A JOURNAL OF THE FOUNDATION FOR THE U.S. CONSTITUTION

CONSTITUTION

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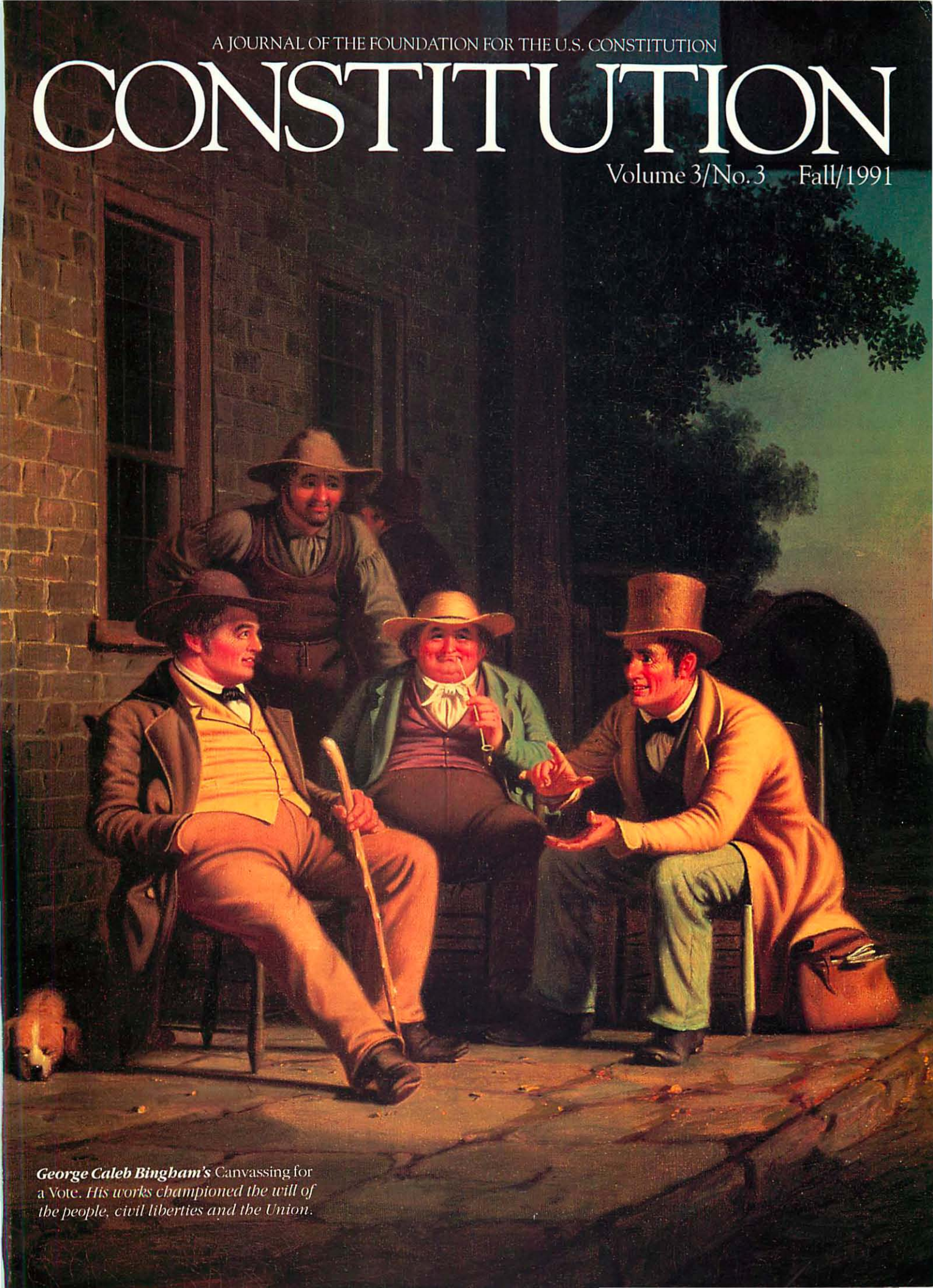

George Caleb Bingham's Canvassing for a Vote. *His works championed the will of the people, civil liberties and the Union.*

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CONSTITUTION

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DETERMINATION

To be the best: it isn't a matter of minutes; it's a matter of attitude. That's why winners never quit. Because whether the goal is a high school diploma, a world record, or simply making it to the finish line, our only real limitation is the drive inside us. We have America's word.

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Preamble

A letter from the Chairman of the Foundation for the U.S. Constitution

Two hundred and four years ago this September, the delegates to the Constitutional Convention finished writing their great charter and presented it to the states for ratification. The nation they created has been celebrating this tremendous achievement for almost five years, a long time, to be sure, but hardly long enough to sum up or honor the work those men did in five short months.

Officially, the celebration of the Constitution's bicentennial ends this December, when the commission established by Congress and headed by former Chief Justice Warren E. Burger expires. The commission has been notably successful. Working chiefly with fourth grade through high school teachers and students from around the country, it has inaugurated a dramatic expansion of awareness of the Constitution and the role it plays in our everyday life.

Cynthia Johnson/TIME Magazine

Bicentennial Commission Chairman Warren E. Burger

History too played a part in creating this heightened awareness, which is worldwide. The last half decade has seen courageous efforts by the people of Eastern Europe and the Soviet Union to find new ways of governing; a priority was establishing constitutional guarantees and procedures that would be inalienable—beyond law and immune to legal curtailment. The celebration of our Constitution's bicentennial helped foreign lawmakers recognize that constitutional democracy has universal attraction. That attraction may prove of cardinal importance as new governments develop in the months and years to come. For the part they played in creating this perception, the Bicentennial Commission and its chairman have earned our strong vote of thanks. The Foundation for the United States Constitution, created as a permanent educational trust, will continue to further the commission's goals. A key aspect of the foundation's work is publishing CONSTITUTION, which is received by more than 60,000 individuals, schools and libraries in the United States and overseas.

* * *

In this issue three articles and one book review deal with the role of the press and efforts to control—or in one case, silence—it. The press is never very popular; pollsters regularly report that the public ranks journalists a little higher than real estate agents and stockbrokers but beneath funeral directors. Yet the free press and the First Amendment that protects it are among the chief glories of our country. Let doubters try to name one country where the press has been successfully fettered in which government functions half as efficiently—let alone half as beneficently—as in our own. James Madison summed up the case for the press in 1799 when he wrote, "To the press alone, chequered as it is with abuses, the world is indebted for all the triumphs, which have been gained by reason and humanity over error and oppression."

Dwayne O. Andreas

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At 45, Ken Starr has already served stints as a judge on a circuit court of appeals and as a clerk for Warren E. Burger.

The Government's Advocate

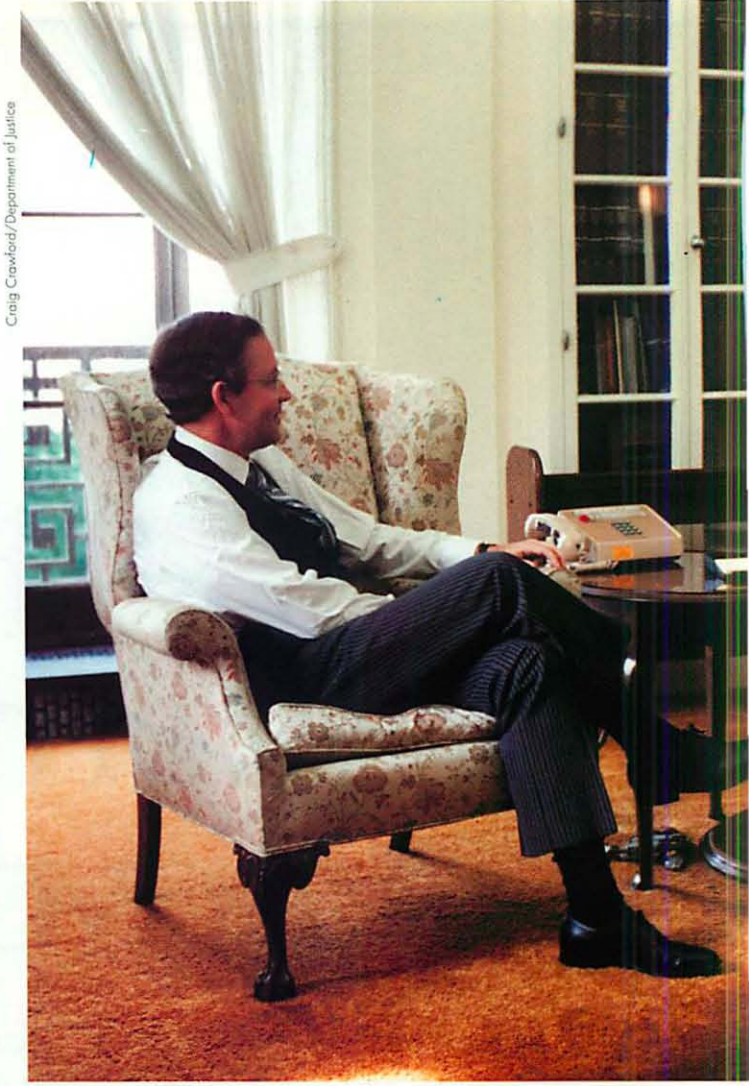
As solicitor general, Kenneth W. Starr argues the government's case before the Supreme Court and advises the Court on everything from abortion to defendants' rights.

by Andrea Sachs

Kenneth W. Starr, the solicitor general of the United States, has not one but two spacious Washington offices, one in the Supreme Court building, just steps away from the courtroom, and another ten blocks away in the Justice Department, an Art Deco suite with 24-foot-high ceilings and a view of Capitol Hill. An executive-branch official (he ranks third at Justice, behind the attorney general and the deputy attorney general), the solicitor general also serves as a legal counselor to the Supreme Court. His is an important and complex job, not provided for in the Constitution; created, in fact, only in 1870 under President Ulysses S. Grant. That two large offices are allotted the solicitor general says a good deal about the job: both his chief clients tend to view him as their employee. Tensions are built into the post. Where do the loyalties of the SG properly lie, with the executive branch or the judicial?

In recent years, that question has made the job of solicitor general (and the personalities of the men who have held it) the focus of a good deal of controversy. More specifically, during the presidency of Ronald Reagan, many observers thought the solicitor general became nothing less than an instrument for imposing Reagan's conservative political agenda on the nation's legal system. Is that inappropriate? No, say conservatives like constitutional expert Bruce Fein, a lawyer who has served in government and is now in private practice. Fein, who believes the solicitor general is the President's advocate, says, "It would violate the separation of powers if the judiciary were able to control, directly or indirectly, what litigating positions are taken by the executive branch. This 'tension' has been largely invented by bureaucrats who like to think that they're not beholden to the electoral process like other officials are in the administration."

Other observers, such as Lincoln Caplan, author of *The Tenth Justice,* view the question differently. As the title of his book suggests, Caplan sees the solicitor general as the 10th Justice, a lawyer with special obligations to the Supreme Court. Says Caplan: "To observers of the SG's office who hold to the belief that the law can have a reassuring sense of continuity despite its



Craig Crawford/Department of Justice

Wearing striped trousers, traditional for a Court appearance,

contradictions, a measure of stability that contributes to social order, and an integrity provided by, among other things, the careful practice of legal reasoning, a significant way to work toward maintaining those qualities is by preserving an appropriate measure of independence for the solicitor general. Such independence represents an expression of faith in the idealized political neutrality of his office."

Congress created the office of the solicitor general 121 years ago, at the same time that it authorized the Department of Justice. Until the mid-19th century the job of attorney general was only part-time, and the government's civil suits were managed by a solicitor in the Treasury Department with the help of private attorneys. A joint congressional committee recommended establishment of a cabinet department to save on fees paid to private attorneys and decreed that "there shall be an officer learned in the law" to assist the attorney general. This was a requirement the founders had omitted in providing for the Supreme Court, whose members need not even be lawyers.

