral meetings with other specific delegations and had extensive consultations with representatives of other participating States. The Commission’s Deputy Staff Director, Jane Fisher, served as a Deputy Head of the U.S. delegation, and Commission staff served as members of the delegation, participating in all aspects of the meeting.

Proposals: Many of the proposals introduced at last year’s CHD meeting in Paris were revived or revised for Copenhagen, including a U.S. proposal on free elections and political pluralism. Originally introduced at last year’s Paris Meeting by Co-Chairman Hoyer on behalf of the U.S. delegation, this proposal took on heightened importance in light of this year’s historic elections in Central and Eastern Europe, the Baltic States, and the Soviet Union. In all, the thirty-five participating States introduced a total of forty-three proposals covering virtually every aspect of the human dimension.

Document: At the end of the meeting, a document was adopted. The Copenhagen Document is built on the central premise that "pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms." The document expresses the participating States’ "determination to build democratic societies based on free elections and the rule of law." Most notably, its provisions regarding what constitutes a system of democracy in which civil and political rights may be guaranteed mark a significant step forward in the field of human rights. Highlights of the key provisions follow.

Democracy and the Rule of Law (paragraphs 1 - 5.21)
- The CSCE participating States identified the protection of human rights and fundamental freedoms as one of the basic purposes of government and reaffirmed that recognition of these rights and freedoms constitutes the foundation of freedom, justice and peace.
- They acknowledged that democracy is an inherent element of the rule of law.
- They declared that the elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings include (in addition to protections of civil and political rights):
  - a form of government that is representative in character, in which the executive is accountable to the elected legislature or the electorate;
  - the duty of the government and public authorities, which are not above the law, to comply with their constitution;
  - a clear separation between the state and political parties; in particular, political parties may not be merged with the state (the "no establishment clause" for political parties);
  - military forces and police under the control of, and accountable to, the civil authorities;
  - independent judges and impartial operation of the public judicial service.

Free and Fair Elections (paragraphs 6 - 8)
- The participating States declared that the will of the people, expressed through periodic and genuine elections, is the basis of the authority and legitimacy of government.
- To that end, they will respect the right of individuals and groups to establish freely political parties and organizations and enable them to compete with each other on a basis of equal treatment before the law and the authorities;
- Recognizing that the presence of observers, both foreign and domestic, can enhance the electoral process, they agreed to
invite governmental and non-governmental observers for national elections.

**Human Rights and Fundamental Freedoms (paragraphs 9 - 29)**
- In elaborating on the right of the individual to know and act upon human rights and fundamental freedoms, the participating States agreed to respect the right of everyone, individually or in association with others, to seek, receive, and impart freely views and information on human rights and fundamental freedoms, including the right to disseminate and publish such views and information; the right to seek redress for human rights violations with the assistance of counsel; and the right to communicate with international bodies regarding human rights abuses.
- They underscored that in a democracy any restrictions on human rights and fundamental freedoms must be truly exceptional and consistent with a state's international obligations.
- They confirmed that, even in a state of emergency, any derogations from such obligations must strictly remain within the limits provided for by international law.

**Minority Rights (paragraphs 30 - 40.7)**
- The participating States affirmed that respect for the rights of persons belonging to national minorities is an essential factor for peace, justice, stability, and democracy. They condemned totalitarianism, racial and ethnic hatred, anti-semitism and all manifestations of xenophobia and discrimination against anyone, as well as persecution on religious and ideological grounds.
- They committed themselves to protect the rights of persons to freely, express preserve and develop their ethnic, cultural, linguistic, and religious identity and maintain and develop their culture free from involuntary assimilation, including the right to use freely their mother tongue, to establish and maintain their own cultural and religious institutions, and to establish and maintain organizations or associations within their country and to participate in international non-governmental organizations.
- They further recognized the rights of minorities to establish and maintain contacts among themselves within their country and across international frontiers.
- They committed themselves to respect the right of persons belonging to national minorities to effective participation in public affairs, including affairs relating to the protection and promotion of the identity of such minorities.

2. **Background to and Organization of the Meeting**

The CHD concept (also known by its French initials as "CDH") originated in the negotiations of the Vienna CSCE Follow-up Meeting (November 1986 - January 1989). During these negotiations, Western countries, especially Denmark, France, the Netherlands, Canada, the United Kingdom, and the United States, sought to elevate the status of human rights and other humanitarian issues within the CSCE for two interrelated reasons. First, Soviet and East European human rights performance, despite some improvements, continued to be well below CSCE standards. Second, the prospects for new negotiations on both conventional armed forces in Europe and on Confidence- and Security-Building Measures promised to enhance the military-security aspect of the CSCE greatly, thus threatening to upset the long-standing balance between the humanitarian and the military-security aspects of the CSCE.
The NATO countries therefore adopted a proposal based on a draft of the European Community to combine the relevant parts of the Principles section of Basket I and Basket III (encompassing human rights and humanitarian concerns) into one conference on "the human dimension" which would meet once each year between the Vienna Meeting and the next main follow-up meeting in Helsinki in 1992.

As a group, the Eastern countries did not express much interest in such a conference. Early in the Vienna Meeting, however, the Soviet Union tabled its own proposal for a Conference on Humanitarian Cooperation, to be held in Moscow and to focus on Basket III issues alone. During the ensuing two years of intense negotiations, the Eastern countries accepted the broader CHD concept, while the Western countries agreed to hold the third meeting of the CHD in Moscow in 1991. The first meeting was set for Paris in 1989, and the second for Copenhagen in 1990.

All three CHD meetings have the same agenda, which, in brief, consists of the following:

1) Opening statements;

2) A review of implementation of CSCE commitments;

3) A discussion of the "human dimension mechanism" (see sections 6 and 9d below for a review of the mechanism) in both plenary sessions and in Subsidiary Working Body A (SWB-A);

4) The introduction and consideration of proposals in plenary sessions and in Subsidiary Working Body B (SWB-B);

5) Concluding statements.

The mandate for the CHD provided that concluding documents could be adopted for each of the three meetings if the participating States at the meetings decided to do so. As with all other non-military CSCE meetings mandated by the Vienna Concluding Document, the plenary sessions of the CHD are open to the public. The Danish Government, as host to the Copenhagen Meeting, was responsible for the openness and access to the meeting on the part of individuals, either representing themselves or non-governmental organizations, or as members of the press, in accordance with the commitment contained in Annex XI of the Vienna Concluding Document.

3. U.S. Delegation to the Meeting

With strong urging from the U.S. Helsinki Commission, Secretary of State James A. Baker attended the opening of the Copenhagen Meeting. The U.S. delegation was led by Ambassador Max A. Kampelman, who had previously distinguished himself as head of the U.S. delegation to the Madrid CSCE Follow-up Meeting (1980-83).

John Evans, of the State Department, served as principal deputy head of delegation. Paula Dobriansky, Deputy Assistant Secretary for Human Rights and Humanitarian Affairs of the Department of State, and Jane Fisher, Deputy Staff Director of the
Commission on Security and Cooperation in Europe, also served as deputy heads of delegation.

The United States appointed ten U.S. citizens prominent in the field of human rights to serve as Public Members on the U.S. delegation. The presence of these individuals on the delegation underscores the importance of the CSCE and of human rights both to the U.S. Government and the American people. The public members provided the delegation with valuable expertise in areas under discussion in Copenhagen as well as enhanced contacts with various non-governmental organizations and interest groups concerned with the Copenhagen Meeting. The Public Members were:

- Prof. Thomas Buergenthal, George Washington National Law Center
- Ms. Catherine Cosman, Helsinki Watch
- Mr. Larry Garber, Senior Consultant, National Democratic Institute
- Mr. Michael Haltzel, Director, West European Program, Woodrow Wilson International Center
- Prof. Hurst Hannum, Fletcher School of Law and Diplomacy
- Mr. David Harris, Director, American Jewish Committee
- Mr. Maido Kari, President, Baltic World Council
- Prof. Theodore Meron, New York University Law School
- Ms. Carol O’Hallaron, Doctoral Candidate, Cambridge University, U.K.
- Mr. George Weigel, Jr., President, Ethics and Public Policy Center

4. U.S. Objectives for the Meeting

The United States had several objectives for the Copenhagen Meeting. In line with past practice, the United States sought a frank and objective review of implementation of CSCE commitments, citing illustrative cases and specific situations and discussing the utility of the human dimension mechanism in this context. The United States held the view, shared by many other delegations, that recent historic changes in Eastern Europe and the Soviet Union deserved to be acknowledged and commended. At the same time, the United States believed that difficult issues should not be avoided and a review of persistent or new problems should not be neglected.

The United States also believed that a window of opportunity existed to obtain consensus on proposals which had been rejected by the East at previous meetings, as well as on fundamentally new proposals. In addition, some Eastern countries, now led by members of their former opposition movements, urged the acceptance of a document which would both reflect the region’s democratic revolutions and contain commitments that would make potential back-sliding more difficult. Thus, the United States supported the adoption of a document which would meet these criteria. In particular, the United States believed that strong commitments in the areas of free elections, rule of law, and minority rights had to be embraced by a Copenhagen Document if it was to gain the consensus of the United States.

5. Opening of the Meeting and Implementation Review

The Copenhagen Meeting was held in the Bella International Conference Center. The opening was attended by Her Majesty the
Queen of Denmark and His Royal Highness the Prince. The Foreign Ministers of most of the thirty-five participating States were present, including U.S. Secretary of State Baker. In addition, a message of greeting from Czechoslovak President Vaclav Havel was transmitted to the meeting.

At the outset of the meeting, Danish Foreign Minister Uffe Ellemann-Jensen noted the mandate to convene a preparatory conference to open in Vienna on 10 July 1990 to establish the agenda, timetable, and other organizational modalities of a CSCE summit to be held in the fall of 1990. Foreign Minister Ellemann-Jensen also noted Secretary Baker's invitation to hold a CSCE ministerial meeting in the margins of the United Nations General Assembly meeting in New York City in September or October of 1990.

On the first day of the meeting, the Chairman of the day (in this case, the representative of the host country, Danish Foreign Minister Ellemann-Jensen) announced that he had been informed that "the Albanian government, by virtue of paragraph 54 of the Final Recommendations of the Helsinki Consultations [the so-called "Blue Book" of procedures for the Helsinki process], had expressed the wish to attend the Copenhagen Meeting as an observer." Foreign Minister Ellemann-Jensen made an announcement to this effect and, without objection or comment from any other delegations, the meeting proceeded on this basis.

Subsequently, it was learned that Latvia, Estonia and Lithuania had made similar petitions to the Secretariat, also based on paragraph 54 of the Blue Book. In those cases, the Danish Executive Secretary indicated to the Baltic representatives that consensus to give the Baltic States observer status had not been obtained from all thirty-five participating States.

Paragraph 54 of the Blue Book states,

All European States, the United States and Canada shall be entitled to take part in the Conference on Security and Co-operation in Europe. If any of these States wishes to attend as an observer it may do so. In that case, its representatives may attend all stages of the Conference and of its working bodies, but shall not participate in the taking of decisions. Such a State may decide later to accept these decisions or some of them under the conditions defined by the Conference.

It appears that the Danish Secretariat interpreted paragraph 54 of the Blue Book as entitling Albania to join the CSCE process as an observer at any time. The thirty-five participating States, having given consensus to this provision, were understood by the Danish Secretariat to have given consensus to its result. The Danish Executive Secretary, C.U. Haathausen, provided no public explanation as to why he believed no consensus was necessary to admit Albania as an observer while he believed that consensus was necessary to admit the three Baltic States. However, it appears he believed that a consensus as to whether or not the three Baltic States were indeed "European States" was necessary before paragraph 54 could apply. In this case, the Danish Secretariat bowed to the Soviet position that Latvia, Estonian, and Lithuania are not independent. Despite the many opportunities which were present throughout the meeting, no delegation challenged the Secretariat on this point.
In fact, the United States and many other CSCE participating States do not recognize the Soviet incorporation of the Baltic States. This position is consistent with Principle IV of the Helsinki Final Act ("No such occupation or acquisition [by military or other direct or indirect measures of force in contravention of international law] will be recognized as legal"), by which all thirty-five participating States are bound.

In formulating its position, the Danish Secretariat did not seem to consider paragraph 55 of the Blue Book, which states,

States referred to in the first sentence of the paragraph above [i.e., paragraph 54] wishing to participate in the Conference or to attend as observers must so inform the Finnish Government at the latest on 25 June 1973.

This "sunset clause" clearly added a temporal restriction on the right of Albania or any other European state to join the CSCE process as a participating State or as an observer. Although the Blue Book does not describe what procedures are required to add additional participating States or observers to the process after 25 June 1973, CSCE practice dictates that any change in the status quo requires the consensus of all thirty-five participating States. The Blue Book does not distinguish between the process for obtaining observer status and for obtaining participating State status.

During Secretary of State Baker's opening speech, attention was briefly drawn away when, as he stood at the podium and began to read, more than 30 members of the public stood up on their chairs, took off outer clothing to reveal white sweatshirts with "HIV+" printed on them in large black letters, and silently unfurled a banner that read: "CSCE Breaks Down Walls; USA Puts Up Walls." Their orderly demonstration was in anticipation of an international conference on AIDS scheduled to be held in San Francisco later in the month, from which some potential visitors were expected to be barred because of U.S. immigration regulations prohibiting entry of visitors diagnosed as HIV+. Security officers quickly removed the demonstrators from the plenary hall as Secretary Baker continued reading his speech.

Strong support for free elections, rule of law, and minority rights was a common theme in almost all the opening statements. In addition, many speakers, expressing a broad range of ideas, addressed the larger framework of the CSCE and its future in light of the new political climate prevailing in Europe. Several countries noted positively the contributions of the Council of Europe in the human dimension. A number of countries welcomed Albanian representatives to the meeting, although some suggested that Albania would have to accept the provisions of all previously agreed CSCE documents before it could become a full participating State.

While welcoming improvements which had taken place in Eastern Europe and the Soviet Union, some delegations, including that of the United States, raised human rights problems and humanitarian concerns which still persist in those countries. At the same time, many delegations evidenced considerable uncertainty regarding how implementation issues should be constructively approached in what was agreed to be a markedly different political environment. Under these circumstances, only a few implementation issues were consistently singled out.

Concern over the continued intransigence of the Soviet Government regarding the three Baltic States was voiced by several delegations. In raising this issue, Secretary of State Baker was...
joined by Irish Foreign Minister Gerard Collins, who spoke on behalf of Ireland as well as the 12 member-states of the European Community; British Foreign Minister Douglas Hurd; Luxembourg Foreign Minister Jacques Poos; Norwegian Foreign Minister Kjell Magne Bondevik; Canadian Foreign Minister Joe Clark; and Dutch Head of Delegation Max van der Stoel. Icelandic Foreign Minister Jon Baldvin Hannibalsson stated the issue most concisely when he remarked: "There can be no solution to this problem that is compatible with the Helsinki-Vienna process, other than full recognition of the Baltic nations' right to independence. . . . Peaceful negotiations, between the Soviet Government and the democratically elected Governments of the Baltic States, is a crucial test of the Soviet Union's commitment to the principles of peaceful reform and fundamental democratic values."

A number of delegations declared their support for the gradual abolition of the death penalty and the adoption of a commitment to that end within the CSCE process. Among those who advanced this position during the opening of the meeting were Danish Foreign Minister Uffe Ellemann-Jensen; Federal Republic of Germany Foreign Minister Hans-Dietrich Genscher; Portuguese Foreign Minister Joao de Deus Pinheiro; Luxembourg Foreign Minister Jacques Poos; Italian Foreign Minister Gianni de Michelis; Maltese Foreign Minister Guido de Marco; Swedish Foreign Minister Sten Andersson; Dutch Head of Delegation Max van der Stoel; and Italian Head of Delegation Walter Gardini. In addition, Soviet Head of Delegation Yuri Reshetov supported proposals put forward by Amnesty International regarding the gradual abolition of the death penalty; in this regard, he spoke of changes in Soviet laws cutting the number of crimes punishable by the death penalty from thirty-four to six (leaving, specifically: high treason, espionage, terrorism, sabotage, pre-mediated murder under aggravating circumstances, or rape of children).

6. The Human Dimension Mechanism

As a result of a Western desire to improve the implementation of CSCE provisions in the "human dimension" -- which includes the Principles section of Basket I as well as Basket III -- a device was created at the Vienna Follow-up Meeting known as the "human dimension mechanism." This mechanism allows any participating State to raise instances of non-compliance with any other state at any time and commits the other state to respond.

Specifically, the Vienna Concluding Document commits each of the participating States:

(1) to respond to requests for information and to representations from any other participating State on specific cases or broad situations relating to commitments in the human dimension of the CSCE;

(2) to meet bilaterally with participating States requesting such a meeting to examine these cases or situations;

(3) to bring, if it deems necessary, these cases and situations to the attention of the other participating States; and

(4) to provide, if it deems necessary, information on what has transpired in paragraphs (1) and (2) at the three meetings of the CHD as well as CSCE follow-up meetings.
The Paris Meeting of the CHD came right on the heels of the Vienna Follow-up Meeting and, as a consequence, there were limited uses of the mechanism to evaluate at that time. In addition, some countries preferred that their invocations of the mechanism not be made public. This narrowed assessments of both the effectiveness of the mechanism and the substance of its use. Moreover, Romania maintained it was not even bound by the Vienna provisions on the human dimension. Romania’s position was widely condemned at both Vienna and Paris as inconsistent with Romania’s consensus to the entirety of the Vienna Concluding Document, including the human dimension provisions, and an act of bad faith towards the CSCE process in general.

A year later, a great deal had changed, as illustrated by the two cases or situations which had led to the greatest number of known uses of the mechanism prior to and during the Paris Meeting. At that time, the most frequently raised case was the arrest of the renowned writer Vaclav Havel in Czechoslovakia last year. At the time of the Copenhagen Meeting, after last November’s "Velvet Revolution," Vaclav Havel was President of his country. In Paris, the most frequently raised situation was that of Romania, particularly the practice of "systematization," which was expected to result in the destruction of approximately half of Romania’s 13,000 villages. Immediately after the overthrow of the Ceausescu regime in December 1989, the systematization program was abandoned. In January 1990, Romania rescinded its previous position on the human dimension and announced its adherence to all elements of the Vienna Concluding Document. Most of the concerns which led to uses of the mechanism before and during the Paris Meeting have been similarly resolved.

In spite of the tremendous progress in the human dimension evidenced in several countries, it is clear that the human dimension mechanism did not fully keep pace with those events. Nothing is more indicative of this than the record of its use over the last year since the Paris Meeting, and particularly in the six months prior to the Copenhagen Meeting. After the eventful fall of 1989, few countries made representations or requests for information to other countries under the provisions of paragraph 1. As in Paris, in Copenhagen the delegations found themselves with a record which was difficult to assess.

Nevertheless, many delegations asserted the human dimension mechanism has greater potential to be used constructively than ever before. In this vein, the United States voiced the hope that "the mechanism, when it is used, will be used in good faith, with the genuine aim of seeking information and resolving concerns. Incorrect uses of the mechanism -- and there have been some, in our opinion -- are less likely to occur. In a trans-Atlantic relationship that is less marked by polemics and more closely identified with cooperation, the mechanism is a vehicle through which we can communicate our concerns over the issues which trouble us."

7. Congressional Participation

A congressional delegation, led by Helsinki Commission Co-Chairman Steny H. Hoyer (D-MD), attended the Copenhagen CHD Meeting. Members of the delegation included two Helsinki Commissioners, Representative Frank Wolf (R-VA) and the Senior Advisor to the Secretary of Commerce on CSCE matters, William Fritts, as well as Representative Ben Cardin (D-MD), who closely follows CSCE affairs.
Co-Chairman Hoyer, in his capacity as Vice-Chairman of the U.S. Delegation to the Copenhagen Meeting, addressed a plenary session of the meeting. In his statement Co-Chairman Hoyer concluded that, as the Soviet Union and the states of Central and Eastern Europe move to institutionalize respect for basic human rights and move on to the broader issues of democracy, CSCE can continue to serve as a source of values and, increasingly, as an agent of conflict resolution.

The congressional delegation also held bilateral meetings with the delegations from the Soviet Union, Turkey, Romania, and Yugoslavia; an informal meeting was held with the Albanian delegation. The delegation joined a reception for representatives of the non-governmental organizations attending the Copenhagen Meeting.

8. Non-Governmental Attendance and Activities

The attendance at the Copenhagen Meeting by representatives of numerous non-governmental organizations (NGOs) representing a variety of issues demonstrated the continuing interest of private individuals in the CSCE, as well as the important role they play in the process. Representatives of more than a dozen U.S.-based NGOs gathered in Copenhagen, along with NGOs from many other participating States. U.S.-based NGOs attending the meeting included the Estonian-American National Council, the American Latvian Organization, the Supreme Committee for the Liberation of Lithuania, the Lithuanian Information Center, National Conference on Soviet Jewry, Union of Councils for Soviet Jews, the World Congress of Free Ukrainians, the Armenian Assembly of America, Hungarian Human Rights Foundation, National Federation of American Hungarians, the National Council of Churches, Americans for Soviet Muslim Rights and Beyond War.

NGOs took an active interest in the meeting, organizing or participating in meetings, seminars, and press conferences and meeting with representatives of various delegations. Many NGO representatives worked closely with individuals from the Soviet Union and Eastern Europe, including private citizens and elected officials who were present in Copenhagen independent of official delegations.

The U.S. delegation assisted NGOs in gaining access to the conference center when necessary, listening to their views and concerns, briefing them on developments in the meeting, attending events which they organized, and, in some cases, hosting press conferences for them at the conference hall. NGOs also had the opportunity to meet the congressional delegation led by Helsinki Commission Co-Chairman Hoyer.

Individuals from all participating States were able to attend the meeting without difficulties. There was only one known case of a state-created barrier to attendance at the meeting; that was the case of Soviet refusenik Vladimir Tsivkin, who was denied permission to travel by the Soviet Government.

All plenary sessions of the Copenhagen Meeting were open to the public, and NGO representatives as well as other members of the public and press were able to observe the proceedings. Seating was ample in the plenary hall itself. There were few problems reported regarding access, and the Danish Secretariat was helpful and efficient in facilitating public access to the conference center.
NGOs utilized the opportunity to meet with delegations, including the Soviet delegation, to discuss arrangements for the 1991 Moscow Human Dimension Meeting. During the Copenhagen Meeting, the Soviet delegation announced the formation of an NGO-liaison committee under the leadership of former Soviet cosmonaut Valentina Tereshkova.

In addition to their activities in connection with the official meeting, many NGOs also participated in the "Parallel Activities" organized by Danish NGOs -- a series of human rights-related seminars, workshops, exhibitions, and cultural events which took place in Copenhagen throughout June. The Parallel Activities Steering Committee operated an NGO-Liaison Counter, located at the main entrance of the Bella Center, as a service to NGOs, delegates, visitors, and press.

9. Proposals, Negotiations, and the Concluding Document

From the first days of the Copenhagen Meeting, countries introduced proposals which built on the work that had been done in Paris. In all, forty-three new proposals were introduced during the four weeks of the meeting, covering virtually every aspect of the human dimension. What was, perhaps, most indicative of the changed atmosphere in Copenhagen was not what was introduced, but what was withdrawn. Several delegations withdrew proposals which they had introduced during the Paris Meeting: Romania withdrew Paris proposal #23 (on economic rights); the GDR withdrew Paris proposals #10 (on the right to education), #11 (on scientific and technical progress), and #12 (on developing a "political culture of cooperation"; the Czechoslovak delegation withdrew Paris proposals #25 (on bilateral cooperation in the human dimension) and #26 (on medical assistance); and Turkey withdrew Paris proposal #35 (on the regulation of massive population movements). The GDR characterized the proposals it was withdrawing as "propagandistic." Although in previous CSCE meetings some countries allowed certain of their proposals to die quietly from lack of support, at no other time in the Helsinki process had proposals been formally withdrawn.

In the second week of the meeting, at the suggestion of the highly regarded head of the Czechoslovak delegation, Dr. Jiri Hajek, several informal working groups were established to consider the four categories of proposals which were emerging: 1) a group on free elections and the rule of law, which met under a Swiss coordinator; 2) a group on minority rights, which met under an Austrian coordinator; 3) a group on other human rights and humanitarian issues, which met under a Finnish coordinator; and 4) a group on the human dimension mechanism, which met under a Hungarian coordinator.

a. Free Elections and the Rule of Law

During the first CHD meeting in Paris, the delegations of the United States and Great Britain tabled a proposal on free elections and political pluralism. At that time, it was considered a bold proposal -- some even considered it unrealistic. In the view of the United States, this proposal was designed to lay the groundwork for further development of these ideas during the second and third meetings on the Human Dimension to be held in Copenhagen and Moscow in 1990 and 1991, respectively. No one could have foreseen in Paris how appropriately the proposal would mirror the events which took place during the next extraordinary twelve
months -- events which made the adoption of the proposal possible as early as the Copenhagen Meeting.

Reflecting the momentous importance of the democratic transitions taking place in the Warsaw Pact countries, President Bush gave top priority to the adoption of the free elections proposal in Copenhagen. In the months leading up to Copenhagen, the United States and Great Britain refined their original Paris proposal and, along with Canada, introduced it again in Copenhagen. By the end of the second week of the meeting, this proposal (CHDC.2) had twenty-one other co-sponsors. As a consequence, work in this area progressed relatively smoothly.

The proposal embodied the key elements of a democratic electoral process, including: free, open and periodic elections; individual and collective rights to establish political parties and organizations; uninhibited access to the media; and a commitment to ensuring a tolerant atmosphere conducive to the free and open conduct of political campaigning.

Although there were a few changes which had to be made to accommodate the national laws of some Western countries, consensus was not difficult to reach on the core elements of a free electoral process (paragraphs 6 - 8 of the Copenhagen Document). The last paragraph in the free elections section, dealing with the presence of observers at elections taking place within CSCE states, gave the Soviet Union some difficulty initially. But even this, with some modifications, was able to gain consensus. The negotiations in this area reflected the general tone of the Copenhagen meeting: a strong desire to capture the dramatic movement towards democratic societies within the political context of CSCE commitments.

Likewise, work on a rule-of-law section proceeded without major difficulties. Several delegations had introduced proposals on this subject during the Paris Meeting, and considerable support for the concept of rule of law had been voiced during the opening phase of the Copenhagen Meeting. By 8 June, a rule of law proposal (CHDC.16) was introduced "in the name of the twelve participating States Members of the European Community," and with eighteen co-sponsors.

Although the United States generally supported the concept of the rule of law, CHDC.16, as it was introduced, largely repeated commitments regarding civil and political rights already contained in other international documents. The EC-12 argued that incorporating these commitments into the CSCE process would be a step forward, since not all of the commitments had been endorsed by the Eastern countries (although it was conceded that the Warsaw Pact countries were in the process of doing so).

The U.S. delegation argued that this section would be considerably strengthened by adding language which would address the fundamental components of a democratic system, such as a separation of the state from political parties (a "no-establishment" clause). This language was ultimately incorporated into the final document, particularly as reflected in paragraphs 1, 3, 4, 5.1 - 5.4, 5.6, and 5.9. These provisions regarding what constitutes a system of democracy in which civil and political rights may be guaranteed go significantly beyond any other international human rights document.

b. Minority Rights

The minority rights working group was arguably the most contentious of the informal bodies. A number of delegations
wanted to put their own cast on the final language regarding minorities which would appear in the concluding document, and any residual alliance unity which still existed in Copenhagen was almost completely absent in this group.

It was in this area that a new unofficial negotiating group first made its presence known in the Copenhagen Meeting. Here, Austria, Yugoslavia, Czechoslovakia, Hungary, and Italy coordinated their efforts in what became known as the "Pentagonale Initiative." Coordinated prior to the opening of the Copenhagen Meeting, their proposal (CHDC.5) built extensively on existing accepted language on minorities in CSCE and other international documents, and set out twenty principles to strengthen minority rights observance in the CSCE. This initiative, drawing together neutral/non-aligned countries with members of NATO and the Warsaw Pact, was designed to reflect the new political atmosphere in Europe and the ability of participating States to work together in areas of common interest regardless of "bloc" status.

The working group considered eight proposals in all; of these, three were considered in a small sub-group headed by Canada. Those three proposals represented attempts to operationalize the condemnations of intolerance heard throughout the opening statements of the first week of the meeting.

One of the major dilemmas which delegates confronted in this group was how to curb intolerance while preserving the integrity of the principle of freedom of expression to which the Concluding Document would ultimately refer. History had shown that forty years or more of repressing free speech in some parts of Europe had not made intolerance disappear. Thus, the United States argued that the people who were to be protected by laws limiting the freedom of expression could very well turn out to be the unwitting victims of those laws.

Another particularly contentious issue was the definition of a minority itself. Delegations were split over whether they should be dealing only with the rights of national minorities, or with those of religious, racial, linguistic and other minorities as well. In the end, the group used the CSCE term "national minorities"; some reserved the right to return to the question of definition at subsequent meetings.

By far the greatest disagreement in the working group centered around the extent to which states should take an active role in protecting and promoting minority identities, rather than refraining from blocking or inhibiting minorities' efforts to protect and promote themselves. Issues of minority language education and the shape of minority participation in public affairs were hotly debated themes, and at times delegations' positions seemed too irreconcilable to achieve any compromise text. Yet thanks in large part to the dogged determination of the Austrian coordinator, these and other divisive issues were ironed out, fine-tuned, and ultimately included in the concluding document. While not as far-reaching as some delegations and NGOs had hoped, the minority rights language in the Copenhagen Document represents a forward step in the CSCE process and minorities protections generally.

The minority rights text of the Copenhagen Document consists of ten paragraphs, numbered 30 - 40.7. The provisions cover a broad scope of issues, ranging from the rights of minorities to contacts with persons belonging to their minority inside as well as across frontiers, to the right to establish and maintain organizations in their country and to participate in international NGOs. Para-
graph 40 contains the language of greatest symbolism, embracing specific references to anti-semitism and discrimination against Roma (gypsies). It was felt that a direct reference to anti-semitism was particularly important because, prior to Copenhagen, the Soviet Union had refused in all international fora to accept a reference to this problem of clear historical and contemporary importance. Participating States also felt a special collective responsibility to acknowledge the plight of Roma, a people without a majority in any state to act on their behalf.

c. Other Human Rights and Humanitarian Issues

A third working group was established to review the broad and often unwieldy group of "other" proposals that failed to fit neatly into one of the three other categories. Here, proposals ranging from the rights of children to the abolition of the death penalty to democratic-institution building were considered. Some of these proposals, such as a Canadian proposal on the right to leave and return and a Yugoslav proposal on the rights of migrant workers, represented ambitious attempts to expand on subjects already touched upon in CSCE documents. Others, such as a Dutch proposal on states of emergency, broached new subjects that had not been raised in previous CSCE meetings.

This group was significantly handicapped by the inordinate number of proposals which the delegates were asked to negotiate. In the end, there was simply more on the table than could be fairly and thoroughly reviewed. The Finnish coordinator met the challenge by salvaging in some innocuous form the basic theme of virtually every proposal. Although the end product contains few hard and fast commitments, it sets the stage for a more comprehen-
sive discussion of those subjects which may continue to be of interest at the Moscow Meeting.

d. The Human Dimension Mechanism

This working group was perhaps the most surprising of the four in that it accomplished the least relative to the grand ambitions held by a number of countries in this area. It was in this group that proposals aimed at improving the working of the so-called human dimension mechanism were considered, including several that would have involved considerable "institutionalization" of the CSCE.

Virtually the only proposal that survived this group was one initially proposed by the Italians during the Paris Meeting and revised in Copenhagen. This proposal, reflected in paragraphs 42 - 42.3 of the Copenhagen Document, is directed at increasing the efficiency of the human dimension mechanism by setting out greater procedural clarity for its use.

The Swiss, the Canadians, the Danes, and the Dutch also all spearheaded strong efforts to elaborate further on the mechanism. Their efforts, however, did not come to fruition. In spite of the strong interest expressed by many delegations in strengthening the human dimension mechanism, there was equally strong resistance from several quarters for several reasons. Some countries, like Greece, stated they were simply unprepared to accept any new commitments at Copenhagen which they considered forms of "institutionalization." Although the Vienna Concluding Document clearly gave all three human dimension meetings a mandate to adopt such procedures, many countries wanted to leave these decisions to the fall ministerial summit.
In addition, there was a failure to find common ground even among those countries introducing proposals in this area. A number of the proposals seemed, on their surface, to be quite similar; for example, one group dealt with "observers," "rapporteurs," and "experts" — persons who would come into a country to examine an issue. Another group dealt with establishing committees. Yet in spite of the superficial similarities, proposing countries could not find shared elements to incorporate into a final document.

Finally, some countries were so attached to their own national proposals that they were only willing to support publicly other compromise proposals at the eleventh hour when, effectively, it was too late to gain the support of other, more recalcitrant delegations.

10. Conclusions

The Copenhagen Meeting continued the momentum established at the Bonn Economic Conference — a momentum propelled by a sense of urgency to provide guidelines for newly emerging democracies seeking to establish rule-of-law states and free market economies. The Soviet Union and the East European states were at least ready to adopt a common body of truly democratic principles even if they were not yet implementing them fully in practice. This alone was a major achievement.

The dynamics of the meeting reflected the post-Cold-War era in which the CSCE community now finds itself. Perhaps the most striking feature of the meeting was the absence of the traditional East-West division — foreshadowed at least as early as 1989 in the London Information Forum — although new forms of effective cooperation had not yet emerged to replace the old ways. The meeting was also notable in that there seemed to be agreement from the beginning that a document was needed. In previous CSCE meetings, the United States generally considered the adoption of new documents of secondary importance to efforts directed at improved implementation of existing CSCE commitments. In Copenhagen, delegations recognized from the outset that CSCE was ready to adopt commitments which, for the first time, would be based on a common philosophical view of government and would, if implemented, provide their citizens with a voice in how they should be governed.

As a consequence, the Copenhagen Meeting was characterized by fast-track negotiations rather than the traditional concentration on implementation review. While implementation review was not altogether neglected, neither was it the primary focus for Western delegations. It was generally assumed that implementation had improved to the point where less review was needed.

The negotiations themselves offered a fascinating study in the new dynamics of CSCE. With the disappearance of clear distinctions between the governments of East and West, West-West differences in national laws presented some of the most difficult challenges to consensual agreement. Ireland, for example, insisted on heavily qualifying the free elections section with a statement reflecting its concerns about terrorist activities in Northern Ireland. The Swiss had to be particularly sensitive to the unique election procedures (e.g., voting by a show of swords) in some of its cantons. States which still practice the death penalty, including the United States, were at odds with the growing majority of CSCE countries which no longer permit this as a legal form of punishment.

Although none of these differences resulted in insurmountable obstacles at the Copenhagen Meeting, they serve to illustrate the
new phase, CSCE has entered. The opportunity now exists to explore higher human rights standards for CSCE as a whole, which will increasingly test the limits which are acceptable in Western, as well as Eastern, CSCE states. The strengths and the weaknesses of the Copenhagen Document shed light on what may -- and may not -- be achievable in the near future in the CSCE.