The solicitor general has myriad responsibilities. He is authorized to conduct and argue any case in which the United States has an interest, either as a party or a friend of the Court. No appeal may be made by the government to any appellate court without the SG's consent. The SG enjoys considerable freedom in deciding which cases to appeal to the Supreme Court, and each term he is apt personally to argue the most important cases. While the Supreme Court alone decides which cases it will hear of those that are presented to it, the SG sets the Supreme Court's agenda to some degree because he determines which federal cases reach the Justices. In addition, the Court often seeks his assistance in briefing it on difficult cases in which the government is not a party.

The first man to occupy the post was Ku Klux Klan fighter Benjamin H. Bristow; there have been only 38 solicitors general since. One, William Howard Taft, went on to be President and later served as Chief Justice. Three others—Stanley F. Reed, Robert H. Jackson and Thurgood Marshall (see box, p. 10)—have also served on the Court. Jackson, moreover, was chosen by President Harry S Truman to exercise his prosecutorial skills at the Nuremberg War Crimes Trials in 1946. A fifth, Robert H. Bork, was nominated for the Court but was rejected by the Senate. Says Erwin Griswold, who at 87 is the senior living solicitor general: "It is the best legal job in the executive branch of government."

Ken Starr was named solicitor general by President George Bush in 1989. Many observers believe his appointment was evidence that the new administration wanted to depoliticize an office that, under President Reagan, had become too partisan. Says Burt Neuborne, a professor of law at New York University law school: "The SG now has to be both a principled voice of reason in the Court and the lightning rod for the President's political views, and he has to balance those two roles. Starr, it seems to me, does a pretty good job of balancing them. I think he reflects a lessening of the ideological fervor that existed under the Reagan administration. He's more pragmatic and centrist." But, says Neuborne, "we're never again going to have a period when the SG's office is not politicized. It's too important. If some miracle happens, and the Democrats get back into power nationally, my assumption is that they will politicize the office in exactly the same way."

Just 45, Starr has moved gracefully but quickly up the ladder of legal success. Former law clerk to Chief Justice Warren Burger, counselor to Attorney General William French Smith, and a court of appeals judge appointed by President Reagan, he has an impeccable conservative record. Says Fein, who served with Starr at Justice: "If you examine Ken's court decisions, and the advocacy he's laid out for the U.S. Supreme Court, they basically echo those conservative doctrines that are a hallmark of Justice Antonin Scalia. They carry that note of caution about having judges quickly slide into concluding that something is unconstitutional because they don't think it's wise policy."

Starr meets with his boss, Attorney General Dick Thornburgh.

Starr's future prospects seem bright. By all accounts he is on Bush's short list for a position on the Supreme Court. Even when it seemed unlikely that a white male would be named to succeed Justice Thurgood Marshall after his retirement, Starr's name popped up with regularity. While professing contentment with the job he has —and a willingness to return to coaching Little League teams when his services at Justice or on the bench are no longer required—Starr is careful to say little about his judicial philosophy or his views of issues that might complicate any confirmation hearings in his future. In successive interviews he declined to discuss his personal opinions on topics ranging from abortion to the conservative tendencies of the present Supreme Court.

If he is eventually named to the Court, Starr's legal credentials will not be in doubt. In his two years as SG, he has argued 13 cases before the Court, winning 10. Traditionally, the SG's success rate is high, since the government picks its cases carefully. Starr has kept up that record. In the 1989-90 term, the SG's office won 60 cases and lost 27 in which it was a party or an amicus. In the last term, which ended in June, Starr won the most controversial case, *Rust v. Sullivan*. The Court, following his argument, upheld by a 5-to-4 vote regulations barring family-planning clinics that receive federal funds from discussing abortion. In another major victory, *Bostick v. Florida,* Starr convinced the Court that police may approach bus passengers at random and, with no warrant, obtain permission to search their luggage for drugs. Starr also won a major victory in *Chisom v. Roemer,* where the Court ruled that the Voting Rights Act of 1965 as amended in 1982 applied to elections of judges. It was one of the few instances in which the administration came down on the liberal side of a civil-rights issue, and the victory seems likely to lead to the election of more minority judges, especially in the South. Starr argued the case before the Court last April. Wearing the traditional uniform of the solicitor general—morning coat, vest and striped trousers—he fielded questions from the Justices in a soft, yet confident voice. John Dunne, head of the civil-rights division of the Justice Department, describes Starr's courtroom style as "very deferential and respectful, with an element of the professor to it. Without pontificating, he is very good at teaching." Dunne's is a fair portrait. More than anything else, what comes across when one watches Starr in action is the impression of a scholar at work. He is not a theatrical litigator in the mold of Alan Dershowitz but a quietly effective advocate for the administration's point of view.

Ken Starr grew up in Texas, far from the world of high-wire litigation. The son of a protestant minister in the little northern town of Thalia, Starr moved with his family to San Antonio when he was in the third grade, and attended high school there. "The household was deeply religious," Starr recalls. "It was not that there were a lot of outward manifestations of piety so much as that the household was mindful of what T.S. Eliot called the permanent things. And it put the things of the world in a healthy perspective. The ups and downs of life should be viewed as less important than those with a more secular viewpoint would consider them."

Notwithstanding the religious atmosphere prevailing at home, Starr was fascinated early on by the worldly arena of politics. "My earliest recollections are of the Nixon-Kennedy election of 1960. I was in junior high school, active in student government. It became evident that my life's ambition of playing second base for the Cleveland Indians was going to be dashed and that I needed to find some other outlet for a high energy level, so I became increasingly interested in politics and national affairs. I became active in campus politics and ran for office. I was president of my junior and senior classes at high school."

Starr's instincts were Republican from the outset. He identified closely with the austere background of Richard Nixon. "I was intrigued by Kennedy," he recalls, "because he was viewed as a very attractive person. But I really identified with Nixon because of his rather humble roots and the way he worked his way up. He was not born with the proverbial silver spoon, and he wasn't

George Duke/Department of Justice

The solicitor general greets his ex-boss, former Supreme Court Chief Justice Warren E. Burger, at a gathering in Washington.

educated at Harvard. That was something I strongly related to. I think many people, at least now, a generation later, find it difficult to understand how people related to Nixon favorably, but I had a sense of his substance as a person and what he had accomplished given his limited horizons as a child. I admired that greatly. I thought that was very much an American dream."

After graduating from George Washington University, Starr was torn between going on to law school and doing graduate work in political science, which had been his undergraduate major. The decision was ultimately an economic one: scholarship aid was available for political science but not for law. "I went to Brown in a Ph.D. program in political science. It was my intention to get a doctorate, then return to Texas and become involved in politics and run for office. In those days, before television became vital in political elections at the state level, there were a lot of thoughtful, able academics serving in the Senate on both sides of the aisle. I admired senators like Mike Mansfield, Gale McGee and John Tower, who came from my home state. Politically, I related more to Tower, but I had a high regard for those men who had spent either part or virtually all of their prepolitical career in the academy."

After receiving his master's degree in 1969, Starr changed course and decided to go to law school. "As much as I loved Brown as an institution, I did not like the direction of political science at that time. I saw that to achieve success in the profession, I would end up doing things I would not find particularly satisfying," he says. So Starr, by then married, enrolled at Duke University law school. He made the law review and received all A's, with the exception of "one unfortunate C in property—a grade I don't understand to this day."

In 1973 Starr went from law school to clerk for a year for Judge David Dyer on the Fifth Circuit Court of Appeals, then in Miami. Before beginning his clerkship, he took the bar exam in California and was accepted as an associate at the Los Angeles law firm of Gibson, Dunn & Crutcher. At the end of his year with Judge Dyer, Starr consulted him about the possibility of a Supreme Court clerkship. Says Starr: "I told Judge Dyer, 'I didn't go to Harvard; I didn't go to Yale. There's not a long tradition of Duke clerks going to the Supreme Court, but I would at least like to give it a try.' Judge Dyer was encouraging. I ended up having interviews with Justices Lewis F. Powell and William H. Rehnquist and the then Chief Justice, Warren Burger. I was chosen by the Chief to begin a year later, in the fall of 1975." In the meantime, Starr returned to California to work in the litigation department at Gibson, Dunn. With the firm's blessing, he then went to Washington to clerk for Burger.

The pace at the Supreme Court was much stiffer than that at the circuit court. "Here one was dealing in each case with nine Justices. That was difficult. And many of the cases were more difficult. I recall vividly a sense of despair when I began working at the Court and taking full time to do my memos for the cert pool [clerks' memoranda recommending whether or not the Court should give a full hearing to a case]. I thought, 'How am I ever going to have time to prepare bench memoranda [prehearing memos for a Justice before oral arguments] for the Chief Justice? How am I going to have time to work with him on drafts of opinions?' In October, when the beginning of the Court term rolls around, one learns to adjust."

Working at the Supreme Court was a 12-hour-a-day job, six days a week. In a tribute to Burger that appeared in the *Harvard Law Review* in 1987, Starr recalled his life there. "I remember Saturdays best of all," he wrote. "Saturdays were a common day for sitting down with the Chief to work on opinions. He took a direct hand in this work, even at a time when Justices without administrative responsibilities were increasingly required by the [heavy] caseload to have clerks produce the initial drafts. He insisted, wisely, on shaping the opinion at the outset, with his own ideas set forth in a memorandum or draft addressing the core issues of the case. We frequently had the benefit of what he called his 'thoughts while shaving,' which were, more precisely, his continuing reflections on a case or issue as the days wore on."

In 1977, after two years with Burger, Starr returned to Gibson, Dunn, this time to its Washington office. While working for the firm in California, he had become acquainted with senior partner William French Smith, whom Reagan later named attorney general. Two weeks after the election of 1980, Starr got a message to call Smith. "I want you to do a couple of things in Washington," Smith announced. On Christmas Eve, he asked Starr to join him at the Justice Department as counselor to the attorney


George Duke/Department of Justice

Starr with former solicitor general Robert H. Bork, whose nomination for a seat on the Court was rejected by the Senate.

general and chief of staff. "In practice," says Starr, "this meant I was a personal adviser to him, and that I spent an enormous amount of time with him. I was also the doorkeeper and the paper-flow person. And I administered his staff, which was 40 people or so. I worked on anything that the attorney general was working on."

From his position as a Department of Justice insider, Starr built a reputation for himself as one of the leading architects of the Reagan legal agenda, especially in the areas of criminal law and civil rights. As counselor to the attorney general, he helped implement the President's policies limiting defendants' rights and against school busing and affirmative action. Another of Starr's duties was to identify prospects for the Supreme Court. "Bill asked me to lead a confidential internal effort to identify a set of candidates for the Court. He did not tell me that [Associate Justice] Potter Stewart had indicated informally his intention to resign. Once it became clear from the attorney general's discussions with the President that Mr. Reagan viewed his statements during the campaign about the appointment of a woman to the Court as a moral commitment, we turned our focus to the women we had identified. It was the attorney general who gave me Judge Sandra Day O'Connor's name. He did not tell me where he got it. In case there was a vacancy, we wanted to be ready to go."

O'Connor was highly thought of by people such as Solicitor General Rex Lee and William Webster, who went on to become Reagan's FBI director and, later, director of the CIA. She was unknown to the press and the public, and she had been sitting on a state appellate court only a short time. But her opinions and background contained nothing damaging to her prospects. Starr and another Justice Department official flew out to Arizona and met with O'Connor at her home on a Saturday. "I recall being deeply impressed with her knowledge of federal law and especially constitutional law. She was an admirably articulate person of obviously high intelligence." Starr arranged for O'Connor to meet with his boss at the Jefferson Hotel in Washington, and the attorney general was equally impressed. Judge O'Connor's historic appointment was just a matter of time.

By the early 1980s Starr's interest in running for an elected position had waned. "I changed my career ambitions along the way," he says. "The experience of law school, of working for Judge Dyer and of seeing the direction of American politics, with the growing importance of money and fund raising, made the avenue of elective politics less attractive. And I had found something satisfying in the law. Public service through law ended up being, to my pleasant surprise, tailor made, and I was just unaware of it. I loved working for a judge. And so I think, without having articulated it as such, that somewhere inside me, I was saying, 'Wouldn't it be wonderful to be a judge?'" In 1983 President Reagan appointed Starr to the Court of Appeals for the District of Columbia. He served six years.

When Starr arrived on the court, there was tension between the liberal Democratic appointees and the conservative Reagan judges. Starr was criticized for a 1987 decision that held the Washington fire department's affirmative-action plan illegal on the grounds that it violated the 14th Amendment's equal-protection clause. Characteristically, Starr was able to avoid the kind of personal confrontations that had soured relations between others on the court. Says Chief Judge Abner Mikva, a Carter appointee: "There were periods of tension, but what was interesting was that Judge Starr, who certainly believed vigorously in his points of view, never was the cause of the tension. If he couldn't be a consensus builder, he at least was one who made sure that the disagreements remained intellectual and professional rather than personal. He was a delightful colleague."

Starr's view of his period on the circuit court is not substantially different, but his emphasis is distinct—and instructive: he attributes the harmony Mikva credits him with to the professionalism of his colleagues. "I think there was a substantial community of interest between the Carter and Reagan judges, which is not appreciated outside. A lot of that was by virtue of our doing the daily work of our court. We weren't having to wrestle with the great issues of abortion and capital punishment, prayer in the schools. We were engaged in judging as professionals, and we were all singing from the same professional sheet music."

As a judge, Starr says his models were the men for whom he had clerked. "It was from Judge Dyer that I truly learned the importance of rigor in the law, that we are to be careful and workmanlike in the interpretation of statutes and in the review of records in cases. In terms

Astride the Line between Politics and the Law

Erwin N. Griswold

Of the 39 men who have served as solicitor general, most have been familiar figures to the Justices but largely unknown to the general public. Justice Potter Stewart said that he and his colleagues regarded the solicitor general as "a traffic cop" who helped control the flow of cases to the Court. Thousands of applications for review are made each year, but the Court can hear only a small number of them. Thus, as former SG Erwin N. Griswold wrote, "This means that it is of great importance for the solicitor general to select with care the relatively small number of cases in which the government will file petitions. A high proportion of the solicitor general's petitions are in fact granted by the Court, which means that he has, as part of his responsibility, carried out an important part of the selection process necessarily confronting the Court." This has been especially true in recent years. During the 1989-90 term, for example, Supreme Court review was sought in 5,746 cases, but it was granted in only 146 of them. The SG's batting average was much better. During the same term, the SG sought review in 30 cases, and it was granted in 20.

At least three SGs in recent decades have found themselves in the spotlight, standing uncomfortably astride the line that divides politics from the law. Robert Bork, a Nixon appointee, became famous for actions that had little relation to his responsibilities to the Court. As third in command at the Justice Department, Bork fired Watergate special prosecutor Archibald Cox in 1973, sparking a fire storm of criticism. Does Bork, now an American Enterprise Institute scholar, have any regrets? "No, no," he says. "The only thing I regret is that, if I hadn't been so new to Washington, I would have walked out of the White House that night and held a press conference to explain to people that nothing drastic had happened to any investigation. In fact, they didn't miss a day's work." Bork's term as SG was otherwise unmarred by the controversies about the position that arose during the Reagan administration. His view of the office? "The SG is an advocate, and the Court has often had considerable trust in the SG's judgment," says Bork "The Court trusts the SG's office to represent the record of the law accurately, which is not always true with all lawyers."

Steve Northrup/TIME Magazine

Robert H. Bork

In 1965, Lyndon Johnson asked Thurgood Marshall to become the solicitor general. A civil rights legend, thanks to his work as the chief architect of *Brown v. Board of Education,* Marshall would be the first black SG—a precedent of which Johnson was keenly aware. In *The Brethren,* authors Bob Woodward and Scott Armstrong recount that when Marshall hesitated, the President goaded him by saying, "I want folks to walk down the hall at the Justice Department and look in the door and see a nigger sitting there." Two years later, Johnson appointed Marshall to the Supreme Court. While on the bench, Justice Marshall grew disgusted with growing politicization of the SG's office. University of Michigan professor Richard Pildes, a former Marshall law clerk, recalls the Justice saying during the 1984-85 term, "You used to be able to take an SG's brief, put your hand on it and swear on it like it was the Bible. Now they put out political pamphlets and stamp the word brief on them."

Henry Grossman

Thurgood Marshall

Erwin Griswold, the longtime dean of the Harvard Law School, succeeded Marshall as SG, serving under both Johnson and Richard Nixon from 1967 to 1973. In 1971 a monumental clash between the goverment and the press took place: the Pentagon Papers dispute (See story, "From *Times* to *Times*," pp. 16-25). Griswold, who privately counseled the goverment not to sue the newspapers that had published parts of the classified papers, found himself arguing the opposite position before an emergency Supreme Court session. The Court, however, declined to enjoin publication of the Pentagon Papers. Griswold's years as an academic give him a unique relationship with the current Court. Says he: "Three of the last four appointees to thc Court—Antonin Scalia, Anthony Kennedy and David Souter—have my signature on their diplomas."

—Andrea Sachs

Wearing the robes of a political-science major, Starr appeared in the 1968 edition of Cherry Tree, *the yearbook of George Washington University.*

of constitutional philosophy, I learned much from the Chief Justice and identified substantially with his constitutional vision. That is to say, he was in many respects a great reformer. He was always seeking to improve the system. He viewed his role as an administrator of the system and not, as a judge, to read his vision of reform into the law. He liked to use the example of the death penalty. He was not at all convinced that he would vote in favor of the death penalty as a legislator, but he saw no respectable argument at all in the Constitution for the proposition that the death penalty is under all circumstances unconstitutional. The document itself by its very terms envisions the existence of the death penalty."

Starr's view of the Constitution is a fairly narrow one. "To my mind," he says, "the Constitution is law and is to be treated respectfully as law and not simply as a glowing statement of aspirations and values, such as the value of human dignity, and therefore any decision that promotes and serves human dignity is supportive of and is buttressed by and finds its roots in the Constitution. I can't subscribe to that philosophy."

In 1989 when Starr was named solicitor general, some observers surmised that he saw the appointment as little more than a stepping stone to the Supreme Court—since accepting the job meant giving up a lifetime judgeship. Starr, however, gives a characteristically earnest explanation. "First and foremost, I was asked to do it," he says. "I did not seek to do it. And secondly, I have the greatest respect, admiration and affection for this office and its work. I had worked down the hall from Wade McCree [Carter's solicitor general] for almost three years and also during the first six months of the Reagan administration when he remained as SG. Then for the next two years I was at the Justice Department with Rex Lee. I came to know the people. I obviously had observed the office in operation during my years of clerking, and I held it and continue to hold it in the highest regard."

The office Starr inherited was one plagued by controversy. Lincoln Caplan, describing what happened to the solicitor general's office in the Reagan years, says, "Far-reaching changes were pushed through by Presidential Counsellor-turned-Attorney General Edwin Meese and Assistant Attorney General William Bradford Reynolds, two of the administration's most powerful and controversial officials; the changes were resisted by Rex Lee, the administration's first SG.... They have been carried out by Lee's successor, Charles Fried, and they are at the center of many of the deep, near seismic reforms that the Reagan administration has tried to bring about in American law." The administration wanted to persuade the court to be activist in a conservative sense by overturning *Roe v. Wade,* by limiting the uses of affirmative action as a remedy for past discrimination and by curbing the use of school busing.

Some scholars and many conservatives disagree with Caplan's appraisal. Wrote Louis Fisher, a constitutional specialist at the Library of Congress: "The general theme of Caplan's book—the politicization of the SG's office under Meese, Reynolds and Fried, and the substitution of a political agenda for the rule of law—does not stand scrutiny. As advocate for the executive branch, the SG inevitably carries out part of the administration's agenda. He has always done so. Nothing is improper about that, and it would be naive or an exercise in self-delusion to

Craig Crawford/Department of Justice

Starr, shown with his wife, Alice. The couple has three children and lives a determinedly private life in McLean, Virginia.

George Duke/Department of Justice

Starr with Utah's Republican senator, Orrin Hatch, a member of the Senate Judiciary Committee, the body that investigates the credentials of nominees to the federal courts.

believe otherwise." Says former SG Erwin Griswold: "I rather disagreed with Caplan. I thought that Charles [Fried] was not taking the position he took because of political pressure, but because that was the way he thought."

Rex Lee, who is now president of Brigham Young University, has a different view of what he calls the office's "case-to-case balancing act." By attempting to balance the interests of the government's long-term relationship to the Court and the administration's political viewpoint, Lee aroused the anger of many Reagan officials. "There were people who just became furious with my approach, particularly among the ultra-conservatives," he says. "You'd get statements like, 'Either he's got to do his job as SG, or resign and let somebody else do it who isn't so timid.'" Some diehard conservatives, says Lee, would "accuse me of disloyalty to the President. My answer to that was, 'My job is not to declare true doctrine; my job is to litigate in the Supreme Court. I'm not the pamphleteer general; I'm the solicitor general.'"

Charles Fried, now a professor at Harvard Law School, says, "There are some people in whose minds the two roles conflict, and those people are the ones who lost the election. It's hard for me to understand the theory that says the government is not allowed to argue that the Supreme Court overrule some of its precedents. It overrules its precedents every year, and only because some advocate in some case has asked for that. I don't understand why the government is the only advocate not allowed to do that. It doesn't make sense."

By selecting Starr as solicitor general, President Bush hoped to end the fierce political debate that swirled around the office in recent years, and to a large extent that is what has happened. Says Steven Shapiro, associate legal director of the American Civil Liberties Union: "Ken Starr did not come to the job with a predetermined agenda and has not approached the job in the ideological way that some of his predecessors did. There certainly has not been a retreat on any of the fundamental positions. The Justice Department continues to push for a reversal of *Roe v. Wade*, and for its conservative views on affirmative action and criminal matters. But I think the decibel level of some of the briefs has been toned down. Starr deserves a certain credit for that. It reflects a difference in temperament and personality. He's a less combative person than Fried. He's low key, casual and conversational with the Court and a forceful advocate for the administration."

Throughout his tenure as SG, Starr has been discussed as a likely candidate for the Court; he was a finalist for the seat eventually taken by David Souter. While Starr makes light of it, the period before the President announced the choice of Souter was an ordeal for him and his family. Privacy is important to Starr. He recalls: "I was coming home from church with my son. My wife Alice and the girls had gone in a different direction after the service. And as I turned the corner, doing an imitation of Winston Churchill, with what remains of my hair blowing in every direction, I saw an encampment of reporters outside my house. I just didn't like that. I value privacy and anonymity." How does he feel about an eventual place on the Court? "My job is to chop the wood that is before me to chop. I have a very keen sense that I am to do what I am called upon to do. And I will accept challenges that come my way or happily return to my garden at Monticello, as it were." Given his track record, though, it looks as if it will be a good many years before Ken Starr will be able to lay down his ax and pick up a gardener's trowel.