On the positive side, the Copenhagen Document enunciates standards for democracy that are absent from any other CSCE document and, indeed, from other human rights instruments. The commitments on rule of law, free and fair elections, and pluralism form a remarkable declaration of the quintessential elements necessary for the guarantee of individual civil and political rights. They demonstrate that the CSCE states are prepared to make significant movement forward in accepting broad principles governing not only their relations with each other and with their own citizens, but governing the fundamental structure of the state itself. As such, this language may provide the nucleus for future implementation reviews at the Moscow Meeting of the Conference on the Human Dimension and beyond.

Although the Copenhagen Document's shortcomings do not seriously undermine its overall achievements, they do point to potentially serious problems which CSCE may face in the future. First, the document contains a significant amount of repetition of commitments which have already been elaborated in other human rights instruments. The motivation for proposing such language seems to stem from a desire to see greater specificity in CSCE; but previously enunciated commitments are not likely to be more effective simply because they are now directly included in a CSCE document, rather than included by reference. Future meetings will indicate whether the repetition of these previously enunciated commitments within the CSCE does, in fact, make it easier to seek their implementation.

The Copenhagen Document is also devalued by language which contains little in the way of substantive, clear obligations. This is particularly true of the section dealing with "other human rights and fundamental freedoms." In this area, countries proposing commitments unable to gain consensus demonstrated their willingness to settle for a generic reference to the subject, without holding out for real teeth. Likewise, countries opposed to certain proposals evidenced their willingness to accept a minimized reference to the subject for the sake of preserving the new "atmosphere" of the meeting. If continued, this practice could lead to a proliferation of language devoid of real obligations. Alternatively, to negotiate thoroughly and effectively the diverse range of subjects covered in this area is likely to take longer than the amount of time allotted to scheduled intercessional meetings and, in the end, may force countries to recognize that consensus on substantive obligations regarding many of these subjects simply does not exist. In this respect, Moscow and other meetings may provide a real test of countries' willingness to walk away with nothing rather than accept a watered-down version of a proposal.

Finally, the Copenhagen Document bears the scars of the emerging struggle between the legal advisors and the diplomats. CSCE is having an identity crisis: on the one hand, there is the long-standing and time-tested practice of seeking commitment to broadly based principles which are politically binding. On the other hand, there is a noticeable trend in some quarters to treat the documents being negotiated as though they are draft treaties -- the idea being, it seems, that what is good will be even better if it is legally binding. At times, these two schools of thought clash, as
when the former leans toward a concise statement of principle that can be applied to many circumstances, and the later leans toward enunciating detailed standards, specifying every possible eventuality. As one delegate in Copenhagen quipped, "The fight used to be between East and West; now it's between all of us [delegates] and all of our lawyers." Some of the questions raised in this debate may be answered in the forthcoming summit; others may have to wait until there is greater clarity in post-Cold-War European and North American relations.
DOCUMENT OF THE COPENHAGEN
MEETING OF THE CONFERENCE ON THE
HUMAN DIMENSION OF THE CSCE

The representatives of the participating States of the Conference on
Security and Cooperation in Europe (CSCE), Austria, Belgium, Bul-
garia, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France,
the German Democratic Republic, the Federal Republic of Germany,
Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein,
Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Por-
tugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the
Union of Soviet Socialist Republics, the United Kingdom, the United
States of America and Yugoslavia, met in Copenhagen from 5 to 29
June 1990, in accordance with the provisions relating to the Con-
ference on the Human Dimension of the CSCE contained in the Con-
cluding Document of the Vienna Follow-up Meeting of the CSCE.

The representative of Albania attended the Copenhagen Meeting as
observer.

The first Meeting of the Conference was held in Paris from 30
May to 23 June 1989.

The Copenhagen Meeting was opened and closed by the Minister
for Foreign Affairs of Denmark.

The formal opening of the Copenhagen Meeting was attended by
Her Majesty the Queen of Denmark and His Royal Highness the
Prince Consort.

Opening statements were made by Ministers and Deputy Ministers
of the participating States.

At a special meeting of the Ministers for Foreign Affairs of the
participating States of the CSCE on 5 June 1990, convened on the
invitation of the Minister for Foreign Affairs of Denmark, it was
agreed to convene a Preparatory Committee in Vienna on 10 July
1990 to prepare a Summit Meeting in Paris of their Heads of State
or Government.

The participating States welcome with great satisfaction the fun-
damental political changes that have occurred in Europe since the
first Meeting of the Conference on the Human Dimension of the
CSCE in Paris in 1989. They note that the CSCE process has contri-
buted significantly to bringing about these changes and that these de-
velopments in turn have greatly advanced the implementation of the
provisions of the Final Act and the other CSCE documents.

They recognize that pluralistic democracy and the rule of law are
essential for ensuring respect for all human rights and fundamental
freedoms, the development of human contacts and the resolution of
other issues of a related humanitarian character. They therefore wel-
come the commitment expressed by all participating States to the ideals of democracy and political pluralism as well as their common determination to build democratic societies based on free elections and the rule of law.

At the Copenhagen Meeting the participating States held a review of the implementation of their commitments in the field of the human dimension. They considered that the degree of compliance with the commitments contained in the relevant provisions of the CSCE documents had shown a fundamental improvement since the Paris Meeting. They also expressed the view, however, that further steps are required for the full realization of their commitments relating to the human dimension.

The participating States express their conviction that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress in setting up the lasting order of peace, security, justice and co-operation that they seek to establish in Europe. They therefore reaffirm their commitment to implement fully all provisions of the Final Act and of the other CSCE documents relating to the human dimension and undertake to build on the progress they have made.

They recognize that co-operation among themselves, as well as the active involvement of persons, groups, organizations and institutions, will be essential to ensure continuing progress towards their shared objectives.

In order to strengthen respect for, and enjoyment of, human rights and fundamental freedoms, to develop human contacts and to resolve issues of a related humanitarian character, the participating States agree on the following:

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(1) The participating States express their conviction that the protection and promotion of human rights and fundamental freedoms is one of the basic purposes of government, and reaffirm that the recognition of these rights and freedoms constitutes the foundation of freedom, justice and peace.

(2) They are determined to support and advance those principles of justice which form the basis of the rule of law. They consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.

(3) They reaffirm that democracy is an inherent element of the rule of law. They recognize the importance of pluralism with regard to political organizations.

(4) They confirm that they will respect each other’s right freely to choose and develop, in accordance with international human rights standards, their political, social, economic and cultural systems. In exercising this right, they will ensure that their laws, regulations, practices and policies conform with their obligations under international law and are brought into harmony with the provisions of the Declaration on Principles and other CSCE commitments.

(5) They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(5.1) free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives;

(5.2) a form of government that is representative in character, in which the executive is accountable to the elected legislature or the electorate;

(5.3) the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law;

(5.4) a clear separation between the State and political parties; in particular, political parties will not be merged with the State;

(5.5) the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law. Respect for that system must be ensured;

(5.6) military forces and the police will be under the control of, and accountable to, the civil authorities;

(5.7) human rights and fundamental freedoms will be guaranteed by law and in accordance with their obligations under international law;

(5.8) legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability. Those texts will be accessible to everyone;
(3.9) —all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds;

(5.10) —everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;

(5.11) —administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;

(5.12) —the independence of judges and the impartial operation of the public judicial service will be ensured;

(5.13) —the independence of legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice;

(5.14) —the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution;

(5.15) —any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function;

(5.16) —in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

(5.17) —any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(5.18) —no one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision;

(5.19) —everyone will be presumed innocent until proved guilty according to law;

(5.20) —considering the important contribution of international instruments in the field of human rights to the rule of law at a national level, the participating States reaffirm that they will consider acceding to the International Covenant on Economic, Social and Cultural Rights and other relevant international instruments, if they have not yet done so;

(5.21) —in order to supplement domestic remedies and better to ensure that the participating States respect the international obligations they have undertaken, the participating States will consider acceding to a regional or global international convention concerning the protection of human rights, such as the European Convention on Human Rights or the Optional Protocol to the International Covenant on Civil and Political Rights, which provide for procedures of individual recourse to international bodies.

The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes. They recognize their responsibility to defend and protect, in accordance with their laws, their international human rights obligations and their international commitments, the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or of that of another participating State.

(7) To ensure that the will of the people serves as the basis of the authority of government, the participating States will:

(7.1) —hold free elections at reasonable intervals, as established by law;

(7.2) —permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote;

(7.3) —guarantee universal and equal suffrage to adult citizens;

(7.4) —ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public;

(7.5) —respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination;
---respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities;

---ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them or from casting their vote free of fear of retribution;

---provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process;

---ensure that candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures.

The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other OSCE participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavour to facilitate similar access for election proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings.

II

The participating States reaffirm that

---everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards. In particular, no limitation will be imposed on access to, and use of, means of reproducing documents of any kind, while respecting, however, rights relating to intellectual property, including copyright;

---everyone will have the right of peaceful assembly and demonstration. Any restrictions which may be placed on the exercise of these rights will be prescribed by law and consistent with international standards;

---the right of association will be guaranteed. The right to form and—subject to the general right of a trade union to determine its own membership—freely to join a trade union will be guaranteed. These rights will exclude any prior control. Freedom of association for workers, including the freedom to strike, will be guaranteed, subject to limitations prescribed by law and consistent with international standards;

---everyone will have the right to freedom of thought, conscience and religion. This right includes freedom to change one's religion or belief and freedom to manifest one's religion or belief, either alone or in community with others, in public or in private, through worship, teaching, practice and observance. The exercise of these rights may be subject only to such restrictions as are prescribed by law and are consistent with international standards;

---they will respect the right of everyone to leave any country, including his own, and to return to his country, consistent with a State's international obligations and OSCE commitments. Restrictions on this right will have the character of very rare exceptions, will be considered necessary only if they respond to a specific public need, pursue a legitimate aim and are proportionate to that aim, and will not be abused or applied in an arbitrary manner;

---everyone has the right peacefully to enjoy his property either on his own or in common with others. No one may be deprived of his property except in the public interest and subject to the conditions provided for by law and consistent with international commitments and obligations.

---In reaffirming their commitment to ensure effectively the rights of the individual to know and act upon human rights
and fundamental freedoms, and to contribute actively, individually or in association with others, to their promotion and protection, the participating States express their commitment to

(10.1) respect the right of everyone, individually or in association with others, to seek, receive and impart freely views and information on human rights and fundamental freedoms, including the rights to disseminate and publish such views and information;

(10.2) respect the rights of everyone, individually or in association with others, to study and discuss the observance of human rights and fundamental freedoms and to develop and discuss ideas for improved protection of human rights and better means for ensuring compliance with international human rights standards;

(10.3) ensure that individuals are permitted to exercise the right to association, including the right to form, join and participate effectively in non-governmental organizations which seek the promotion and protection of human rights and fundamental freedoms, including trade unions and human rights monitoring groups;

(10.4) allow members of such groups and organizations to have unhindered access to and communication with similar bodies within and outside their countries and with international organizations, to engage in exchanges, contacts and co-operation with such groups and organizations and to solicit, receive and utilize for the purpose of promoting and protecting human rights and fundamental freedoms voluntary financial contributions from national and international sources as provided for by law.

(11) The participating States further affirm that, where violations of human rights and fundamental freedoms are alleged to have occurred, the effective remedies available include

(11.1) the right of the individual to seek and receive adequate legal assistance;

(11.2) the right of the individual to seek and receive assistance from others in defending human rights and fundamental freedoms, and to assist others in defending human rights and fundamental freedoms;

(11.3) the right of individuals or groups acting on their behalf to communicate with international bodies with competence to receive and consider information concerning allegations of human rights abuses.

(12) The participating States, wishing to ensure greater transparency in the implementation of the commitments undertaken in the Vienna Concluding Document under the heading of the human dimension of the CSCE, decide to accept as a confidence-building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law; it is understood that proceedings may only be held in camera in the circumstances prescribed by law and consistent with obligations under international law and international commitments.

(13) The participating States decide to accord particular attention to the recognition of the rights of the child, his civil rights and his individual freedoms, his economics, social and cultural rights, and his right to special protection against all forms of violence and exploitation. They will consider acceding to the Convention on the Rights of the Child, if they have not yet done so, which was opened for signature by States on 26 January 1990. They will recognize in their domestic legislation the rights of the child as affirmed in the international agreements to which they are Parties.

(14) The participating States agree to encourage the creation, within their countries, of conditions for the training of students and trainees from other participating States, including persons taking vocational and technical courses. They also agree to promote travel by young people from their countries for the purpose of obtaining education in other participating States and to that end to encourage the conclusion, where appropriate, of bilateral and multilateral agreements between their relevant governmental institutions, organizations and educational establishments.

(15) The participating States will act in such a way as to facilitate the transfer of sentenced persons and encourage those participating States which are not Parties to the Convention on the Transfer of Sentenced Persons, signed at Strasbourg on 21 November 1983, to consider acceding to the Convention.

(16) The participating States

(16.1) reaffirm their commitment to prohibit torture and other cruel, inhuman or degrading treatment or punishment, to take effective legislative, administrative, judicial and
other measures to prevent and punish such practices, to protect individuals from any psychiatric or other medical practices that violate human rights and fundamental freedoms and to take effective measures to prevent and punish such practices;

(16.2) —intend, as a matter of urgency, to consider acceding to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, if they have not yet done so, and recognizing the competences of the Committee against Torture under articles 21 and 22 of the Convention and withdrawing reservations regarding the competence of the Committee under article 20;

(16.3) —stress that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture;

(16.4) —will ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment;

(16.5) —will keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under their jurisdiction, with a view to preventing any cases of torture;

(16.6) —will take up with priority for consideration and for appropriate action, in accordance with the agreed measures and procedures for the effective implementation of the commitments relating to the human dimension of the CSCE, any cases of torture and other inhuman or degrading treatment or punishment made known to them through official channels or coming from any other reliable source of information;

(16.7) —will act upon the understanding that preserving and guaranteeing the life and security of any individual subjected to any form of torture and other inhuman or degrading treatment or punishment will be the sole criterion in determining the urgency and priorities to be accorded in taking appropriate remedial action; and,

(b) other inhuman or degrading treatment or punishment within the framework of any other international body or mechanism may not be invoked as a reason for refraining from consideration and appropriate action in accordance with the agreed measures and procedures for the effective implementation of the commitments relating to the human dimension of the CSCE.

The participating States

(17.1) —recall the commitment undertaken in the Vienna Concluding Document to keep the question of capital punishment under consideration and to cooperate within relevant international organizations;

(17.2) —recall, in this context, the adoption by the General Assembly of the United Nations, on 15 December 1989 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;

(17.3) —note the restrictions and safeguards regarding the use of the death penalty which have been adopted by the international community, in particular article 6 of the International Covenant on Civil and Political Rights;

(17.4) —note the provisions of the Sixth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty;

(17.5) —note recent measures taken by a number of participating States towards the abolition of capital punishment;

(17.6) —note the activities of several non-governmental organizations on the question of the death penalty;

(17.7) —will exchange information within the framework of the Conference on the Human Dimension on the question of the abolition of the death penalty and keep that question under consideration;

(17.8) —will make available to the public information regarding the use of the death penalty.

The participating States

(18.1) —note that the United Nations Commission on Human Rights has recognized the right of everyone to have conscientious objection to military service;

(18.2) —note recent measures taken by a number of participating States to permit exemption from compulsory military service on the basis of conscientious objections;
—note the activities of several non-governmental organizations on the question of conscientious objections to compulsory military service;

—agree to consider introducing, where this has not yet been done, various forms of alternative service, which are compatible with the reasons for conscientious objection, such forms of alternative service being in principle of a non-combatant or civilian nature, in the public interest and of a non-punitive nature;

—will make available to the public information on this issue;

—will keep under consideration, within the framework of the Conference on the Human Dimension, the relevant questions related to the exemption from compulsory military service, where it exists, of individuals on the basis of conscientious objections to armed service, and will exchange information on these questions.

The participating States affirm that freer movement and contacts among their citizens are important in the context of the protection and promotion of human rights and fundamental freedoms. They will ensure that their policies concerning entry into their territories are fully consistent with the aims set out in the relevant provisions of the Final Act, the Madrid Concluding Document and the Vienna Concluding Document. While reaffirming their determination not to recede from the commitments contained in CSCE documents, they undertake to implement fully and improve present commitments in the field of human contacts, including on a bilateral and multilateral basis. In this context they will

—strive to implement the procedures for entry into their territories, including the issuing of visas and passport and customs control, in good faith and without unjustified delay. Where necessary, they will shorten the waiting time for visa decisions, as well as simplify practices and reduce administrative requirements for visa applications;

—ensure, in dealing with visa applications, that these are processed as expeditiously as possible in order, \textit{inter alia}, to take due account of important family, personal or professional considerations, especially in cases of an urgent, humanitarian nature;

—endeavour, where necessary, to reduce fees charged in connection with visa applications to the lowest possible level.

The participating States will consult and, where appropriate, cooperate in dealing with problems that might emerge as a result of the increased movement of persons.

The participating States recommend the consideration, at the next CSCE Follow-up Meeting in Helsinki, of the advisability of holding a meeting of experts on consular matters.

The participating States reaffirm that the protection and promotion of the rights of migrant workers have their human dimension. In this context, they

—agree that the protection and promotion of the rights of migrant workers are the concern of all participating States and that as such they should be addressed within the CSCE process;

—reaffirm their commitment to implement fully in their domestic legislation the rights of migrant workers provided for in international agreements to which they are parties;

—consider that, in future international instruments concerning the rights of migrant workers, they should take into account the fact that this issue is of importance for all of them;

—express their readiness to examine, at future CSCE meetings, the relevant aspects of the further promotion of the rights of migrant workers and their families.

The participating States reaffirm their conviction expressed in the Vienna Concluding Document that the promotion of economic, social and cultural rights as well as of civil and political rights is of paramount importance for human dignity and for the attainment of the legitimate aspirations of every individual. They also reaffirm their commitment taken in the Document of the Bonn Conference on Economic Co-operation in Europe to the promotion of social justice and the improvement of living and working conditions. In the context of continuing their efforts with a view to achieving progressively the full realization of economic, social and cultural rights by all appropriate means, they will pay special attention to problems in the areas of employment, housing, social security, health, education and culture.

The participating States will ensure that the exercise of all the human rights and fundamental freedoms set out above will not be subject to any restrictions except those which are provided by law and are consistent with their obligations under international law, in particular the International Covenant on Civil and Political Rights, and with their inter-
national commitments, in particular the Universal Declaration of Human Rights. These restrictions have the character of exceptions. The participating States will ensure that these restrictions are not abused and are not applied in an arbitrary manner, but in such a way that the effective exercise of these rights is ensured.

Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law.

The participating States confirm that any derogations from obligations relating to human rights and fundamental freedoms during a state of public emergency must remain strictly within the limits provided for by international law, in particular the relevant international instruments by which they are bound, especially with respect to rights from which there can be no derogation. They also reaffirm that

—measures derogating from such obligations must be taken in strict conformity with the procedural requirements laid down in those instruments;

—the imposition of a state of public emergency must be proclaimed officially, publicly, and in accordance with the provisions laid down by law;

—measures derogating from obligations will be limited to the extent strictly required by the exigencies of the situation;

—such measures will not discriminate solely on the grounds of race, colour, sex, language, religion, social origin or of belonging to a minority.

III

The participating States recognize that vigorous democracy depends on the existence as an integral part of national life of democratic values and practices as well as an extensive range of democratic institutions. They will therefore encourage, facilitate and, where appropriate, support practical co-operative endeavours and the sharing of information, ideas and expertise among themselves and by direct contacts and co-operation between individuals, groups and organizations in areas including the following:

—constitutional law, reform and development,
—electoral legislation, administration and observation,
—establishment and management of courts and legal systems,
—government and decentralization,
—access to information and protection of privacy,
—developing political parties and their role in pluralistic societies,
—trade unions,
—co-operative movements,
—developing other forms of free associations and public interest groups,
—journalism, independent media, and intellectual and cultural life,
—teaching of democratic values, institutions and practices in educational institutions and the fostering of an atmosphere of free inquiry.

Such endeavours may cover the range of co-operation encompassed in the human dimension of the CSCE, including training, exchange of information, books and instructional materials, co-operative programmes and projects, academic and professional exchanges and conferences, scholarships, research grants, provision of expertise and advice, business and scientific contacts and programmes.

The participating States will also facilitate the establishment and strengthening of independent national institutions in the area of human rights and the rule of law, which may also serve as focal points for co-ordination and collaboration between such institutions in the participating States. They propose that co-operation be encouraged between parliamentarians from participating States, including through existing inter-parliamentary associations and, inter alia, through joint commissions, television debates involving parliamentarians, meetings and round-table discussions. They will also encourage existing institutions, such as organizations within the United Nations system and the Council of Europe, to continue and expand the work they have begun in this area.

The participating States recognize the important expertise of the Council of Europe in the field of human rights and fundamental freedoms and agree to consider further ways and means to enable the Council of Europe to make a contribution to the human dimension of the CSCE. They agree
The participating States will consider the idea of convening a meeting or seminar of experts to review and discuss co-operative measures designed to promote and sustain viable democratic institutions in participating States, including comparative studies of legislation in participating States in the area of human rights and fundamental freedoms, *inter alia* drawing upon the experience acquired in this area by the Council of Europe and the activities of the Commission "Democracy through Law".

IV

The participating States recognize that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary. This framework guarantees full respect for human rights and fundamental freedoms, equal rights and status for all citizens, the free expression of all their legitimate interests and aspirations, political pluralism, social tolerance and the implementation of legal rules that place effective restraints on the abuse of governmental power.

They also recognize the important role of non-governmental organizations, including political parties, trade unions, human rights organizations and religious groups, in the promotion of tolerance, cultural diversity and the resolution of questions relating to national minorities.

They further reaffirm that respect for the rights of persons belonging to national minorities as part of universally recognized human rights is an essential factor for peace, justice, stability and democracy in the participating States.

Persons belonging to national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law.

The participating States will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms.
The participating States will endeavour to ensure that persons belonging to national minorities, notwithstanding the need to learn the official language or languages of the State concerned, have adequate opportunities for instruction of their mother tongue or in their mother tongue, as well as, wherever possible and necessary, for its use before public authorities, in conformity with applicable national legislation.

In the context of the teaching of history and culture in educational establishments, they will also take account of the history and culture of national minorities.

The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.

The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.

The participating States recognize the particular importance of increasing constructive co-operation among themselves on questions relating to national minorities. Such co-operation seeks to promote mutual understanding and confidence, friendly and good-neighbourly relations, international peace, security and justice.

Every participating State will promote a climate of mutual respect, understanding, co-operation and solidarity among all persons living on its territory, without distinction as to ethnic or national origin or religion, and will encourage the solution of problems through dialogue based on the principles of the rule of law.

None of these commitments may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the Final Act, including the principle of territorial integrity of States.

The participating States, in their efforts to protect and promote the rights of persons belonging to national minorities, will fully respect their undertakings under existing human rights conventions and other relevant international instruments and consider adhering to the relevant conventions, if they have not yet done so, including those providing for a right of complaint by individuals.

The participating States will co-operate closely in the competent international organizations to which they belong, including the United Nations and, as appropriate, the Council of Europe, bearing in mind their on-going work with respect to questions relating to national minorities.

They will consider convening a meeting of experts for a thorough discussion of the issue of national minorities.

The participating States clearly and unequivocally condemn totalitarianism, racial and ethnic hatred, anti-semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds. In this context, they also recognize the particular problems of Roma (gypsies).

They declare their firm intention to intensify the efforts to combat these phenomena in all their forms and therefore will:

- take effective measures, including the adoption, in conformity with their constitutional systems and their international obligations, of such laws as may be necessary, to provide protection against any acts that constitute incitement to violence against persons or groups based on national, racial, ethnic or religious discrimination, hostility or hatred, including anti-semitism;

- commit themselves to take appropriate and proportionate measures to protect persons or groups who may be subject to threats or acts of discrimination, hostility or violence as a result of their racial, ethnic, cultural, linguistic or religious identity, and to protect their property;

- take effective measures, in conformity with their constitutional systems, at the national, regional and local levels to promote understanding and tolerance, particularly in the fields of education, culture and information;

- endeavour to ensure that the objectives of education include special attention to the problem of racial prejudice and hatred and to the development of respect for different civilizations and cultures;

- recognize the right of the individual to effective remedies and endeavour to recognize, in conformity with national legislation, the right of interested persons and
consider adhering, if they have not yet done so, to the international instruments which address the problem of discrimination and ensure full compliance with the obligations therein, including those relating to the submission of periodic reports;

—consider, also, accepting those international mechanisms which allow States and individuals to bring communications relating to discrimination before international bodies.

V

The participating States reaffirm their commitment to the human dimension of the CSCE and emphasize its importance as an integral part of a balanced approach to security and cooperation in Europe. They agree that the Conference on the Human Dimension of the CSCE and the human dimension mechanism described in the section on the human dimension of the CSCE of the Vienna Concluding Document have demonstrated their value as methods of furthering dialogue and cooperation and assisting in the resolution of relevant specific questions. They express their conviction that these should be continued and developed as part of an expanding CSCE process.

The participating States recognize the need to enhance further the effectiveness of the procedures described in paragraphs 1 to 4 of the section on the human dimension of the CSCE of the Vienna Concluding Document and with this aim decide

— to provide in as short a time as possible, but no later than four weeks, a written response to requests for information and to representations made to them in writing by other participating States under paragraph 1;

— that the bilateral meetings, as contained in paragraph 2, will take place as soon as possible, as a rule within three weeks of the date of the request;

— to refrain, in the course of a bilateral meeting held under paragraph 2, from raising situations and cases not connected with the subject of the meeting, unless both sides have agreed to do so.

The participating States examined practical proposals for new measures aimed at improving the implementation of the
ANNEX

CHAIRMAN'S STATEMENT

ON THE ACCESS OF NON-GOVERNMENTAL ORGANIZATIONS AND THE MEDIA TO MEETINGS OF THE CONFERENCE ON THE HUMAN DIMENSION

The Chairman notes that the practices of openness and access to the Meetings of the Conference on the Human Dimension, as they were applied at the Vienna Meeting and as contained in Annex XI of the Concluding Document of that Meeting, are of importance to all participating States. In order to follow and build upon those practices at forthcoming CSCE meetings of the Conference on the Human Dimension, the participating States agree that the following practices of openness and access should be respected:

— free movement by members of interested non-governmental organizations (NGOs) in the Conference premises, except for the areas restricted to delegations and to the services of the Executive Secretariat. Accordingly, badges will be issued to them, at their request, by the Executive Secretariat;

— unimpeded contacts between members of interested NGOs and delegates, as well as with accredited representatives of the media;

— access to official documents of the Conference in all the working languages and also to any document that delegates might wish to communicate to members of interested NGOs;

— the opportunity for members of interested NGOs to transmit to delegates communications relating to the human dimension of the CSCE. Mailboxes for each delegation will be accessible to them for this purpose;

— free access for delegates to all documents emanating from interested NGOs and addressed to the Executive Secretariat for the information of the Conference. Accordingly, the Executive Secretariat will make available to delegates a regularly updated collection of such documents;
Further undertake to guarantee to representatives of the media:
—free movement in the Conference premises, except for the areas restricted to delegations and to the services of the Executive Secretariat. Accordingly, badges will be issued to them by the Executive Secretariat upon presentation of the requisite credentials;
—unimpeded contacts with delegates and with members of interested NGOs;
—access to official documents of the Conference in all the working languages.

The Chairman notes further that this statement will be an Annex to the Document of the Copenhagen Meeting and will be published with it.
CHARTER OF PARIS FOR A NEW EUROPE

A NEW ERA OF DEMOCRACY, PEACE AND UNITY

We, the Heads of State or Government of the States participating in the Conference on Security and Co-operation in Europe, have assembled in Paris at a time of profound change and historic expectations. The era of confrontation and division of Europe has ended. We declare that henceforth our relations will be founded on respect and co-operation.

Europe is liberating itself from the legacy of the past. The courage of men and women, the strength of the will of the peoples and the power of the ideas of the Helsinki Final Act have opened a new era of democracy, peace and unity in Europe.

Ours is a time for fulfilling the hopes and expectations our peoples have cherished for decades: steadfast commitment to democracy based on human rights and fundamental freedoms; prosperity through economic liberty and social justice; and equal security for all our countries.

The Ten Principles of the Final Act will guide us towards this ambitious future, just as they have lighted our way towards better relations for the past fifteen years. Full implementation of all CSCE commitments must form the basis for the initiatives we are now taking to enable our nations to live in accordance with their aspirations.

Human Rights, Democracy and Rule of Law

We undertake to build, consolidate and strengthen democracy as the only system of government of our nations. In this endeavour, we will abide by the following:

Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law. Their protection and promotion is the first responsibility of government. Respect for them is an
essential safeguard against an over-mighty State. Their observance and full exercise are the foundation of freedom, justice and peace.

Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person.

Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law.

We affirm that, without discrimination,

every individual has the right to:

freedom of thought, conscience and religion or belief,
freedom of expression,
freedom of association and peaceful assembly,
freedom of movement;

no one will be:

subject to arbitrary arrest or detention,
subject to torture or other cruel, inhuman or degrading treatment or punishment;

everyone also has the right:

to know and act upon his rights,
to participate in free and fair elections,
to fair and public trial if charged with an offence,
to own property alone or in association and to exercise individual enterprise,
to enjoy his economic, social and cultural rights.
We affirm that the ethnic, cultural, linguistic and religious identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination and in full equality before the law.

We will ensure that everyone will enjoy recourse to effective remedies, national or international, against any violation of his rights.

Full respect for these precepts is the bedrock on which we will seek to construct the new Europe.

Our States will co-operate and support each other with the aim of making democratic gains irreversible.

**Economic Liberty and Responsibility**

Economic liberty, social justice and environmental responsibility are indispensable for prosperity.

The free will of the individual, exercised in democracy and protected by the rule of law, forms the necessary basis for successful economic and social development. We will promote economic activity which respects and upholds human dignity.

Freedom and political pluralism are necessary elements in our common objective of developing market economies towards sustainable economic growth, prosperity, social justice, expanding employment and efficient use of economic resources. The success of the transition to market economy by countries making efforts to this effect is important and in the interest of us all. It will enable us to share a higher level of prosperity which is our common objective. We will co-operate to this end.

Preservation of the environment is a shared responsibility of all our nations. While supporting national and regional efforts in this field, we must also look to the pressing need for joint action on a wider scale.
Friendly Relations among Participating States

Now that a new era is dawning in Europe, we are determined to expand and strengthen friendly relations and co-operation among the States of Europe, the United States of America and Canada, and to promote friendship among our peoples.

To uphold and promote democracy, peace and unity in Europe, we solemnly pledge our full commitment to the Ten Principles of the Helsinki Final Act. We affirm the continuing validity of the Ten Principles and our determination to put them into practice. All the Principles apply equally and unreservedly, each of them being interpreted taking into account the others. They form the basis for our relations.

In accordance with our obligations under the Charter of the United Nations and commitments under the Helsinki Final Act, we renew our pledge to refrain from the threat or use of force against the territorial integrity or political independence of any State, or from acting in any other manner inconsistent with the principles or purposes of those documents. We recall that non-compliance with obligations under the Charter of the United Nations constitutes a violation of international law.

We reaffirm our commitment to settle disputes by peaceful means. We decide to develop mechanisms for the prevention and resolution of conflicts among the participating States.

With the ending of the division of Europe, we will strive for a new quality in our security relations while fully respecting each other's freedom of choice in that respect. Security is indivisible and the security of every participating State is inseparably linked to that of all the others. We therefore pledge to co-operate in strengthening confidence and security among us and in promoting arms control and disarmament.

We welcome the Joint Declaration of Twenty-Two States on the improvement of their relations.

Our relations will rest on our common adherence to democratic values and to human rights and fundamental freedoms. We are convinced that in order to
strengthen peace and security among our States, the advancement of democracy,
and respect for and effective exercise of human rights, are indispensable. We
reaffirm the equal rights of peoples and their right to self-determination in
conformity with the Charter of the United Nations and with the relevant norms
of international law, including those relating to territorial integrity of
States.

We are determined to enhance political consultation and to widen
co-operation to solve economic, social, environmental, cultural and
humanitarian problems. This common resolve and our growing interdependence
will help to overcome the mistrust of decades, to increase stability and to
build a united Europe.

We want Europe to be a source of peace, open to dialogue and to
co-operation with other countries, welcoming exchanges and involved in the
search for common responses to the challenges of the future.

Security

Friendly relations among us will benefit from the consolidation of
democracy and improved security.

We welcome the signature of the Treaty on Conventional Armed Forces in
Europe by twenty-two participating States, which will lead to lower levels of
armed forces. We endorse the adoption of a substantial new set of Confidence-
and Security-building Measures which will lead to increased transparency and
confidence among all participating States. These are important steps towards
enhanced stability and security in Europe.

The unprecedented reduction in armed forces resulting from the Treaty on
Conventional Armed Forces in Europe, together with new approaches to security
and co-operation within the CSCE process, will lead to a new perception of
security in Europe and a new dimension in our relations. In this context we
fully recognize the freedom of States to choose their own security
arrangements.
Unity

Europe whole and free is calling for a new beginning. We invite our peoples to join in this great endeavour.

We note with great satisfaction the Treaty on the Final Settlement with respect to Germany signed in Moscow on 12 September 1990 and sincerely welcome the fact that the German people have united to become one State in accordance with the principles of the Final Act of the Conference on Security and Co-operation in Europe and in full accord with their neighbours. The establishment of the national unity of Germany is an important contribution to a just and lasting order of peace for a united, democratic Europe aware of its responsibility for stability, peace and co-operation.

The participation of both North American and European States is a fundamental characteristic of the CSCE; it underlies its past achievements and is essential to the future of the CSCE process. An abiding adherence to shared values and our common heritage are the ties which bind us together. With all the rich diversity of our nations, we are united in our commitment to expand our co-operation in all fields. The challenges confronting us can only be met by common action, co-operation and solidarity.

The CSCE and the World

The destiny of our nations is linked to that of all other nations. We support fully the United Nations and the enhancement of its role in promoting international peace, security and justice. We reaffirm our commitment to the principles and purposes of the United Nations as enshrined in the Charter and condemn all violations of these principles. We recognize with satisfaction the growing role of the United Nations in world affairs and its increasing effectiveness, fostered by the improvement in relations among our States.

Aware of the dire needs of a great part of the world, we commit ourselves to solidarity with all other countries. Therefore, we issue a call from Paris today to all the nations of the world. We stand ready to join with any and all States in common efforts to protect and advance the community of fundamental human values.
GUIDELINES FOR THE FUTURE

Proceeding from our firm commitment to the full implementation of all CSCE principles and provisions, we now resolve to give a new impetus to a balanced and comprehensive development of our co-operation in order to address the needs and aspirations of our peoples.

Human Dimension

We declare our respect for human rights and fundamental freedoms to be irrevocable. We will fully implement and build upon the provisions relating to the human dimension of the CSCE.

Proceeding from the Document of the Copenhagen Meeting of the Conference on the Human Dimension, we will co-operate to strengthen democratic institutions and to promote the application of the rule of law. To that end, we decide to convene a seminar of experts in Oslo from 4 to 15 November 1991.

Determined to foster the rich contribution of national minorities to the life of our societies, we undertake further to improve their situation. We reaffirm our deep conviction that friendly relations among our peoples, as well as peace, justice, stability and democracy, require that the ethnic, cultural, linguistic and religious identity of national minorities be protected and conditions for the promotion of that identity be created. We declare that questions related to national minorities can only be satisfactorily resolved in a democratic political framework. We further acknowledge that the rights of persons belonging to national minorities must be fully respected as part of universal human rights. Being aware of the urgent need for increased co-operation on, as well as better protection of, national minorities, we decide to convene a meeting of experts on national minorities to be held in Geneva from 1 to 19 July 1991.

We express our determination to combat all forms of racial and ethnic hatred, anti-semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds.

In accordance with our CSCE commitments, we stress that free movement and contacts among our citizens as well as the free flow of information and ideas
are crucial for the maintenance and development of free societies and flourishing cultures. We welcome increased tourism and visits among our countries.

The human dimension mechanism has proved its usefulness, and we are consequently determined to expand it to include new procedures involving, inter alia, the services of experts or a roster of eminent persons experienced in human rights issues which could be raised under the mechanism. We shall provide, in the context of the mechanism, for individuals to be involved in the protection of their rights. Therefore, we undertake to develop further our commitments in this respect, in particular at the Moscow Meeting of the Conference on the Human Dimension, without prejudice to obligations under existing international instruments to which our States may be parties.

We recognize the important contribution of the Council of Europe to the promotion of human rights and the principles of democracy and the rule of law as well as to the development of cultural co-operation. We welcome moves by several participating States to join the Council of Europe and adhere to its European Convention on Human Rights. We welcome as well the readiness of the Council of Europe to make its experience available to the CSCE.

Security

The changing political and military environment in Europe opens new possibilities for common efforts in the field of military security. We will build on the important achievements attained in the Treaty on Conventional Armed Forces in Europe and in the Negotiations on Confidence- and Security-building Measures. We undertake to continue the CSEM negotiations under the same mandate, and to seek to conclude them no later than the Follow-up Meeting of the CSCE to be held in Helsinki in 1992. We also welcome the decision of the participating States concerned to continue the CFE negotiation under the same mandate and to seek to conclude it no later than the Helsinki Follow-up Meeting. Following a period for national preparations, we look forward to a more structured co-operation among all participating States on security matters, and to discussions and consultations among the thirty-four participating States aimed at establishing by 1992, from the conclusion of the Helsinki Follow-up Meeting, new negotiations on disarmament and confidence and security building open to all participating States.
We call for the earliest possible conclusion of the Convention on an effectively verifiable, global and comprehensive ban on chemical weapons, and we intend to be original signatories to it.

We reaffirm the importance of the Open Skies initiative and call for the successful conclusion of the negotiations as soon as possible.

Although the threat of conflict in Europe has diminished, other dangers threaten the stability of our societies. We are determined to co-operate in defending democratic institutions against activities which violate the independence, sovereign equality or territorial integrity of the participating States. These include illegal activities involving outside pressure, coercion and subversion.

We unreservedly condemn, as criminal, all acts, methods and practices of terrorism and express our determination to work for its eradication both bilaterally and through multilateral co-operation. We will also join together in combating illicit trafficking in drugs.

Being aware that an essential complement to the duty of States to refrain from the threat or use of force is the peaceful settlement of disputes, both being essential factors for the maintenance and consolidation of international peace and security, we will not only seek effective ways of preventing, through political means, conflicts which may yet emerge, but also define, in conformity with international law, appropriate mechanisms for the peaceful resolution of any disputes which may arise. Accordingly, we undertake to seek new forms of co-operation in this area, in particular a range of methods for the peaceful settlement of disputes, including mandatory third-party involvement. We stress that full use should be made in this context of the opportunity of the Meeting on the Peaceful Settlement of Disputes which will be convened in Valletta at the beginning of 1991. The Council of Ministers for Foreign Affairs will take into account the Report of the Valletta Meeting.

**Economic Co-operation**

We stress that economic co-operation based on market economy constitutes an essential element of our relations and will be instrumental in the construction of a prosperous and united Europe. Democratic institutions and
economic liberty foster economic and social progress, as recognized in the Document of the Bonn Conference on Economic Co-operation, the results of which we strongly support.

We underline that co-operation in the economic field, science and technology is now an important pillar of the CSCE. The participating States should periodically review progress and give new impulses in these fields.

We are convinced that our overall economic co-operation should be expanded, free enterprise encouraged and trade increased and diversified according to GATT rules. We will promote social justice and progress and further the welfare of our peoples. We recognize in this context the importance of effective policies to address the problem of unemployment.

We reaffirm the need to continue to support democratic countries in transition towards the establishment of market economy and the creation of the basis for self-sustained economic and social growth, as already undertaken by the Group of twenty-four countries. We further underline the necessity of their increased integration, involving the acceptance of disciplines as well as benefits, into the international economic and financial system.

We consider that increased emphasis on economic co-operation within the CSCE process should take into account the interests of developing participating States.

We recall the link between respect for and promotion of human rights and fundamental freedoms and scientific progress. Co-operation in the field of science and technology will play an essential role in economic and social development. Therefore, it must evolve towards a greater sharing of appropriate scientific and technological information and knowledge with a view to overcoming the technological gap which exists among the participating States. We further encourage the participating States to work together in order to develop human potential and the spirit of free enterprise.

We are determined to give the necessary impetus to co-operation among our States in the fields of energy, transport and tourism for economic and social development. We welcome, in particular, practical steps to create optimal conditions for the economic and rational development of energy resources, with due regard for environmental considerations.
We recognize the important role of the European Community in the political and economic development of Europe. International economic organizations such as the United Nations Economic Commission for Europe (ECE), the Bretton Woods Institutions, the Organisation for Economic Co-operation and Development (OECD), the European Free Trade Association (EFTA) and the International Chamber of Commerce (ICC) also have a significant task in promoting economic co-operation, which will be further enhanced by the establishment of the European Bank for Reconstruction and Development (EBRD).

In order to pursue our objectives, we stress the necessity for effective co-ordination of the activities of these organizations and emphasize the need to find methods for all our States to take part in these activities.

Environment

We recognize the urgent need to tackle the problems of the environment and the importance of individual and co-operative efforts in this area. We pledge to intensify our endeavours to protect and improve our environment in order to restore and maintain a sound ecological balance in air, water and soil. Therefore, we are determined to make full use of the CSCE as a framework for the formulation of common environmental commitments and objectives, and thus to pursue the work reflected in the Report of the Sofia Meeting on the Protection of the Environment.

We emphasize the significant role of a well-informed society in enabling the public and individuals to take initiatives to improve the environment. To this end, we commit ourselves to promoting public awareness and education on the environment as well as the public reporting of the environmental impact of policies, projects and programmes.

We attach priority to the introduction of clean and low-waste technology, being aware of the need to support countries which do not yet have their own means for appropriate measures.

We underline that environmental policies should be supported by appropriate legislative measures and administrative structures to ensure their effective implementation.
We stress the need for new measures providing for the systematic evaluation of compliance with the existing commitments and, moreover, for the development of more ambitious commitments with regard to notification and exchange of information about the state of the environment and potential environmental hazards. We also welcome the creation of the European Environment Agency (EEA).

We welcome the operational activities, problem-oriented studies and policy reviews in various existing international organizations engaged in the protection of the environment, such as the United Nations Environment Programme (UNEP), the United Nations Economic Commission for Europe (ECE) and the Organisation for Economic Co-operation and Development (OECD). We emphasize the need for strengthening their co-operation and for their efficient co-ordination.

Culture

We recognize the essential contribution of our common European culture and our shared values in overcoming the division of the continent. Therefore, we underline our attachment to creative freedom and to the protection and promotion of our cultural and spiritual heritage, in all its richness and diversity.

In view of the recent changes in Europe, we stress the increased importance of the Cracow Symposium and we look forward to its consideration of guidelines for intensified co-operation in the field of culture. We invite the Council of Europe to contribute to this Symposium.

In order to promote greater familiarity amongst our peoples, we favour the establishment of cultural centres in cities of other participating States as well as increased co-operation in the audio-visual field and wider exchange in music, theatre, literature and the arts.

We resolve to make special efforts in our national policies to promote better understanding, in particular among young people, through cultural exchanges, co-operation in all fields of education and, more specifically, through teaching and training in the languages of other participating States. We intend to consider first results of this action at the Helsinki Follow-up Meeting in 1992.
Migrant Workers

We recognize that the issues of migrant workers and their families legally residing in host countries have economic, cultural and social aspects as well as their human dimension. We reaffirm that the protection and promotion of their rights, as well as the implementation of relevant international obligations, is our common concern.

Mediterranean

We consider that the fundamental political changes that have occurred in Europe have a positive relevance to the Mediterranean region. Thus, we will continue efforts to strengthen security and co-operation in the Mediterranean as an important factor for stability in Europe. We welcome the Report of the Palma de Mallorca Meeting on the Mediterranean, the results of which we all support.

We are concerned with the continuing tensions in the region, and renew our determination to intensify efforts towards finding just, viable and lasting solutions, through peaceful means, to outstanding crucial problems, based on respect for the principles of the Final Act.

We wish to promote favourable conditions for a harmonious development and diversification of relations with the non-participating Mediterranean States. Enhanced co-operation with these States will be pursued with the aim of promoting economic and social development and thereby enhancing stability in the region. To this end, we will strive together with these countries towards a substantial narrowing of the prosperity gap between Europe and its Mediterranean neighbours.

Non-governmental Organizations

We recall the major role that non-governmental organizations, religious and other groups and individuals have played in the achievement of the objectives of the CSCE and will further facilitate their activities for the implementation of the CSCE commitments by the participating States. These organizations, groups and individuals must be involved in an appropriate way in the activities and new structures of the CSCE in order to fulfil their important tasks.
NEW STRUCTURES AND INSTITUTIONS OF THE CSCE PROCESS

Our common efforts to consolidate respect for human rights, democracy and the rule of law, to strengthen peace and to promote unity in Europe require a new quality of political dialogue and co-operation and thus development of the structures of the CSCE.

The intensification of our consultations at all levels is of prime importance in shaping our future relations. To this end, we decide on the following:

We, the Heads of State or Government, shall meet next time in Helsinki on the occasion of the CSCE Follow-up Meeting 1992. Thereafter, we will meet on the occasion of subsequent follow-up meetings.

Our Ministers for Foreign Affairs will meet, as a Council, regularly and at least once a year. These meetings will provide the central forum for political consultations within the CSCE process. The Council will consider issues relevant to the Conference on Security and Co-operation in Europe and take appropriate decisions.

The first meeting of the Council will take place in Berlin.

A Committee of Senior Officials will prepare the meetings of the Council and carry out its decisions. The Committee will review current issues and may take appropriate decisions, including in the form of recommendations to the Council.

Additional meetings of the representatives of the participating States may be agreed upon to discuss questions of urgent concern.

The Council will examine the development of provisions for convening meetings of the Committee of Senior Officials in emergency situations.

Meetings of other Ministers may also be agreed by the participating States.

In order to provide administrative support for these consultations we establish a Secretariat in Prague.
Follow-up meetings of the participating States will be held, as a rule, every two years to allow the participating States to take stock of developments, review the implementation of their commitments and consider further steps in the CSCE process.

We decide to create a Conflict Prevention Centre in Vienna to assist the Council in reducing the risk of conflict.

We decide to establish an Office for Free Elections in Warsaw to facilitate contacts and the exchange of information on elections within participating States.

Recognizing the important role parliamentarians can play in the CSCE process, we call for greater parliamentary involvement in the CSCE, in particular through the creation of a CSCE parliamentary assembly, involving members of parliaments from all participating States. To this end, we urge that contacts be pursued at parliamentary level to discuss the field of activities, working methods and rules of procedure of such a CSCE parliamentary structure, drawing on existing experience and work already undertaken in this field.

We ask our Ministers for Foreign Affairs to review this matter on the occasion of their first meeting as a Council.

* * *

Procedural and organizational modalities relating to certain provisions contained in the Charter of Paris for a New Europe are set out in the Supplementary Document which is adopted together with the Charter of Paris.

We entrust to the Council the further steps which may be required to ensure the implementation of decisions contained in the present document, as well as in the Supplementary Document, and to consider further efforts for the strengthening of security and co-operation in Europe. The Council may adopt any amendment to the supplementary document which it may deem appropriate.

* * *
The original of the Charter of Paris for a New Europe, drawn up in English, French, German, Italian, Russian and Spanish, will be transmitted to the Government of the French Republic, which will retain it in its archives. Each of the participating States will receive from the Government of the French Republic a true copy of the Charter of Paris.

The text of the Charter of Paris will be published in each participating State, which will disseminate it and make it known as widely as possible.

The Government of the French Republic is requested to transmit to the Secretary-General of the United Nations the text of the Charter of Paris for a New Europe which is not eligible for registration under Article 102 of the Charter of the United Nations, with a view to its circulation to all the members of the Organization as an official document of the United Nations.

The Government of the French Republic is also requested to transmit the text of the Charter of Paris to all the other international organizations mentioned in the text.

Wherefore, we, the undersigned High Representatives of the participating States, mindful of the high political significance we attach to the results of the Summit Meeting, and declaring our determination to act in accordance with the provisions we have adopted, have subscribed our signatures below:

Done at Paris,
on 21November
1990, in the name of
OAS General Assembly Resolution 1080

Approved at the June 5, 1991 OAS General Assembly creating a new mechanism for convening foreign ministers in response to a coup d'état or interruption of a legitimate elected government.

Whereas:

The Preamble of the Charter of the OAS establishes that representative democracy is an indispensable condition for the stability, peace and development of the region;

Under the provisions of the Charter, one of the basic purposes of the Organization of American States is to promote and consolidate representative democracy, with due respect for the principle of nonintervention.

Due respect must be observed for the policies of each member country in regard to the recognition of states and governments;

Bearing in mind the widespread existence of democratic governments in the hemisphere, the principle enshrined in the Charter, namely, that the solidarity of the American States and the high aims which it pursues require the political organization of those States to be based on effective exercise of representative democracy—must be made operative; the region faces serious political, social and economic problems that may threaten the stability of democratic governments,

The General Assembly Resolves:

1. To instruct the Secretary General to call for the immediate convocation of a meeting of the Permanent Council in the case of any event giving rise to the sudden or irregular interruption of the democratic political institutional process of the legitimate exercise of power by the democratically elected government in any of the Organization’s member states, in order, within the framework of the Charter, to examine the situation, decide on and convene an ad hoc meeting of the ministers of foreign affairs, or a special session of the General Assembly, all of which must take place within a ten-day period.

2. To determine that the purpose of the ad hoc meeting of ministers of foreign affairs or the special session of the General Assembly shall be to look into the events collectively and adopt any measures deemed appropriate, in accordance with the Charter and international law.

3. To instruct the Permanent Council to devise a set of proposals that will serve as incentives to preserve and strengthen democratic systems, based on international solidarity and cooperation, and to apprise the General Assembly thereof at its twenty-second regular session.

The vote on this resolution was unanimous 34-0.

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THE WORD

Definitions of significant words and concepts in the areas of campaign finance reform and ethics in government.

Buckley v. Valeo

Buckley v. Valeo is the landmark 1976 Supreme Court decision on campaign finance law. The Supreme Court upheld the disclosure requirements in the law, the contribution limits, and the provision for public funding of presidential election campaigns. The Court found that: "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."

The Court struck down the spending limits in the law -- except when there are voluntary limits as part of a public financing scheme, as in the presidential campaign finance system. The ruling affected the limits on spending by congressional candidates (the law did not include public financing for congressional races), on independent expenditures and on the amount of personal wealth that a candidate spends on his or her own campaign.

The Court also struck down the mechanism for appointing members of the Federal Election Commission (FEC). In 1976, Congress established a new appointment process for the FEC.

Bundling

"Bundling" is when an individual or an entity gathers together separate campaign contributions from many sources and delivers them together -- in a bundle -- to a particular candidate. It is a problem because it is a way for the bundler to evade the contribution limits.
For instance, a PAC can give only $5,000 to a candidate for a particular election. But suppose agents of the PAC go around to a number of individuals and collect separate checks for $1,000 made payable to the candidate from each individual. Assume that the PAC collects 50 of these checks. It then provides these checks in a bundle to the candidate and gets the credit for delivering a $50,000 contribution -- far in excess of the PAC's contribution limit. The same is true for an individual such as a lobbyist who gathers together many separate checks from different individuals and delivers them -- or arranges for them to be delivered -- to a candidate.

Bundling thus is harmful because it is a way around the contribution limits for both individuals and PACs. It allows individuals and PACs to get credit from candidates for delivering the kind of big money that the contribution limits are intended to deter. As *The New York Times* has said, "By assembling checks and then sheaving them together as one huge gift to favored candidates, corporations and industry PACs now easily evade limits on campaign contributions."

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**Congressional Campaign Finance System**

There are no spending limits or public financing in congressional campaigns. Congressional candidates are subject to the same contribution limits and disclosure requirements as presidential candidates.

[BACK]

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**Contribution Limits**

Federal campaign finance law limits the amounts individuals and groups may contribute to candidates, PACs or political parties. Corporations and labor unions are prohibited from making contributions or expenditures to influence federal elections. They are allowed to use their own funds to establish and administer PACs in order to make contributions and expenditures.

The chart below shows how the limits apply to the various participants in a federal election:
<table>
<thead>
<tr>
<th></th>
<th>To a candidate or candidate committee per election</th>
<th>To a national party committee per calendar year</th>
<th>To any other political committee per calendar year</th>
<th>Total per calendar year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual may give:</td>
<td>$1,000</td>
<td>$20,000</td>
<td>$5,000</td>
<td>$25,000</td>
</tr>
<tr>
<td>Political Action Committee+ may give:</td>
<td>$5,000</td>
<td>$15,000</td>
<td>$5,000</td>
<td>No limit</td>
</tr>
<tr>
<td>Other political committee may give:</td>
<td>$1,000</td>
<td>$20,000</td>
<td>$5,000</td>
<td>No limit</td>
</tr>
</tbody>
</table>

* Exception: if a contributor gives to a committee knowing that a substantial portion of the contribution will be used to support a particular candidate, then the contribution counts against the donor's limit for that candidate (first column on the chart).

+ Limits apply to any PAC with more than 50 contributors which has been registered for at least six months and has made contributions to 5 or more candidates for federal office.

Source: Federal Election Commission

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**Filibuster/Cloture**

"Filibuster" is an informal term for any attempt to block or delay Senate action on a bill or other matter by debating it at length, by offering numerous procedural motions, or by any other delaying or obstructive actions. In the past, Senators had to actually stand on the Senate floor and speak for the filibuster to continue. But in recent years, Senate rules, in effect, allow a Senator simply to declare his intention to filibuster. A filibuster can be stopped by "invoking cloture" -- the only procedure by which the Senate can vote to place a time limit on consideration of a bill and thereby end a filibuster. Invoking cloture requires an affirmative vote of three-fifths of the Senators (60 votes when there are no vacancies).

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**Independent Counsel**

In 1978, as part of the Ethics in Government Act, Congress
established the process for independent counsel investigations of allegations against certain high-level executive branch officials. (28 USC 591) When allegations are brought to the attention of the Department of Justice, a two-step investigatory process is followed, leading to the Attorney General applying to a three-judge panel for appointment of an independent counsel if the charges appear to reach a threshold level of credibility.

The law is designed to ensure that there is a credible system for holding the highest-level officials in the executive branch accountable for criminal wrongdoing. The Independent Counsel statute flowed directly from the Watergate scandal. In that scandal, those officials most entrusted with enforcing the law faced allegations of violating it — the Attorney General, the Director of the Federal Bureau of Investigation and the President of the United States himself.

As Archibald Cox, the first Watergate Special Prosecutor, testified before the Senate: "The pressures, the tensions of divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential."

**Independent Expenditures**

Independent expenditures are expenditures on behalf of or against a candidate which are not coordinated with a candidate. For example, an auto dealers' PAC might spend $50,000 on TV ads critical of a candidate's stand on import restrictions and urge a vote against that candidate.

Like personal wealth, the Supreme Court has ruled that spending in support of or in opposition to a candidate that is not coordinated with any candidate cannot be limited. Such "independent expenditures" can be made by either individuals or PACs. Thus, while individuals and PACs are limited in the amount they can contribute directly to a campaign, they are not limited in the amount they can spend for a campaign, so long as it is spent without coordination or consultation with any campaign.
Issue Advocacy/Express Advocacy

Political ads which urge the viewer to "vote for" or "vote against" a candidate are examples of express advocacy and must be paid for from contributions which come under the restrictions of federal campaign finance laws, including prohibitions on contributions by corporations or labor unions. Advertising campaigns discussing issues -- and not directly advocating the defeat or election of a candidate -- are not subject to federal campaign finance laws. Thus, these "issue advocacy" campaigns are not subject to limits on spending or contributions and are not required to disclose their contributions or expenditures.

However, in the 1996 election, labor unions and corporations waged multimillion dollar campaigns in the districts and states of targeted congressional candidates. These campaigns were carried out under the guise of issue advocacy even though the ads criticized a named candidate in hostile terms clearly meant to influence the election. Because a series of court decisions have defined broadly what constitutes "issue advocacy", spending in this form may become a significant new loophole for evading the campaign finance laws.

Lobbyist

Lobbying, or attempting to influence the policymaking of government, is a right under the U.S. Constitution. Article I of the Bill of Rights declares "the right of the people ... to petition the Government for a redress of grievances."

While lobbying is a right, the practice of special-interest lobbying in Washington and the state capitals has developed into a system of using money to gain access and influence to powerful public officials.

The Lobbyist Disclosure Act of 1995 requires persons lobbying Congress or the executive branch to register and to disclose their expenses and the issues they are lobbying on. The Act defines a lobbyist as "any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other
than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a six-month period."

**Political Action Committee (PAC)**

PACs are political committees that make contributions to candidates and engage in other election-related activities but are not the official committees of particular candidates or political parties. Some PACs are affiliated with corporations, labor unions, or other sponsoring organizations which provide the PACs with administrative expenses. Employees or members of the sponsoring organizations may contribute to PACs, but the corporations and labor unions are prohibited from contributing their own treasury funds to their PAC. Other PACs are independent of any sponsoring organization. Additionally, some Members of Congress have formed their own PACs, separate from their candidate committees, allowing them to accept and dole out larger contributions than they can through their own candidate committee.

Nearly all PACs have specific legislative agendas. Special-interest PACs are a dominant force in the financing of congressional campaigns and their contributions are heavily tilted to incumbents. Their numbers and influence are growing: in 1976 there were 608 PACs, 20 years later, in 1996, there are more than 4,000 PACs.

BACK

**Presidential Campaign Finance System**

The presidential campaign finance system was a landmark reform coming in the wake of the Watergate scandal. The system provides candidates with public funds if they agree to voluntary spending limits. In the 1996 general election, the two major party candidates received $62 million each after agreeing not to raise or spend any private money. In the primaries, candidates received matching federal funds for any contribution up to $250 if they agree to the spending limit; in the 1996 election the spending limit was $37 million.

Presidential campaigns are covered by the same contribution
limits and disclosure requirements as congressional candidates.

BACK

Public Financing/Public Resources

A critical element of campaign finance reform is to ensure that candidates, especially challengers, have sufficient resources to run viable campaigns. There are various ways to accomplish this goal. In the presidential campaign finance system, candidates in the primaries receive matching funds for every $250 contribution if they agree to spending limits; in the general election, the candidates may receive a grant of public funds if they agree not to raise or spend any private money. The presidential system is funded by the voluntary $3 tax checkoff on federal income tax forms.

The congressional campaign finance system does not include provisions for public financing. Reform advocates have proposed some alternative resources as part of overall reform of the congressional system. These resources could include free and reduced rate television and radio time, and reduced rate postage. These measures would reduce fundraising pressure by reducing the candidate's costs for communicating with voters.

Soft Money

Soft money is a loophole that has developed in recent years to provide candidates, contributors and political parties a means to evade federal contribution limits. "Soft" money is money that is illegal under federal law -- it either violates federal source restrictions (such as money from corporations) or federal limits (such as large contributions from individuals in amounts often exceeding $100,000).

Federal law prohibits corporations and labor unions from contributing any money to federal campaigns. Federal law also limits an individual to contributing no more than $1,000 to a federal candidate per election, and no more than $20,000 to a political party per year.

To evade these restrictions, soft money contributions are given
by individuals, corporations, unions or others directly to designated non-federal accounts of the national political parties. The national party committees spend the money directly or through state parties on activities such as voter registration drives or get-out-the-vote drives that benefit candidates in federal elections. In the 1996 election, soft money paid for so-called issue ads intended to influence the presidential election. Thus, the soft money contributions are laundered through the political parties in a way that allows federally illegal money to nonetheless be used to influence federal elections.

Soft money is a scandal. This loophole has given a rebirth to the kinds of huge individual and corporate contributions in the political process that have not been seen since Watergate.

BACK

Spectrum/Free TV

According to the Congressional Budget Office, "the radio 'spectrum' does not exist as a physical object; rather, it is a conceptual tool used to organize and map a set of physical phenomena. Electric and magnetic fields produce waves that move through space at different frequencies, and the set of all possible frequencies is called the electromagnetic spectrum." The portion of the electromagnetic spectrum which is usable for radio and television transmission is about one percent of the total spectrum. The rest includes visible light, ultraviolet, X-rays, and gamma-ray waves.

The airwaves are owned by the public. Television broadcasters receive a license to use and profit from the public's airwaves. Congress has the power to condition that license on the broadcaster's agreement to public interest obligations, including providing a reasonable amount of air time at free or reduced rates for the sake of improving the political process.

BACK

Spending Limits

There are no limits on spending by congressional candidates.
In presidential campaigns, candidates may agree to voluntary spending limits and in return receive public funding for their campaigns. In the presidential primaries, candidates receive federal matching funds for contributions of $250 or less; the primary spending limit in 1996 was $37 million. In the general election, candidates' campaigns are funded entirely by public funds if they agree not to raise or spend any private campaign money; in 1996, the two major party presidential candidates each received $62 million.

Under the Supreme Court decision in Buckley v. Valeo, spending limits must be voluntary. Candidates may be offered significant inducements of alternative resources if they abide by the spending limits. But candidates are free to refuse the alternative resources and ignore the spending limits.
NOTE: pages 273-288 have been intentionally deleted
The supporters of certain types of campaign reform argue that the current presidential system should be a model for congressional campaigns. Yet I would contend the opposite: the presidential experience proves that many well-intentioned reform measures either do not work, or they do not work as intended. Indeed, the two-decade history of post-Watergate presidential campaigns should serve as a humbling lesson for all who hope to reform the practice of politics at any level of government.

The presidential system created by the Federal Election Campaign Act (as amended) worked as intended for a single presidential cycle, the 1976 election. By 1980, loopholes now well known to all of us who have studied electoral politics (such as independent expenditures) began to emerge - loopholes opened by creative consultants, determined candidates, and wily lawyers, all aided and abetted by the courts. Within a decade, soft money, bundling, the evasion of state spending caps, and pre-presidential foundations and candidate PACs were widely utilized. In the 1990’s other tricks have been added to the performance, including enormous political expenditures by nonprofit and tax-exempt groups, issue advertising (also called non-express advocacy spending), and a new category of independent expenditures: spending by the political parties themselves. And doubtless, even as we testify, still more and ever shrewder devices are being readied for the all-out presidential shoot-out in 2000, the first open-seat contest since 1988.

Despite these undeniable developments (or perhaps because of them) we can draw some useful and important lessons from the post-Watergate presidential experience that directly apply to the current reform effort:

1. **Spending limits do not, and cannot, work.** At least double, perhaps triple or quadruple the official presidential expenditure limits are actually spent in our general elections for president, once all party and indirect kinds of spending are counted. Critics may call the limit-busting devices enumerated earlier “loopholes”, but the courts have judged them to be “rights”: free speech and political association derived from the First
Amendment. The Supreme Court is highly unlikely to change this interpretation in the near future and thus any “spending limit” will not dam the flow of political money but merely change the precise patterns of the flow. Interested money will always find an outlet and interests will always claim credit (publicly or privately) for the money they spend. This point has relevance to the debate about soft money, the current devil of choice. The Congress can certainly abolish the category of money we call soft, but it will never silence that money, since it will simply find its way to some other, perhaps less disclosable, venue.

2. **Limits encourage subterfuge.** Example: Groups deny that money being spent on “issue ads” or tilted voting “scorecards” is political. Even worse, much of this spending is undisclosed since it is not officially election-related. Hidden money is dangerous money, and spending limits push the flow of money into dark underground recesses.

3. **The evidence suggests that the public does not support taxpayer financing of campaigns.** Over the past two decades, the percentage of the public participating in the Presidential Election Campaign Fund has declined drastically, from about 29 per cent at the peak in 1981 to just 13 percent in 1995. In other words, 87 percent of taxpayers will not agree even to designate a few dollars to the presidential campaign at no direct cost to themselves. Cleverly worded polling questions aside, there is not much to encourage those who wish to divert hundreds of millions of tax dollars to the public financing of campaigns.

4. **Reform of the presidential system has led to a mushrooming of regulations, yet oddly and simultaneously, it has led to the growth of campaign finance scandal.** The Federal Election Commission has proven unequal to the task of controlling or effectively regulating presidential campaigns. Partly, this is because the FEC lacks the money and mandate to do so, having been purposely hamstrung and deadlocked since inception. But more importantly, it is because the FEC cannot (and should not) regulate First Amendment freedoms in any way. The FEC has tried to compensate for its impotence by aggressively regulating some of the aspects of the campaign system still within its purview, in the process creating a monstrously complex bible of rules that no one clearly understands. Thus, politics seems more forbidding and inaccessible to average citizens, who are discouraged from participating. And in the place of citizen empowerment we have election attorney empowerment. These specialist lawyers have become the roving ayatollahs of American politics, roaming the countryside during election seasons and playing an Octoberfest game by leveling last-minute campaign charges about violations of arcane FEC regulations.

What do these lessons imply about current reform efforts? First, in the arena of campaign finance changes, we ought to recognize the limitations of reform, that less is more, that some problems not only do not have perfect solutions, they have no convincing solutions at all.
Second, we ought to learn from past mistakes and move in positive and more productive directions. Undeniably, the easiest and least costly reform is broadened disclosure -- the only change with no negative consequences. There ought to be nearly instantaneous disclosure of all sizable contributions via the computer internet, at least weekly in the general election period. And campaigns should be forced to refuse all donations that cannot be fully sourced under the requirements of present law. Moreover, instead of phony spending limits, we can find other ways to reduce fundraising pressures on candidates, including the provision of free television time; an increase in individual, PAC, and party contribution limits to account for inflation since the 1970's; and a reasonable tax credit for small gifts, which in the aggregate can help to balance the power of large donations.

In sum, the post-Watergate presidential system is not a model that ought to serve as an ideal standard, but rather a real-world experiment that has demonstrated the folly of many campaign reforms and regulations. To me, the presidential system's Rube Goldberg structure and operations have proven that the wise Hippocratic Oath should be applied to political reform: "First, do no harm......"
SOME PROBLEMS WITH TAXPAYER-FUNDED POLITICAL CAMPAIGNS
Bradley A. Smith

INTRODUCTION

If one were trying to identify the world's healthiest democracy, the United States—with its long history of peaceful transitions of power, independent judiciary, sound record in human rights, expansive personal liberties, low inflation and unemployment, balanced government budgets, high standard of living, and relatively low taxes—would seem as good a candidate as any. Despite this, for literally decades we have been bombarded with complaints and warnings that this democracy was fundamentally unhealthy due to its reliance on private funds to finance political campaigns. Given the long-term record though, I think it prudent to presume that we ought to retain our traditional, private system of campaign finance, and that a high burden of proof should be placed on those proposing radical change.

When all is said and done, the indictment of private financing of campaigns rests on two arguments: it violates equality and fosters corruption. The system is unequal because not every citizen can give the same amount and because not every candidate or party can raise the same amount. They lack "equal" influence. It is "corrupt" because officeholders might feel beholden either to those who gave them money in the last election or to those who might give them money in future elections. These officeholders will thus lose the ability to act freely in carrying out their duties: they are subject to "undue influence."

For these reasons, twentieth-century America has witnessed a steadily expanding set of rules and regulations aimed at controlling the raising and spending of private campaign funds. But these efforts to regulate the private system of campaign finance have failed to accomplish their objectives, in part due to mistaken assumptions about the effects of money in politics, in part due to poorly designed legislation, and in part due to the role of the federal courts, which have

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struck down many aspects of regulation on First Amendment grounds. In short, regulating the private campaign finance system has, so far, been a flop. Law has its limits.

Frustration with the failure of regulation to cure the alleged evils of a private finance system have contributed to intellectual support for financing all campaigns with tax dollars. Though this is usually called "public" funding, that term is a misnomer. Campaigns are funded by the public now—by hundreds of thousands, even millions of citizens who make voluntary contributions to various candidates and organizations. What is euphemistically called "public" funding actually means "government" funded campaigns, or "tax" funding of campaigns, and I will address it as such. Government-funded campaigns are attractive because they can potentially take monetary inequality out of the equation, and because, by eliminating the need for candidates to rely on private donors, they can free officeholders to ignore the wishes of these donors, presumably to act in accordance with the individual officeholder's own conception of the public good.

Part I of this Article addresses some of the difficult issues in designing a system of government financing, in the process pointing out some often overlooked advantages to a private finance system. Part II reexamines the more fundamental justifications behind the push for tax financing—the questions of equality and corruption. Part III questions whether, even if all of these concerns are addressed, we will actually accomplish anything by extending tax financing to congressional and senatorial races.

1. EASIER SAID THAN DONE: SOME DIFFICULT ISSUES FOR GOVERNMENT FINANCING

To say that one favors government financing of campaigns is a bit like saying that one enjoys sports. Are we talking football? Kayaking? Downhill skiing? Ballroom dancing? Chess? The options are endless. Many people may favor government financing in principle, but oppose many, or even most, particular plans for government financing. Say, for example, one proposed a government financing plan providing that incumbents would receive twenty times the amount of money as challengers—I think it would have little support. Thus, let me be-

incumbents to be $200,000 during a two-year period). At the same time, there must be many people generally opposed to government financing who would, nonetheless, support the right plan for government financing. I suspect that this group is much smaller, however, because so much of the opposition to government financing is ideologically based. There are many who have a blanket objection to any government financing of campaigns as inherently beyond the scope of either good government, the Constitution, or both.