Andrea Sachs *is a lawyer and a reporter at* Time *magazine.*

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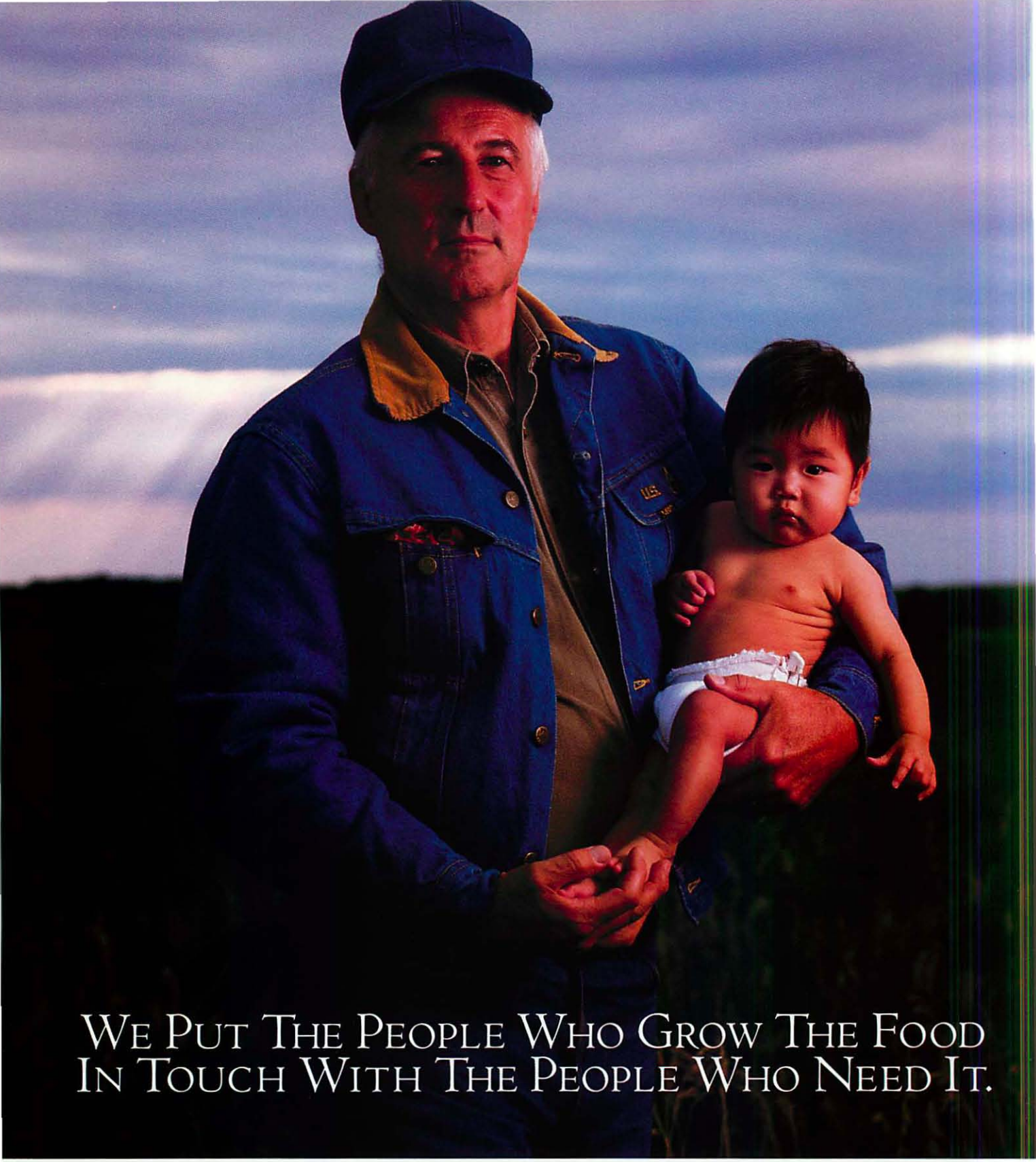

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SUPERMARKET TO THE WORLD

A Constitutional Morass

by Stephen H. Balch

The principles enshrined in our Bill of Rights do double service. As points of law they afford us legal recourse when our individual rights are violated by government. As ideals they inspire both the conduct of our lives and the governance of our private institutions. Thus, while the First Amendment shields us from censorship, it also alerts us to the importance of open and vigorous discourse in many of our endeavors.

Problems arise when these functions are confused. This is particularly true when the inspirational role of the Constitution becomes "judicialized," conferring on the courts, rather than conscience, excessive control over the daily business of life. However useful it may be as a shield, as an instrument of micromanagement the Constitution is likely to lead us into a morass.

There are few domains where external micromanagement is more liable to be disastrous than the academy. Colleges face the challenge of creating an environment hospitable to new ideas, while maintaining the intellectual authority necessary to judge both the quality of these ideas and the scholarly competence of their champions. Academic assessment demands rigor, clarity and fidelity to evidence together with a receptivity to the new, disconcerting and even initially improbable line of conjecture. Moreover, it must clearly recognize the wide spectrum within which academically competent individuals can reasonably disagree. All this calls for a cast of mind tempered by extensive academic training and experience. While this seasoned mentality has become less common in today's academy than it should be, it is unlikely to be often found outside it.

Two bills, one already introduced into Congress and the other still in draft form, ignore this fact, tempting our courts into an academic micromanagement role they are ill-equipped to play. The first bill, introduced by Congressman Henry J. Hyde and endorsed by the American Civil Liberties Union, invites students to sue any college receiving federal funds if it makes or enforces a "rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech." The other, drafted by the Free Congress Foundation, a conservative think tank, protects students from being subjected to "discrimination," "official sanction" or "adverse action," denied "benefits," or excluded from participation on the "basis of protected speech." Both bills contain partial exclusions for religious institutions and, in the Free Congress version, for military academies as well.

The proposals have laudable goals. To the extent that they enlarge the public's recognition of the rising tide of intellectual intolerance on many of our nation's campuses, the debate they spark will have educational value. Nonetheless, if enacted, these bills would place what remains of the integrity of academic life at a level of risk exceeding any possible benefit. The gravest danger is that they may open the way for judicial interference in the process of academic evaluation. Needless to say, a student's political viewpoint should never be the pretext for a diminished grade—but neither can it immunize from criticism a thesis that is conceptually fuzzy, logically inconsistent or oblivious to evidence.

How will the courts respond when —as is inevitable—a student challenges an instructor's low grade or a pattern of unsatisfactory evaluation on the grounds that such "disciplinary sanctions" or "adverse actions" are—as in some entirely valid way they may well be—related to the content of his opinions? Will jurists, recognizing their inadequacy to make the appropriate intellectual determinations, steer clear of the case by narrowly interpreting the plastic language of these bills? Or will a desire to "do good," and the inclination to take on new issues, tempt them to stretch the definitions of terms like "rule" and "sanction"? And what about our colleges and universities? When faced with the possibility of a torrent of litigation, will they resolutely defend their academic autonomy or will they employ neutered, vapid and standardized evaluation procedures to minimize the threat of legal challenge? Unfortunately, there is little in the recent history of either American jurisprudence or higher education to suggest that forbearance on the one side or courage on the other will be the most probable course.

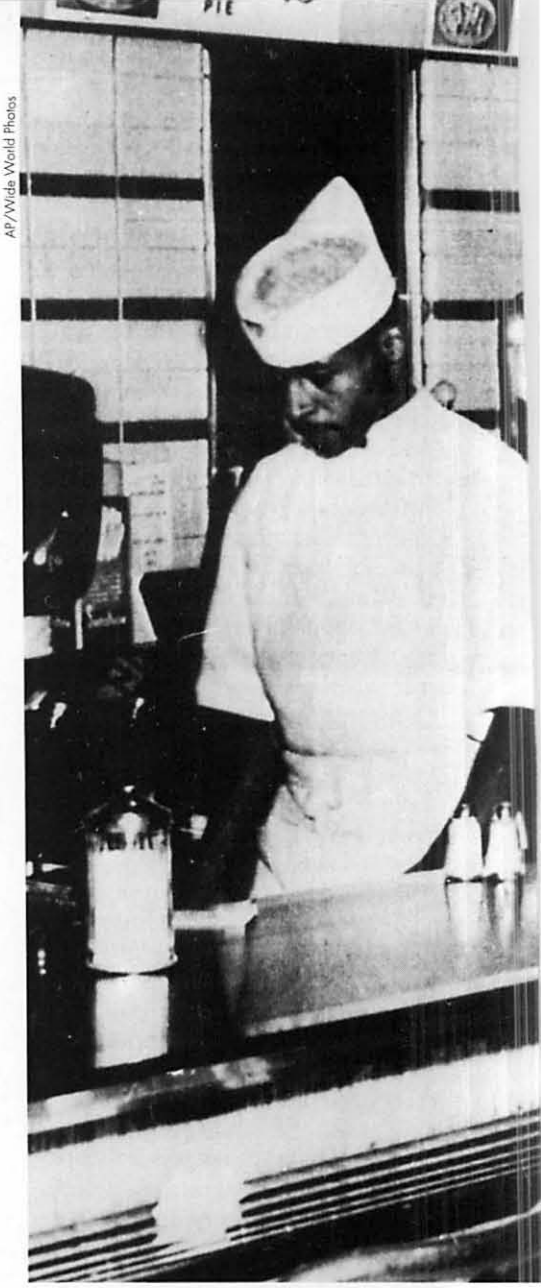
In several recent cases students at public universities have successfully challenged broadly drafted "speech codes," which clearly infringed on their general rights to free expression on campus. When such expansive prohibitions were struck down, the courts and the Constitution played the roles intended for them by the founders. It is one thing, however, to respond to specific abuses of power. It is quite another to define new and ambiguous legal standards against which to measure institutional behavior—standards likely to lead the courts into realms where they have no professional competence. In such realms the Constitution may inspire but should not regulate.

Stephen H. Balch *is president of the National Association of Scholars.*

From *Times* to *Times*

Two extraordinary lawsuits against the New York *Times* bracket a seven-year period that transformed the First Amendment.

by Lucas A. Powe, Jr.