1 These criteria, including equality and insulating legislators from the effect of money, are inclusive of Professor Briffault's three criteria. See Richard Briffault, Public Funding and Democratic Elections, 148 U. Pa. L. Rev. 563, 563 (1999). Professor Briffault elaborates on his criteria at some length and there is little in that portion of his discussion with which I would disagree. My own take on the question of voter equality, besides the discussion that follows, see infra Part II, is best explored in Bradley A. Smith, Money Talks: Speech, Corruption, Equality, and Campaign Finance, 86 Geo. L.J. 45, 88-96 (1997). Because this Article is based on a resolution which I interpret as being more focused on corruption, I have not addressed the equality issues here beyond describing my general take of the dividing line between me and those with whom I disagree. My disagreements with Professor Briffault on the question of corruption are reasonably well articulated in this Article.
that most of these goals are relatively non-controversial. Although there are potential advantages for government-financed systems in meeting some of these criteria, in none of the five criteria listed above is it at all clear that government-financed systems are preferable to private ones.

A. Administrability

Campaign finance regulation creates compliance costs, both for government and for private political actors. Many systems will require substantial government resources to be devoted to monitoring and enforcement. A system that is too complex can create significant administrative, compliance, and funding difficulties for candidates, and this burden is likely to weigh heaviest on those candidates and groups which are new to political wars.2

When it comes to ease of administration, no system can beat that of a private, unregulated system of funding, such as existed in all parts of the United States until very late in the nineteenth century, when laws regulating campaign finance first appeared. A completely unregulated system of campaign finance requires no government monitoring, auditing, or enforcement. There need be no federal agency of any kind entrusted with regulating the system.3 Similarly, on the candidate side there is no need to devote resources to compliance, and recordkeeping can be done with the needs of the candidate, rather than government monitors, foremost in mind. Against a baseline of unregulated private finance, extending government financing to congressional races loses the test on ease of administration every time.

We do not, however, have an unregulated system of private finance, but rather one that, at the federal level, is quite heavily regulated. It is unlikely that all regulation will end anytime soon; at a minimum, disclosure of private campaign contributions seems here to stay for the foreseeable future.4 Thus, a system of government financ-

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2 See Bradley A. Smith, Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 YALE L.J. 1049, 1052-83 (1996) (arguing that regulations hurt political novices because they do not have the experience to comply with and interpret the law).

3 This is not to say that there would not be routine law enforcement agencies engaged in prevention of bribery, blackmail, and other crimes that happen to take place in the context of political campaigns.


5 See FEC FY 2000 Budget Request (last modified Sept. 22, 1999) <http://www.fec.gov/pages/budcont.htm> (allocating 2% of budget to campaign fund administration while over 75% goes to enforcement, disclosure, and audits).

6 424 U.S. 1, 58 (1976).

The problem is that we are not inclined to provide government financing at such lavish levels. For example, Annelise Anderson has estimated the cost of a reasonable communications program for a presidential campaign to be at least $600,000,000.1 We presently provide major party presidential nominees with less than $65 million for the general election campaign. Yet virtually all “reform” measures suggest that we should lower, rather than increase, spending.

When subsidies are set too low, many candidates will be reluctant to join voluntary government financing schemes, figuring that they can raise more money and run a more effective campaign on private contributions. To provide incentives for candidates to opt-in despite low funding levels, many proposals for government funding include complicated provisions that increase administrative costs and can hamper grassroots candidacies.2 Until “reformers” are willing to do away with such complicated and generally punitive trigger mechanisms and provide true incentives to take the public funds, it is likely that most proposals for government funding will increase administrative costs beyond those involved in the present system of regulated private financing, and far beyond those in an unregulated, or at least substantially deregulated, system of campaign finance.

B. Flexibility

A finance system should be flexible. Politics—in terms of issues, personalites, technologies, and tactics—is a rapidly changing field. Magazines such as Campaigns and Elections now exist for the purpose of keeping campaign managers and tacticians up to date on the latest developments in campaigning. A system that is geared to regulate or subsidize the last campaign may “distort” politics, and in particular runs the danger of “locking in” certain parties or candidates.3

1 See Annelise Anderson, Political Money: The New Prohibition 7-8 (1997). The figure is based on a campaign including: enough 30-second ads on network, cable, and local television in major media markets to reach most adults 10 times each; three to four 30-minute ad slots “Fireside Chats”; radio ads attempting to reach listeners in major radio markets five times each, one to two full-page ads in every major newspaper in the country; two pieces of direct mail sent to each potential voter; a video cassette on the candidate sent to each household; and traditional billboards, buttons, and bumper stickers. Id.
2 See, e.g., Gable v. Patton, 142 F.3d 940, 947-49 (6th Cir. 1998), cert. denied, 119 S. Ct. 1112 (1999) (discussing the extent of the financial pressure Kentucky’s campaign finance scheme puts on all candidates to participate).
3 For example, a “funded” campaign finance law, along with many other practices, helped to lock in a Democratic majority in the U.S. House in the 1970s and 1980s. See Larry J. Sabato & Glenn R. Simpson, Dirty Little Secrets: The Persistence of Corruption in American Politics 49-57 (1996) (discussing the importance of franking, redistricting, campaign contributions, and committee structures to solidifying the democratic majority in the House).
6 See Amicus Curiae Brief of Senator Mitch McConnell, Nixon v. Shrink Mo. Gov’t PAC, 1999 WL 367218, at *14-17 (U.S. cert. granted Jan. 25, 1999) (No. 98-968) (arguing that Buckley’s authorization of a $1000 limit on campaign contributions is so low that it now represents a clear impediment to running a campaign).
7 See Sabato & Simpson, supra note 11, at 59-53 (noting that the first political action committee was created by the Congress of Industrial Organizations, and it threw its support behind Democratic candidates, as did its successor).
8 See, e.g., id. at 54-55 (describing how such tactics have been used by environmental groups, pro-choice feminists, and trial lawyers to channel millions into Democratic coffers).
9 It is often not possible for opposing interests to take advantage of the same techniques as their adversaries. Different groups find different types of fundraising techniques and political action most effective. For example, trial lawyers use “bundling” very effectively; many trial lawyers have incomes allowing them to donate $1000
ply put, government cannot keep up with the fluid world of political campaigning.

Furthermore, it has long been noted that one major difficulty in reforming campaign finance laws is that most changes will be perceived as benefiting either Republicans or Democrats. As both sides will fight tooth and nail to block reform perceived as detrimental to their political prospects, reform efforts are prone to gridlock.18 If we add to this the noted propensity of campaign finance regulation to be particularly prone to the law of unintended consequences,19 we have a recipe for a system that creates more problems than it solves.

The alternative, we might note, is hardly more inviting—if gridlock does not set in, we might see constant tinkering with the law in an effort to gain partisan advantage. In short, campaign finance is an area in which we cannot afford to have the law in constant flux, due to the propensity of temporal majorities to aim for partisan advantage. Nor can we afford a static, heavily regulated system, due to its distortive effects on political life. Campaign finance, we must glumly come to realize, is a theatre in which the law is particularly ill-equipped to act.

C. Opportunity

A third problem is to design a system that does not discourage meaningful candidates from running. In this regard, the alleged shortcomings of an unregulated private system are well documented.20 Potential candidates can be prevented from running for office by their inability to raise the necessary funds, or discouraged from running by the difficulty of raising funds. Of course, this is more true in a regulated private system than in an unregulated one. A system that

to a campaign. This technique will be less effective for a group such as National Right to Life, whose members have lower incomes.


19 See Samuel Issacharoff & Pamela S. Karlan, The Hydraulics of Campaign Finance Reform, 77 TEX. L. REV. 1705, 1705 (1999) ("Electoral reform is a graveyard of well-intentioned plans gone awry."); Lovenstein, supra note 18, at 302-03 (discussing potential negative effects of campaign finance reform); Gas R. Sunstein, Political Equality and Unintended Consequences, 94 COLUM. L. REV. 1390, 1400-11 (1994) (arguing that various "reform" schemes wind up entrenching incumbents, producing more PACs, burdening PACs that represent labor or minority groups, and increasing soft money or secret gifts).

20 See generally Raskin & Bonifaz, supra note 1 (arguing that financial resources are a decisive factor in elections).

limits the size of private contributions makes it harder for all candidates to raise funds and almost always works against political outsiders and newcomers by making it harder for them to raise money relative to incumbents and well-known figures.21

There is little reason to believe that there are a large number of viable candidates for office who cannot raise the necessary funds in a deregulated system, as opposed to one that limits private contributions and spending. Most people who would have any chance of running a serious campaign for office can attract the necessary funds; and the freedom to raise and spend money increases the pool of viable candidates.

Perhaps this can best be shown through a simple thought experiment. Imagine that all campaign expenditures were banned. Who would surface as viable candidates for Congress? I strongly suspect it would be a small coterie of local celebrities (such as athletes, television personalities, and car dealers whose names are well-known from their business ads); current officeholders; a handful of successful business persons, lawyers, and physicians who have been extremely active in their professions or the community; and perhaps a few other well-known community leaders, such as the head of the local police or teachers’ union, some community activists, or pastors of large churches. Overall, it is a group not too different from that which runs now, except probably a bit smaller in number and a bit less diverse. In an unregulated system of private finance, virtually all of these people could raise the money needed to run a serious campaign—in some cases from a large number of small contributions, in others from a small number of large contributions.22 The important thing is that some people not in this group can also raise the funds to become viable candidates.

As it is, candidates work frantically and spend their money in desperate attempts just to get the typical voter to know their names.23

21 See Smith, supra note 3, at 1072-73 (arguing that limits on contributions require candidates to raise cash from a large number of small contributors, a process that is easier for those with name recognition).

22 The current, heavily regulated system, however, works against many of these potential challengers, especially those who begin with low name recognition. See id. at 1072 (arguing that officeholders have the advantages of established campaign organizations, past contributors to target, and the ability to raise funds on an ongoing basis from political action committees).

23 At the height of the campaign season, a majority of persons of voting age cannot name either major party congressional candidate in their district. See Ilya Somin, Voter Ignorance and the Democratic Ideal, 12 CRITICAL REVIEW 415, 417 (1998).
One cannot win without name recognition. Spending money allows a candidate without that initial name recognition to have a fighting chance. What makes us think that the ability of some candidates to spend money to gain name recognition somehow decreases the pool of viable candidates? Does Steve Forbes decrease the pool of viable Republican presidential nominees? Of course not. If anything, in both 1996 and 2000 his presence as a candidate seems to have increased interest in alternatives to the front runners, Bob Dole in 1996 and George W. Bush in 2000.

Nevertheless, a government finance system could potentially increase the pool of candidates beyond that of a deregulated private system by assuring that adequate financing is available to more candidates. But it could decrease that pool of candidates as well, if the incentives created to encourage acceptance of public financing make it extremely unlikely that a privately financed candidate can win, while at the same time setting the bar for government financing higher than most candidates can reach.

The problem here is in deciding who ought to receive government funds. Most observers seem to reject the notion that funds should be available to every potential candidate, seeing such a loose standard as a giveaway of public money. Funds need to be available on a broad enough basis to encourage “legitimate” candidates, but should not be so broadly available that the very availability of tax dollars for campaigning promotes frivolous candidacies. For this reason, most proposals for government financing require candidates to show a measure of “popular support.”

The current presidential financing system, for example, provides “matching” funds to a candidate seeking his party’s nomination who raises at least $5000 in each of twenty states in amounts of $250 or less. Contributions are then matched, up to $250 per contribution, from the federal treasury. In the general election, party nominees receive public funds to run their campaigns in an amount determined by their showing in the last election.

This system appears to be both overinclusive and underinclusive in terms of financing candidates. It is overinclusive in that, under the system, a number of fringe candidates have qualified for federal matching funds, most notably convicted felon Lyndon LaRouche; John Hagelin of the Natural Law Party, which advocates greater use of transcendent meditation as the key government policy; and Lenora Fulani of the New Alliance Party, a socialist party which has been accused of engaging in cult-type brainwashing. It is also underinclusive in that a party may be eligible for general election funds based on past performance, even though it is unlikely to contest a future election. It is under-inclusive because any new major third-party nominee would not be eligible for funds prior to the general election.

Other plans use other devices to cut the potential number of candidates who might make a claim on the government purse. For example, so-called “Clean Money Campaign Reform” bills being promoted by the lobbying group Public Campaign at the state level require candidates to garner a substantial number of $5 contributions in order to qualify for government funds. As introduced in the U.S. Senate, a “Clean Money” bill requires the larger of either one thousand $5 contributions or a number of $5 contributions equal to one quarter of one percent of a state’s voting age population. I have no way of knowing whether or not such a figure is too high or too low, and the truth is that the promoters of these bills do not either. The

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32 Such a candidate can receive funds after the election if he tops five percent of the vote. See 26 U.S.C. § 9094(a) (1994). However, this is of little use to the candidate during the critical campaign before the election. Candidate John Anderson discovered this in 1980, when he was unable to borrow campaign funds before the election based on the anticipated receipt of federal funds after the election. Thus, Anderson’s campaign shone for lack of funds when needed—before the election. See Elizabeth Rada et al., Access to the Ballot, 13 URA L. REV. 793, 809 (1981) (discussing the constitutional implications of the discriminatory impact of existing law on Anderson and other independent candidates).


34 The Maine Civil Liberties Union has challenged a similar clause in Maine state legislation. The ACLU argues that this functions as an unconstitutional barrier to running for office, citing Bullock v. Carter, 405 U.S. 134 (1972), which limited filing fees for candidates. See Daggett v. Webster, 34 F. Supp. 2d 73, 74 (D. Me. 1999), vacated on other grounds, 172 F.3d 104 (1st Cir. 1999) (challenging Maine election law on First and Fourteenth Amendment grounds).

35 One organization has described the proper figure as follows: It must be high enough to screen out frivolous candidates who are unable to demonstrate a threshold level of support. At the same time, it must be low enough so as not to present a barrier to serious challengers. ... It should also
sponsors recognize that this threshold is likely to be manipulated by incumbents seeking to protect their seats.26

In any case, the "Clean Money" plans are also both under- and overinclusive. They are underinclusive in that they will exclude late starting candidates who might otherwise gain substantial support but who do not have time to gather the necessary small contributions, and they will exclude serious candidates who have available substantial funds with which to campaign and raise name recognition, but who, prior to using those funds to campaign, lack the necessary organization, public support, and name recognition to gather lots of small contributions.37

They are overinclusive in that candidates who are not viable candidates will still qualify. As the lobbyists for these "Clean Money" bills admit, getting signatures on a petition is not truly representative of any level of popular support.38 Getting $5 contributions is more difficult, and the theory is that few people will usually give money to a cause with which they are not in agreement. However, I will speak simply from personal experience: in my neighborhood a variety of political groups, including Greenpeace and various Public Interest Research Groups, regularly send young student volunteers or low-paid workers through the neighborhood to collect $5 contributions for various causes. These volunteers appear at the door, describe a horrible problem facing the neighborhood, city, or state, and ask for a small contribution. I assume by their regular appearances that they

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be noted that the required number will need to be reviewed and, probably, revised once the new law has been in effect. Public Campaign, Clean Money Campaign Reform Annotated Model Legislation, comment to § 103(A)(2) (visited Oct. 29, 1999) <http://www.publiccampaign.org/model_bill/bill.html#103>(See id. ([It will be easier to revise the numbers upwards than downwards (incumbents being unlikely to encourage more challengers).]). This illustrates a typical "reform" trap of mistaking the purpose of campaigns with the purpose of voting. The "Clean Money" acts are based on the premise that spending should reflect a pre-existing level of public support. In fact, it usually will, but there is no particular reason why it should: the purpose of spending money is to gain public support, not merely to reflect pre-existing popularity. 34 See Public Campaign, supra note 31, at comment to § 103 ("It's common knowledge that many people will sign anything but that very few people will contribute even a couple of dollars to a person or project they aren't in favor of."); see also PHILIP L. DUBOIS & FLOYD F. FLEENOR, IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE 84 (1999) ("[S]ignatures . . . are simply not meaningful gauges of public discontent or even interest."); Daniel H. Lowenstein & Robert M. Stern, The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal, 17 HASTINGS CONST. L.Q. 175, 199-200 (1989) (arguing that factors other than public support determine the success of a petition).

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1999] TAXPAYER-FUNDED POLITICAL CAMPAIGNS 60:
find this to be a successful way to raise money. I doubt that most of the donors have any real idea about the issues involved, and my conversations with neighbors who have contributed confirm this. I doubt therefore, that any real depth of public support will be found in collecting $5 contributions through simplistic, one-sided presentations of issues to voters who otherwise know little or nothing about the candidate.

Government-financed campaigns might therefore be better or worse than a deregulated private system in promoting worthwhile candidates. It will depend largely on where the threshold is set for qualifying for funds. Given the uncertainties involved, the tendency for incumbents to protect themselves, and the fact that even a rule that at one point works well may periodically need revising, which may come slowly or not at all due to the lack of flexibility in the system, I am skeptical that there is much to be gained from tax funding.

D. Competitiveness

Very similar problems arise when it comes to fostering competitive races. Professor Briffault argues that "[p]ublic funding would make the electoral process more competitive," but the comparison he makes is between a tax-funded system with adequate campaign funds, and a heavily regulated private system.39 In fact, since the era of heavy federal campaign finance regulation began in 1974, incumbent re-election rates have continued to rise and the number of competitive, or marginal, districts to decrease.40 Of course it is not clear that this trend is not a mere statistical blip, or perhaps caused by political background factors.41 It is certainly not true that this trend as a whole can be laid at the feet of campaign finance regulation. There are, however, reasons why limits on contributions and spending within a

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26 Briffault, supra note 2, at text following note 78.
28 See, e.g., JACOBSON, supra note 36, at 133 ("Electional swings have been modest in recent elections because national conditions and issues have not been conducive to change.").
privately financed contribution system distort political campaigns in favor of incumbents. For instance, prior to the passage of FECA, challengers in U.S. House races tended to raise about $0.67 for every dollar raised by incumbents. After FECA, that number dropped to about $0.25 by a challenger for every dollar raised by incumbents before rebounding somewhat to its recent level of $0.42 per incumbent-raised dollar.

Whether or not government financing will improve the situation of challengers relative to a deregulated private system is open for debate. In those two states which have meaningful experience with tax financing for their state legislatures, studies of government financing systems have yielded mixed results. A 1995 study of Minnesota’s system by Patrick Donnay and Graham Ramsden concluded that Minnesota’s system “promises more competitive campaigns, but does not go far toward creating them.” A study of Wisconsin’s system by Kenneth Mayer and John Wood seemed to yield a similar result. They concluded that “public financing has had no effect at all on the level of electoral competition,” and “public financing of congressional elections, by itself, will not eliminate the problem of uncompetitive elections.” In a later study, however, Professor Mayer argues that “a well-designed and adequately funded public finance program can dramatically increase competition levels.”

So, will government financing foster competitive elections? Again, it depends on the type of financing system that might be adopted. For example, to the extent that government financing with a spending cap equalizes expenditures, it might help challengers, who are usually underfunded in a deregulated system. Public financing, however, also prevents challengers from ever spending more than incumbents. Given the tremendous value of incumbency, many believe that challengers are only on equal footing with incumbents when they can spend more. Challengers in a position to spend more than an incumbent are usually the strongest challengers. Thus, a flat spending cap may harm those challengers most likely to actually defeat an incumbent.

Complicating the question further, strong evidence suggests that the key variable is not really who outspends whom, but whether challengers spend “enough” to make their names and positions known to the public. Thus, a government financing system with an expenditure cap that sets the limits high enough may make races more competitive, while a system that sets the spending level too low may make races less competitive. The presence of adequate funding is a key element to Mayer’s 1998 findings that public financing can “dramatically increase” competition.

But can we expect government to set funding at adequate levels? As Professor Mayer notes, Wisconsin has failed to do so. One reason that it is difficult to assure that government funding is both enacted or maintained at adequate levels is that it is easily criticized as “welfare for politicians,” and as an unnecessary state expense in any period of budget cutbacks or austerity. There is, quite simply, “no hint of a po-

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59 See Smith, supra note 3, at 1072-75 (arguing that contribution limits benefit incumbents, who have fundraising advantages and generally need to spend less because they benefit from office-related press coverage and name recognition).
61 Patrick D. Donnay & Graham P. Ramsden, Public Financing of Legislative Elections: Lessons from Minnesota, 20 LEGIS. STUD. Q. 351, 369 (1995). The authors attribute this failure to the program’s design which, not surprisingly, gives more benefits to incumbents than to challengers. See id.
63 KENNETH R. MAYER, PUBLIC FINANCING AND ELECTORAL COMPETITION IN MINNESOTA AND WISCONSIN 17 (1998). Mayer argues that the true measure of competitiveness is less about how many incumbents actually lose than about how many are involved in close races. See id. at 8.
64 See RASKIN & BONIFAZ, supra note 1, at 289 (finding that the financial advantage of incumbency has two aspects: public self-subsidies Congress bestows on its members, and private money seeking legislative influence).
65 See, e.g., ALAN I. ABRAMOWITZ & JEFFREY A. SEGAL, SENATE ELECTIONS 139 (1992) ("[d]ollar for dollar, spending by challengers and open seat candidates should produce a greater electoral return than spending by incumbents."); GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 130-32 (3d ed. 1992) (discussing the correlation between a challenger’s level of campaign spending and the probability that a voter will report having contact or familiarity with him or her); Alan I. Abramowitz, Explaining Senate Election Outcomes, 82 AM. POL. SCI. REV. 365, 397 (1988) (concluding that “[t]he challenger’s campaign expenditures are the single most important variable affecting an incumbent senator’s chances of being reelected”); Jeffrey Milyo, The Electrical [sic] Effects of Campaign Spending in House Elections (visited Oct. 15, 1999) <http://www.lsg.berkeley.edu/8880/CART/RS/milyo.html> (suggesting that incumbents that marginally outspend their challengers do not benefit from their additional expenditures).
66 See MAYER, supra note 42, at 3-4 (describing Minnesota’s system as successful, in part because it has higher spending limits and allows for different levels of expenditures in different types of races—including a 10% increase in spending for first time candidates).
67 See id. at 7, 17-19 (noting that Wisconsin’s spending limits have remained the same since 1986).
68 See id. at 17 (challenging the notion that public funding has a negative effect on
how much they need to run an effective campaign, may simply have forgotten how much challengers need to spend to run an effective campaign.

Worse, even if the original grant seems adequate, it may not remain so. For example, in the federal system, it appears that the amounts allotted to the major parties for the general election of the president, even though adjusted for inflation, are no longer adequate. This deficiency has prompted increased spending on "issue advocacy" and increased amounts of "soft money" contributions. In Wisconsin, spending limits have not been raised since 1986, becoming, in the process, woefully inadequate. Thus, we see that the lack of flexibility within a government financing campaign, coupled with political pressures to reduce spending, makes it difficult to keep government grants and limits adequate, even if they were adequate when first enacted.

Of course, the argument that the spending cap may be set too low is easily rebutted by proposing a program—such as Minnesota’s, perhaps—in which the cap is set at an appropriate level and indexed for inflation. But it is legitimate to question whether the incentives and dynamics of the issue make it more likely than not that a government financing system will come to favor incumbents. Professor Briffault is correct in suggesting that a tax finance system can assure that all candidates, especially challengers, receive a fair share of funds necessary to make them competitive. That same system, however, can also be used to lock in incumbents and deter serious challengers. Considering the limited experience at the state and federal level and what we know about political behavior, a government financing system could increase competitiveness, but probably will not.

See Stephen Ansolabehere & James M. Snyder Jr., Money and Institutional Power, 77 TEx. L. Rev. 1673, 1704 (1999) (finding that increases in the presidential campaign limit have failed to match the similar increases for congressional races because the limits are indexed to different economic indicators).

See id. at 1702-04. "Issue ads" are advertisements that may be intended to influence voters by discussing candidates’ views on issues, but which stop short of urging people to vote one way or another. "Soft money" consists of unregulated contributions made to political parties, rather than candidates, for purposes of party building, which may include "issue advertising." See Bradley A. Smith, Soft Money, Hard Dollars: The Constitutional Prohibition on a Soft Money Ban, 24 J. LEGIS. 170, 182-84 (1998) (examining the links between soft money and issue advocacy).

See Mayer, supra note 42, at 2 (comparing Wisconsin’s campaign spending limits to those of Minnesota where higher limits and an indexing system have more effectively fostered competition).
E. Communication

While addressing the difficulty of providing for funds adequate to foster competition, we have already considered the electoral advantages of incumbency. One reason that incumbents do well when spending caps are set too low is that voters are deprived of both information about challengers and information that challengers would provide about incumbents. Because voters start with more information on incumbents, but rarely with any concerted effort to find potential flaws with the incumbent, low spending favors incumbents. Also, because challengers are less well-known, and usually receive less free coverage than incumbents (by virtue of not holding office or engaging in the public acts and discussion that go with holding office), low spending tends to penalize challengers. Again, it is certainly possible to devise a government system that provides for adequate funds, but there is little reason to think that such a result is likely or, even if temporarily achieved, that funding levels will remain adequate. Without campaign spending, voters' information is limited to what they can get through the free media.

A deregulated private system may not always provide adequate funds to challengers, but given that the general thrust of political reform efforts is to reduce the amount spent on political campaigns, I am not optimistic that government financing will increase voter education levels.

Unlike some supporters of government financing, Professor Briffault resists the temptation to demonize private financing, providing a generally balanced account. But the model of private financing against which he compares government financing is the current, highly regulated model, rather than the alternative of a deregulated system. Even if he avoids demonizing private financing (heavily regulated or not), his vision of a government-financed system is quite idealized.

Overall, there are no guarantees that a tax-financed system will perform better than a deregulated private system judged on any of these criteria of administrability, flexibility, opportunity, competitiveness, or communication. Tax financing does offer potential improvements in some areas, but what we know about politics and government regulation suggests that such benefits are unlikely to be realized. In fact, negative consequences are perhaps the more likely result.

II. CLASHING VISIONS: EQUALITY AND CORRUPTION

I have set aside, until now, the two prime arguments usually offered up in support of tax financing: that it is necessary to assure equality and to prevent corruption. The resolution we have been asked to discuss assumes two extremely important facts. First, it presumes that there is some problem, described as "the political influence of special interests," which must be addressed. Second, it presumes that taxpayer financing and spending limits will solve this problem. Given that there are no particular advantages to government financing outside of the alleged benefits for equality and control of corruption, we should closely examine each of these assumptions. The first I examine here, the second in Part IV.

A. The Question of Influence

When we say that we want to control the influence of "special interests," we need first to remember that one person's "special interest" is another's "vital national interest." Rarely does a labor union leader stride boldly to the microphone and announce that his members favor a prevailing wage law because they want as much as possible for themselves, taxpayers take the hindmost. Rarely does a corporate executive argue that import duties are bad for the country, but he does not care so long as his company benefits. More subtly, is the Sierra Club a "citizens' lobby" or a "special interest"? It may depend on whether you want to hike in the wilderness and preserve species, or drive on the freeway and preserve jobs in the timber industry. How about the National Rifle Association? The United Auto Workers? The Grange? Are they "special interests" or "citizens' groups"? Until we can all agree on the answers to these questions, I am not sure that the idea of combating "special interests" gets us very far. I personally oppose tariffs and import quotas on foreign textiles. Try telling the employee about to lose her job due to cheap textile imports that she is a "special interest." This problem alone should make us skeptical of trying to reign in "special interests."

Assuming that we could agree on the answers to these questions, we would still have the problem of defining what kind of influence we want to block. The object of participating in politics is to have "influence" in the political system. If it were not, why would anyone participate? Thus, the editors' proposition seems to presume that certain

10 See Lillian R. BeVier, Campaign Finance Reform: Specious Argumentum, Intractable Di-
types of influence are in some way illegitimate and need to be controlled or eliminated. Further, it presumes that such influence is linked to political contributions. Political contributions can arguably provide influence in two different ways. The first is that they alter the way in which legislators behave while in office. The second is that they affect the way that voters vote. The first is usually the subject of the anti-corruption argument, and the second, the "equality" argument. I will take up the equality issue first.

**B. Equality**

In *Buckley*, the Supreme Court held that the pursuit of equality is an insufficiently compelling government interest to justify infringements on the First Amendment. This holding, however, hardly takes the issue off the table. Equality can certainly be a legitimate political objective, and its pursuit in a constitutional manner—such as through a truly voluntary system of government financing—may be a sound policy objective. However, the notion that removing one source of political influence from politics (money) while leaving others (such as writing and organizational ability) intact will add to equality is based on a combination of dubious empirical assertions, a romantic notion of politics, and a core philosophical definition of equality that is certainly debatable.

The first empirical assertion is the unproven and rather unlikely notion that other sources of political influence—such as good looks, speaking ability, time, or more importantly, celebrity, writing ability, free media access, campaign organizational skills, and the like—are more evenly spread across the populace and the political spectrum than is wealth. This view is unlikely because it seems rather clear that in virtually every major political debate or campaign, both sides (or all sides with any serious measure of popular support) are reasonably well-financed. Moreover, because wealth is a reward generally available to those who gain success in athletics, in Hollywood, through campaign consulting, and most any other profession, persons with other sources of influence tend to be subsets of those with wealth. It is to be expected that the larger group of "people with money" will have a broader spectrum of political views than any given subset. If this is true, barring monetary contributions but leaving other sources of influence intact will lead to fewer, not more, views being represented.

It is also argued that money must be excluded because unlimited spending allows some voices to "drown out" others. This is empirically not true. There are now so many media outlets—including magazines, twenty-four hour news channels (including two exclusively devoted to government), a booming talk-radio market, the internet, and more, available for free or virtually so (visit the local library)—that a prospective voter can get just about any perspective he or she might conceivably want. We must not mistake the listener’s disinterest for the communicator’s inability to speak.

Of course, most of these low cost information sources must be sought out by the voter. A well-financed candidate can simply blast passive viewers with television ads, but this does not "drown out the opponent." At worst, it simply means that many voters—those who get all their information from television ads—hear only one side (assuming only one side has sufficient funds to run ads—a dubious assumption in many, if not most, serious campaigns). The argument for people who run and own them) share common political views, but people in other walks of life who have greater than average political influence, such as Hollywood or academia, would not have certain widely shared views within their professional circles. See id. at 1646. Finally, if Professor Hasen really does perceive such a difference, is his game not up? For it would then appear that his goal is to disadvantage certain political viewpoints (those held by corporate owners and managers) rather than to promote any particular type of "equality." If one is truly interested in "equality," I am puzzled as to why celebrities, academics, reporters, campaign consultants, and others with "undue" political influence should be allowed to have such influence, regardless of the distribution of their views along the political spectrum.

This argument might fail if these subsets of wealthy people tend to disproportionately share a common political philosophy with all other people of wealth. In this case, banning money will make no difference.

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*See Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (invalidating certain provisions of the Federal Election Campaign Act of 1971, as amended in 1974, as violative of the First Amendment).*

*See Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 Tex. L. Rev. 1627, 1646 n.101 (1999) (arguing that with those personal attributes, such as celebrity, capable of affecting the electoral process are evenly spread across the political spectrum). Professor Hasen casually asserts the proposition that "celebrity views are likely to be randomly distributed on the political spectrum." Id. at 1646 n.101. I find this a most curious assertion for several reasons. First, Hasen never makes an effort to prove it or even to show that it flows logically from some proposition. Since it is not at all obvious to me, or to most people with whom I communicate regularly, that this is true, I have to discount this assertion. Second, I do not understand why Professor Hasen would be convinced that "corporations" (meaning the people who run and own them) share common political views, but people in other walks of life who have greater than average political influence, such as Hollywood or academia, would not have certain widely shared views within their professional circles. See id. at 1646. Finally, if Professor Hasen really does perceive such a difference, is his game not up? For it would then appear that his goal is to disadvantage certain political viewpoints (those held by corporate owners and managers) rather than to promote any particular type of "equality." If one is truly interested in "equality," I am puzzled as to why celebrities, academics, reporters, campaign consultants, and others with "undue" political influence should be allowed to have such influence, regardless of the distribution of their views along the political spectrum.

*See Lassachoff & Karlan, supra note 19, at 1726 (noting the case with which consumers of political news can obtain information about competing viewpoints). But cf. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 Stan. L. Rev. 993, 996-98 (1998) (discussing how inequality of opportunity to reach a voter does not rest primarily on a candidate’s resources, but on the voter’s level of interest).*
campaign spending limits seems to assume that we would be better off if those voters heard from neither side before heading off to vote. This is a puzzling perspective, and one which would almost certainly leave politics to a mix of car salesmen, television anchormen, sports stars, state and local officeholders, and those few others who might already possess local name recognition—a more narrow group than the current crop of candidates.

The solution to the problem of limited voter information, again, is to increase spending by candidates so that all are heard. A government finance system with adequate spending levels might do this; one with inadequate spending levels will not, and will probably be worse than an unregulated private system. The problem, again, is what kind of financing system the political system is actually likely to yield.

The idea that money is in some way different from other sources of political influence also draws on a romantic idea of politics. All of us do not have equal monetary resources, but in theory, at least, all of us can volunteer to walk a precinct, man a phone bank, stuff envelopes, or write a letter to the editor. Twenty-four hours spent working on a campaign by most Americans, however, are certainly not as valuable as are twenty-four hours of James Carville’s time spent working on the same campaign. To put it another way, what the “average” citizen can do, non-monetarily, for a campaign—stuff envelopes, distribute a few brochures door to door, and the like—is the equivalent of a ten to twenty dollar campaign donation. But there are some citizens—campaign managers such as Carville; activist celebrities such as Arnold Schwarzenegger, Lauren Bacall, or Barbara Streisand; writers such as George Will or Elaine Goodman—whose political influence far, far exceeds those of most citizens. Campaign endorsements or participation by such individuals are the equivalent of $5,000, $50,000 and $250,000 donations. As with money contributions, most citizens are capable only of small contributions of non-monetary resources, while only a select few “large donors” can really wield significant influence. Professor Briffault tells us that just 235,000 people contributed one-third of the private money for federal campaigns in 1996. Leaving aside the millions of donors who contributed the remaining bulk of the private funds, I am quite certain that 235,000 is a considerably larger group than the number of people who were offered op-ed space in daily newspapers; or the number of people who served as campaign managers in federal campaigns; or the number of people who filed amicus briefs in the Supreme Court; or the number of people who head advocacy groups arguing for campaign finance reform. Indeed, I am quite certain that these large donors make up a more numerous and more diverse group than all of the above combined—and yet comprise a group with less political influence than the above. Professor Briffault adds that these 235,000 are not typical of all Americans. Not to be overly flippant, but tell us something that we do not know about journalists, consumer “activists,” or most any other class of people wielding political power. Tell us something, indeed, that we do not know about the elected representatives themselves. Let us focus not just on the “evil” attributes of these 235,000 (they are more likely to be “affluent, men, [and] whites” as well as “more conservative . . . [and] more Republican”), let us also consider that compared to most other people with political influence, they are less likely to work for government, less likely to be college professors, more likely to have met a payroll, more likely to live outside of the federal capital, less likely to be Democrats, and in each of these and many other ways, they are more like “the general population.” In short, though they are in many ways different from the “general population,” in a great many other ways they are more like the general population than those whose influence would increase if these 235,000 were cut out of the process.

At this point, the debate over equality tends to shift to philosophical ground, with supporters and opponents of banning private contributions arguing for very different views of what constitutes “equality.” Much has been written on the subject, and I doubt that we can add

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61 Of course, the reality is that we are not all equal there, either—even those of us with strongly held political views. My 91-year-old grandmother can no longer do any of those things, but when it comes to politics, “don’t get her started . . .”

62 See, e.g., “All the Ink Spilt by the Many Talented and Well-Positioned Advocates Amounts to a Million Dollar Sub rosa Subsidy to Those Political Candidates Running on a Reform Platform. My Participation in this Debate Rests on the Conviction that Each Citizen Should be Able to Use Every Asset, Skill, or Talent He or She Possesses to Promote His or Her Views. Does not the Reformers’ Agenda Suggest that Every Citizen’s Voice Should be Reduced to the Level of the Least Able Participant? And If So, How Do They Justify the Use of Their Unusual Privilege and Talent to Be Heard?”

63 See Briffault, infra note 2, at text accompanying notes 40–41.

64 See id. at text accompanying notes 41–42.

65 Id. at text accompanying note 42.

66 See, e.g., Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, in THE BILL OF RIGHTS IN THE MODERN STATE 225, 228 (Geoffrey R. Stone et al., eds., 1992); Lillian R. BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 CAL. L. REV. 1045, 1047 (1985) (noting that defenders of lenient judicial scrutiny for campaign finance reform legislation argue that equalizing access to the political process is intrinsically related to the First Amendment); Edward
much here beyond a brief summary of those competing views.

We might call those who would like to destroy monetary participation in politics the Platonists. Platonists believe that individuals blessed with certain types of talents are inherently entitled to greater political influence than their fellow citizens. The Platonist view holds that citizens with skills and attributes directly valuable to politics—speaking, writing, political organizing, media access (as with celebrities), good looks, etc.—deserve their unequal political influence, and by right and breeding ought to serve as platonic "rulers" of the republic's body politic. Therefore, inequalities in these attributes should not concern us. Those who possess other skills—in medicine, business, computers, or manufacturing, for example—may or may not deserve the wealth that their skills bring to them, but they definitely do not deserve political influence. Thus, expenditures of money by such individuals, or what we should recognize as efforts to convert their non-political skills into political influence, are illegitimate. And because wealth is not equally distributed across the populace, this type of effort serves a great concern.

Against this view stand those whom we might dub the Stoics. The Stoic thinkers on campaign finance believe in strict equality before the law. In this view, all citizens should have an equal opportunity to use their talents—any talents—to influence political life. This means that citizens must be allowed to convert all of their abilities into political influence in the form of contributions. This is a broader, more plebian, more free-wheeling conception of democracy which allows more people to play the game. It denies that certain political views have inherent merit merely because the speaker possesses certain types of skills. Rather, it promotes equality before the law.

Stoic thinkers are relatively unconcerned, then, when an individual or group of individuals gives or pays money to a candidate, a political party, an ad agency, or some other group to promote political views similar to those of the contributor. Stoics see this as enhancing equality by allowing all politically involved citizens to use their diverse assets to promote their political beliefs. The fact that monetary assets are unevenly distributed, as are the political skills of writing, speaking, managing campaigns and so forth, is of little concern to Stoics, who accept it as a fact of life. The Stoic view is inherently unattractive to academics, journalists, and "good government" lobbyists. These people tend to possess skills with direct political utility and also tend to believe that their political views are better informed than those of most citizens. Naturally then, they are drawn to the Platonist vision, which affirms their greater worthiness to participate in political discussion and grants them greater political power.

The philosophical conflict between the Platonist and Stoic views of campaign finance is not one that can be resolved here, but there is another aspect to the discussion. On a practical level, there are those of us who doubt that most campaign finance regulation accomplishes what it is intended to accomplish. Thus, we have argued that even accepting the Platonist definition of equality favored by self-styled "reformers," regulation—including government financing—both has

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38 See Foley, Equal Dollars Per Voter: A Constitutional Principle of Campaign Finance, 94 Colum. L. Rev. 1204, 1206 (1994) ("[E]ach eligible voter should receive the same amount of financial resources for . . . participating in electoral politics."); Stephen E. Goulston, Dilemma of Election Campaign Finance Reform, 18 Hofstra L. Rev. 215, 220 (1989) (noting that the very definition of equality is a contested concept in this area); Richard L. Hasen, Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers, 84 Cal. L. Rev. 1, 27 (1996) (arguing that a voucher plan would best serve egalitarian pluralism); Raskin & Bonifaz, supra note 1, at 278-79 (positing that equal protection "provides the principal constitutional paradigm" for analyzing questions about the political process).

39 See PLATO, THE REPUBLIC of Plato ch. VIII-X (Francis MacDonald Cornford trans., 1961); id. at 122 ("[I]f a state is constituted on natural principles, the wisdom it possesses as a whole will be due to the knowledge residing in the smallest part, the one which takes the lead and governs the rest."). These positions are the modern equivalent of the craftsman, merchants, and laborers in Plato's Republic. According to Plato, though necessary to an economically sound state, "on intellectual grounds they are hardly worth including in our society." id. at 58.

40 See E. Joshua Rosenkranz, Faculty Assumptions in "Faculty Assumptions": A Response to Professor Smith's Critiques of Campaign Finance Reform, 50 Conn. L. Rev. 867, 894 (1998) ("The power of persuasion, which involves skills 'such as writing and speaking goes to the heart of what the First Amendment is about. . . . [M]oney spent to broadcast an idea is completely unrelated to the value of the idea it propels or the influence of the message on the listener.").
been and will continue to be a bad thing. Regulation, by its very nature, casts the heaviest burden on those who lack the resources to hire lawyers, accountants, and consultants to advise them on the law and their campaigns. It also favors incumbents and others who already know how to play the system and use it against their opponents. Restricting influence through campaigning can increase the influence of those with a permanent presence at the seat of government; this group consists overwhelmingly of powerful industrial and union interests, not lobbyists for the disorganized and disempowered.

Moreover, if I am right about the lack of flexibility in government finance systems and the tendency of incumbent lawmakers to skew systems to their advantage, these "undemocratic" consequences of campaign finance regulation may be all but unavoidable in a tax-financed system. At least in theory, a better system might be developed. I am skeptical, however, that proponents of government financing can design a plan that will do what they hope it will.

C. Corruption

The second interest allegedly furthered by tax financing of campaigns is the elimination of a second type of "special interest" influence—influence in the political process after the votes are counted. This is often referred to by regulatory advocates as "corruption." As

always, we need to begin this debate by pointing out that by "corruption," reform advocates do not mean traditional bribery. Traditional bribery in terms of funds that line the lawmaker's pockets in exchange for specific official action is already outlawed. What regulatory advocates seem to mean by corruption is that lawmakers will vote in certain ways, once in office, in order to please contributors, rather than in some other, better manner. I find it rather implausible that this is really a major problem in American government.

For one thing, the assertion that lawmakers vote to please financial contributors is simply not supported by the bulk of systematic evidence. Serious studies of legislative behavior have overwhelmingly concluded that campaign contributions play little role in floor voting, and these conclusions are no longer seriously disputed by the would-be regulators. Instead, it is now argued that the corruption exists where it is harder to see—in committee activities, in "the speech not given," and in prioritizing. Of course, if "corruption" cannot be measured or seen, this assertion cannot be disproven, which is something of a handicap to labor under for those of us skeptical of this justification.

On the other hand, this assertion is backed only by bits of anecdotal evidence, usually quotes from present and former legislators explaining their support for campaign finance regulation or explaining why they were unable to accomplish certain legislative objectives. This evidence is not terribly persuasive. There is a human tendency to blame defeat on "unfair" factors such as "corruption," rather than to admit that our ideas were not strong enough, our allies not numerous enough, or our side not organized enough, to gain legislative victory. There are also anecdotal quotes running in the oppo-

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77 See Thomas Gais, Improper Influence 181 (1996) (arguing that past electoral reforms and regulations have led to representational deficiencies in the PAC system); BeVier, supra note 56, at 1076 (arguing that commentators favoring campaign finance reform discount the value of the contributors' First Amendment rights); Gottlieb, supra note 66, at 286-92 (pointing out the potential adverse impact of campaign finance reform proposals on First Amendment rights); Smith, supra note 3, at 1050 (arguing that campaign finance regulation conflicts with accepted notions of equality and is undemocratic); see also Joel M. Gora, Campaign Finance Reform: Still Searching Today for a Better Way, 6 J.L. & Pol'y 137, 165 (1997) (noting that the constitutionality of many proposed reforms is suspect); Sanford Levinson, Regulating Campaign Activity, 83 Mich. L. Rev. 939, 948-49 (1985) (book review) (arguing that campaign finance reform does not address the fact that other socially useful resources which can affect electoral results are also unequally distributed).

78 See Smith, supra note 3, at 1083 ("[C]ampaign enforcement actions are disproportionately directed at challengers, who are less likely to have staff familiar with the intricacies of campaign finance regulation.").

79 See Gais, supra note 73, at 132 (noting that "the PAC system highlights certain policy domains and underrepresents others"); see also Edward A. Kangas, Soft Money and Hard Bargains, N.Y. Times, Oct. 22, 1999, at A27 (arguing that "lobbyists and trade associations" would allow big business "to be heard" even if soft money was banned and supporting such a ban).


81 See id. at 130 n.45 and sources cited therein (indicating that "contributions do influence representative, but less than many suppose"); see also Stephen G. Bronars & John R. Lott, Jr., Do Campaign Donations Affect How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do? 40 J.L. & Econ. 317, 346 (1997) (concluding that empirical data fail to support the notion that campaign contributions buy politicians' votes).

82 But see Bosenkranz, supra note 69, at 877 (arguing that even though the presence of corruption is not supported by voting pattern studies, it still pays a major role in influencing representatives).

83 See, e.g., Wertheimer & Manes, supra note 76, at 1129 (quoting former Senator Paul Douglas, who feared that the influence of money and favors "may be so subtle as not to be detected by the official himself").
Consider just what it would mean for a legislator to act in a "corrupt" manner. For centuries, philosophers, political scientists, and others have debated how a legislator ought to make decisions. Suffice it to say that there is no consensus on the issue. Let me suggest, then, a few ways of decision making which, I think, have enough legitimacy that even those who disagree with them would not suggest that they are "corrupt."

First, a U.S. congressman or senator might choose to act according to the desires of a majority of his constituents, whether or not doing so comports with his own best judgment. Second, he might choose to act according to his own best judgment and ideological principles, whether or not doing so comports with the wishes of his constituents. This would be a legitimate method of acting whether the legislator is measuring the benefits according simply to what is best for his constituents, or whether he is considering what is best for the nation as a whole. These do not exhaust the possibilities for legitimate legislative action. A legislator might also legitimately (i.e., "non-corruptly") act in a way opposed to both her own best judgment and opposed to the desires of a majority of her own constituency. For example, if the legislator thinks it would be a good idea to allow private discrimination against homosexuals in the rental housing market, and recognizes that a majority of her constituents hold a mild preference for allowing such private discrimination against homosexuals, she might still act in support of a law barring such discrimination because of the much more intense preference of a minority of constituents who favor such legislation. This, too, I think is a legitimate mode of legislative action.

Which theory is best is, of course, a question for another day. At this point it is enough to note that a vote cast along any of these three lines cannot really be called "illegitimate" or "corrupt." In practice, I of the professors who write on "reform," and most of the staff and board members of advocacy groups which champion more regulation, conduct their affairs as well. It strikes me as odd, if not offensive, that these people assume that most members of Congress are reckless suitors, easily swayed by a few dollars to their campaign organizations, while they themselves are men and women of principle. Not have I felt that this created a difficult conflict of interest problem.

See John Stuart Mill, Considerations on Representative Government, in THREE ESSAYS 143, 325 (Oxford ed. 1975) (noting that some representatives "feel bound in conscience to let their conduct, on questions on which their constituents have a decided opinion, be the expression of that opinion rather than of their own").
suspect that most legislators are frequently torn between these theories, and will usually vote their best judgment unless it means probable electoral defeat, or, conversely, will usually vote with the constituency unless the legislators hold very strong opinions to the contrary.

In any case, to find "corruption," we must assume that the representative is acting against his own best judgment and principles, against the wishes of a majority of his constituents, and against the intense preferences of a minority of his constituents, and that he is doing so in order to gain a campaign contribution (as opposed to a media or other endorsement, favorable press coverage, or some other electoral advantage). How likely is any legislator to do such a thing for a mere contribution? Yet people express surprise that empirical studies fail to show monetary contributions exerting much influence.

This is not to say that money never plays a role, or that monetary contributions may not weigh on the representative's mind. And, indeed, this simple observation defines a more subtle corruption thesis advanced by Professor Lowenstein. Professor Lowenstein argues that the fact that donor wishes will be just one factor among many in a legislator's decision-making process is the problem, and is what makes the role of money so insidious. It is not necessary for money to "corrupt" legislators in any outright way. Rather, the mere fact that it is there, influencing the "chemistry" or "mix" of the legislator's actions, "taints" the legislative process. For Professor Lowenstein, this inability to pinpoint the corruption is the clinching argument for doing away with private financing. The system cannot be policed because none of us—not even the legislators—can know the exact influence of contributors.

But if the wishes of contributors are just one factor among many, why do they "taint" the process any more than the fact that the legislator might consider the opinions of family, friends, or staffers; endorsements by newspapers, colleagues, and key constituents; the information provided by lobbyists or groups which have not made contributions; and any of the other factors that might come into play?

One answer (apparently not Lowenstein's) is that money is "completely unrelated to the value of the idea it propels," whereas other influences "attract the candidate's attention because they are in a posi-

tion to persuade voters or to deliver blocks of votes. But this is not really the case. The spouse's position in the bedroom and ability to gain a legislator's ear may also be "unrelated to the value of the idea it propels." Staffers and friends are not in positions to "persuade voters or deliver blocks of votes" any more than most contributors. Newspaper and other endorsements are typically decided by a small group of individuals, who then try to persuade voters of the candidate's merit, and are in that respect little different than contributions, which are given to the candidate by a voter or voters so that the candidate can directly try to persuade other voters of the candidate's merit. Clearly the problem is not that money is any more "tainting" than are many of the other factors that go into decision making, and that, in any event, are secondary to the dominant, "untainted" considerations of ideology and constituency desires.

Professor Lowenstein's answer, and apparently Professor Briffault's, is that this low-level monetary influence is inappropriate simply because our culture regards it as inappropriate. The potential influence of money is a problem because, among forms of political influence, we consider money a unique problem. He argues that scholars such as myself "would not be at such great pains to characterize the influence of campaign contributions as minimal if they did not believe that it would be wrong if the contributions were influential, or at least that the overwhelming majority of our fellow citizens believe that it would be wrong." I disagree. We are at pains to show that the influence of contributions is minimal—in the sense that they might lead to the quid pro quo corruption that Buckley held to be the constitutional justification for limits and that most citizens find abhorrent—precisely because if we show that contributions do not lead to rampant quid pro quo corruption, we believe that the majority of our fellow citizens will not be concerned about campaign contributions or find them problematical. And the placidity with which citizens react to reform proposals, so-called scandals, and proposals for government financing is evidence of that fact. The fact is, the American people have proven

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97 See Ortiz, supra note 60, at 899 ("C)andidates [might] become so beholden to contributors that they follow the contributors' rather than the voters' interests. Everyone, including the Supreme Court, agrees that this is a serious danger. The pivotal questions concern how great a danger it actually presents . . . .").

98 Lowenstein, supra note 18, at 322-26.


100 Rosenkrans, supra note 69, at 894-95.
101 See Lowenstein, supra note 18, at 328-29 (describing campaign contributions as "payments of money to the official for the official's benefit" and concluding that this is the "paradigm case for improper influence").
102 Id. at 329.
time and time again that they are not particularly disturbed by the way in which campaign funds are raised and the minor role that they might play in legislative behavior.

Professor Lowenstein then adds that our culture regards any role for private money as inappropriate because "it constitutes bribery, as that crime is defined in most American jurisdictions."79 I doubt, however, that any state enacted its bribery statute with campaign contributions in mind. In any case, as Professor Lowenstein notes, campaign contributions are rarely prosecuted under such laws. He attributes this to the pervasiveness of the practice, rather than to approval of the process.80 I attribute it to the fact that no more than a very small minority of Americans really consider private contributions to be bribery, and that there is no more a cultural norm against the practice than there is a cultural norm against driving 68 miles per hour in a 65 mile per hour zone.

Thus, I cannot agree with Professor Lowenstein's assertion that:

It is a fact of our political culture that although a great variety of the pressures brought to bear on politicians embody forces that are regarded as more or less democratic and therefore legitimate, this is not true of pressure imposed by payments of money to politicians, either for their personal benefit or for campaign use.81

To the contrary, I believe that our political culture does not consider a contribution for campaign use to be corrupting, which is why campaign finance reform has never become an important issue with the voting public, and which is why millions of American citizens make campaign contributions and never feel the least tainted by the process. Indeed, my own observation is that politicians often find it easier to tell a constituent that his vote was dictated by campaign contributions than to admit that it was dictated by disagreement with the

and concluding "the American people understand that it takes money to run political campaigns and that, in the absence of total public financing of such campaigns, candidates are going to, and should, solicit funds for those campaigns"; Smith, supra note 24, at 833-36 (noting that public opinion polls reveal the public's ambivalence on the issue of campaign finance reform); The Tarrant Group, Key Findings from a Nationwide Survey of Voter Attitudes About Campaign Finance Reform (visited Oct. 18, 1999) <http://www.tarrant.com/polls/campfin.htm> (finding that 78% of respondents oppose tax funding of campaigns).


80 See Lowenstein, supra note 18, at 329.

81 Id.

constituent. That strongly suggests that there is not a strong cultural norm against the influence of contributors, even when that influence is described in terms that indicate "corruption" far more strongly than Professor Lowenstein's idea of a "tainted" system.

It is probably true that it is rare for a legislator to admit that contributors influenced his activity, but it is, I believe, equally rare for a legislator to admit that the possibility of a newspaper endorsement, or even the endorsement of a powerful group representing large numbers of members, influenced his activity.82 So the opinions of donors go into the mix, along with the opinions of numerous other individuals whose influence sometimes does and sometimes does not have anything to do with their numbers, their talents, or some third party's view of the merit of their opinions.

Most Americans are sophisticated enough to recognize that these donors usually represent large numbers of persons with similar views, and when they do not, it is perhaps even more important that they be heard. Indeed, in some cases it will be a good thing for the representative to overtly consider donations, as monetary contributions can be an indicator of the intense preferences of a minority, or of the preferences of the majority. Given all this, I am simply not persuaded that this influence—and this type of influence alone—is so corrupting that it calls for limiting a primary mechanism, and in many cases the only real mechanism, for millions of Americans to participate in the political system.

At this point we are told that even if all that I have written is true, the political system is "corrupt" because some have more "access" than others. This is not entirely true. The fact is, the vast majority of campaign contributors never seek access, and legislators meet regularly with people who have never made contributions. Nor does every contributor who seeks access get it.79 To the extent that the access theory is true, however, I am not exactly certain why this should shock me. For one thing, such contributors are often well informed on public issues and provide valuable information to representatives. But beyond that, I think we are back to the romantic notions of political life that surface in the equality debates. There seems to be a notion that

79 How often do you hear a Democrat say that he thinks minimum wage increases are a bad idea, but votes for them anyway just to keep labor unions happy? Or even that the prospect of getting labor's vote influenced his decision?

82 See Hearings on Campaign Contribution Limits, supra note 81, at 46 (testimony of former Senator Dan Coates) ("A contribution is by no means necessary to obtain a meeting, and a meeting by no means guarantees results.").
but for monetary contributions, the typical congressional representative would... well, would what? Randomly call citizens in his district to get their opinions? Or spend more time golfing? The most likely result, I think, is that the typical representative would spend more time with the people who already surround him most of the day, and who make up the single largest group of witnesses in congressional committee hearings: other government employees and officials. Personally, I would rather see him or her get out and spend some time with private sector lobbyists. But if private contributions were banned, there are two things of which we can be absolutely sure: the overwhelming majority of citizens would still never, ever, get to spend even two minutes discussing public affairs with their congressional representatives; and the number of private citizens with whom that representative does discuss public affairs would almost certainly decline.

IV. THE FUTILITY OF GOVERNMENT FINANCING

So, are we left at a draw? Either you subscribe to the Platonist theory of political equality or you do not; either you find the anti-corruption rationale (which by definition cannot be disproven) persuasive, or you do not. Despite the disadvantages to government financing pointed out in Part I, I suspect that most people who fall into the former category—that is, who accept Platonist thinking or who still fear corruption, however improbable—will still favor government financing.

There is, however, one more issue to address, and having written so much prose, it seems almost perverse to disclose it now. Nevertheless, here it is: even with a major change in constitutional jurisprudence (probably requiring a constitutional amendment), government financing will not solve either the equality or the corruption problems.

We have 100% government financing, with voluntary spending limits, of the presidential general election campaigns now. No major party nominee has ever opted out of the system or broken the expen-

diture limit. Yet, those who demand more regulation, in this case those who favor extending some type of tax financing to congressional and senatorial campaigns, do not generally consider the presidential system to have even remotely resolved the problems of equality or corruption. The reason is simple: the primary result of public funding of presidential campaigns has been to distort political campaigns and cause monetary participation to take new forms. In particular, the successful effort to chop off the head of "evil" in presidential campaigns—private donations to candidates—has caused the Hydra-like growth of the twin "evils" of "soft" money and "issue advocacy," which would-be regulators now denounce. Thus, candidates' campaigns do not spend money, yet money is spent, on independent expenditures, issue ads, convention sponsorship, party-building activities financed with soft money, and more. "Soft" money and "issue advocacy," to focus only on the two most disparaged evils, cannot be successfully regulated for both practical and constitutional reasons.

Even if proposals to regulate "soft" money and "issue advocacy"

109 Candidates, including George W. Bush and Steve Forbes, have opted out of the primary system, but no major party nominee has opted out of public funding in the general election.


111 The Supreme Court's key decisions on the right to engage in "issue advocacy" are Buckley v. Valeo, 424 U.S. 1, 79-80 (1976) (restricting permissible regulation to funds spent in concert with a candidate to advocate election or defeat of a clearly identified candidate), and Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 253-54 (1986) (distinguishing Massachusetts Citizens for Life from PACs because its purpose is issue advocacy rather than the nomination or election of a candidate). Recent efforts to regulate "issue advocacy" within the constraints of Buckley have been uniformly struck down by the courts. See James Bopp, Jr., Campaign Finance Reform: The Good, the Bad, and the Unconstitutional, HERITAGE FOUND. BACKGROUNDER (Heritage Foundation, Washington, D.C.), July 19, 1999, at 1 (citing 20 federal cases that have "adhered faithfully to the 'explicit' or 'express' words of the advocacy test according to its plain terms"). The Court has never explicitly ruled on efforts to ban soft money but has implicitly indicated that most soft money cannot be regulated in accordance with the Constitution. See Bopp, supra, at 7 (noting that the Court has found that proposed bans on political parties' receiving soft money cannot be justified by the government's interest in preventing corruption); Gora, supra note 73, at 161 (noting that there is "not a word in Buckley" that suggests that the Court would uphold a total ban on PACs and soft money); Smith, supra note 54, at 182-83 (noting that the Buckley court suggested that ads which did not urge the election or defeat of a candidate could not be constitutionally subjected to regulation); see also Lasacharoff & Karlan, supra note 19, at 1708-17, 1735-36 (discussing both practical reasons and general constitutional principles that make regulation unlikely to succeed).

Imagine the probable results of such phone calls. I expect that there would be a large number of hang-ups, many more "I don't knows," and a great deal of off-the-cuff advice by persons with little knowledge of the issues the representative may be addressing. In general, it would be time poorly spent.

Others might not, but I see no reason why they should impose their theory of good government on my representative!
were to be upheld against constitutional challenge in the courts—or perhaps implemented after constitutional amendment—this would not solve the regulators' dilemma. There are simply too many ways for those who want to influence public policy to do so. For example, in 1996 the Republican and Democratic parties spent nearly $41 million on their national conventions, although only $8 million was provided in federal funds for the conventions. The extra money came in the form of corporate sponsorship for "civic and commercial" purposes. In fact, such sponsorship both helps the conventions work as part of the campaign (by firing up activists and drawing added paid and free media attention) and provides a method for donors interested in supporting candidates and parties to do so.

Convention sponsorship is an obvious way of rerouting political spending in a world of spending caps. Even if soft money and issue ads could be constitutionally regulated, many other approaches would spring up, perhaps including the purchase of partisan media outlets. Thus, extreme proposals now favor curbing the ability of the press to make political endorsements. Even these proposals, if enacted under an amended constitution (almost certainly a necessity), would not solve the "problem" because the main complaint with the influence of the press is not over its overt editorializing but rather over its coverage and selection of news. There are numerous other ways to sidestep even these draconian types of regulation. With a federal government that currently spends over $1.5 trillion per year and which claims the right to regulate local education, virtually every phase of the employer-employee relation, prices, wages, gun ownership, birth control, tobacco use, drug use, foreign trade, health care, and much, much more, there is no reason to think that those who seek to influence who holds power in this monumental government will not be creative enough to circumvent the regulations.

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105 Such a resolution was introduced and voted on in the 105th Congress. See H.R.J. Res. 47, 105th Cong. (1997).
107 See Foley, supra note 66, at 1252 (advocating a rule which would "prohibit newspapers from using their resources to publish editorials that support or oppose a candidate or ballot initiative"); Hasen, supra note 58, at 1665 ("Political equality will be limited so long as the media are exempt from otherwise applicable campaign finance regulations.").
108 See L.A. Pove, Jr., Boiling Blood, 77 Tex. L. REV. 1667, 1670 (1999) ("The influence of the press comes from its choices of coverage: which stories (or issues) and how presented (including photography)").
109 See Bradley A. Smith, The Stress' Song: Campaign Finance Regulation and the First
“equality” problem or a “corruption” problem, is not going to be met merely through government financing.

CONCLUSION

Government subsidies of political campaigns, if not tied to bans on private contributions and spending limits, may indeed have certain benefits for political life. A well-designed system might increase competitiveness, and therefore accountability, and it might also increase the flow of information to voters as well as the availability of well-qualified candidates. For reasons discussed in Part I, I tend to be skeptical that such a well-designed system could be enacted or maintained. In any case, such a system is probably off the charts politically: none of the major “reform” groups seems willing to even consider a government funding proposal that does not include limits on contributions and spending.

Government financing plans which include limits on contributions and spending, whether deemed “voluntary” or not, are doomed to failure. The United States was well served by the totally deregulated system that existed prior to this century and by the largely deregulated system that existed prior to the passage of FECA in 1974. Even with the distortive effects that FECA has had on the political scene, the United States remains one of the healthiest democracies, despite, or perhaps because of, its reliance on private financing of campaigns.

Rather than rethink our historic opposition to government-financed campaigns, perhaps it is time for self-styled reformers to rethink their opposition to deregulated campaigns.

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118 See Gora, supra note 73, at 184-86 (arguing that meaningful public subsidies and funding of candidates and campaigns will facilitate political opportunity and participation).

119 It is beyond the scope of this Article, but I share many of the concerns of those who argue that tax financing of political speech is at its core morally wrong. See Thomas Jefferson, A Bill for Establishing Religious Freedom, in THE PORTABLE THOMAS JEFFERSON 252 (Merrill D. Peterson ed., 1975) (“[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s], is sinful and tyrannical . . . .”). I also share the concerns of many who consider it bad policy to have politicians more beholden to the government for their campaign funding than to their fellow citizens.

121 The only significant group of which I am aware that has consistently urged such an approach is the American Civil Liberties Union. See AMERICAN CIVIL LIBERTIES UNION, POLICY GUIDE 75-77 (1993).
Rule of Law Readings, Volume 4

THE FOLLOWING PAGES HAVE BEEN INTENTIONALLY DELETED:

36-46
115-149
312-327
109th CONGRESS
1st Session
H. R. 1133

To advance and strengthen democracy globally through peaceful means and to assist foreign countries to implement democratic forms of government, to strengthen respect for individual freedom, religious freedom, and human rights in foreign countries through increased United States advocacy, to strengthen alliances of democratic countries, to increase funding for programs of nongovernmental organizations, individuals, and private groups that promote democracy, and for other purposes.

TO THE HOUSE OF REPRESENTATIVES
March 3, 2005

Mr. Wolf (for himself, Mr. Lantos, Mr. Smith of New Jersey, and Mr. Payne) introduced the following bill; which was referred to the Committee on International Relations

A BILL

To advance and strengthen democracy globally through peaceful means and to assist foreign countries to implement democratic forms of government, to strengthen respect for individual freedom, religious freedom, and human rights in foreign countries through increased United States advocacy, to strengthen alliances of democratic countries, to increase funding for programs of nongovernmental organizations, individuals, and private groups that promote democracy, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title.--This Act may be cited as the "Advance Democratic Values, Address Non-Democratic Countries, and Enhance Democracy Act of 2005" or the "ADVANCE Democracy Act of 2005".

(b) Table of Contents.--The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Findings.
Sec. 3. Statement of policy.
Sec. 4. Definitions.

TITLE I--DEPARTMENT OF STATE ACTIVITIES

Sec. 101. Promotion of democracy in foreign countries.
Sec. 102. Reports.
Sec. 103. Translation of annual Department of State reports.
Sec. 104. Strategies to enhance the promotion of democracy in foreign

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countries.
Sec. 105. Activities by the United States to promote democracy and human rights in foreign countries.
Sec. 106. Democracy Promotion and Human Rights Advisory Board.
Sec. 107. Establishment and maintenance of Internet site for global democracy and human rights.
Sec. 108. Programs by United States missions in foreign countries and activities of chiefs of mission.
Sec. 109. Training for Foreign Service officers.
Sec. 110. Performance pay; promotions; Foreign Service awards.
Sec. 111. Appointments.

TITLE III--ALLIANCES WITH OTHER DEMOCRATIC COUNTRIES
Sec. 201. Alliances with other democratic countries.
Sec. 202. Sense of Congress regarding the establishment of a Democracy Caucus.
Sec. 203. Annual diplomatic missions on multilateral issues.
Sec. 204. Strengthening the Community of Democracies.
Sec. 205. Funding for nongovernmental organizations supporting a Community of Democracies.
Sec. 206. Reports.

TITLE IV--FUNDING FOR PROMOTION OF DEMOCRACY
Sec. 301. Policy.
Sec. 302. Human Rights and Democracy Fund.

TITLE IV--SUPPORT FOR SPECIAL AND REGIONAL INITIATIVES
Sec. 401. Findings.
Sec. 402. Sense of Congress regarding support for regional initiatives.

TITLE V--PRESIDENTIAL ACTIONS
Sec. 501. Description of Presidential actions.
Sec. 502. Investigation of violations of international humanitarian law.
Sec. 503. Presidential communications.

TITLE VI--NATIONAL SECURITY COUNCIL
Sec. 601. Special Assistant on Non-democratic Countries.

SEC. 2. FINDINGS.

Congress finds the following:

(1) All human beings are created equal and possess certain rights and freedoms, including the fundamental right to participate in the political life and government of their respective countries. These inalienable rights are recognized in the Declaration of Independence of the United States and in the Universal Declaration of Human Rights of the United Nations.

(2) Political legitimacy derives from the consent of the governed, whether expressed directly or through representatives chosen by free, fair, and open elections.

(3) In his Inaugural Address and State of the Union Address, President George W. Bush upheld the pursuit of freedom as the driving ideal of the foreign policy of the United States and made clear that the best way to defend freedom is to spread liberty to the places where tyranny thrives, opportunity is stifled, and terrorism grows.

(4) The right to democracy was affirmed as a human right by the United Nations Commission on Human Rights on April 27, 1999, by a vote of 50-0 with only two abstentions. The resolution recognized that democracy is based on free, fair, and open elections, a foundation of open and transparent civil institutions, an independent judiciary, the rule of law, a free press, the right of peaceful assembly, the freedom of religion, and the right of every citizen to participate fully in the political life of the citizen's country.

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(5) Over the past three decades, the number of fully democratic countries has more than doubled to 89 from 44, while the number of countries governed by a dictator or a totalitarian government decreased by 37 percent, often as a result of nonviolent resistance by the peoples of such countries, aided by support from democratic countries.

(6) According to the annual Freedom in the World report published by Freedom House (an annual comparative assessment of the state of political rights and civil liberties in 192 countries and 18 related and disputed territories), 75 percent of the population of the world currently lives in countries categorized as "entirely free" or "partly free", as opposed to only 57 percent in 1973.

(7) These changes have been achieved in part through sustained and comprehensive efforts by democratic countries, including the United States and the democratic countries of Europe, to support dissidents and democracy activists in nondemocratic countries.

(8) The continued lack of democracy, freedom, and fundamental human rights in some countries is inconsistent with the universal values on which the United States is based, the promotion of which comprises a fundamental element of United States foreign policy.

(9) The continued lack of democracy, freedom, and fundamental human rights in some countries also poses a security threat to the United States, its interests, and its friends, as it is in such countries that radicalism, extremism, and terrorism can flourish.

(10) There is a correlation between nondemocratic rule and other threats to international peace and security, including war, genocide, famine, poverty, drug trafficking, corruption, refugee flows, human trafficking, religious persecution, environmental degradation, and discrimination against women.

(11) Wars between or among democratic countries are exceedingly rare, while wars between and among nondemocratic countries are commonplace, with nearly 170,000,000 people having lost their lives because of the policies of totalitarian governments.

(12) There is a strong correlation between nondemocratic rule and famine.

(13) Seventy-seven percent of refugees in the world come from countries that lack electoral democracy.

(14) In nondemocratic countries, women are often exposed to particular hardships and a lack of opportunity, and trafficking in women and children often flourishes.

(15) There is a positive correlation between economic and political freedom and preservation of the environment.

(16) A world that fully reflects fundamental human and political rights would be free of dictatorship. Such a world would be profoundly safer and more just, peaceful, prosperous, and stable. Countries that lack freedom and democracy necessarily limit the full flourishing of human potential and, as such, a goal of United States foreign policy is to promote universal democracy.

(17) The transition to democracy must be led from within nondemocratic countries and by nationals of such countries who live abroad. Nevertheless, democratic countries have a number of instruments available for supporting democratic reformers who are committed to promoting effective, nonviolent change in nondemocratic countries.

(18) United States efforts to promote democracy in countries where it is lacking can be strengthened. A full evaluation of United States funding expanded for the support of democracy is necessary to ensure an efficient and effective use of such funds.

(19) In 2002, Congress passed the Freedom Investment Act of 2002 (subtitle E of title VI of division A of the Foreign

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Relations Authorization Act, Fiscal Year 2003) to increase the focus on promoting human rights and democracy as an element of United States foreign policy.

(20) United States ambassadors and diplomats can play a critical role in the effort to promote democracy by publicly demonstrating support for democratic principles, by discussing democratic, social, and economic freedoms with citizens and leaders of non-democratic countries, and by building relationships with citizens that promote democratic principles, practices, and values. United States missions in non-democratic countries are potential "islands of freedom" in such countries. Training and incentives are needed to assist United States officials in strengthening the techniques and skills required to promote democracy.