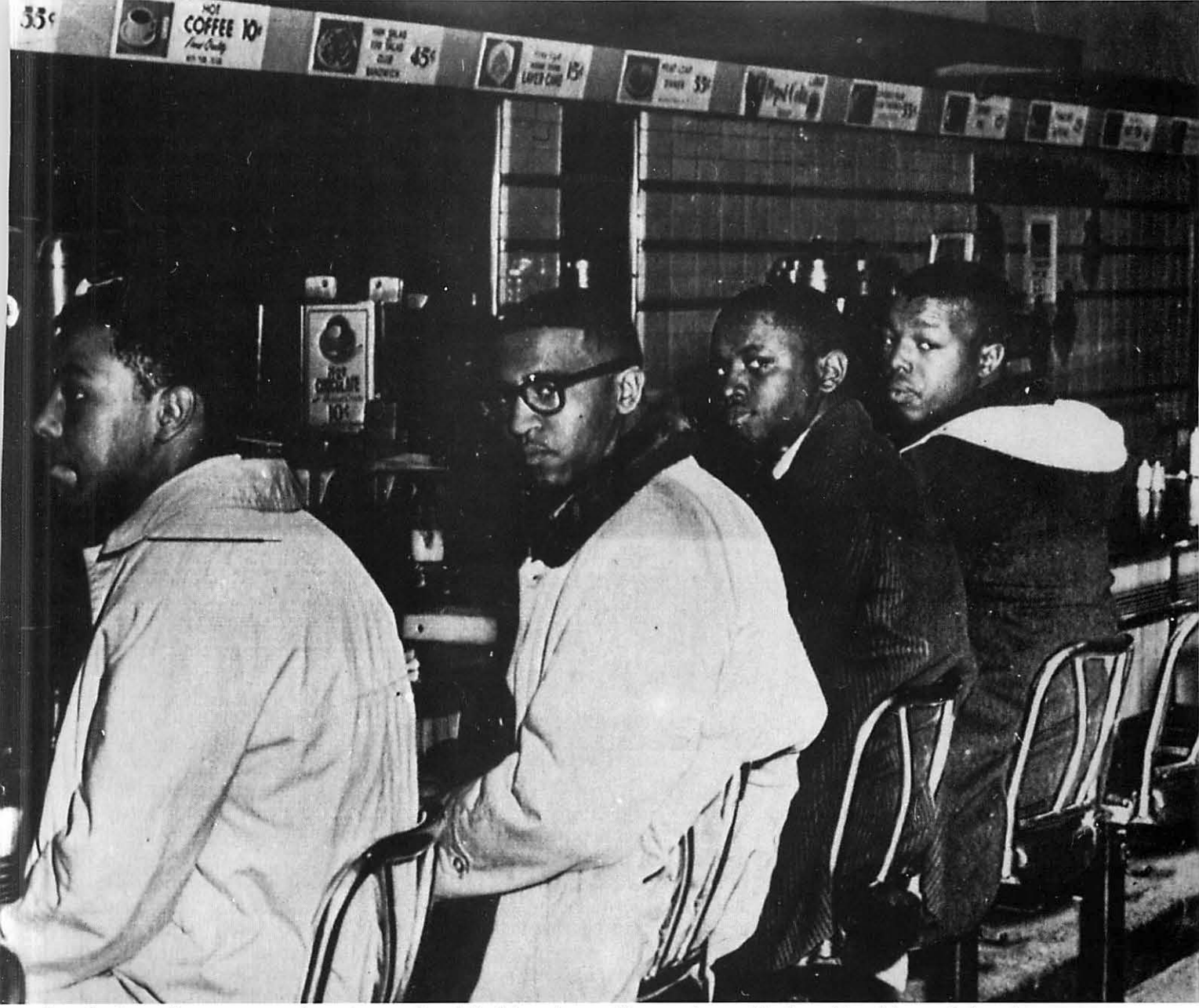


AP/Wide World Photos

Greensboro, N.C., 1960: the first sit-in. Four

On February 1, 1960, four black college freshmen in Greensboro, North Carolina, went to the downtown Woolworth's, sat down at the whites-only lunch counter and, after being refused service, stayed all day. Sit-ins had begun. These peaceful protests, met with both violence and the full force of the southern legal system, helped trigger the freedom rides and mass demonstrations that challenged the social order of the South during the next few years. All were essential in placing the eradication of segregation squarely on the national agenda. Seven weeks after the Greensboro sit-in, the New York *Times* editorialized, "The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable." The *Times* urged Congress to "heed their rising voices." Bayard Rustin and Harry Belafonte borrowed this phrase and used it as the lead to an advertisement in the *Times* seeking funds to assist Martin Luther King, Jr., in paying his ever rising legal fees. The ad ended by calling on "men and women of good will" to do more than "applaud." They did; the ad, which cost $4,800, paid for itself many times over before it began to consume rather than provide money.

The ad appealed for help in "the defense of Martin Luther King—the support of the embattled students —and the struggle for the right to vote." It described the situation in the South, charging that efforts by demonstrators to affirm constitutional guarantees had been "met by an unprecedented wave of terror...." A detailed account followed of the mistreatment of demonstrators as they sang the national anthem in Montgomery, Alabama, the state capital. Leaders of the demonstration had been expelled from Alabama State College, the ad charged, truckloads of police "armed with shotguns and tear-gas" had ringed the campus, and when "the entire student body" protested by refusing to register, the college dining hall was padlocked in an effort to starve the protesters into submission. In other southern cities, the ad asserted, "young American teenagers" were facing the "entire weight" of the state and police.



college freshmen began a new phase in war for civil rights, demanding service at Woolworth's whites-only lunch counter.

The ad speculated that "Southern violators of the Constitution fear this new, non-violent brand of freedom fighter...even as they fear the upswelling right-to-vote movement [and had] answered Dr. King's protests with intimidation and violence." It referred to the bombing of King's home, an assault on his person, his many arrests and a pending perjury charge, claiming that "their real purpose is to remove him physically as the leader to whom the students—and millions of others—look for guidance and support, and thereby to intimidate all leaders who may rise in the South."

A week after the advertisement ran, the Alabama attorney general announced that, on instructions from Governor John Patterson, he was considering suing the New York *Times* for libeling Alabama officials. A few days later Montgomery Police Commissioner L.B. Sullivan wrote to the *Times*, demanding a "full and fair retraction of the entire false and defamatory matter." After checking with its Montgomery stringer, the *Times* wrote back that it was "puzzled as to how you think the statements [in the ad] in any way reflect on you." The point was a good one; neither Sullivan nor any other Alabama official had been mentioned by name, nor was there any mention of Sullivan's job.

Alabama law required Sullivan to request a retraction before suing. It did not require him to explain how he felt he had been harmed. On April 19 his lawyers filed suit against the *Times* demanding $500,000 in damages. That was 10 times higher than the highest libel award the Alabama supreme court had ever sustained.

A day later the Alabama attorney general recommended that "proper public officials...file a multi-million dollar law suit." Sullivan's fellow commissioner Frank Parks, former commissioner Clyde Sellers and Montgomery mayor Earl James followed Sullivan's lead. Then on May 6 the mayor of Birmingham and that city's two commissioners filed suits for $500,000 against the paper, based on stories that *Times* correspondent Harrison Salisbury had written. Similar suits were filed by three officials of Bessemer, Alabama.

But the toppers were yet to come.

AP/Wide World Photos

Under arrest, Dr. Martin Luther King, Jr., is escorted to a hearing in Georgia. King's mounting legal bills were one reason why civil-rights leaders Bayard Rustin and Harry Belafonte decided to run the ad in the Times *that began, "Heed their rising voices."*

On May 9 Governor Patterson wrote to the *Times* demanding a retraction. Unlike Sullivan, Patterson explained why he thought the ad implicated him. Not only was he governor, but he was also ex officio chairman of the state board of education. This time the *Times* printed a retraction: "To the extent that anyone can fairly conclude from the statements in the advertisement that any such charge [of wrongdoing by Patterson] was made, the New York *Times* hereby apologizes." It wasn't enough. Patterson filed suit for $1 million, naming King as co-defendant. Next, Salisbury was hit with a 42-count indictment for criminal libel, based on the two stories he had written about conditions in Birmingham and Bessemer. As the Montgomery *Advertiser* accurately informed its readers, "State and city authorities have found a formidable legal bludgeon to swing at out-of-state newspapers whose reporters cover racial incidents in Alabama."

The *Times* was seeing this legal bludgeon up close and personal in a state where it could legitimately claim to be a stranger. Only 394 (out of 650,000) copies of the *Times* came to Alabama daily, some 35 to Montgomery County. Moreover, only two regular *Times* reporters had even been in Alabama in 1960 (they and all other *Times* reporters were now instructed to stay out of the state). If Alabama courts had jurisdiction over the *Times*—and all the courts would hold they did—then trouble lay ahead.

Furthermore, the *Times* had a problem that made the bludgeon effective: there was one substantial and several minor factual errors in the ad. Under Alabama defamation law—which was the same as that in most areas of the United States—these errors would preclude the *Times* from defending the ad on the basis of truth because that defense existed solely for statements that were 100 percent true. The errors also negated the common-law defense of fair comment, a privilege to draw conclusions from truthful facts.

The ad's minor errors were just that, minor: demonstrators sang the national anthem, not "My Country 'Tis of Thee," as the ad said; King had been arrested four times—not seven; police never "ringed" the Alabama State campus but were deployed nearby in great numbers; a large portion, but not "all," of the student body participated in the demonstrations. The one serious error was the charge that the dining room had been padlocked to starve the protesting students into submission. That simply was not so.

Still, Sullivan faced a major hurdle. He would have to convince a jury that references in the ad to police would be read as referring to him in his capacity as Montgomery's police commissioner, and that references to "they" and "Southern violators of the Constitution" portrayed the Montgomery police—and hence him—as lawbreakers who would padlock a dining hall to starve students.

The trial began inauspiciously for the *Times*. An all-white jury was impaneled, and Sullivan's counsel established the right to use the word nigger in the courtroom, on the ground that it was the customary usage of a lifetime. Then came Sullivan's case. Grover Hall, the editor of the Montgomery *Advertiser,* testified that most Montgomery citizens, if they believed the charges, would take the ad to be defamatory of Sullivan. Other witnesses testified that they understood the ad to refer to the police department and to Sullivan.

None of Sullivan's witnesses thought less of him because of the ad. That was not relevant, however, because of a unique facet of libel law: damage and malice could be presumed without being proved. Were the jury to find that the ad did indeed refer to Sullivan, he would be entitled to damages, based on presumed harm to his reputation—never mind the irony that the ad, if believed, would probably have enhanced Sullivan's reputation in the Montgomery of 1960! Similarly, because the *Times* was unable to establish that every statement in the ad was accurate, the trial judge ruled, properly, that the ad's charges were libelous as a matter of law. It was irrelevant that the newspaper had not known that the facts were untrue. By publishing the ad, the *Times* took its chances. When the

Montgomery Sheriff Mac Sim Butler (on horseback) urges a crowd to disperse in March 1960. Hatless man at right is L.B. Sullivan, the city's police commissioner, who later sued the New York Times *for $500,000, claiming the paper had libeled him.*

jury came back, giving Sullivan every cent he had asked for, the *Times* learned the cost of taking its chances.

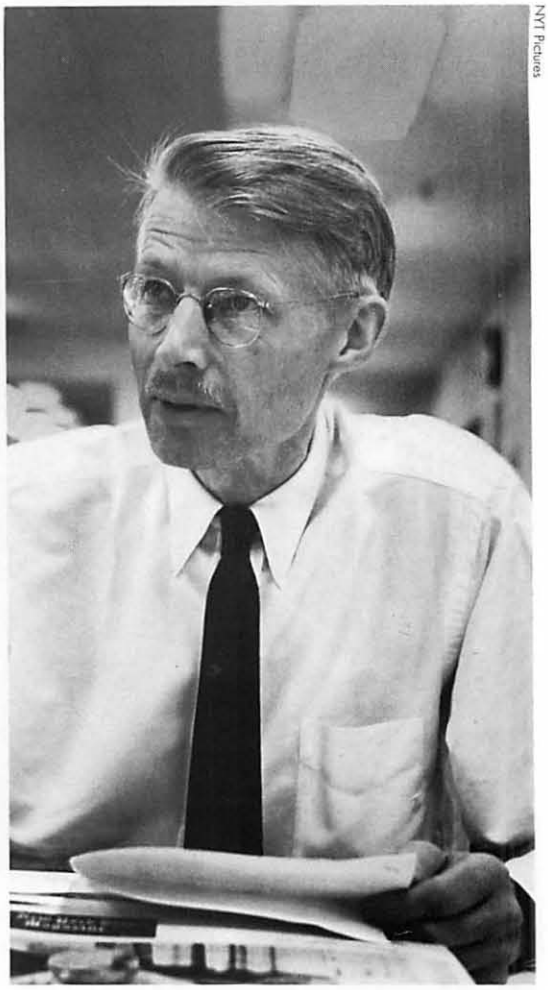
If the battles against segregation in the arena of public opinion were largely draws, the legal arsenal contained in the law of libel gave the South a powerful advantage. On appeal, the Alabama supreme court, in a strongly worded opinion that referred to "so-called demonstrations," ruled against the *Times* on every single point. Similar results threatened to follow as judgments in the other libel cases rolled in. James Goodale, a former general counsel and executive vice-president of the New York Times Co., has reflected, "Without a reversal of these verdicts, there was a reasonable question of whether the *Times*, then wracked by strikes and small profits, would survive."

The *Times*' only hope now was the U.S. Supreme Court. Since delivering the *Brown v. Board of Education* decision in 1954, which demolished the doctrine of "separate but equal," the Court had taken the lead in opposing southern segregation. It was inconceivable that it would now sit back and allow the South to silence the northern press. Yet there is rarely certainty in constitutional law, and with potential bankruptcy as the risk, the *Times* was in no position to assume it would prevail—especially when the conventional legal wisdom in 1962 was that state libel laws created no federal constitutional problems. Sullivan's counsel, M. Roland Natchman, Jr., based his confidence of victory on just this point. "The only way the Court could decide against me," he said, "was to change one hundred years or more of libel law."

The *Times* put its fate into the hands of Columbia law professor Herbert Wechsler, who had been assisting its legal team from Lord, Day & Lord. Wechsler had before him a case with wonderful facts but no law. His job was to show the Court how to make the law conform to the facts. He did it by merging the two, arguing ingeniously that the Alabama court had functionally, if not formally, applied the common law of seditious libel, under which any criticism that officials feel brings the government or them into contempt or disrepute (this could be, literally, almost anything) could be prohibited. Yet, Wechsler argued, Alabama had not provided even the safeguards included in the infamous Sedition Act of 1798, which had required proof beyond a reasonable doubt that the defendant had intended to bring an official "into contempt or disrepute." Furthermore, there was no protection against double jeopardy; the *Times* was being punished several times for a single offensive statement, and in amounts vastly exceeding fines permissible under the Sedition Act. Alabama libel law, Wechsler argued, had "transformed the law of defamation from a method of protecting private reputation to a device for insulating government against attack." All nine Justices agreed.

Justice William J. Brennan's opinion for the Court followed Wechsler's argument, resurrected the Sedition Act—163 years after it expired—and slew it properly. "Although the Sedition Act was never tested in this Court," he said, "the attack upon its validity has carried the day in the court of history.... Because of the restraint it imposed upon criticism of government and public officials, [the Sedition Act] was inconsistent with the First Amendment." The Court recognized that citizens must be free to criticize their government, and that government may not win

Don Uhrbrock, LIFE Magazine © Time Warner Inc.



NYT Pictures

Alabama Governor John Patterson (left) urged his subordinates to file suit against the Times, *then filed one himself for $1 million.* Times *correspondent Harrison Salisbury (right) was one of only two reporters the paper had sent to Alabama in 1960. His reporting occasioned suits by Birmingham's mayor, two commissioners and even the notorious police chief, Bull Connor. None was successful.*

a debate by using its powers, courts and legitimacy to silence its critics.

To this Brennan added his own flourish: the risk of being sued for libel by public officials chilled freedom of discussion. Those wishing to discuss an issue should not be deterred because of the possibility of accidental error or because they doubted they could prove a statement true to the satisfaction of a jury.

Then the Court translated its reasoning into legal doctrine and announced four new rules. First, public officials may not recover damages for defamatory falsehoods relating to their official conduct unless they can prove the statements were made with "actual malice"—that is, either with knowledge of falsity or with "reckless disregard" of it. Second, actual malice must be proved with "convincing clarity." Third, a jury may not infer that criticism of the conduct of underlings is criticism of the supervising official. Finally, judges must not defer to the jury's decision as to whether or not the evidence of malice was sufficient but must exercise independent judgment.

By themselves, the first and third points would have required that the verdict in Sullivan's case be reversed. But to make sure that the message was loud and clear, the Court held that the evidence of malice was not sufficient. Had it not done so, there was a real risk that an Alabama jury would find whatever facts were necessary to justify the imposition of damages. (Birmingham's notorious chief of police, Bull Connor, in fact, won his libel judgment when a federal jury in Birmingham found malice in Harrison Salisbury's careful reporting. It took a trip to a U.S. court of appeals to set aside that judgment.)

Despite some memorable dissents on behalf of free speech by Oliver Wendell Holmes, Jr., and Louis D. Brandeis and the extension of constitutional protection to it, the Court constricted the range of acceptable debate in the 1950s and early 1960s by concluding in virtually all the major cases that First Amendment interests were outweighed by other needs —for example, by the compelling need to root out domestic communism. *New York Times v. Sullivan* ended that. The Court now stated its belief that free expression was of transcendent importance. Thereafter cases must be considered, in Brennan's words, "against the...profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."

After *Sullivan* the Court plunged energetically into First Amendment adjudication and transformed it, expanding and deepening the amendment's protections. In 1965 Julian Bond, the young black communications director of the Student Nonviolent Coordinating Committee, was refused his seat in the Georgia legislature because he had made remarks opposing the Vietnam War. The Justices unanimously held that *Sullivan* gave legislators such as Bond, no less than citizens, the right to speak freely on controversial issues. From public officials, the Court moved on to public figures, all but

Harrison Salisbury reported that there was "not one mention of the Pentagon Papers. My God...the story is a bust!"

creating the impression that if a newspaper published information, it was a matter of public importance and therefore constitutionally protected, even if false. In case after case in all areas of First Amendment law, the Court reached for results that most protected speech. Within three years it demolished the most pernicious aspects of the loyalty oath and security programs; it restricted prosecutions for obscenity, offensive behavior and advocacy of illegal action. Ohio Klansman Clarence Brandenberg won the right to spout vitriolic Klan-type hatred and Paul Cohen to wear a jacket stating "Fuck the Draft" in a Los Angeles courthouse. A year before *Sullivan,* Bob Dylan wrote "The Times They Are a-Changin'"; as the 1960s progressed, it was impossible not to see the change.

Then came the most massive security leak in American history, what James Reston, Washington columnist and vice-president of the New York *Times,* predicted in 1971 would be "the biggest story of the century." In the spring of 1967, disillusioned Secretary of Defense Robert McNamara had commissioned, without White House approval, a study of decision making on Vietnam: 7,000 pages, 47 volumes of documents detailed the origins and development of America's involvement in the Vietnam War. Daniel Ellsberg, a former hawk turned guilt-ridden dove, copied the documents and then spent a year trying to persuade some leading politician to go public with them.

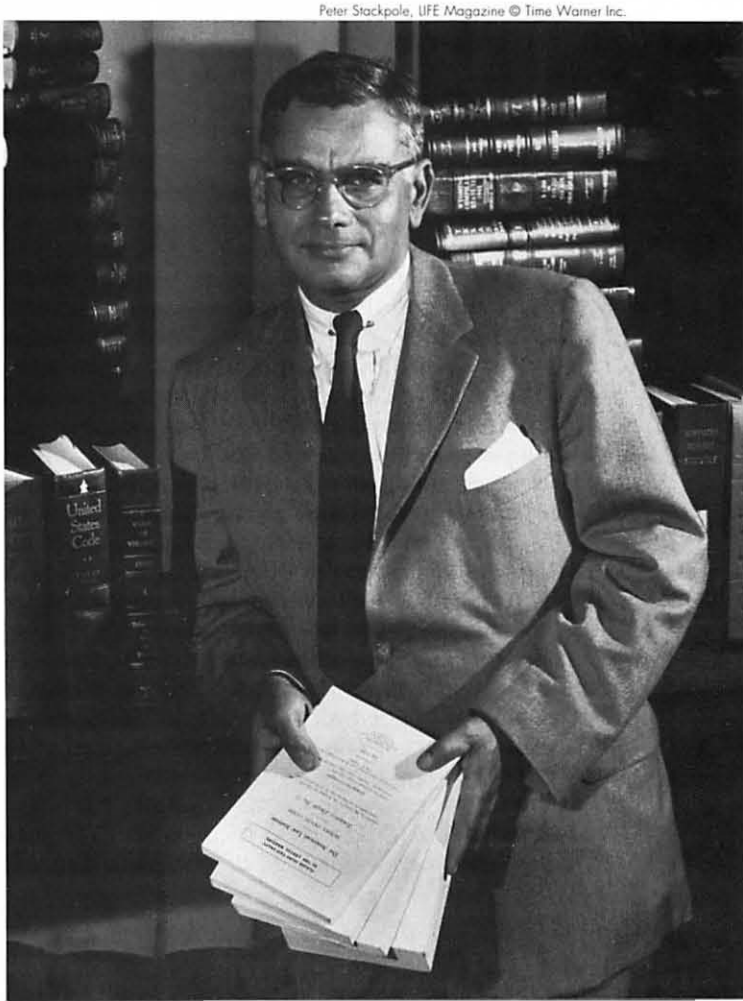
Failing with politicians, Ellsberg turned to a New York *Times* reporter, Neil Sheehan, and gave him all but four very sensitive diplomatic volumes. Once the paper's top managers verified the study, they felt "the *Times* had to publish," even though their lawyers were adamant that the paper's duty was to go to the government.

On Sunday, June 13, 1971, the *Times*' front page featured a picture of Tricia Nixon being escorted by her father to her wedding in the Rose Garden. To the right, a large headline, reading "Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement," introduced Sheehan's story. Below, another headline announced, "Vast Review of War Took a Year." The only use of the word secret on the page was in this story, which reported that while the *Times* had most of the Pentagon Papers, it lacked "the section on the secret diplomacy of the Johnson period."

Thrilled by their scoop, the *Times* editors and reporters waited for the reaction. At first there wasn't one. As a history of U.S. involvement in Vietnam, the Pentagon Papers undermined public positions taken by the Kennedy and Johnson administrations; thus the initial response at the White House was that the story was a Democratic problem. More surprising was the fact that there was no response from the press or those opposed to the war. Sheehan did not get a single call on Sunday. Neither did managing editor Abe Rosenthal or Washington bureau chief Max Frankel. Harrison Salisbury, by then an associate editor at the *Times,* had lunch that day with a group of avid *Times* readers, cocktails with a second group and dinner with another; and yet, as he later reported, there was "not one mention of the Pentagon Papers. My God, I said to myself, the story is a bust!"

The story's second installment appeared on Monday morning, and that day the Nixon administration made the decision to go "full court" against the *Times* to demonstrate its resolve to protect government secrets. Once President Richard Nixon gave his O.K., a telegram was sent to the

Peter Stackpole, LIFE Magazine © Time Warner Inc.



Columbia University law professor Herbert Wechsler managed the Times' *appeal to the U.S. Supreme Court. Wechsler argued that Alabama's libel law went even further than the Sedition Act of 1798 in safeguarding public officials from criticism. Associate Justice Brennan noted that the Sedition Act had never been tested before the Court and ruled it invalid, 163 years after it had expired.*

AP/Wide World Photos

Former Defense Department official Daniel Ellsberg (center) leaked the secret study of the Vietnam War to the New York Times. *His co-defendant, Anthony Russo, is shown at left with wife Katherine, and at far right is Ellsberg's wife Patricia.*

FBI for transmittal to the *Times*, ordering it to cease publication and return the documents. (The FBI mistakenly sent the wire to a fish company. Improving with experience, they got it to the *Times* on the next try.)

The *Times*' lawyers counseled against further publication. After hearing the arguments over the phone in London, publisher Arthur O. Sulzberger gave the go-ahead. That meant heading to Court, and the *Times* turned once again to its longtime law firm, Lord, Day & Lord. Herbert Brownell, who had served as attorney general in the Eisenhower administration, expressed shock that the *Times* was defying Attorney General John Mitchell and stated that his firm would not defend the paper. Meanwhile, the text of the *Times*' response to the government was being hammered out and was phoned to James Reston for his input. Reston happened to be dining with Robert McNamara. On hearing that the *Times* would abide by "decisions of the courts," McNamara interjected, "not the courts —the highest court." That was too strong for the *Times*, which split the difference: "We will abide by the decision of the court." This completed, James Goodale set out to round up Yale law professor Alexander Bickel for the defense (Wechsler being unavailable), and the lead story for Tuesday's paper was hastily changed from Sheehan's continuation to an announcement of the confrontation between the *Times* and the Nixon administration: "Mitchell Seeks To Halt Series on Vietnam but *Times* Refuses."

Litigation in major cases typically takes years. The Pentagon Papers case took 15 days, beginning with a hearing Tuesday before Judge Murray Gurfein, sitting for his first working day since President Nixon appointed him to the federal bench. The government argued that further publication would cause serious injury to foreign relations and the national defense. But no American court had ever enjoined publication of a newspaper article. Gurfein, who kept saying "we are all patriotic Americans," did not want his to be the first. He asked the *Times* to cease publication voluntarily while the case proceeded. When it refused, Gurfein issued a temporary restraining order and set Friday as the day for hearing the case.