(21) Nongovernmental organizations and private individuals and movements also play a vital role in promoting democracy, and the United States must expand its support of such organizations, individuals, and movements.

(22) The promotion of democracy requires a broad-based effort with collaboration between all democratic countries. One forum for advancing this effort is the Community of Democracies, which first met in Warsaw, Poland, in June 2000, and which is scheduled to meet in 2005 in Santiago, Chile.

(23) The promotion of such universal democracy constitutes a long-term challenge that does not always lead to an immediate transition to full democracy, but universal democracy is achievable.

SEC. 3. STATEMENT OF POLICY.

It shall be the policy of the United States --

(1) to promote freedom and democracy in foreign countries as a fundamental component of United States foreign policy;

(2) to affirm fundamental freedoms and human rights in foreign countries and to condemn offenses against those freedoms and rights as a fundamental component of United States foreign policy;

(3) to use all instruments of United States influence to support, promote, and strengthen democratic principles, practices, and values in foreign countries, including the right to free, fair, and open elections, secret balloting, and universal suffrage;

(4) to protect and promote fundamental political, social, and economic freedoms and rights, including the freedom of association, of expression, of the press, and of religion, and the right to own private property;

(5) to protect and promote respect for and adherence to the rule of law in foreign countries;

(6) to provide appropriate support to organizations, individuals, and movements located in nondemocratic countries that aspire to live in freedom and establish full democracy in such countries;

(7) to provide, political, economic, and other support to foreign countries that are willingly undertaking a transition to democracy;

(8) to commit United States foreign policy to the long-term challenge of promoting universal democracy and

(9) to strengthen alliances and relationships with other democratic countries in order to better promote and defend shared values and ideals.

SEC. 4. DEFINITIONS.

In this Act:

(1) Annual report on democracy.--The term "Annual Report on Democracy" means the Annual Report on Democracy required under section 102(b).

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(3) Appropriate congressional committees.--The term "appropriate congressional committees" means--
(A) the Committee on International Relations of the House of Representatives; and
(B) the Committee on Foreign Relations of the Senate.

(4) Community of democracies and community.--The terms "Community of Democracies" and "Community" mean the association of democratic countries committed to the global promotion of democratic principles, practices, and values, which held its first Ministerial Conference in Warsaw, Poland, in June 2000.

(5) Department.--The term "Department" means the Department of State.

(6) Eligible entity.--The term "eligible entity" means any nongovernmental organization, international organization, multilateral institution, private foundation, corporation, partnership, association, or other entity, organization, or group engaged in or with plans to engage in the promotion of democracy and fundamental rights and freedoms in foreign countries categorized as "partly democratic" or "non-democratic" in the most recent Annual Report on Democracy.

(7) Eligible individual.--The term "eligible individual" means any individual engaged in, or who intends to engage in, the promotion of democracy and fundamental rights and freedoms in foreign countries categorized as "partly democratic" or "non-democratic" in the most recent Annual Report on Democracy.


(9) International financial institution.--The term "International financial institution" means the International Bank for Reconstruction and Development, the International Development Association, the International Monetary Fund, the International Finance Corporation, the Inter-American Development Bank, the African Development Bank, the African Development Fund, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Multilateral Investment Guarantee Agency.

(10) Regional democracy hub and hub.--The terms "Regional Democracy Hub" and "Hub" mean the Regional Democracy Hubs established under section 101(d)(1).

(11) Secretary.--The term "Secretary" means the Secretary of State.

(12) Special assistant.--The term "Special Assistant" means the Special Assistant to the President on Non-Democratic Countries established under subsection (1) of section 101 of the National Security Act of 1947 (50 U.S.C. 403), as added by section 601 of this Act.

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(13) Under secretary.--The term "Under Secretary" means the Under Secretary of State for Global Affairs established under section 1(b) of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2651a(b)), as amended by section 101(a)(2) of this Act.

TITLE II--DEPARTMENT OF STATE ACTIVITIES

SEC. 101. PROMOTION OF DEMOCRACY IN FOREIGN COUNTRIES.

(a) Codification of Under Secretary of State for Global Affairs.--Section 1(b) of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2651a(b)) is amended--

(1) by redesignating paragraph (4) as paragraph (5); and

(2) by inserting after paragraph (3) the following new paragraph:

"(4) Under secretary of state for global affairs.--There shall be in the Department of State, under the Under Secretary, an Under Secretary of State for Global Affairs, who shall have primary responsibility to assist the Secretary and the Deputy Secretary in the formulation and implementation of United States policies and activities relating to the transition to and development of democracy in nondemocratic countries and to coordinate United States policy on global issues, including issues related to human rights, women's rights, freedom of religion, labor standards and relations, the preservation of the global environment, the status and protection of the oceans, scientific cooperation, narcotics control, law enforcement, population issues, refugees, migration, war crimes, and trafficking in persons. The Secretary may assign such other responsibilities to the Under Secretary for Global Affairs as the Secretary determines appropriate or necessary. In particular, the Under Secretary for Global Affairs shall have the following responsibilities:

"(A) Promoting democracy and fundamental rights and freedoms in foreign countries, condemning violations of the right of an individual to participate in the government and political life of the country of the individual, either directly or through representatives chosen in free, fair, and open elections, and recommending appropriate actions to be undertaken by the United States whenever such right is violated or is in danger of being violated.

"(B) Coordinating with the Under Secretary for Public Diplomacy and Public affairs and employees and officers from the regional bureaus of the Department of State to--

"(i) promote the transition to and development of democracy in nondemocratic countries; and

"(ii) promote and strengthen the development of democracy in countries that are in transition to democracy.

"(C) Developing, in consultation with other appropriate executive agencies having programs and responsibilities related to democracy promotion, a strategic plan to promote transition to and development of democracy in nondemocratic countries and overseeing implementation of the plan through an appropriate interagency process.

"(D) Advising the Secretary regarding any recommendation requested by any official of any other agency that relates to the human rights situation in a foreign country or the effects on human rights or democracy in a foreign country of an agency program of such official.

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(E) Assisting the Secretary in the preparation of the reports required under section 102 of the Advancing Democratic Values, Address Non-Democratic Countries, and Enhance Democracy Act of 2005."

(b) Additional Duties for Assistant Secretary of State for Democracy, Human Rights, and Labor.--Section 105(c)(2) of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2651a(c)(2)) is amended--

(1) in subparagraph (A), by inserting after the first sentence the following new sentence: "The Assistant Secretary of State for Democracy, Human Rights, and Labor shall also be responsible to the Under Secretary of State for Global Affairs for matters relating to the transition to and development of democracy in nondemocratic countries, including promoting and strengthening the development of democracy in foreign countries that are in the early stages of a transition to democracy."

(2) by adding after subparagraph (B) the following new subparagraph:

"(C) The Assistant Secretary of State for Democracy, Human Rights, and Labor shall maintain continuous observation of and review all matters pertaining to the transition to and promotion and development of democracy in foreign countries. In particular, the Assistant Secretary shall have the following responsibilities:

(i) Assisting the Under Secretary of State for Global Affairs in the preparation of the reports required under section 102 of the Advancing Democratic Values, Address Non-Democratic Countries, and Enhance Democracy Act of 2005.

(ii) Making recommendations to the Under Secretary of State for Global Affairs regarding the promotion of democracy in foreign countries, including assisting the Under Secretary to--

(I) promote transition to and development of democracy in nondemocratic countries;

(II) promote and strengthen the development of democracy in foreign countries that are in the early stages of a transition to democracy; and

(III) support and promote the academic and intellectual study and discussion of democracy in democratic, partly democratic, and nondemocratic countries.

(iii) Gathering detailed information that

further--

(i) the identification of foreign countries that are democracies, the extent to which democracy is established in such countries, and the extent to which such countries are committed to promoting democratic principles, practices, and values;

(ii) the understanding of the most effective means of change and methods of nonviolent action to promote and achieve transition to democracy in a foreign country;

(iii) the identification of and consultation with nongovernmental organizations, individuals, and movements that promote democratic principles, practices, and values in partly democratic and nondemocratic countries to obtain the views of such organizations, individuals, and movements on the approaches that the United States should take to promote the transition of the governments of such countries to full democracies; and

(iv) the documentation of human rights violations.

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abuses condoned or encouraged by leaders of nondemocratic countries, including an identification of such leaders.

(iv) Consulting with nongovernmental organizations, individuals, and movements committed to the peaceful promotion of democracy, democratic principles, practices and values, and fundamental rights and freedoms.

(v) Coordinating United States Government assistance to promote democracy abroad, including designing and coordinating an overall assistance strategy, pursuing coordination with other countries and international organizations, ensuring proper management, implementation, and oversight by United States agencies, and resolving policy and program disputes among such agencies.

(vi) Performing such other responsibilities which serve to promote and develop democracy in foreign countries.

(c) Authorization of Appropriations.—In addition to amounts otherwise authorized, there is authorized to be appropriated to the Secretary of State $10,000,000 for fiscal year 2006, and such sums as may be necessary in each fiscal year thereafter, for the hiring of staff and the conduct of the business of the offices of the Under Secretary of State for Global Affairs and the Assistant Secretary of State for Democracy, Human Rights, and Labor.

(d) Department of State and United States Missions Abroad.—

(1) Office of democratic movements and transitions.—

(A) Establishment.—There is established within the Bureau of Democracy, Human Rights, and Labor of the Department of State an Office of Democratic Movements and Transitions.

(B) Purpose.—The Office shall promote transitions to full democracy in countries that have been designated as nondemocratic or partly democratic in the most recent Annual Report on Democracy required under section 102(b).

(C) Director.—The Secretary of State, after consultation with the Assistant Secretary of State for Democracy, Human Rights, and Labor, shall appoint a director to head the Office, who shall report to the Assistant Secretary. The individual chosen as Director should possess clearly demonstrated competence in and commitment to the promotion of democracy, including competence in promoting democratic principles, practices, values, and ideals through nonviolent means.

(D) Responsibilities.—The Director of the Office shall—

(i) develop relations with, consult with, and provide assistance to nongovernmental organizations, individuals, and movements that are committed to the peaceful promotion of democracy, democratic principles, practices, and values, and fundamental rights and freedoms in countries described in subparagraph (B);

(ii) develop strategies and programs to promote peaceful change in such countries;

(iii) provide political, financial, and other support to nongovernmental organizations, individuals, and movements that promote democratic principles, practices, and values in such countries, including providing training in the strategy and tactics of nonviolent change and providing training equipment related to such purposes;

(iv) foster relationships between nongovernmental organizations, individuals, and
movements and the United States and the governments of other democratic countries, and establish common positions with other democratic countries and the Community of Democracies to promote democratic transitions in countries described in subparagraph (B); 
(v) foster dialogue, the extent practicable, between the leaders of such nongovernmental organizations, individuals, and movements and the officials of such countries; 
(vi) evaluate recommendations by the Democracy Promotion Advisory Board, established under section 106, regarding strategies to promote democracy in such countries; 
(vii) communicate with the leaders and other senior government officials of such countries concerning respect for liberty, democracy, and political, social, and economic freedoms; 
(viii) communicate with opposition political parties within such countries that support democratic values and respect for human rights; 
(ix) create narratives and histories required under section 107(b) for the Internet site for global democracy and human rights and assist in the preparation of the report required under section 102; and
(x) facilitate, in coordination with public affairs officers and offices of the Department of State responsible for public diplomacy programs in such countries, debates and discussions, including among young people in other countries, regarding the values and benefits of democracy and human rights at academic institutions in such countries.

Regional democracy hubs at United States missions abroad.--

(A) Establishment.--

(i) In general.--The Secretary shall establish at least one Regional Democracy Hub at one United States mission in each of the following geographic regions:

(I) the Western Hemisphere; 
(II) Europe; 
(III) South Asia; 
(IV) the Near East; 
(V) East Asia and the Pacific; and 
(VI) Africa.

(ii) Director.--Each Regional Democracy Hub shall be headed by a Director. The Director and the associated staff shall be selected by the Secretary of State in consultation with the Assistant Secretary for Democracy, Human Rights, and Labor.

(B) Responsibilities.--Each Regional Democracy Hub shall support the appropriate United States ambassador and United States employees assigned to United States missions in each such geographic region to carry out the responsibilities described in this Act, including--

(i) assisting the Assistant Secretary for Democracy, Human Rights, and Labor and the Under Secretary for Global Affairs to conceive and implement strategies for transitions to democracy for each nondemocratic country in the geographic region for which such Hub is responsible, including regional strategies as
appropriate, and assisting such United States missions to prepare the reports required under section 102;

(ii) helping to design and implement programs funded by the Human Rights and Democracy Fund described in section 102, including making proposals directly to the Assistant Secretary for Democracy, Human Rights, and Labor regarding the use of the Fund; and

(iii) supporting the implementation of other requirements of this Act, including identifying opportunities for United States officials to speak directly to citizens, particularly to young people, in such countries.

(C) Accreditation.—As appropriate, the Department shall seek accreditation for the Director to all nondemocratic countries in each geographic region for which each Hub is responsible.

(D) Termination.—No earlier than two years after a geographic region has ceased to include any nondemocratic or partly democratic country, the Secretary may terminate the Hub for such region.

(E) Authorization of appropriations.—There are authorized to be appropriated to the Secretary such sums as may be necessary to carry out the responsibilities described in subparagraph (B), including hiring additional staff to carry out such responsibilities.

(3) Responsibilities of the Bureau of Intelligence and Research.—The Assistant Secretary for Intelligence and Research shall coordinate with the Department of the Treasury, the Department of Justice, the Central Intelligence Agency, other appropriate intelligence agencies, and, as appropriate, with foreign governments to—

(A) monitor and document financial assets inside and outside the United States held by leaders of countries determined to be nondemocratic under section 102;

(B) identify close associates of such leaders; and

(C) monitor and document financial assets inside and outside the United States held by such close associates.

(4) Coordination.—

(A) Deputy assistant secretary of state for democracy, human rights, and labor.—There shall be in the Department of State a Deputy Assistant Secretary of State for Democracy, Human Rights, and Labor who shall report to the Assistant Secretary of State for Democracy, Human Rights, and Labor. Such Deputy Assistant Secretary shall be in addition to the current number of such other Deputy Assistant Secretaries so reporting. In addition to considering qualified noncareer candidates, the Secretary of State shall seek to recruit senior members of the Senior Foreign Service to serve in such position.

(B) Responsibilities.—In addition to such other duties as the Secretary or Assistant Secretary of State for Democracy, Human Rights, and Labor may from time to time designate, the Deputy Assistant Secretary of State for Democracy, Human Rights, and Labor shall—

(i) coordinate the work of the Office of Democratic Movements and Transitions with the work of other offices and bureaus at the Department of State;

(ii) coordinate the work of the Office of

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Democratic Movements and Transitions with the work of other United States Government agencies;

(iii) forge connections between the United States and nongovernmental organizations, individuals, and movements committed to the promotion of democracy and democratic principles, practices, and values; and

(iv) seek ways to promote and enhance the work of nongovernmental organizations, individuals, and movements committed to the promotion of democracy and democratic principles, practices, and values.

(5) Recruitment.—The Secretary shall seek to ensure that no later than December 31, 2012, not less than 50 percent of the nonadministerial employees serving in the Bureau of Democracy, Human Rights, and Labor are members of the Foreign Service.

SEC. 102. REPORTS.

(a) Portions of Annual Human Rights Reports.—The Under Secretary of State for Global Affairs shall assist the Secretary of State in the preparation of those portions of the reports and other information provided to Congress required under sections 116 and 502(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n and 2304) that relate to freedom and political rights as set forth in the Universal Declaration of Human Rights.

(b) Annual Report on Democracy.—

(1) Preparation and deadline for submission.—The Secretary of State shall prepare an Annual Report on Democracy. The Under Secretary of State for Global Affairs, with the assistance of the Assistant Secretary of State for Democracy, Human Rights, and Labor, shall have the principal responsibility of assisting the Secretary in the preparation of the Annual Report. The Under Secretary and Assistant Secretary shall consult with the regional bureaus of the Department and the embassies in the preparation of the Annual Report. Not later than July 1 of each year, the Secretary shall submit to the appropriate congressional committees the Annual Report on Democracy.

(2) Contents.—The Annual Report on Democracy shall contain the following:

(A) Executive summary.—An Executive Summary with a table listing every foreign country, together with a categorization of each country as "fully democratic," "partly democratic," or "non-democratic." The Executive Summary shall contain a short narrative highlighting the status of democracy in each country categorized as partly democratic or nondemocratic.

(B) Determination of categorization.—With respect to a country listed in the Executive Summary, the Secretary shall determine which of the categorizations specified under subparagraph (A) is appropriate by reference to the principles enshrined in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the United Nations Commission of Human Rights Resolution 1999/57 (entitled "Promotion of the Right to Democracy"), the assessments used to determine eligibility for financial assistance disbursed from the Millennium Challenge Account, the assessments of nongovernmental organizations used to determine eligibility to participate in the meetings of the Community of Democracies, and the standards established and adopted by the

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Community of Democracies. In addition, the categorization of a country should be informed by the general consensus regarding the status of civil and political rights in such country by major nongovernmental organizations that conduct assessments of such conditions in such countries.

(ii) Determination of nondemocratic categorization.--

(i) In general.--The Secretary shall categorize a country as nondemocratic if such country fails to satisfy any of the following requirements:

(a) All citizens of such country have the right to, and are not restricted in practice from, fully and freely participating in the political life of such country regardless of gender, race, language, religion, or beliefs.

(b) The national legislative body of such country and, if directly elected, the head of government of such country, are chosen by free, fair, open, and periodic elections, by universal and equal suffrage, and by secret ballot.

(c) More than one political party in such country has candidates who seek elected office at the national level and such parties are not restricted in their political activities or their process for selecting such candidates except for reasonable administrative requirements commonly applied in countries categorized as fully democratic.

(d) All citizens in such country have a right to, and are not restricted in practice from, fully exercising the freedom of thought, conscience, belief, peaceful assembly and association, speech, opinion, and expression, and such country has a free, independent, and pluralistic media.

(e) The current government of such country did not come to power in a manner contrary to the rule of law.

(f) Such country possesses an independent judiciary and the government of such country generally respects the rule of law.

(ii) Additional considerations.--

Notwithstanding the satisfaction by a country of the requirements specified

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under subclause (I), the Secretary may categorize a country as nondemocratic if the Secretary determines that such is appropriate after consideration of the principles specified under clause (I) with respect to such country.

(B) Status of democracy.—A description of each country categorized as partly democratic or nondemocratic in the Executive Summary, including—

(i) an evaluation of trends over the preceding 12 months towards improvement or deterioration in the commitment to and protection of democratic principles, practices, values, institutions, and processes in each such country;

(ii) an evaluation of the political rights and freedoms enjoyed by individuals in each such country and an evaluation of the factors that prevent each such country from being categorized as fully democratic; and

(iii) for each country previously categorized as nondemocratic in the Executive Summary from the preceding year, an evaluation of any progress made over the previous calendar year towards achieving a categorization of partly democratic or fully democratic.

(C) Strategy for nondemocratic countries.—An in-depth examination of each country categorized as nondemocratic in the Executive Summary, including—

(i) a specific action plan developed following consultations with nongovernmental organizations, individuals, and movements that promote democratic principles, practices, and values in each such country to promote and achieve transition to full democracy in each such country, including a summary of actions taken by the United States in furtherance of such goal in the preceding 12 months;

(ii) a summary of any actions taken by the President pursuant to section 501 with respect to any such country, the effects of any such actions, and if no such actions have been taken, a statement explaining why not;

(iii) a summary of any actions taken by the President pursuant to section 501 with respect to any such country, the effects of any such actions, and if no such actions have been taken, a statement explaining why not;

(iv) a summary of efforts taken by the United States to speak directly to the people in each country, and in particular, a description of any visits taken by the chief of mission and other officials of the United States in each such country to the colleges and universities and other institutions in the country where young people congregate and learn; and

(v) a summary of any communications between United States Government officials, including the chief of mission, and the leader and other high government officials of each such country concerning respect for liberty, democracy,
political, social, and economic freedoms.

(D) United States policies.--A description of United States actions and policies aimed at promoting democracy in foreign countries categorized as partly democratic or nondemocratic, and the extent to which such actions and policies were undertaken in coordination with other democratic countries.

(4) Peaceful transfers of political power.--A description of peaceful transfers of political power in each country categorized as partly democratic or nondemocratic in the Executive Summary that have occurred between rival political entities according to established rules and without violence.

(3) Classified addendum.--If the Secretary determines that it is in the national security interests of the United States, is necessary for the safety of individuals identified in the Annual Report on Democracy, or is necessary to further the purposes of this Act, any information required by paragraph (2), including policies adopted or actions taken by the United States, may be summarized in the Annual Report on Democracy or the Executive Summary and submitted to appropriate congressional committees in more detail in a classified addendum.

(4) Public disclosure.--The Executive Summary shall be made available on the Department of State Internet site, except for information that is classified under paragraph (3).

(c) One-Time Report on Training and Guidelines for Foreign Service Officers and Chiefs of Mission.--The Secretary of State, in consultation with the Under Secretary of State for Global Affairs, shall submit to the appropriate congressional committees a one-time report containing a description of the training provided under section 109 for foreign service officers, including chiefs of mission serving or preparing to serve in countries categorized as partly democratic or nondemocratic or chiefs of mission in fully democratic countries whose job performance could benefit from such training, with respect to methods to promote and achieve transition to full democracy in each such country, including nonviolent action. The Secretary shall submit the report together with the first Annual Report on Democracy required under subsection (b).

SEC. 103. TRANSLATION OF ANNUAL DEPARTMENT OF STATE REPORTS.

(a) Translation.--The Secretary of State shall ensure that the relevant country specific sections of the reports listed in subsection (b) that relate to a particular country are translated into the principal languages of such country and made available in such country.

(b) Reports.--The relevant country specific sections of the reports referred to in subsection (a) are the following:

1. Country specific sections of the most recent Annual Report on Democracy.

2. Country specific sections of the most recent annual Trafficking in Persons Report prepared by the Office to Monitor and Combat Trafficking in Persons of the Department of State.


(c) Date of Completion.--Not later than 120 days after the completion of each report described in subsection (a), the Secretary shall ensure the translation of each such report.

(d) Authorization of Appropriations.--In addition to amounts that are otherwise available for the translation of Department of State reports, there is authorized to be appropriated to the Secretary such

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SOME AS MAY BE NECESSARY TO CARRY OUT THIS SECTION.

SEC. 104. STRATEGIES TO ENHANCE THE PROMOTION OF DEMOCRACY IN FOREIGN COUNTRIES.

(a) Working Group on Nondemocratic Countries.--Beginning in the year after the second Annual Report on democracy required under section 102(b) is submitted and not less than once each year thereafter, the Under Secretary of State for Global Affairs shall convene a working group under subsection (c) focused on each country designated as nondemocratic in the most recent such report in order to--

(1) review progress on the action plan with respect to each such country to promote and achieve the transition to full democracy in such country; and

(2) receive recommendations regarding further action that should be taken with respect to such plan.

(b) Working Group on Countries in Transition.--Beginning in the year after the second Annual Report on democracy required under section 102(b) is submitted and not less than once each year thereafter, the Under Secretary of State for Global Affairs should also convene a working group under subsection (c) focused on the progress towards a fully democratic form of governance in each country designated as "partly democratic" in the most recent annual report that was designated as "nondemocratic" in any of the previous annual reports.

(c) Members of Working Groups.--The working groups referred to in subsections (a) and (b) shall include officials and employees of the Department of State and appropriate representatives from other relevant government agencies, including the United States Agency for International Development, the Department of the Treasury, and the Department of Defense.

(d) Consultations With Chiefs of Missions.--The chief of mission for each country designated as nondemocratic or partly democratic in the most recent Annual Report on Democracy shall meet with the Under Secretary of State for Global Affairs at least once each year to discuss the transition to full democracy in such country, including any actions the chief of mission has taken to implement the action plan for such country included in such report.

SEC. 105. ACTIVITIES BY THE UNITED STATES TO PROMOTE DEMOCRACY AND HUMAN RIGHTS IN FOREIGN COUNTRIES.

(a) Freedom Investment Act of 2002.--The Freedom Investment Act of 2002 (subtitle E of title VI of Public Law 107-228) is amended--

(1) in section 663(a), relating to human rights activities at the Department of State)--

(A) in paragraph (1), by striking "and" at the end;

(B) by redesignating paragraph (2) as paragraph (4);

(C) by inserting after paragraph (1) the following new paragraphs:

"(2) a United States mission abroad in a country that has been designated as nondemocratic in the most recent Annual Report on Democracy (as required under section 102(b) of the Advance Democratic Values, Address Nondemocratic Countries, and Enhance Democracy Act of 2005) should have at least one political officer who shall have primary responsibility for monitoring and promoting democracy and human rights in such country;

(3) the level of seniority of any such political officer should be in direct relationship to the severity of the problems associated with the establishment of full democracy and respect for human rights in such country; and"

(D) in paragraph (4), as so redesignated, by striking "monitoring human rights developments" and all that follows through "recommendation" and inserting the following: "monitoring and promoting

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democracy and human rights, including a political officer described in paragraphs (2) and (3), in a foreign country should be made after consultation with and upon the recommendation"; and

(2) in Section 66(a), relating to reports on actions taken by the United States to encourage respect for human rights, by striking the second sentence and inserting adding at the end the following new sentences: "If the Secretary elects to submit such information as a separate report, such report may be submitted as part of the Annual Report on Democracy required under section 102(b) of the Advance Democratic Values, Address NonDemocratic Countries, and Enhance Democracy Act of 2005. If the Secretary makes such an election, such report shall be organized so as to contain a separate section for each country to which such information applies, together with a short narrative describing the extrajudicial killings, torture, or other serious violations of human rights that are indicated to have occurred in each such country."."

(b) Foreign Assistance Act of 1961.--The Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.) is amended--

(1) in section 116(d) (22 U.S.C. 2151a(d)), by striking paragraph 10 and inserting the following new paragraph:

"(10) for each country with respect to which the report indicates that extrajudicial killings, torture, or other serious violations of human rights have occurred in the country, a strategy, including a specific list of priorities and an action plan, to end such practices in the country, and any actions taken in the previous year to end such practices in the country."; and

(2) in section 502(b) (22 U.S.C. 2304(b)), by striking the sixth sentence and inserting the following new sentence: "Such report shall also include, for each country with respect to which the report indicates that extrajudicial killings, torture, or other serious violations of human rights have occurred in the country, a strategy, including a specific list of priorities and an action plan, to end such practices in the country, and any actions taken in the previous year to end such practices in the country.".

SEC. 106. DEMOCRACY PROMOTION AND HUMAN RIGHTS ADVISORY BOARD.

(a) Establishment.--There is established a Democracy Promotion and Human Rights Advisory Board.

(b) Purpose and Duties.--The Board shall advise and provide recommendations to the Secretary of State, the Under Secretary of State for Global Affairs, the Assistant Secretary of State for Democracy, Human Rights, and Labor, and the Assistant Administrator for the Bureau of Democracy, Conflict and Humanitarian Assistance of the United States Agency for International Development concerning United States policies regarding the promotion of democracy and the establishment of universal democracy, including the following:

(1) Reviewing and making recommendations regarding the overall United States strategy for promoting democracy and human rights in partly democratic and nondemocratic countries, including methods for incorporating the promotion of democracy and human rights into United States diplomacy, the use of international organizations to further United States democracy promotion goals, and ways in which the United States can work with other countries and the Community of Democracies to further such purposes.

(2) Recommendations regarding specific strategies to promote democracy in countries categorized as nondemocratic in the most recent Annual Report on Democracy under section 102(b), in countries that are in a transition to democracy, and methods for consulting and coordinating with individuals (including expatriates) and nongovernmental organizations that promote democratic principles, practices, and ideals.
(3) Recommendations regarding the use of—
   (A) programs related to the promotion of democracy and human rights administered by the United States Agency for International Development; and
   (B) the Human Rights and Democracy Fund, established under section 444 of the Freedom Investment Act of 2002 (subtitle E of title VI of Public Law 107- 288).
(4) Recommendations regarding regulations to be promulgated concerning—
   (A) the standards of performance to be met by members of the Foreign Service, including chiefs of mission, under section 445(d) of the Foreign Service Act of 1980 (22 U.S.C. 3956(d)); and
   (B) the development of programs to promote democracy in foreign countries under section 308, relating to programs undertaken by United States missions in foreign countries and the activities of chiefs of mission.
(c) Study on Democracy Assistance.---
   (1) In general.---Not later than 18 months after the appointment of five members of the Board, the Board shall submit to the President, Congress, and the Secretary a study on United States democracy assistance.
   (2) Transmittal.---Copies of the report shall be transmitted to the Under Secretary of State for Global Democracy, the Assistant Secretary of State for Democracy, Human Rights, and Labor, the Broadcasting Board of Governors, the Administrator of the United States Agency for International Development, the President of the National Endowment for Democracy, the President of the Center for International Private Enterprise, the President of the Inter-American Republican Institute, the President of the National Democratic Institute for International Affairs, and the President of the Free Trade Union Institute.
(3) Contents.---The study shall include—
   (A) a comprehensive review and an overall evaluation of the efficiency and effectiveness of United States appropriations for the promotion of democracy, including—
      (i) information regarding the amount of money dedicated to such purpose each fiscal year;
      (ii) an identification of the international organisations, nongovernmental organizations, multilateral institutions, individuals, private groups (including corporations and other businesses), and government agencies and departments receiving such funds for such purposes;
      (iii) information regarding the efficiency and effectiveness of the use of such funds to promote a transition to democracy in nondemocratic countries with a special emphasis on activities related to the promotion of democracy under section 302(b), relating to the Human Rights and Democracy Fund; and
      (iv) information regarding the efficiency and effectiveness of the use of such funds to promote and sustain democracy in countries that are already fully democratic or partly democratic;
   (B) a review of—
      (i) the ability of the Broadcasting Board of Governors to provide 24-hour service seven days a week to all countries categorised as nondemocratic in the most recent Annual Report.
on Democracy and the influence such broadcasts may have on the views of citizens of such countries, including information relating to programming on the means of nonviolent protest and successful movements for democratic change in other countries around the world; and
(11) the advisability of supporting private media sources that are not controlled or owned by the United States, including by providing grants, loans, or loan guarantees and by establishing a new entity that would manage such a program to promote a wider range of view that have no connection to the United States;
(C) policy recommendations to the President and Congress regarding ways to improve United States programs for the promotion of democracy; and
(D) recommendations for reform of United States Government agencies involved in the promotion of democracy.

(d) Membership.--
(1) Appointment.--The board shall be composed of nine members, who shall be citizens of the United States and who shall not be officers or employees of the United States. The members shall be appointed as follows:
(A) Three members shall be appointed by the President.
(B) Three members shall be appointed by the Speaker of the House of Representatives, of whom two members shall be appointed upon the recommendation of the leader in the House of the political party that is not the political party of the President, and of whom one member shall be appointed upon the recommendation of the leader in the House of the other political party.
(C) Three members shall be appointed by the President pro tempore of the Senate, of whom two members shall be appointed upon the recommendation of the leader in the Senate of the political party that is not the political party of the President, of whom one member shall be appointed upon the recommendation of the leader in the Senate of the other political party.
(2) Selection and vacancies.--Members of the Board shall be selected from among distinguished individuals noted for their knowledge and experience in fields relevant to the issues to be considered by the Board, including issues related to the promotion of democracy, international relations, management and organization of foreign assistance or comparable programs, methods and means of nonviolent protest, academic study and debate of democracy, human rights, and international law. A vacancy on the Board shall not affect its powers, but shall be filled in the manner in which the original appointment was made.
(3) Time for appointment.--The appointment of members to the Board under paragraph (1) shall be made not later than 120 days after the date of the enactment of this Act.
(4) Term of service and tenure.--Each member shall be appointed to the Board for a term that shall expire on the date that is one year after the date of the submission of the report under subsection (c). The Board shall terminate on the date that is one year after the date of the submission of the report under such subsection.
(5) Security clearances.--The Secretary shall ensure that all members of the Board, and appropriate experts and consultants under paragraph (6)(B), obtain relevant security clearances in an expeditious manner.
(6) Operation.--
(A) Chairperson.--Not later than 15 days after the completion of the appointment of all members to the
Board under paragraph (1), the President shall appoint a chairperson for the Board from among the members.

(b) Meetings.--The Board shall meet at the call of the chairperson. The initial meeting of the Board shall be held not later than 30 days after the appointment of the chairperson under subparagraph (A).

(c) Quorum.—A majority of the members of the Board shall constitute a quorum to conduct business, but the Board may establish a lesser quorum for conducting meetings scheduled by the Board.

(d) Rules.--The Board may establish by majority vote any other rules for the operation of the Board under this paragraph, if such rules are not inconsistent with this Act or other applicable law.

(e) Travel expenses.—Members of the Board shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of service for the Board.

(f) Office space and administrative assistance.—Upon the request of the chairperson of the Board, the Secretary shall provide reasonable and appropriate office space, supplies, and administrative assistance.

(g) Applicability of certain other laws.—Nothing in this section shall be construed to cause the Board to be considered an agency or establishment of the United States, or to cause members of the Board to be considered officers or employees of the United States. Executive branch agencies may conduct programs and activities and provide services in support of the activities duties of the Board, notwithstanding any other provision of law. The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Board.

(h) Experts and consultants.—The Board may procure temporary and intermittent services under section 3109(b) of title 5, United States Code.

(e) Authorization of Appropriations.—There are authorized to be appropriated to the Board $2,000,000 for each of fiscal years 2006, 2007, and 2008.

SEC. 107. ESTABLISHMENT AND MAINTENANCE OF INTERNET SITE FOR GLOBAL DEMOCRACY AND HUMAN RIGHTS.

(a) Establishment.—In order to facilitate access by individuals and non-governmental organizations in foreign countries to documents, streaming video and audio, and other media regarding democratic principles, practices, and values, and the promotion and strengthening of democracy, the Secretary of State, in cooperation with the Under Secretary of State for Global Affairs, the Under Secretary for Public Diplomacy and Public Affairs, and the Assistant Secretary of State for Democracy, Human Rights, and Labor, shall establish and maintain an Internet site for global democracy and human rights.

(b) Contents.—The Internet site for global democracy established under subsection (a) shall contain the following information:

(1) The Executive Summary prepared under section 102(b)(2)(A), but only to the extent that information contained therein is not classified.

(2) The texts of the founding documents of the United States, including the Declaration of Independence, the Constitution, appropriate excerpts from the Federalist Papers, and other documents that the Under Secretary of State for Global Affairs determines appropriate.

(3) Selected texts of the founding documents of the leading democratic countries that the Under Secretary determines appropriate.

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(4) Narratives and histories of significant democratic movements in foreign countries, particularly regarding successful nonviolent campaigns to oust dictatorships.
(5) Narratives relating to the importance of the establishment of and respect for fundamental freedoms.
(6) The annual Trafficking in Persons report prepared by the Office to Monitor and Combat Trafficking in Persons of the Department of State.
(9) Any other documents, references, or links to external Internet sites the Secretary or Under Secretary determines appropriate, including reference to or links to training materials regarding successful movements in the past.
(c) Translation.--
(1) In general.--The Secretary of State shall ensure that the relevant country specific sections of the Annual Report on Democracy and the country specific sections of the content described in paragraphs (7) through (9) of subsection (b) that relate to particular countries are translated into the principal languages of such countries and posted on the Internet website described in such subsection.
(2) Date for posting.--Not later than 120 days after the submission of the Annual Report on Democracy, the translation required by this subsection shall be completed.

SEC. 108. PROGRAMS BY UNITED STATES MISSIONS IN FOREIGN COUNTRIES AND ACTIVITIES OF CHIEFS OF MISSION.

(a) Development of Programs to Promote Democracy in Foreign Countries.--The Secretary of State shall direct each chief of mission in each foreign country categorized as nondemocratic in the most recent Annual Report on Democracy to--
(1) develop, as part of annual program planning, a strategy to promote democracy in the foreign country and to provide visible and material support to individuals and nongovernmental organizations in that country that are committed to democratic principles, practices, and values, such as--
(A) consulting and coordinating with such individuals and organizations regarding the promotion of democracy;
(B) visiting local landmarks and other local sites associated with nonviolent protest in support of democracy and freedom from oppression;
(C) holding periodic public meetings with such individuals and organizations to discuss democracy and political, social, and economic freedoms;
(D) issuing public condemnation of severe violations of internationally recognized human rights (as such term is described in section 116(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2155n(a)), violations of religious freedom, including particularly severe violations of religious freedom (as such term are defined in paragraphs (11) and (13) of section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402(1)), political repression, and government-tolerated or condoned trafficking in persons; and
(E) providing technical, financial, and such other support to such individuals and organizations;
(2) hold ongoing discussions with the leaders of the nondemocratic country regarding a transition to full democracy and the development of political, social, and economic freedoms.

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and respect for human rights, including freedom of religion or belief, in the country; and
(3) conduct meetings with civil society, interviews with media that can directly reach citizens of such country, and discussions with students and young people of the nondemocratic country regarding a transition to democracy and the development of political, social, and economic freedoms in the country.

(b) Public Outreach in Foreign Countries--Each chief of mission or principal officer should spend a substantial amount of time at universities and other institutions of higher learning to--
(1) debate and discuss values and policies that promote democracy and
(2) communicate, promote, and defend such United States values and policies.

(c) Access to United States Missions.--The Secretary is authorized and encouraged to allow access to a United States diplomatic or consular mission in each foreign country categorized as partly democratic or nondemocratic in the most recent Annual Report on Democracy by individuals and representatives of nongovernmental organizations in that country who are committed to democratic principles, practices, and values in that country.

SEC. 109. TRAINING FOR FOREIGN SERVICE OFFICERS.

(a) Training in Democracy and the Promotion of Democracy and Human Rights.--Section 708 of the Foreign Service Act of 1980 (22 U.S.C. 4228) is amended by adding at the end the following new subsection:

'(c) Training on Global Democracy Promotion.--

'(1) In general.--In addition to the training required under subsections (a) and (b), the Secretary of State, in cooperation with other relevant officials, including the Under Secretary of State for Global Affairs, and the Director of the National Foreign Affairs Training Center of the Foreign Service Institute of the Department of State, shall establish as part of the training provided after December 31, 2006, for members of the Service, including all chiefs of mission and deputy chiefs of mission, instruction in how to strengthen and promote democracy through peaceful means in consultation with individuals and nongovernmental organizations that support democratic principles, practices, and values. In particular, such instruction shall be mandatory for members of the Service having reporting or other responsibilities relating to internal political developments and human rights, including religious freedom, in nondemocratic or partly democratic countries, including for chiefs of mission and deputy chiefs of mission, and shall be completed before the time that such member or chief of mission assumes a post (or, if such is not practical, within the first year of assuming such post).

'(2) Contents of training.--The training required under paragraph (1) shall include instruction, a training manual, and other materials regarding the following:

'(A) International documents and United States policy regarding electoral democracy and respect for human rights;

'(B) United States policy regarding the promotion and strengthening of democracy around the world, with particular emphasis on the transition to democracy in nondemocratic countries;

'(C) For any member, chief of mission, or deputy chief of mission who is to be assigned to a foreign country that is categorized as nondemocratic in the Annual Report on Democracy required under section 102(b) of the Advance Democracy Values, Address Nondemocratic Countries, and Enhance Democracy Act of 2005, instruction regarding--

'(i) the status of political rights in such country;'
(ii) ways to promote democracy in such country including building relationships and consulting with individuals and nongovernmental organizations in such country that support democratic principles, practices, and values;  
(iii) providing technical, financial, and other support to individuals (including expatriated citizens) and nongovernmental organizations in such country that support democratic principles, practices, and values;  
(iv) visiting local landmarks and other local sites associated with nonviolent protest in support of democracy and freedom from oppression;  
(v) conducting discussions with the leaders of such country regarding—  
(I) a transition to full democracy;  
(II) political, social, and economic freedoms;  
(III) United States policy to promote democracy in foreign countries; and  
(IV) the possibility that such leaders might voluntarily cede power;  
(vi) conducting discussions with the students and young people of such country regarding—  
(I) a transition to full democracy;  
(II) political, social, and economic freedoms; and  
(III) United States policy to promote democracy in foreign countries;  
(vii) the methods of nonviolent action and the most effective manner to share such information with individuals and nongovernmental organizations in such country that support democratic principles, practices, and values; and  
(viii) the investigation and documentation of violations of internationally recognized human rights in coordination with nongovernmental human rights organizations, violations of religious freedom, including particularly severe violations of religious freedom (as such terms are defined in paragraphs (I) and (I) of section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6401)), political repression, and government-tolerated or condoned trafficking in persons that occur in such country.

(D) The protection of internationally recognized human rights (including the protection of religious freedom) and standards related to such rights, provisions of United States law related to such rights, the various aspects and manifestations of violations of such rights, diplomatic tools to promote respect for such rights, the protection of individuals who have fled their countries due to violations of such rights (including the role of United States embassies in providing access to the United States Refugee Admissions Program) and the relationship between respect for such rights and democratic development and national security. The Director of the National Foreign Affairs Training Center of the Foreign Service Institute of the Department of State shall consult with
nongovernmental organizations involved in the protection and promotion of such rights and the United States Commission on International Religious Freedom (established under section 201(a) of the International Religious Freedom Act of 1998 (22 U.S.C. 6421(a)) in developing the training required by this subparagraph.''.

(b) Other Training.--The Secretary of State shall ensure that the training described in subsection (a) is provided to members of the civil service who are assigned in the United States or abroad who have reporting or other responsibilities relating to nondemocratic and human rights in countries that are categorized as partly democratic or nondemocratic in the most recent Annual Report on Democracy required under section 102(b) of the Advance Democratic Values, Address Nondemocratic Countries, and Enhance Democracy Act of 2005.

(c) Authorization of Appropriations.--There are authorized to be appropriated such sums as may be necessary to develop appropriate programs and materials to accomplish the training required under subsection (a) of section 708 of the Foreign Service Act of 1980 (22 U.S.C. 6078), as added by subsection (a).

(d) Clerical Amendments.--Section 708 of the Foreign Service Act of 1980 is further amended--

(1) in subsection (a) by striking "'(a) The'" and inserting

'(a) Training on Human Rights.--The'" and

(2) in subsection (b) by striking "'(b) The'" and inserting

'(b) Training on Refugee Law and Religious Persecution.--The'."

SEC. 110. PERFORMANCE PAY; PROMOTIONS; FOREIGN SERVICE AWARDS.

(a) Performance Pay.--Section 605(d) of the Foreign Service Act of 1980 (22 U.S.C. 2675(d)) is amended by inserting after the second sentence the following new sentence: "Recipients or distinguished service in the promotion of democracy in foreign countries, including contact with and support of individuals and nongovernmental organizations that promote democracy in a foreign country categorized as nondemocratic in the most recent Annual Report on Democracy required under section 102(b) of the Advance Democratic Values, Address Nondemocratic Countries, and Enhance Democracy Act of 2005, shall also serve as a basis for granting awards under this section.''.

(b) Promotions.--Section 603(b) of the Foreign Service Act of 1980 (22 U.S.C. 2673(b)) is amended by adding at the end the following new sentence: "For purposes of selection boards shall also, where applicable, include an evaluation of whether members of the Service and members of the Senior Foreign Service have met the standards of performance established by the Secretary pursuant to section 110(c) of the Advance Democratic Values, Address Nondemocratic Countries, and Enhance Democracy Act of 2005, or have served in a position in which the primary responsibility is to monitor democracy or human rights.''.

(c) Regulations and Evaluations Concerning Standards of Performance and Programs to Promote Democracy.--With respect to members of the Foreign Service, including all chiefs of mission, who are assigned to foreign countries categorized as nondemocratic in the most recent Annual Report on Democracy, the Secretary shall prescribe regulations concerning the standards of performance to be met under sections 605(d) and 603(b) of the Foreign Service Act of 1980 (22 U.S.C. 2675(d) and 2673(b), as amended by subsections (a) and (b), respectively, and the development of programs to promote democracy in foreign countries under section 108. The requirements of sections 108 and 109(a) shall serve as one of the bases for performance criteria in evaluating chiefs of mission and those officers at posts so designated by the chief of mission.

(d) Foreign Service Awards.--Section 614 of the Foreign Service Act of 1980 (22 U.S.C. 2674) is amended by adding at the end the following new sentence: "Distinguished or meritorious service in the promotion of democracy in foreign countries, including contact with aid support..."
of individuals and nongovernmental organizations that promote democracy in a foreign country categorized as nondemocratic in the most recent Annual Report on Democracy (as required under section 102(b) of the Advancing Democratic Values, Address Non-Democratic Countries, and Enhance Democracy Act of 2005), shall also serve as a basis for granting awards under this section.'

(e) Congressional Democracy Award.--

(1) Establishment.--There is established a Congressional Award for Outstanding Achievements in Advancing Democracy to be awarded to officers or employees of the Government of the United States. The Award shall be in addition to any other award issued by the Assistant Secretary for Democracy, Human Rights, and Labor for the promotion of human rights in such countries.

(2) Selection.--The Secretary of State shall establish procedures for selecting recipients of the Award. The criteria for selecting recipients of the Award shall include whether the candidate has made extraordinary efforts to promote democracy.

(3) Financial Award.--The recipient of the Award shall receive not less than $5,000. Such sum shall be in addition to any other compensation received by the recipient. Amounts awarded shall be drawn from amounts appropriated to the Department of State.

(4) Award Ceremony.--Congress shall host an annual award ceremony for the recipient of the Award. Costs associated with travel by the recipient to the ceremony shall be paid by the United States.

(5) Authorization of Appropriations.--There is authorized to be appropriated to the Secretary such sums as may be necessary to award the Award, including such sums as may be necessary to cover costs associated with the Award.

SEC. 111. APPOINTMENTS.

(a) Appointments by the President.--Section 302 of the Foreign Service Act of 1980 (22 U.S.C. 3942) is amended by adding at the end the following new subsection:

'(c) If an individual (with respect to subsection (a) or a member of the Service (with respect to subsection (b)) is appointed by the President to be and if such individual or such member has previously served as a chief of mission of the United States in a country at the time such country was categorized as nondemocratic in an Annual Report on Democracy (as required under section 102(b) of the Advance Democratic Values, Address Non-Democratic Countries, and Enhance Democracy Act of 2005), the President shall transmit to the Committee on Foreign Relations of the Senate a written report summarizing the actions that such individual or member took during the period of such prior service to promote democracy and human rights in such country, including actions in furtherance of the action plan contained in such report.'

(b) Chiefs of Mission.--Section 304(a)(1) of such Act (22 U.S.C. 3944(a)(1)) is amended by adding at the end the following new sentence:

'If the country in which the individual is to serve is categorized as nondemocratic in the most recent Annual Report on Democracy (as required under section 102(b) of the Advance Democratic Values, Address Non-Democratic Countries, and Enhance Democracy Act of 2005), the individual should possess clearly demonstrated competence in and commitment to the promotion of democracy in that country, including competence in promoting democratic practices, values, and ideals through regular interaction with individuals, including students and young people within that country, who support and advocate such principles, practices, and values.'

TITLE II—ALLIANCES WITH OTHER DEMOCRATIC COUNTRIES

SEC. 201. ALLIANCES WITH OTHER DEMOCRATIC COUNTRIES.

(a) Finding.--Congress finds that it is in the national interest of

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the United States, including for humanitarian, economic, social, political, and security reasons, to forge alliances with democratic countries to work together to promote and protect—

(1) shared democratic principles, practices, and values;

and

(2) political, social, and economic freedoms around the world.

(b) Purpose.—The purposes of this title are to encourage new ways of forging alliances with democratic countries in order to—

(1) promote and protect democratic principles, practices, and values, including the right to free, fair, and open elections, secret balloting, and universal suffrage;

(2) promote and protect fundamental shared political, social, and economic freedoms, including the freedoms of association, of expression, of the press, of religion, and to own private property;

(3) promote and protect respect for the rule of law;

(4) develop, adopt, and pursue strategies to advance common interests in international organizations and multilateral institutions to which members of the alliance of democratic countries belong; and

(5) provide political, economic, and other necessary support to countries that are undergoing a transition to democracy.

(c) Authorization.—The President is authorized to take such actions as the President determines to be necessary and appropriate to establish alliances with other democratic countries to achieve the purposes described in subsection (b).

(d) Sense of Congress Regarding Participation.—It is the sense of Congress that any foreign country that is categorized as nondemocratic in the most recent Annual Report on Democracy under section 102(b) should not participate in any alliance of democratic countries aimed at working together to promote democracy.

SEC. 202. SENSE OF CONGRESS REGARDING THE ESTABLISHMENT OF A DEMOCRACY CAUCUS.

(a) Findings.—Congress finds that with the passage of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108–458), Congress—

(1) encouraged the establishment of a Democracy Caucus within the United Nations, the United Nations Human Rights Commission, the United Nations Conference on Disarmament, and at other broad-based international organizations; and

(2) required increased training in multilateral diplomacy for members of the Foreign Service and appropriate members of the Civil Service to support such an establishment.

(b) Sense of Congress.—It is the sense of Congress that the creation of a Democracy Caucus in each international organization and multilateral institution of which the United States is a member will not only improve the internal governance of such organizations but will also strengthen the implementation of commitments by such organizations and institutions regarding democracy and human rights.

SEC. 203. ANNUAL DIPLOMATIC MISSIONS ON MULTILATERAL ISSUES.

The Secretary of State, acting through the principal officials responsible for advising the Secretary on international organizations, shall ensure that a high level delegation from the United States is sent on an annual basis to consult with key foreign governments in every region to promote United States policies, including issues related to democracy and human rights, at key international fora, including the United Nations General Assembly, the United Nations Human Rights Commission, the Organization for Security and Cooperation in Europe, and the United Nations Education, Science, and Cultural Organization.

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SEC. 204. STRENGTHENING THE COMMUNITY OF DEMOCRACIES.

(a) sense of Congress.--It is the sense of Congress that establishing a more formal structure for the Community of Democracies may eventually be necessary in the future, at which time the United States should guide and strongly support such a development. It is the sense of Congress that, if properly funded and supported, the Community of Democracies can achieve great success toward the global promotion of democratic principles, practices, and values.

(b) Membership Authorized.--The President is authorized to enter the United States into membership of the Community of Democracies if the Community should become an organization.

(c) Regional Group in the Community of Democracies.--It is the sense of Congress that regional groups within the Community of Democracies should be established and strengthened in order to facilitate coordination of common positions and action on multilateral strategies to promote and consolidate democracy.

(d) Authorization of Appropriations.--

(1) Membership in Community of Democracies.--There are authorized to be appropriated such sums as may be necessary to pay the assessed costs for membership of the United States in the Community of Democracies.

(2) Cost of headquarters.--There is authorized to be appropriated to the Secretary of State $2,006,006 for fiscal year 2006 for a grant or voluntary contribution for the acquisition, refurbishment, or construction of a headquarters building for the Community of Democracies. Such funds may also be applied toward the costs of meetings and studies to formalize the location of such headquarters, the costs of providing equipment for such headquarters, and other logistical matters related to such headquarters. Amounts appropriated for these purposes are authorized to remain available until expended.

(e) Democracy Transition Center.--

(1) Sense of Congress.--It is the sense of Congress that the United States should support the initiative of the Governments of Hungary and the governments of other European countries to establish a Democracy Transition Center to support transitions to full democracy.

(2) Authorization of Appropriations.--There is authorized to be appropriated to the Secretary of State for a grant or voluntary contribution to the Democracy Transition Center $4,000,000 for fiscal year 2006, $3,000,000 for fiscal year 2007, $2,000,000 for fiscal year 2008, and $1,000,000 for fiscal year 2009. Amounts appropriated under this paragraph shall remain available until expended.

(3) Use of funds.--Any grant or voluntary contribution made in fiscal year 2006 by the Secretary to the Democracy Transition Center under paragraph (2) may be used for the establishment and operation of the Center and for programs and activities of the Center.

(4) Programs and activities.--The programs and activities of the Democracy Transition Center referred to in paragraph (3) are programs and activities that--

(A) develop, adopt, or pursue programs, campaigns, and tactics to promote the peaceful transition to democracy in nondemocratic countries and, in addition, to work with countries that have gone through a transition to a partly democratic form of government in order to consolidate and accelerate progress toward a fully democratic form of government;

(B) provide political, financial, and other necessary support to individual and nongovernmental organizations that promote democratic principles,

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practices, and values in each nondemocratic country, including training in nonviolent means of protest and resistance;
(C) support consultations with such individuals and nongovernmental organizations in countries that are not fully democratic regarding the best approaches to assist such countries to make the transition to a fully democratic form of government;
(D) establish a dialogue with the leaders of each nondemocratic country to discuss democratic principles, practices, and values, fundamental freedoms and human rights, and the possibility of such leaders voluntarily initiating a transition to democracy;
(E) educate and train diplomats, military attaches, and other appropriate individuals from member countries of the Community of Democracies in the means to promote democracy within host countries that are nondemocratic; and
(F) undertake any other appropriate or necessary actions that are compatible with the mission and goal of the Center.

SEC. 205. FUNDING FOR NONGOVERNMENTAL ORGANIZATIONS SUPPORTING A COMMUNITY OF DEMOCRACIES.

(a) Grants.—The Secretary of State is authorized to make grants to United States nongovernmental organizations which have experience with the Community of Democracies to assist the Community of Democracies and its Convening Group to plan its inter-IIR and annual conferences and other related activities with a focus on issues related to the promotion of transitions to and consolidation of democracy.

(b) Authorisation of Appropriations.—There is authorized to be appropriated to the Secretary such sums as may be necessary to carry out this section.

SEC. 206. REPORTS.

(a) Annual Report on the Status of Democratic Alliances of the United States.—Not later than October 1 of each year, the Secretary of State, in coordination with the Under Secretary of State for Global Affairs, the Assistant Secretary of State for Democracy, Human Rights, and Labor, and appropriate international organizations, shall submit to the appropriate congressional committees an Annual Report on the Status of Democratic Alliances of the United States. Each Annual Report shall contain the following information:

1. An evaluation of the efforts undertaken by the United States to establish a caucus of democratic countries in international organizations, multilateral institutions, and related bodies within such organizations and institutions.

2. An evaluation of efforts undertaken by the United States to encourage a more formal framework for the Community of Democracies, including the creation of supporting institutions.

3. An evaluation of the efforts undertaken by the United States to establish the Democracy Transition Center.

4. An evaluation of any other efforts undertaken by the United States in furtherance of democratic alliances or cooperation with democratic countries to promote universal democracy.

5. An evaluation of the efforts undertaken by other democratic states belonging to the Community of Democracies in furtherance of advancing democracy around the world, including through the Community of Democracies, relevant bodies of the United Nations, democracy caucuses, regional organizations, and bilateral policies and foreign assistance.

(b) Report Regarding Election to a Leadership Post in International Organisations, Multilateral Institutions, or Bodies Thereof.—In the

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event of an election or rotation of any country, or representative of any country, to a leadership position in an international organization or multilateral institution (or related body thereof) with a mandate to vote on issues related to democracy and human rights, if such country is subject to a determination by the Secretary under section 2208 of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 41 of the Arms Export Control Act (22 U.S.C. 2780), or section 6(j) of the Export Administration Act of 1979 (50 U.S.C. 2405(j)), or if such country is categorized as nondemocratic in the most recent Annual Report on Democracy under section 102(b), the Secretary of State shall, not later than 30 days after such election or rotation, notify the appropriate congressional committees of such election or rotation and submit a classified report evaluating any steps or actions taken by the United States to prevent such election or rotation and recommendations for appropriate further steps or actions.

TITLE III—FUNDING FOR PROMOTION OF DEMOCRACY

SEC. 301. POLICY.

It shall be the policy of the United States to provide financial assistance to eligible entities and eligible individuals in order to assist such entities and individuals in the promotion of democracy in countries categorized as nondemocratic in the most recent Annual Report on Democracy under section 102(b).

SEC. 302. HUMAN RIGHTS AND DEMOCRACY FUND.

(a) Findings.—


(2) Support for such projects underscores the commitment of the United States to—

(A) promote democracy and human rights; and

(B) fight against terrorism.

(3) Funds allocated to the Human Rights and Democracy Fund for fiscal years 2000, 2001, 2002, and 2003 have been $9,000,000, $13,421,000, $13,000,000 and $31,448,000, respectively.

(4) Additional funding for the Human Rights and Democracy Fund is in the national interests of the United States.

(b) Purpose of the Human Rights and Democracy Fund.—In addition to uses currently approved for the Human Rights and Democracy Fund, the Secretary of State, acting through the Assistant Secretary of State for Democracy, Human Rights, and Labor shall use amounts appropriated to the Human Rights and Democracy Fund under subsection (a) to provide assistance to eligible entities and eligible individuals to promote democracy in foreign countries categorized as nondemocratic in the most recent Annual Report on Democracy under section 102(b). The promotion of democracy in such countries for which such assistance may be provided may include the following activities:

(1) The publication and distribution of books and the creation and distribution of other media, including audio and video cassettes, compact discs and digital video discs, and other audio and video publications, and the purchase and distribution of any equipment needed to review such books and other media. Such books and other media should include—

(A) factual news and related information about current and relevant events and developments in such country and elsewhere in the world; and

(B) educational programming designed to provide information regarding democracy, the rule of law, free, fair and open elections, free market economics,

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fundamental human rights (including the rights of freedom of speech and of religion and the rights to be free from slavery and bondage), and successful democratic movements in history.

(2) The translation into languages spoken in such countries of relevant programming and existing books, videos, and other publications relating to the subjects specified in subparagraphs (A) and (B) of paragraph (1).

(3) The promotion of political pluralism within such countries, including the promotion of nongovernmental organizations and movements that promote democratic principles, practices, and values.

(4) The promotion of the rule of law and the protection of minorities.

(5) The creation of educational programs for leaders and members of democratic movements to convey information to such individuals regarding the means of nonviolent force and the methods of nonviolent action.

(6) The creation of programs for student groups to work with citizens of such countries who are committed to democratic reforms and to the promotion of a transition to democracy.

(7) The production and distribution of materials that promote and celebrate democracy and the equipment needed to produce such materials.

(8) The creation of cultural exchanges between citizens of such countries and citizens of the United States.

(9) The creation of projects to strengthen the parliaments and parliamentary staff in such countries.

(10) The creation of programs to ensure transparency and accountability for government revenues and expenditures, with particular emphasis on revenues derived from extractive industries.

(11) The creation of training programs for citizens of such countries concerning international legal obligations to support democracy and human rights, including religious freedom.

(12) Any other activities related to the promotion of democracy or the transition of such countries to democracy that the Under Secretary of State for Global Affairs determines appropriate.

(c) Freedom Investment Act of 2002.--Section 664(b) of the Freedom Investment Act of 2002 (Subtitle E of title VI of Public Law 107-218, relating to the purposes of the Human Rights and Democracy Fund) is amended--

(1) in paragraph (4), by striking "and" at the end;

(2) by redesignating paragraph (5) as paragraph (6);

(3) by inserting after paragraph (4) the following new paragraph:

"(5) to support the study of democracy abroad, including support for debates and discussions at academic institutions, regarding the values and benefits of democracy; and";

(4) in paragraph (6), as redesignated by paragraph (2) of this subsection, by striking "(4)" and inserting "(5)";

(d) Administrative Authorities.--Assistance provided through the Human Rights and Democracy Fund may be provided to eligible entities and eligible individuals in foreign countries notwithstanding any provisions of law that prohibit assistance to a foreign country or to a government of a foreign country.

(e) Annual Report on the Status of the Human Rights and Democracy Fund.--Within 60 days of the conclusion of each fiscal year, the Assistant Secretary of State for Democracy, Human Rights, and Labor shall submit to the appropriate congressional committees an annual report on the status of the Human Rights and Democracy Fund. Each such annual report shall contain the following information:

(1) An identification of each eligible entity and eligible individual who received assistance during the previous fiscal year under subsection (b) and a summary of the activities of each such recipient.

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(2) An account of projects funded and outside contributions received during the previous fiscal year.

(3) A balance sheet of income and outlays current as of the conclusion of fiscal year to which such report is relevant.

(f) Authorization of Appropriations.--

(1) In general.--There are authorized to be appropriated to the Human Rights and Democracy Fund to carry out the purposes of this section $10,000,000 for fiscal year 2006 and $150,000,000 for fiscal year 2007. Amounts appropriated under this section shall remain available until expended.

(2) Administrative expenses.--Not more than five percent of amounts appropriated to the Human Rights and Democracy Fund for each fiscal year may be applied toward administrative expenses of the carrying out this section.

(3) Contributions.--The Secretary may accept contributions to the Human Rights and Democracy Fund from the governments of other democratic countries, private foundations, private citizens, and other nongovernmental sources.

TITLE IV--SUPPORT FOR SPECIAL AND REGIONAL INITIATIVES

SEC. 401. FINDINGS.

Congress finds the following:

(1) The Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe (1 August 1975) and the Helsinki Process empowered democrats living in nondemocratic countries to organize and insist that the governments of such countries honor the commitments to economic and human rights that such governments had pledged. These local democrats and the Helsinki Process played a fundamental role in bringing about the peaceful end to the communist dictatorships of Eastern Europe.

(2) Since 1975, Algeria, Egypt, Israel, Jordan, Morocco, and Tunisia have been "Mediterranean Partners for Cooperation" with the Organization for Security and Cooperation in Europe.

(3) Conferences regarding security and cooperation in the regions of Africa, Asia, and the Middle East present an opportunity to establish an agreement concerning organizing principles and processes to guide the countries of these regions in the transition to greater security, prosperity, justice, and freedom.

(4) At the Second Ministerial Conference of the Community of Democracies in Seoul, South Korea, all participating governments endorsed the importance of furthering democracy through the formation of regional groups and initiatives. United States support for this regional approach would have a beneficial impact on the promotion of democracy in nondemocratic countries.

SEC. 402. SENSE OF CONGRESS REGARDING SUPPORT FOR REGIONAL INITIATIVES.

It is the sense of Congress that the President, acting through the Secretary of State, the Under Secretary of State for Global Affairs, and relevant United States chiefs of mission, should support the efforts of countries and groups in the regions of the Mediterranean, the Middle East, Asia, and Africa to organize regional processes similar to the Helsinki Process to promote better relations among each other and among the other countries of the world, to promote peaceful relations, to strengthen regional security, and to promote fundamental rights and political, economic, and social progress.

TITLE V--PRESIDENIAL ACTIONS

SEC. 501. DESCRIPTION OF PRESIDENTIAL ACTIONS.

http://frwebgate.access.gpo.gov/cgi-bin/useftpl.cgi?FAddress=162.140.64.21&filename=h1... 5/19/2005
(a) Authorization.—With respect to a foreign country categorized as nondemocratic in the most recent Annual Report on Democracy under section 192(b), the President is authorized to—

(1) issue a private or public demarche to, or a public condemnation of, the government or any official of the government of such country;

(2) issue a public condemnation within one or more multilateral fora to the government or any official of the government of such country;

(3) recall the chief of mission to such country;

(4) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent, or prohibit any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property subject to the jurisdiction of the United States in which the government of such country or any official of the government of such country has any interest;

(5) instruct, through the Secretary of the Treasury, the United States executive directors to each international financial institution to vote against and actively oppose any extension by the respective institution of any loan, credit, or guarantee to or for the benefit of the government, or any specified official of the government, of such country;

(6) direct the Overseas Private Investment Corporation, and the Trade and Development Agency, as appropriate, to not approve the issuance of any (or a specified number of) guarantees, insurance, extensions of credit, or participations in the extension of credit for the benefit of or with respect to the government, or any specified official of the government, of such country;

(7) prohibit the United States from procuring, or entering into any contract for the procurement of, any goods or services from any specified official of the government of such country;

(8) order the heads of appropriate United States agencies to not issue any (or a specified number of) specific licenses, and to not grant any other specific authority (or a specified number of authorities), to export any goods or technology to any specified official of the government of such country, or to any other specified resident of such country, under—

(A) the Export Administration Act of 1979 (50 U.S.C. App. 2401 et seq.);

(B) the Arms Export Control Act (22 U.S.C. 2751 et seq.); or

(C) the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.); or

(D) any other Federal law that requires the prior review and approval of the United States as a condition for the export or reexport of goods or services; and

(9) consistent with section 212(f) of the Immigration and Nationality Act (8 U.S.C. 1182(f)), deny entry into the United States of any specified alien who—

(A) is an official of the government of such country; or

(B) is a spouse, minor child, or agent of such an official.

(b) No Effect on Existing Law.—The encouragement to Presidential action provided under this section is in addition to and shall not supersede United States obligations under domestic law or international agreement.

(c) Regulations.—The President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the actions described in this section.

SEC. 502. INVESTIGATION OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW.

http://frwebgate.access.gpo.gov/cgi-bin/useftpd.cgi?IPaddress=162.140.64.21&filename=h1... 5/19/2005
(a) In General.—The President, with the assistance of the Secretary of State, the Under Secretary of State for Global Affairs, and the Ambassador-at-Large for War Crimes Issues, shall collect information regarding incidents that may constitute crimes against humanity, genocide, slavery, or other violations of international humanitarian law by leaders or other government officials of foreign countries categorized as nondemocratic in the most recent Annual Report on Democracy under section 102(b).

(b) Report.—Not later than January 15 of each year, the President, acting through the Secretary, with the assistance of the Under Secretary of State for Global Affairs and the Ambassador-at-Large for War Crimes Issues, shall submit to the appropriate congressional committees a report concerning the information collected under subsection (a) and any findings, determinations, or recommendations made on the basis of such information.

(c) Accountability.—The President shall consider what actions can be taken to ensure that the leaders or other government officials of foreign countries who are identified in accordance with subsection (a) as responsible for crimes against humanity, genocide, slavery, or other violations of international humanitarian law are brought to account for such crimes in an appropriately constituted tribunal.

(d) Limitation on Disclosure.—Nothing contained in this section shall require the disclosure, on a classified or unclassified basis, of information that the President determines would jeopardize sensitive sources and methods or other national security interests of the United States.

SEC. 503. PRESIDENTIAL COMMUNICATIONS.

(a) Finding.—Congress finds that direct communications from the President to citizens of countries that are categorized as nondemocratic in the most recent Annual Report on Democracy would be extremely beneficial to demonstrate that the United States supports such citizens and the efforts and actions of such citizens to promote and achieve transition to democracy in such countries.

(b) Sense of Congress.—It is the sense of Congress that—

(1) from time to time as the President shall determine appropriate, the President should broadcast a message to the citizens of countries categorized as nondemocratic in the most recent Annual Report on Democracy under section 102(b) expressing the support of the United States for such citizens, discussing democratic principles, practices, and values, and political, social, and economic freedoms, and condemning violations of internationally recognized human rights (as such term is described in section 116(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(a))), violations of religious freedom (as such terms are defined in paragraphs (11) and (13) of section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402)), political repression, and government-tolerated or condemned trafficking in persons that occur in such country; and

(2) the President should encourage leaders of other democratic countries to make similar broadcasts.

TITLE VI—NATIONAL SECURITY COUNCIL

SEC. 601. SPECIAL ASSISTANT ON NONDEMOCRATIC COUNTRIES.

Section 101 of the National Security Act of 1947 (50 U.S.C. 402) is amended—

(1) by redesignating the second subsection (1), as added by section 301 of the International Religious Freedom Act of 1998 (Public Law 105-292), as subsection (4) and

(2) by adding at the end the following new subsection:

"(1) It is the sense of Congress that there should be within the

http://frwebgate.access.gpo.gov/cgi-bin/useftpl.cgi?fpaddress=162.140.64.21&filename=h1... 5/19/2005
staff of the National Security Council a Special Assistant to the President on Nondemocratic Countries and Transition to Democracy whose position should be comparable to that of a senior director within the Executive Office of the President. The Special Assistant should serve as liaison with the Under Secretary of State for Global Affairs, Congress and, as advisable, nongovernmental organizations committed to the promotion of democracy. The Special Assistant should serve as a resource for executive branch officials to:

'(1) compile and maintain information on the facts and circumstances of actions by the leaders of nondemocratic countries and any threats to national and global security posed by such countries;

'(2) support interagency meetings either at the Deputy or Assistant Secretary level to discuss--

'(A) the promotion of democracy;

'(B) the protection of human rights; and

'(C) individualized strategies for the promotion of democracy in nondemocratic and partly democratic countries;

'(3) facilitate transition to a fully democratic form of government for countries that are partly democratic; and

'(4) make policy recommendations.'
Concept: The creation of a permanent democracy and rule of law educational institution in Africa—The African Institute for Democracy—to provide African graduate, law and university students, government officials and those interested in government service in Africa with a deep understanding of democratic principles and the rule of law. The Institute will provide a one-year master’s degree program, and a series of short courses, seminars and semester programs, the completion of which will provide students with course credits at universities and educational institutions throughout Africa. The Institute will include a training and technical assistance program to assist students and government officials in country-specific assessments, and the design and implementation of democratic systems, institutions and programs.

Objective: To provide the educational foundation upon which conflict prevention, freedom and respect for fundamental human rights can be achieved in African nations.

1 John Norton Moore is a Walter L. Brown Professor of Law at the University of Virginia. He is the Director of the Center for National Security Law at the University of Virginia. He formerly served as a United States Ambassador, and as Counselor on International Law to the U.S. Department of State. He also served as the first Chairman of the Board of the United States Institute of Peace. In 1990, he co-chaired, with the Associate Attorney General of the United States, the first talks between the United States and the then Soviet Union on the Rule of Law. Fern L. Holland is a human rights lawyer and consultant for the American Refugee Committee and has worked on legal aid and legislative reform projects in Africa. Most recently, her proposal for a legal aid clinic for refugee women and children in Guinea was accepted and funded by the U.S. Department of State, Bureau of Population, Refugees and Migration. She is also a former U.S. Peace Corps volunteer, serving in Namibia.
I. Background

Violence, corruption, socioeconomic decline, and human rights abuses continue to plague the continent of Africa. Over the last four decades, nearly every country in Africa has been involved in some form of violent conflict. At present, more than 25% of the countries in Africa are engaged in violent civil wars and cross-border conflicts, and millions of Africans are uprooted from their homes. Some reports indicate the figure is as high as 16 million, including refugees and internally displaced persons. The African continent has more internally displaced persons than the rest of the world put together. Displacement is directly related to violence and instability. People flee due to safety concerns, but also due to the inability to sustain life in conflict areas. As noted by the World Bank, “food production is impossible in conflict areas, leading to widespread famine.” Conflict has also derailed nutrition and education programs, and the U.N. has been forced to cut development programs by 25% since 1992 due to increasing instability and the rising demand for peacekeeping efforts. War and its effects have caused untold economic and social damage throughout Africa. According to the United States Agency for International Development ("USAID"), if current trends continue, conflict threatens to devastate almost half the countries in Africa in the near future.