Having been scooped, the Washington *Post* was, in its reporter Sanford Ungar's apt words, "still feeling egg on its well-respected, well-connected face." Now the *Post* used Gurfein's temporary injunction to play catch-up. Ellsberg was dismayed that the *Times* was obeying the injunction and provided the *Post* with more than 4,000 pages of the documents.

The *Post*'s publication that Friday took government lawyers by surprise and made their case against the *Times* more difficult. How could Gurfein enjoin the *Times* for national-security reasons if the *Post* was freely publishing the same materials? Government lawyers scrambled to file for an injunction against the *Post*.

The hearings before Judge Gurfein, Judge Gerhard Gesell in the *Post* case, and on appeal were conducted in camera (that is, in secret). Because no one in any important government position had read the Pentagon Papers, the government had a problem pointing to information in them that, if published, would create a grave danger

to national security. To an executive branch used to bowing without question to absolute White House authority, saying so was enough; to an independent judiciary it might not be

The strongest argument the government could adduce came when Vice Admiral Noel Gayler, director of the National Security Agency, sent the court testimony that a certain document revealed that the United States had the ability to intercept North Vietnamese communications and break their code. This was serious stuff. But George Wilson, the *Post*'s defense correspondent and the principal technical adviser to its lawyers, recognized the document and knew he had seen the information before. "Suddenly it became clear to me," he stated later. "I had seen it on page 34 of the 1968 Senate Foreign Relations Committee hearings on the Tonkin Gulf. It was on the left side of the page." Furthermore, Wilson had a copy of the hearings in his pocket, which *Post* attorneys read to a stunned court. The government's case against the Washington *Post* collapsed.

Ultimately, both trial judges ruled in favor of the newspapers, and the government appealed. On Wednesday, June 23, the respective courts of appeal ruled against the *Times* but for the *Post* (with the injunction against publication continued until Friday evening to allow the government a chance to appeal). If there had been doubt before, the conflicting rulings meant that the Supreme Court must cast the deciding vote.

The Court's year was essentially over. Justice William O. Douglas had been at his summer home in Washington's Cascade Mountains for more than a week. All that remained for the other eight Justices was a final conference on Friday, June 25, to mop up the term and a perfunctory sitting on Monday to announce its end.

Continuing the breakneck pace, attorneys for both sides rushed to get to the Court before it adjourned; the necessary papers arrived late Thursday. At the Friday morning conference the Justices voted 5 to 4 to hear the cases. An unprecedented Saturday sitting was scheduled with double the time for oral argument; briefs would be exchanged beforehand. Douglas flew east to attend, having phoned in his vote to deny review in the *Post* case and lift the stay in the *Times* case—joining Hugo Black, Brennan and Thurgood Marshall.

Renata Perez/NYT Pictures

Neil Sheehan, the reporter to whom Ellsberg delivered Pentagon Papers.

Each side wrote two briefs, one public and one secret. Solicitor General Erwin Griswold had stayed up all night, first forcing Admiral Gayler to pare down what he considered the most sensitive materials to as few as possible and then writing the secret brief, discussing those items. Unbeknownst to the newspapers or their counsel, Griswold filed a secret motion to hold the oral argument in camera. Saturday morning Chief Justice Warren E. Burger announced to a packed courtroom (1,500 hopefuls had begun to queue up just after daybreak for the 174 seats) that the government's motion for argument in camera had been denied by a 6-to-3 vote, with Burger, John M. Harlan and Harry A. Blackmun dissenting. That would be the identical division on the injunctions when the vote was taken in conference that afternoon.

Because the vote held that the injunction violated the First Amendment, logic dictated lifting the injunction as quickly as possible; so no time and effort were spent on producing a majority opinion. Instead, each Justice repaired to his chambers to write. As always, it was no contest as to who finished first. Douglas was done by Sunday night and returned west on Monday, while the other eight continued writing.

At 2:30 P.M. on Wednesday, June 30, the Court convened and announced the result in a laconic unsigned opinion drafted by Brennan: any prior restraint comes to court with a heavy burden of proof, he declared, and the government had not met that burden. Then followed opinions by each of the Justices, the dissenters making clear their hostility to the *Times*' decision to publish. Sounding more like an administration official than a Justice, Blackmun concluded that publication would prolong the war and "then the Nation's people will know where the responsibility for these sad consequences rests."

Staffers at both papers were elated at the victory. The *Post's* managing editor, Eugene Patterson, jumped on a desk to announce, "We win, and so does the New York *Times*." The *Times'* managing editor, Abe Rosenthal, listening in the crowded third-floor newsroom to an open phone from Washington, shouted, "It's a glorious day. We won it. We've all won it."

Sheehan's stories, however, ended as they began, almost unnoticed. China, "lost" for 22 years, had been "found" in a condition apparently safe for an American President. When the administration announced on July 15

"All the News That's Fit to Print"

The New York Times

LATE CITY EDITIO

Weather: Partly cloudy, chance showers today, tonight, tomorr Temp. range: today 66-83; Saturi 65-85. Temp.-Hum. Index yester 78. Full U.S. report on Page 1

SECTION ONE

VOL. CXX .. No. 41,413 © 1971 The New York Times Company NEW YORK, SUNDAY, JUNE 13, 1971 BQLI 50 CENT

Tricia Nixon Takes Vows In Garden at White House

The New York Times/Mike Lien

Tricia Nixon escorted from White House by her father

By NAN ROBERTSON

Special to The New York Times

WASHINGTON, June 12—In New York with his other, ...r a tension-filled delay be- younger daughter, Julie. He ...f rain, Tricia Nixon was gave her away to Dwight David ...day in the Rose Gar- ...d, only grandson ... White House t... ...nt Eisenhow- ... Cox, the ... ...d two of ... p...

CITY TO DISCLOSE BUDGETARY TRIMS FOR DEPARTMENTS

Mayor's Aides Make Decision on Final Figures Scheduled to Be Announced Today

By MAURICE CARROLL

Mayor Lindsay has summoned his supercabinet, the heads of all major city departments, to Gracie Mansion this morning to tell them the cuts that their departments face in his revised budget.

"All of them made their pitch to the Mayor within the last 48 hours," a mayoral aide said yesterday. "Sunday they get the word."

The $9.13-billion budget originally made public by the Mayor must be trimmed by a few hundred million dollars to reflect the revenue package he extracted from Albany, which provides for less than the $1.1-billion gap that Mr. Lindsay had said existed between projected income and spending.

No Details on Cuts

The Mayor's advisers were not saying precisely yesterday how much the budget would have to be cut, or where.

Key city Councilmen have been told that the Mayor would bow on one point that had been made an issue by the Council and the Board of Estimate—by agreeing to double the projected income forecast for offtrack betting to $50-million.

Deputy Mayor Richard R. Aurelio, who sat with Budget Director Edward K. Hamilto... in the Mayor's office y... penciling in chan... budget message ... say will ma... said ...

Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U. S. Involvement

By NEIL SHEEHAN

A massive study of how the United States went to war in Indochina, conducted by the Pentagon three years ago, demonstrates that four administrations progressively developed a sense of commitment to a non-Communist Vietnam, a readiness to fight the North to protect the South, and an ultimate frustration with this effort—to a much greater extent than their public statements acknowledged at the time.

The 2,000-page analysis, to which 4,000 pages of official documents are appended, was commissioned by Secretary of Defense Robert S. McNamara and covers the American involvement in Southeast Asia from World War II to mid-1968—the start of the peace talks in Paris after President Lyndon B. Johnson had set a limit on further military commitments and revealed his intention to retire. Most of the study and many of the appended documents have been obtained by The New York Times and will be described and presented in a series of articles beginning today.

Three pages of documentary materials from the Pentagon study begin on Page 35.

Though far from a complete history, even at 2.5 million words, the study forms a great archive of government decision-making on Indochina over three decades. The study led its 30 to 40 authors and researchers to many broad conclusions and specific findings, including the following:

¶That the Truman Administration's decision to give military aid to France in her colonial war against the Communist-led Vietminh "directly involved" the United States in Vietnam and "set" the course of American policy.

¶That the Eisenhower Administration's decision to rescue a fledgling South Vietnam from a Communist takeover and attempt to undermine the new Communist regime of North Vietnam gave the Administration a "direct role in the ultimate breakdown of the Geneva settlement" for Indochina in 1954.

¶That the Kennedy Administration, though ultimately spared from major escalation decisions by the death of its leader, transformed a policy of "limited-risk gamble," which it inherited, into a "broad commitment" that left President Johnson with a choice between more war and withdrawal.

¶That the Johnson Administration, though the President was reluctant and hesitant to take the final decisions, intensified the covert warfare against North Vietnam and began planning in the spring of 1964 to wage overt war, a full year before it publicly revealed the depth of its involvement and its fear of defeat.

¶That this campaign of growing clandestine military pressure through 1964 and the expanding program of bombing North Vietnam in 1965 were begun despite the judgment of the Government's intelligence community that the measures would not cause Hanoi to cease its support of the Vietcong insurgency in the South, and that the bombing was

Continued on Page 38, Col. 1

NIXON CRITICIZED AS MAYORS MEET

Housing and War Policies Attacked and Defended at Parley in Philadelphia

By MARTIN TOLCHIN

Special to The New York Times

PHILADELPHIA, June 12 — President Nixon's foreign and domestic policies were sharply ... and at times de... number of...

Vast Review of War Took a Year

By HEDRICK SMITH

In June, 1967, at a time of great personal disenchantment with the Indochina war and rising frustration among his colleagues at the Pentagon, Secretary of Defense Robert S. McNamara commissioned a major study of how and why the United States had become so deeply involved in Vietnam.

The project took a year to complete and yielded a vast and highly unusual report of Government self... was compiled ... to 40 Govern...

...bombing of North Vietnam and announced his plan to retire, and while the peace talks began in Paris, the study group borrowed through Government files.

The members sought to probe American policy toward Southeast Asia from the World War II pronouncements of President Franklin D. Roosevelt into the start of Vietnam peace talks in the summer of 1968. They wrote nearly 40 book-length volumes backed up by annexes of cable... ...rams, memorandums, draft ...tials, dissents and other ...nts.

...v Inconsistencies

...rt runs to more ...ges—1.5 million ...ical narrative ...rds of ...

...mentary record, which the researchers did not supplement with personal interviews, partly because they were pressed for time.

The study emerged as a middle-echelon and official view of the war, incorporating material from the top-level files of the Defense Department into which flow papers from the White House, the State Department, the Central Intelligence Agency and the Joint Chiefs of S... Some important ... in the stud... did not ... plete ... all th... conv...

U.S. URGES INDIAN AND PAKISTANI TO USE RESTRAIN

Calls for 'Peaceful Politic Accommodation' to En Crisis in East Pakistan

FIRST PUBLIC APPEA

Statement Is Said to Reflec Fear of Warfare if Flow of Refugees Continues

By TAD SZULC

Special to The New York Times

WASHINGTON, June 12—Th United States appealed today ... India and Pakistan to exerci restraint and urged the Pak stanis to restore normal cond tions in East Pakistan throug "peaceful political accommod tion."

It was the first public stat ment by the United States o the situation in the subcontiner since the Pakistani Army la March 25 began quelling th East Pakistani movement fo autonomy and later for inde pendence. The statement ... flected the increasing co... here that hostilities m... between India and ... the ... Pak... no...

A historic Sunday Times. *The front page as it appeared on the first day the existence of the Pentagon Papers became known to any but a handful of insiders. Despite the prominence the editors gave it, initially the story caused few ripples.*

that Henry Kissinger had returned from a secret trip to China and that Nixon would go there for a summit, everything else was history.