Human rights abuses are also on the rise in Africa. Recent U.S. State Department reports and human rights groups have documented egregious human rights violations by government forces and opposition groups in every region of the continent. The abuses include summary executions, indiscriminate killing of civilians, intentional targeting of civilian areas, sexual slavery, widespread rape and other kinds of sexual violence, abductions of adults and minors, illegal detention, torture, forced recruitment and forced labor, and systematic campaigns of violence and intimidation against stated and perceived supporters of opposition groups, particularly in Zimbabwe, which is now home to 11 million victims of oppression, intimidation and even torture at the hands of the government. Continent-wide violations are not surprising in light of the fact that only

4 According to the internally displaced persons ("IDP") global database created by the Norwegian Refugee Council ("NRC").
5 NRC database.
6 NRC database.
nine (9) African nations qualified as “free” on Freedom House’s freedom scale for the year ending 2002. The majority of Africans continue to be denied basic human freedoms, political rights and civil liberties. Recent efforts to change this statistic failed in Nigeria, Africa’s most populous nation, where elections were marred by intimidation and fraud, including reports of ballot box stuffing, theft, underage voting and charging. 

Corruption remains rampant throughout Africa as well. On a scale of 1 to 10, only three (3) African nations (Botswana, Namibia and South Africa) rated above a 4.0 on Transparency International’s corruption index for the year ending 2002.

Africa is also becoming well known as a safe haven for terrorists, providing a place to hide both operatives and money. On December 29, 2002, The Washington Post reported that in the months prior to 9/11, the governments of Liberia and Burkina Faso allowed senior al Qaeda operatives to go on a $20 million diamond-buying spree. After the attacks, the President of Liberia, Charles Taylor, reportedly received $1 million in exchange for harboring al Qaeda operatives. The report, by staff writer Douglas Farah, was based on information contained in a U.S. military intelligence summary that included details from a European investigation into al Qaeda’s financing. The investigators also found evidence that agents of al Qaeda were attempting to procure sophisticated weapons through sources in West Africa. The Horn of Africa has also been viewed as a safe haven for terrorists, and the Sudan is believed to have links to terrorist organizations and activities, including al Qaeda and Iraqi scientists involved in the development of the nerve agent VX. East Africa has seen its share of terrorist activities as well, including the 1998 U.S. Embassy bombings and recent attacks in Kenya.

Africa has tremendous potential. It has a vast amount of resources and the human capacity to develop those resources. It was hoped that independence would bring freedom and prosperity to the people of Africa. It did not. To the contrary, it brought oppression, violence, abject poverty, egregious human rights abuses and the denial of basic human freedoms, all of which combined has laid the foundation for terrorism to thrive. Over the last decade there has been much debate over the reason(s) post-colonial Africa has failed to thrive. There are many theories and many reasons and solutions have been proffered and some have been tried. However, there is compelling evidence that the root cause of Africa’s turmoil and resulting failure to thrive is the lack of democracy and adherence to the rule of law – it is government failure to create and sustain frameworks consistent with the principles of democracy. The following statistics bolster this well-established and now widely accepted theory.

- **Democratic nations do not engage in violent conflicts with each other.** Of the 353 interstate wars occurring between the years of 1816 and 1991, zero were between democracies. One hundred percent of the wars during this period worldwide using criteria that include: institutional change, political, press, and religious freedom; worker rights; corporate/social responsibility; and human trafficking.

involved at least one non-democracy.\textsuperscript{12} As noted by the National Democratic Institute ("NDI"), "Democracies remain viable at home by resolving conflicts within society nonviolently and through compromise. Thus, they are predisposed to seek solutions peacefully with their neighbors."

- **Democratic nations do not engage in the mass murder of their own people.** Warfare aside, over the course of the last century, governments have murdered approximately 169 million of their own people\textsuperscript{13} Totalitarian and authoritarian governments were responsible for the majority of these deaths, while democratic nations (electoral democracies) were responsible for less than 1 percent. This "death by government" typically occurs through systematic efforts, such as genocide, ethnic cleansing and the mass murder of political opponents and opposition groups, and anyone perceived to be an enemy of the state.

- **Democratic nations provide their citizens with economic freedom, which leads to economic growth, social development, and an improved quality of life.** In 1997, Gwartney and Lawson, *Economic Freedom of the World*, demonstrated a strong correlation between levels of economic freedom and gross domestic product and per capita growth. Democracies with a high level of economic freedom grew at a rate of 2.9 percent, while non-democracies with virtually no economic freedom regressed at a rate of \(-1.9\) percent. Levels of economic freedom also positively correlated with quality of life measures, such as life expectancy, cereal yields and income.\textsuperscript{14} A recent survey by Freedom House finds that countries with the highest levels of democratic freedom produce over 80 percent of the world economic product.\textsuperscript{15} In contrast, the countries with the lowest levels of freedom produce approximately 5 percent of the world product.

- **The citizens of democratic nations do not experience famine.** The work of Harvard Professor Amartya Kumar Sen, a 1998 Nobelist, shows the powerful correlation between government structures and famine, a condition that previously had been regarded as primarily a product of natural causes such as drought or floods. He shows that there is hardly any case in which a famine has occurred in an independent democracy with a free press. Indeed, the history of colonialism.

\textsuperscript{12} This insight was postulated by Immanuel Kant over two hundred years ago and is powerfully supported by recent scholarship, particularly the work of Professors Rudi Rummel and Bruce Russett. See e.g., Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (1995); R.J. Rummel, *Power Kills: Democracy as a Method of Nonviolence*, 25-49 (1997).


\textsuperscript{14} The thrust of this data, showing a strong correlation between levels of economic freedom and both economic development and well-being is also supported by findings from the Heritage Foundation and academic work, including that of G. W. Scully in *Constitutional Environments and Economic Growth* published in 1992, and the work of J. Bradford Delong and Andrei Shleifer who show that absolutist governments were "associated with low economic growth, as measured by city growth, during the eight hundred years prior to the industrial revolution." The correlation is also supported by Douglas C. North, who won the Nobel Prize in economics in 1993 for showing the positive effect of economic growth on institutions and property rights throughout Western history.

and other non-democratically governed entities is replete with famines, the most recent in North Korea and Somalia. Recent academic work also indicates a positive correlation between environmental protection and democratic governmental structures.16

- **Democracies do not produce refugees.** A rough calculation of the number of refugees by type of regime from which they have fled shows that 77 percent of such flows are from non-democratic regimes. None are from well-established liberal democracies. Moreover, following transition to democracy, nations have seen substantial refugee inflows. Examples include Romania, Poland, the Czech Republic, and Nicaragua.

- **Corruption is found in all governments. However, the most corrupt nations are non-democracies.** A recent correlation running the Transparency International Corruption Perceptions Index shows a strong correlation between corruption and levels of freedom. Countries affording the most freedoms (liberal democracies) are the least corrupt. Those affording the least freedom (non-democracies) are the most corrupt. Of the twenty-five countries that are the "least corrupt," only Singapore and post-transition Hong Kong are not fully democratic.

Democracy works because of cross pressures and the associated political culture that emerges in a democracy. Where power is diffused, checked, and accountable, society is run by a myriad of independent groups, disparate institutions, a free press and multiple interests. From this, a democratic culture emerges, which involves debate, demonstrations, protests, negotiation, compromise, and tolerance. The free will of the individual, exercised in democracy and protected by the rule of law (peaceful resolution of disputes and the control of government), also forms the necessary basis for successful economic and social development. As noted by NDL, "it is no coincidence that the world's most prosperous and peaceful nations are also the most democratic, with unchecked power, governments squander resources, resulting in economic decline." This is precisely the cause of Africa's failure to thrive.

There are only 9 nations in Africa that qualify as democratic. The remaining 44 non-democracies do not allow citizens to participate freely in the political process. Citizens are denied voting rights and do not compete for public office. They have no control over the government that runs their country, manages its resources and makes decisions on behalf of the population. Instead, the government has absolute and unchecked power over the people. In fact, of the 44 non-democracies, 22 were rated as autocratic by Freedom House's survey of political change in the 20th century.

16 Frances D'Souza, Democracy as a Cure for Famine, 31 J. Peace Res. 369 (1994) ("The only solution to famine, whether in time of peace or war, is indeed democracy.")

The most successful democracies are liberal democracies, which have the following characteristics: a limited government; checks and balances; free elections; protections of the individual from the state; known and efficient legal rules facilitating human creativity and exchange; legal constraints on government officials; an independent judiciary; and respect for economic freedom. They also promote a climate of informational and political freedom, including freedom of speech, a free and independent media, and freedom of assembly, which is an essential element of an informed electorate.

A common problem in many African countries that boast of a democratic framework and hold multiparty elections is the lack of good governance, transparency and accountability, which are key aspects of an effective liberal democracy governed by rule of law principles. While an electoral democracy is certainly superior to totalitarianism and authoritarian rule, the full benefit of democracy comes from achieving liberal democracy.

The solution is to create liberal democracies and implement the rule of law in the 44 African nations that continue to deny the full panoply of basic human freedoms to their people, and to foster and assist existing democracies in their efforts to transition their governments into liberal democracies. Some of the largest donor organizations and financial institutions in the world have already reached this conclusion and have initiated efforts to achieve this goal. For example, USAID projects an increase in its funding of democracy programs in Africa by 53% for the year 2003. The World Bank has also shifted its focus to democracy and rule of law programs, noting that the "key fundament for economic development is not resources, infrastructure, or even education, but rather government structures, the rule of law, and levels of human freedom in economic matters." Similarly, the African Development Bank ("ADB") has moved good governance to the forefront of its efforts, noting that "good governance, defined to include respect for the rule of law and human rights, enhances accountability and transparency in the management of public resources (to inter alia, fighting corruption) as well as a credible legal and regulatory system, are the vital building blocks for sustained economic growth. Consequently, promoting good governance in the [regional member countries] is probably the single most important catalytic role the Bank will play in the years ahead."

African leaders have also embarked on a mission to transition Africa into a union of independent liberal democracies governed in accordance with the rule of law, fueled by a desire for international trade and economic growth. On March 2, 2001, the members of the Organization of African Unity ("OAU"), established in 1963 to rid the continent of colonialism, apartheid and foreign interference, voted unanimously to replace the OAU with the African Union ("AU") and focus efforts on the implementation of "democratic principles and institutions, popular participation and good governance" in order to achieve socioeconomic growth and foster international trade and investment.

The AU, modeled after the European Union, has established an Assembly, Executive Council and a Pan-African Parliament. It has also established financial institutions, and intends to create a permanent military force capable of intervening in internal conflicts of the 53 member states. (The AU has expressly abandoned the central belief of the OAU that other nations should not interfere with the internal affairs of their neighbors.) The AU has also created a Court of Justice to address human rights abuses. The AU has adopted two core programs: the Conference on Stability, Security, Development and Cooperation In Africa (CSSDCA) and the New Partnership for Africa’s Development (NEPAD). The CSSDCA is a policy development forum designed to forge common values among member states, as well as monitor and evaluate the implementation of collective decisions taken by the Union.19

NEPAD is a comprehensive action plan for socioeconomic development that emphasizes democracy and the rule of law as a means to end Africa’s marginalization, recognizing that sustainable development “is impossible in the absence of true democracy, respect for human rights, peace and good governance.” NEPAD includes a Democracy and Governance Initiative, which aims to strengthen the principles of democracy, transparency, accountability, integrity, respect for human rights, and the rule of law in participating countries through reforms targeting administrative and civil services, parliamentary oversight, participatory decision-making, corruption and embezzlement, and the justice system. AU member states that demonstrate progress in achieving these reforms will receive “partnerships” with foreign investors and governments that have pledged trade deals, debt relief and other forms of aid for such countries. On March 10, 2005, the AU officially adopted the peer review mechanism that will be used to evaluate the progress made by member states and determine which states qualify for partnerships under NEPAD.

NEPAD has been applauded by economists and African human rights and pro-democracy activists alike, who note, “For the first time, [the African leadership] acknowledges the fact that poor political leadership characterized by human rights violations, economic mismanagement, and corruption is the cause of the African problem.” NEPAD has also received widespread support from the international community and donor organizations. The ADB has already funded 17 NEPAD projects for a total of $200 million. The United Nations Development Program (“UNDP”) has promised $2 million. Last June, after NEPAD discussions with African leaders, the G-8 pledged an increase of $1,000 million in debt relief, and the Bush administration pledged to increase aid by $5,000 million annually. The EU committed to an increase of $7,000 million annually.

According to John Fraser of Trade and Industry, as of February 21, 2005, money for NEPAD projects greatly exceeded the supply, leaving a huge pool of funds unspent. Leaders of the G-8 explained the reason for the infusion of funds and renewed hope for Africa as follows: “NEPAD offers something different. It is a pledge by African leaders to consolidate democracy and sound economic management and promote peace and security. [African leaders] have formally undertaken to hold each other accountable and

have emphasized good governance and human rights as necessary preconditions for Africa’s recovery.”

The international community and the African leadership seem to agree that the solution to Africa’s major problems is the implementation of democracy and adherence to the rule of law by governments in Africa. The question is: what is the most effective way to assist African governments and the African people in their efforts to achieve true and lasting democracy.

There are dozens of democracy-related workshops, seminars, training programs, legislative reform efforts, and civil society programs currently underway in Africa. Africa-based examples include Kenya’s Institute for Education in Democracy (“IED”), which promotes democracy through voter education programs and research. In South Africa, the Institute for Democracy in South Africa (“IDASA”) promotes democracy in South Africa by building democratic institutions and advancing social justice. In Namibia, the Namibian Institute for Democracy (“NID”) conducts workshops and seminars designed to educate Namibians about the contents of the Namibian Constitution and principles and practices of multi-party democracy. Regional examples include the Soros Foundation’s Electoral Institute of Southern Africa (“EISA”). Located in Johannesburg, EISA supports and conducts research and training programs on free and fair elections.

In addition, the Soros Foundation has created the Open Society Initiative for West Africa (“OSIWA”). Based in Senegal with an office in Nigeria, OSIWA is dedicated to supporting the creation of open societies in West Africa and disburses $10 million in grants, annually, to initiatives relating to human rights, democracy and good governance, media and technology, legal reform and HIV/AIDS. Other programs include the Center for Democracy and Development (“CDD”), a London-based research, information and training institute, with offices in Abuja and Lagos, which runs capacity building training programs for leaders of civil society institutions and local legislators. CDD is planning to set up a permanent training and conference center in Nigeria to provide research, training and skills development for policy makers and civic leaders in West Africa, at an estimated cost of $2 million. The training will focus on gender development, environmental conservation, democracy, good governance, human rights and security. Also based in London, Justice Africa initiates and supports civil society activities for human rights, democracy and peace in Africa and works with a network of organizations based in various countries in Africa, such as the Horn of Africa Peace Center, the Committee for Civil Projects in Sudan, and Citizens for Peace in Eritrea.

Recent U.S. initiatives include Freedom House’s journalist-training workshops in Nigeria, legislative reforms in Morocco, and the Community of Democracies. The National Democratic Institute (“NDI”) for International Affairs and The International Republican Institute (“IRI”) both provide practical assistance to civic and political leaders in Africa engaged in advancing democratic values, practices and institutions. Recent examples include work with Ugandan officials on legislative reform and the creation of political parties.
The existing democracy and rule of law projects are essential and have made significant progress towards democratic reform in African nations. However, the educational foundation upon which ownership and sustainability depend must also be provided. There is a tremendous need for a permanent educational facility devoted to teaching Africans the underlying principles and essential components of "democracy" and "the rule of law." Only by understanding these principles will Africans be able to understand how and why democracy works, and the programs and reforms that are needed to create and sustain liberal democracies in the African political landscape.

Through this education, it is hoped that future leaders of Africa will be better equipped to implement the drastic reforms that are so desperately needed, and that all Africans will have a better understanding of what to expect from their democracies and their role in the process.

As noted by Thomas Carothers of the Carnegie Endowment, and author of several books on democracy, including Aiding Democracy Abroad, the pattern of democracy and rule of law projects to date has been "an institutional checklist or template that they can pursue through a series of specific aid initiatives . . . . As rule of law providers seek to affect the rule of law in a country, it is not clear if they should focus on institution-building or instead try to intervene in ways that would affect how citizens understand, etc. and value law." "[A]id providers should not presume change will naturally occur once institutions are introduced in the right way of doing things." Carothers also noted that although programs are often directed at reforming institutions and organizations, the "greatest impact [is] the transmission of ideas that will change people's behavior in other settings at other times."

The key is to create a deep understanding of democracy and the rule of law among African leaders and citizens, so that Africans may envision a goal that is understood and desired by them, rather than one that they do not fully understand, but have accepted due to external influences and pressures, even those well intentioned. Education will ensure ownership of the goal and the programs that follow and will foster an in-depth and educated analysis of the application of these concepts within the African context. The existing democracy and rule of law projects are essential and have made significant progress towards democratic reform. However, the educational foundation for democracy must also be provided in order to ensure ownership and sustainability.

II. Concept – African Institute for Democracy

The political will of the AU, the resounding support it has received, and the existing African-led initiatives for democratic reform combined present a unique opportunity to create such an educational institution. The authors propose the creation of the African Institute for Democracy – a permanent educational facility created under the auspices of the AU, located in Africa, and dedicated exclusively to the goal of teaching Africans the principles of democracy and the rule of law and how to apply these principles in the African context. The Institute would be open to all citizens of African nations, but would specifically target students (graduate, law and university level), government officials, those interested in government service in Africa, press and media.
groups, labor organizations, and local non-governmental organizations ("NGOs"). The Institute would provide a one-year master's degree program, as well as seminars and short courses, the completion of which would provide students with course credits at other universities and educational institutions. The Institute could also include a training and technical assistance program to assist participants in country-specific assessments and the design, development, and implementation of democratic systems, institutions and programs.

There are a handful of democracy education programs currently underway. For example, the Pretoria Good Governance Academy offers a 2-week course on good governance each July, and offers a series of 2-week courses throughout the year on a variety of more specialized topics, focusing on the current needs of Southern Africa. Other programs include New School University’s Trans-regional Center for Democratic Studies, which runs a 3-week Democracy and Diversity Graduate program lecture series in a different region of the world each year. The Hague Academy also offers an 8-week class on “governance, democratization and public policy,” conducted on campus at the Academy.

The Institute proposed will not compete with these facilities. To the contrary, it will complement these efforts by providing Africans who may want to attend international and regional programs and seminars on advanced topics and current events with the educational foundation they need to understand and benefit from such programs. Further, the Institute could serve as a hub for international programs, sharing lecturers, materials, and assisting with recruitment. In addition, unlike the other facilities, the Institute proposed would have the following characteristics: (1) continent-wide and open to all Africans; (2) permanently based in an African country; (3) administered under the auspices of the AU in connection with member state obligations under NEPAD (which is based on the belief that development is impossible without democracy and rule of law); and (4) it will focus on long-term intensive educational programs on the fundamentals and practical application of democracy and the rule of law in the political context and history of Africa.

A. The design of the Institute

The authors propose that a Board be formed to design the Institute and its programs and course offerings. The Board should be multinational and include an array of experts in the fields of democracy and the rule of law, political science, economics, and African history. The Board should include legal scholars, professors, government officials from well established democracies, and experts who have been directly involved in the formation and implementation of newly formed democracies. The Board should also include representatives from the AU, university administrators, and representatives from the Association of African Universities. The AAU, with a membership representing 34 universities throughout Africa, was established in 1967 to promote cooperation among African universities and create international opportunities and networks. The AAU could prove essential for recruitment, scholarships, the provision of course credit for summer and semester programs, and the design and implementation of the master’s degree.
program. In addition, the AU could provide connections to lecturers, course materials, country-specific information, networks and facilities for in-country training programs and facilities, NGOs, and could create exchange programs for graduates of the Democracy Institute who want to study and/or lecture at other educational facilities in Africa and abroad.  

The Institute will not succeed in its mission unless African governments and universities support it, and that support will come only if the AU agrees that the Institute is needed and is asked to participate in the design. AU participation will ensure that the Institute is viewed as a legitimate and valuable, if not essential, educational institution and resource for African government officials, students and citizens alike. This will ensure widespread publicity and participation and the development of recruitment programs. It will also ensure that participants receive course credit for their work at the Institute and that the degree program becomes as desirable as a year of study abroad. Moreover, direct input from Africans for an African-based project that is intended to assist and specifically target Africans is essential in order to fully understand the educational needs of the target group and the programs that would make the most sense, logistically and theoretically. Additionally, NEPAD and other funding may be available only through association with the AU.

The authors also suggest that the Board seek input on course offerings and program design from African journalists, university professors, students, human rights activists, and employees of non-governmental organizations. The U.S. Peace Corps could be of some assistance in this regard since they typically hire well-educated Africans for mid-level permanent staff positions and have information on various groups within host countries. This input may prove useful in the Board’s assessment of country-specific needs.

There are dozens of educational facilities that the Board might use as models for the structure of the Institute. For example, the Judge Advocate General (“JAG”) School provides specialized instruction in legal theory and practice to new judge advocates and paralegals. With a staff of 34 full-time faculty, 23 part-time faculty and 30 adjuncts, the JAG School offers 60 separate classes each year on site to 4,500 students and 30-40 classes off-site to another 3,500 students. The JAG School also conducts continuing legal education courses, which are highly specialized courses on advanced topics; JAG school scholars and students contribute to and publish legal periodicals; and the school hosts workshops, symposia, and other special events throughout the year. Its training programs reach approximately 8,000 students per year. Its most extensive program provides a Master of Laws (LLM) degree. Recently, the National Advocacy Center run by the Department of Justice has copied the basic structure of the JAG School in its Center in Columbia, South Carolina.

30 Possible Board members include Mark Palmer, Max Kaapetman, Thomas Carothers, A.E. Dick Howard, Francis Deng, representative from the AU, African and international university professors and scholars of democracy, representatives from Freedom House, NED, NDJ, and IRI.
The Hague Academy of International Law, in operation since 1923, is another potential model. The Hague Academy was founded with the Carnegie Endowment, and is a center for education in public and private international law. Its goal is to facilitate the in-depth, impartial examination of international legal issues and to teach international law as a way to improve the possibilities for peace and international cooperation. The Hague Academy has three main programs: a three-week summer course; a research center; and an external program, which is a two-week course session organized on alternating non-European continents, aimed at young educators, diplomats, magistrates and government employees of a particular region.

By way of illustration only, program ideas for the Institute include: (1) a one year master's degree in democracy and the rule of law designed similar to the IAG School program, with a core curriculum and electives, including country-specific courses with an emphasis on practical application; (2) a semester program designed for university

2 The following course topics provide an example of possible course offerings for the Institute. These are illustrative only and in no way indicative of the curriculum or any particular course to be taught at the proposed African Institute for Democracy: (1) The fundamentals — courses on political science and the evolution of democracy; The Purpose of Law and Government and the Importance of Human Freedom and Dignity; Competing Political Theories: Old and New Thinking; Early Democracies and the Evolution of Democracy and the Rule of Law; Relying Upon Examples From Early Forms of Democracy in Pre-Colonial Africa; Evidence in Support of Democracy and the Rule of Law as the Best Form of Governance (including statistical evidence of the benefits of democracy and a detailed analysis of the "Democratic Peace"); Why Democracy Works; Case Studies of Successful Democracies; Case Studies of Non-Democracies, Consequences for Non-Democracies & The Costs of Extreme Government Failure; (2) Courses on government and politics in Africa: Political Theory & Governance in Pre-Colonial Africa; Government Failure Theory (from the insights of the Nobel Prize in Economics); Governance in Colonial Africa; The Independence of Africa and Resulting Regimes — Who Rose to Power, How, and Why; Analysis of the Post-Colonial Political Landscape of Africa — Lack of Democracy & its Effects, to include: evidence of the need for democracy and the rule of law in Africa; detailed analysis of conflicts in Africa and causal relationship to lack of democracy and rule of law; Freedom House’s freedom scale for Africa and the correlation between democracy and socioeconomic development and respect for human rights; and an analysis of efforts to achieve democracy in Africa since the 1960s — successes and failures; (3) Courses on how to transition African nations into liberal democracies: Creating a Liberal Democracy Governed by the Rule of Law; Federalism and Local Governments; Limited Government, the Judiciary, and Checks and Balances; One-party Systems Versus Multi-party Systems; The Difference Between Liberal Democracies and Electoral Democracies; Free Elections and the Value of Political Freedom; Electing Competent Leaders and the Value of an Informed Electorate; The Essential Components of a Free and Independent Press; Enabling Trade Unions and Protecting Labor; The Benefits of Economic Freedom; Economics (Basic Offerings): Value of Protecting Individual Rights and the Need for Laws To Prevent Government from Encroaching on Those Rights; Free Speech and Freedom of Association; Value of an Informed Electorate; Combating Corruption (with Statistics From Transparency International); Case Studies of Newly Formed Democracies (including an analysis of the government structure and assistance provided in former Yugoslavia, East Timor, Afghanistan, Iraq); Building Upon Efforts at Democracy in Africa — Lessons Learned and Where to Go From Here; Reliance Upon the Global Evolution of Democracy, The Copenhagen Document — Analysis of the Internationalization of Democracy, Information Regarding Development and Financial Institutions and Organizations That Assist Governments in Efforts to Implement Democracy and the Rule of Law (including a contact list for country specific, as well as regional, continental and global institutions and networks for financing, program development and technical assistance); Explanation of the Mandate of the African Union & NEPAD & How These Organizations Can Assist National Efforts to Establish Democracy and the Rule of Law; Impact of Economic Freedom, Accountability, and Transparency on International Trade; Protection of Assets and Resources for the Public; Negotiating Resources with Foreign Investors.
students, offering externship credit at participating African universities; (3) a 3-4 week intensive short course offered two to three times during the year, targeting specific groups, such as AU representatives, NEPAD peer review committees, staff members, etc., parliaments, lawyers, journalists, NGO managers, etc; the courses would be open to anyone, and university students would receive appropriate course credit at participating universities; (4) a series of workshops, special events and guest lecturers throughout the year to cover advanced topics, country-specific issues, current events and practical application or ‘how to’ seminars – seminars and conferences could also be conducted in various countries throughout Africa; (5) a training and technical assistance program – African government officials (or perhaps graduates only) would be invited to contact the Institute at any time to request technical assistance in conducting country-specific assessments and designing and implementing democratic reforms. The Institute would rely on its international network of consultants, associates from existing African programs, government officials and non-governmental organizations to provide the technical assistance requested; and (6) a foreign exchange program – the Institute will develop relations with major universities and democratic institutions that will offer scholarships and fellowships to the Institute’s graduates.

There is a huge pool of potential lecturers. Resources the Board might consider tapping into include Freedom House’s Community of Democracies, the Hague Academy and other schools and programs where democracy and rule of law concepts are taught, scholars and professors of democracy from law schools and universities in democratic nations and from countries in Africa, experts from organizations involved in nation-building efforts, government officials from democratic nations, etc.

III. Project Partners

Freedom House conducts an array of U.S. and overseas research, advocacy education, and training initiatives that promote human rights, democracy, free markets, trade unions, the rule of law and a vital and independent media. We recommend that Freedom House undertake the role of initiating and administering the African Institute for Democracy in partnership with the AU, tying into NEPAD programs and funding. It may also be useful to associate with other organizations such as the World Bank, the United Nations, the European Union, the National Endowment for Democracy, the Peace Corps, the United States Institute of Peace, the Westminster Foundation, the African Development Program of the Department of Commerce, the National Democratic and Republican Institutes, and a number of the NGOs and educational facilities currently running democratic reform programs in Africa.

IV. Possible Donors & Funding Concepts

USAID; NDI; IRI; National Endowment for Democracy (“NED”); U.S. State Department; EU; UNDP; NEPAD; World Bank; African Development Bank; Central Bank of West African States; International Monetary Fund; European Bank for Reconstruction and Development; European Central Bank; International Bureau of Education; International Monetary Fund; Organization for Economic Co-operation and
Development; World Trade Organization; International Center for Human Rights and Democracy Development (Canadian); Swedish International Liberal Center; African Governments in the AU, especially those with earmarked donor money; private foundations & permanent endowments such as the Westminster Foundation for Democracy (Great Britain); Foundation Jean Jaures (France); Alfred Mozer Foundation (Netherlands); Foundation Robert Schuman (France); Soros Foundation (OSFA) disburses $10 million in grants to initiatives relating to human rights, democracy and good governance, and is currently considering democracy and governance projects submitted in connection with NEPAD; governments, especially those with well established democracies that could possibly enter into partnerships to provide lecturers, technical assistance, scholarships and fellowships.

The following list of funders provided substantial assistance to the African democratic reform programs noted:


One possible concept for funding might be to approach USAID on a $50 million project over ten years. The Judge Advocate General School currently runs its many programs reaching approximately 8,000 students per year on a budget of approximately $14 million. As such, we believe that an excellent program could be offered in Africa for approximately $10 million per year. Since we want to create a permanent high quality Institute, rather than one dependent on year to year funding efforts, perhaps we could suggest that the initial outside budget would be $10 million for the first year, decreasing by one million per year over the next ten years while the AU begins funding at $1 million per year in year two of the program, increasing by one million per year. At the end of the decade the program would be fully in AU hands, with respect to funding (or some other appropriate governmental entity or combination) with no more funding from the Freedom
House secured initial funding. This would be a ten-year cost of $50 million for the initial grant. In the alternative, of course, the Institute could begin on a scaled down basis with a smaller permanent budget, or scale up the budget as the programs kick in. Another possibility might be a permanent endowment (the Soros Foundation).

V. Project Location

The authors propose that the Board select a stable democratic nation in Africa that will allow for permanence of the Institute and the safety and security for international scholars, leaders and participants. The country selected should also have a well-respected University that includes a law program. This narrows the field tremendously. It may make sense for the Board to short list 3 countries, and have those countries submit proposals, to include a list of the support that would be provided by the host country, such as university lecture halls, access to resources such as libraries, computers, internet services, accommodation for lecturers and participants, transportation, cafeteria services, etc. The authors suggest considering Botswana, Namibia, and South Africa. They are each good examples of democracy in Africa, and received favorable ratings on Freedom House’s scale for the year ending 2002. (“The “free” countries in Africa are Botswana, Namibia, South Africa, Mali, Benin, and Ghana, and the islands of Mauritius, Cape Verde, and Sau Tome & Principe.) In addition, on Transparency International’s corruption index for 2002, Botswana, Namibia and South Africa were the least corrupt African nations. Botswana scored the highest with a 6.4. Namibia scored a 5.7 and South Africa received a 4.8. Further, they each have at least one major university and a law school.

The institute will generate income in a variety of forms for the host country, including a tremendous boost in tourism and investment in private industry and government due to the promise of increased stability and improvements in democracy and the rule of law. For this reason, it may make sense to provide special consideration to a country that has untapped resources and potential for development. In addition, the international exposure could assist a newly formed democracy in its efforts to achieve a liberal democracy, while providing an excellent case study for the Institute’s lecturers and participants, including a pool of guest speakers. Further, such a country would have incentive to work hard to assist, develop and protect the Institute and its credibility.

The authors have ties to Namibia. John Norton Moore was involved in the drafting of Namibia’s Constitution (which actually includes a provision relating to higher education). Fern Holland was a U.S. Peace Corps volunteer in Namibia. She worked on legal aid projects there and organized programs involving the Ministry of Education. Both of the authors have met and worked with numerous Namibian government officials, including President Sam Nujoma. Many of these ties remain and would be of great assistance in getting this project off the ground. Moreover, Namibia’s elections are in 2004, and this may be the boost it needs to ensure free and fair elections and that democracy in Namibia holds firm. In addition, Namibia provides an excellent case study that will also allow for guest speakers from the Ministry and will provide material for sessions on lessons learned, problems encountered, etc.
Furthermore, Namibia gained its independence in 1990, and is an excellent example of what can be achieved through implementation of democracy and the rule of law in Africa. According to a recent USAID report on Namibia, Namibia has one of the most liberal constitutions in the world. It has 3 branches of government: executive, legislative and judicial. The president is both head of state and commander in chief and is elected directly by the people. Namibia’s judiciary is independent and, according to USAID, generally respects the rule of law. Namibia also has a free and open media with both public and private sectors involved in print and radio. Television has been government owned, but an independent station was recently launched. In addition, multiple USAID and NGO development projects are currently underway in the areas of democracy and governance, including programs designed to increase accountability and decrease corruption through media coverage of events in parliament, on-site and unedited live broadcasts from parliament, websites that include pending legislation and minutes from committee meetings and parliament debates, as well as the biographies of legislators, legislative review committees have been established, public hearings on bills are routinely held, NGO capacity building programs are underway, and bill summaries are being drafted and distributed by NGOs.

Further, the university has many programs that would compliment the Institute. For example, Namibia’s Human Rights and Documentation Center (“HRDC”, affiliated with the University of Namibia), in conjunction with Human Rights Internet (a Canadian initiative) created a website for research and educational materials related to human rights and democracy in Southern Africa. The goal is to create a network of universities, NGOs, Institutes, and other interested parties who are engaged in democratic reform and research. In addition, the Friedrich Ebert Stiftung (“FES”), established in 1925, a German foundation in Windhoek that assists with the transformation process through programs on democratization, local government, women’s rights, and institution building, could be relied upon as a funding source and for project development.

VI. Recommended Action Plan

- Initial Exploratory Approval by Freedom House Board
- Staff development of full proposal for consideration by the Board
- Freedom House Board Approval of the revised concept subject to obtaining funding
- Preliminary coordination with the Department of State, AID, and other potential associated entities or funders
- Assemble board of advisors to assist with the design of courses and programs for the Institute and with preliminary exploratory steps
- Meet with representatives from the AU to discuss the Institute, seek approval on the concept, and obtain input on the design
- Explore through the AU a competition among African countries for the location of the Institute, or, in the alternative

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22 USAID-Namibia, Program Overview, 16 September 2002.
• Obtain preliminary country approval of the host country (subject to obtaining funding) [Note: possibly this step should proceed the approach to the AU if it is initially decided, for example, that the Institute should be located in a particular country such as Namibia.]

• Select representatives to actively participate on the design of the Institute, and find out how to recruit participants, organize funding for the Institute and scholarships and fellowships, ensure participants receive course credit at African universities, and discuss requirements for master’s degree that will be of value to participants

• Proceed to funding submission

• Establishment (this could be in full or in stages)