China did not end Nixon's interest in the Pentagon Papers. He perceived that he had lost a battle: the press, he wrote in his memoirs, had "won the constitutional right to profit [by] the publication of stolen documents under the First Amendment. This right is superior to the right of our soldiers to live." But he thought he could win the war. Ellsberg would pay. And with that conclusion, Nixon initiated the chain of events we know as Watergate, the real story of the century and one that belonged to the *Post*, not the *Times*.

The seven years encompassing the two New York *Times* decisions were remarkable. Never before had there been such an outpouring of law on freedom of speech and the press. And never had the Court been so protective of the interests of dissent and so skeptical of government claims of the social harm that might follow if the expression was allowed. The two *Times* cases came in an ironical order. *Sullivan* protected falsity to protect truth. Brennan reasoned that perfect truth could be guaranteed only at the cost of a drastically limited range of discussion, a range assisting the status quo, whatever it was—from segregation to continued war. The Pentagon Papers cases protected truth to expose official lies.

Fifty years earlier, the Supreme Court had affirmed the conviction of Joseph Gilbert, an important member of Minnesota's Non-partisan League, for giving a speech questioning conscription and the official version of the causes of World War I. In the Pentagon Papers cases, the two newspapers not only questioned the origins of the Vietnam War, but also did so using the government's own secret documents. The juxtaposition of the cases is stark when one realizes that no genuine harm could have come from Gilbert's rhetoric, whereas in the Pentagon Papers cases the Justices recognized that publication might prolong the war and therefore additional Americans might be killed. Yet the Court accepted that risk. It understood that citizens cannot control or change government policies without information.

In World War I, Gilbert was jailed merely for denouncing the war; in Vietnam, it was Presidents John F. Kennedy and Lyndon B. Johnson (and later Nixon) who were denounced. The Court's changed perception was that an official version of events could

UPI/Bettmann Newsphotos

June 26, 1971: The Times' *lawyers leave the Supreme Court, having argued for the right to publish remaining sections of Pentagon Papers. They are (from left) Lawrence McKay, Floyd Abrams, Alexander Bickel, James Goodale and William Hegarty.*

not be imposed. It is not for officials, elected or appointed, but for citizens to make the choices. The press plays an essential role in this: "The press was to serve the governed, not the governors.... [It] was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."

This passage from Justice Hugo Black's opinion in the case, the last of his distinguished career, did more than summarize his views. It spoke for what the Court had been doing during the preceding seven years: protecting those who challenged entrenched authority, removing the government's role in establishing an acceptable level and style of criticism, and allowing citizen-critics the opportunity to challenge at will the established truth. During this remarkable period, the Court's decisions fully realized the conclusions of Chief Justice Charles Evans Hughes on security in a democracy. It is essential, said the Chief Justice in 1937, "to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Lucas A. Powe, Jr., *holds the Anne Green Regents Chair at The University of Texas and is the author of* The Fourth Estate and the Constitution: Freedom of the Press in America *(University of California Press, 1991), on which this article is based.*

E. T. Archive, London

E. T. Archive, London

LIFE Magazine © Time Warner Inc.

Dispatches from London Times *correspondent William Howard Russell (above) describing hardships of soldiers wounded in Crimea were considered treasonous. As a result, British commander Sir William Codrington (above, left) prohibited publication of anything of potential use to the enemy. Public awareness of conditions led Florence Nightingale (left) to the front, bringing the first modern nursing techniques.*

Private Collection/Bridgeman Art Library, London

The Allied Generals with the Officers of Staff Before Sebastopol *by Thomas Jones Barker (1815-82). Conditions in the trenches around the embattled city provided much of the detail for Russell's stories.*

War and the Press: U.K. versus U.S.

Although Britain's government has long controlled reporting in wartime, its restrictions during Desert Storm were no more onerous than those the Pentagon imposed on American reporters.

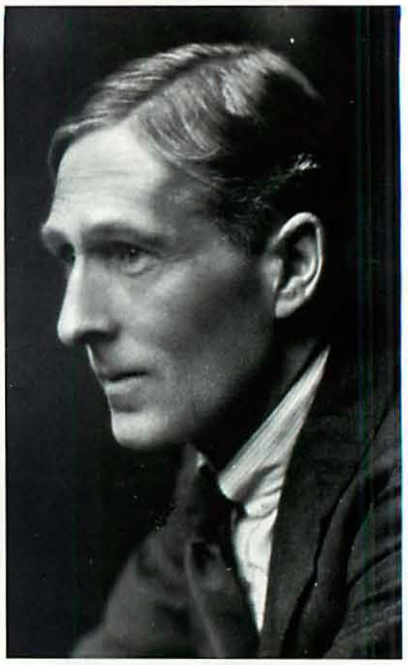
by David Goldberg

"There is no such principle as freedom of the press," Lord McDonald, one of Scotland's senior judges, recently declared. He was speaking of an attempt by the British Crown to stop an Edinburgh newspaper, the *Scotsman,* from publishing information taken from Anthony Cavendish's privately printed exposé, *Inside Intelligence.* How strange this must sound in the United States, where the notion that the press is free is king. The gap between the two countries could hardly seem wider. But a look at how each handled its press during the recent war in the Persian Gulf reveals surprising similarities.

The war dominated life on both sides of the Atlantic during the first few months of 1991. The familiar tension between the military's need to pursue the conflict without undue publicity and the public's right to know what was happening and how effectively the war was being waged blew up. This discord created a domestic battlefield on which press and government fought over their turfs.

The British Ministry of Defence issued two sets of guidelines on reporting on January 15, 1991, after consulting with the media. Ground rules required journalists to remain with military escorts at all times and prohibited the publication, without prior approval, of numerous categories of information. This ban included the rather confusing category of "embargoed information until the expiry of the embargo." No sanction for breaching the rules was mentioned, although withdrawal of accreditation (and thereby access to the front line) was clearly the unspoken punishment. In addition to the government's rules, the British Broadcasting Corporation issued guidelines: certain information could be withheld for an indefinite period if the Ministry of Defence had "satisfactory reasons"; the advice of military "minders" in the field not to publish particular facts should be observed "unless there are very strong reasons for not doing so"; and the ministry would, as in the Falklands/Malvinas dispute in 1982, hold confidential briefings to help editors "steer through problems."

Actually, most of these strictures evolved during the past 150 years and are standard procedures in almost all conflicts involving British troops. According to Phillip Knightley, author of *The First Casualty,* which examines the subversion of truth in wartime journalism, modern military censorship began on February 25, 1856, when Sir William Codrington, Commander in Chief of troops fighting in the Crimea, issued a general order prohibiting the publication of anything that might help the enemy.



After World War I, British correspondent Sir Philip Gibbs admitted without embarrassment that he and his colleagues had acted as "our own censors."

William Howard Russell, the war correspondent for the London *Times,* had exposed the dreadful conditions encountered by British troops after the allied attack on Sevastopol, circumstances that brought Florence Nightingale to the area and led to the development of modern nursing. That Russell's reporting was accurate was neither here nor there. The *Times* article was considered treasonous, and highly placed people demanded that Russell be lynched.

By 1914 public opinion had become an important consideration, and the origins of news management, 1991 style, can be found in practices developed in World War I. Half a dozen correspondents chosen by the War Office covered the British Expeditionary Force in France. They were dressed as officers, treated accordingly and conducted everywhere by minders and censors. The reporters drew lots to see who would cover which area of a particular attack; after the engagement they shared information, then each wrote his own story and filed it via the War Office. The stories tended to glorify heroism and minimize mistakes, thereby engendering general enthusiasm for the war. The attitude of the reporters was summed up by one of them, Sir Philip Gibbs (they were all subsequently knighted): "We identified ourselves absolutely with the Armies in the field...There was no need of censorship of our despatches. We were our own censors."

During World War II, under the Emergency Powers (Defence) Act of 1939, the British home secretary could close any publication that published material "calculated to foment opposition to...any war in which His Majesty is engaged." No right of appeal was allowed. Two papers, the Communist *Daily Worker* and the left-wing *The Week,* were actually shut down in January 1941. No such stringent moves were taken again during the war, although the government's strongest critic, the *Daily Mirror,* might have been closed but for vociferous opposition. Otherwise, the press cooperated. As the Newspaper Emergency Council wrote to the Ministry of Information in 1939, "Our respective tasks and duties are complementary."

The same control was asserted in the 1982 Falklands/

By the middle of World War II, censorship was official, open and expected. British and American censors sometimes worked side by side to check copy submitted by war correspondents before transmission from the theater of operations to the home front. Scene at right took place in North Africa during 1943.

AP/Wide World Photos

Malvinas dispute. The Ministry of Defence, which controlled access to the battlefield, put the familiar accreditation/pool arrangements into effect. Journalists were told they would be expected to "help in leading and steadying public opinion in times of national stress or crisis."

By comparison, U.S. restrictions at its front lines were considerably more liberal, at least during World War II. But just as in World War I, when a committee on public information set up voluntary regulations that were tolerated by the press, so World War II saw the creation of the Office of Censorship by executive order from the White House on December 19, 1941. According to President Franklin Roosevelt, "It is necessary to the national security that military information which might be of aid to the enemy be scrupulously withheld at the source." The code formulated by the office was meant to be followed voluntarily and was managed by negotiation. It had no legal force.

Relatively relaxed rules also governed battlefront reporting in Vietnam. The main don'ts were that troop movements were not to be reported prior to an engagement and the faces of dead or wounded soldiers were not to be shown so that they could be identified. The conventional perception that such easy access caused a reversal of support for the Vietnam War is now being challenged. But that view may explain the restrictions set in place during the 1983 invasion of Grenada. (*The Nation* magazine opined that President Ronald Reagan had learned from his good friend, British Prime Minister Margaret Thatcher, that it was actually possible to control the press.) No newspaperman was permitted to join the invasion, and tight restraints were imposed afterward until "conditions were safe." Journalists who tried to breach the ban were held for 18 hours aboard the U.S.S. *Guam*. Because of continued uproar, a few journalists were granted access with military escorts.

After the Grenada invasion, an internal Pentagon commission inquired into the sour state of relations between the military and the media. In August 1984, it recommended more public-affairs planning, the media's voluntary compliance with security guidelines, logistical help for the media as soon as possible and operating the largest pooling system practical for the briefest period of time. The following October the Department of Defense media pool was established, to be prepared for any surprise military operation.

However, in Panama in 1989, the pool didn't arrive on the scene until after the invasion, and then the journalists were confined to base. No eyewitness reports of the fighting were published. A former press spokesperson at the Department of Defense, Fred S. Hoffman, concluded afterward that there had been an "excessive concern for secrecy," that Secretary of Defense Dick Cheney had not activated the pool soon enough, and that it had only "produced stories and pictures of...secondary value."

Despite this criticism, the Pentagon did no better during the gulf crisis. U.S. troops were being dispatched to the gulf in early August 1990. Not until a fortnight later, after a meeting between the Pentagon and high-level Saudi officials, was a pool established. Preliminary ground rules for covering combat were issued on January 3, 1991: all journalists in combat areas would travel in pools with military escorts at all times, stories would be subject to security review by military public-affairs officers, and all interviews with U.S. military officers would be "on the record." Members of combat press pools had to be physically fit, and those who were not were subject to "medical evacuation."

Horst Faas/TIME Magazine

In Vietnam reporters went almost everywhere with the troops. Here, correspondent David Halberstam fords a stream.

News organizations and bureau chiefs contested the security-review rules the next day during a meeting at the Pentagon, and certain rules, such as those against impromptu interviews and identifying dead or wounded soldiers, were changed to guidelines. Unchanged were the regulations concerning 12 categories of nonreleasable information, the pool arrangements themselves and the security review. Another set of rules and guidelines issued on January 10 prohibited journalists from carrying weapons and transmitting "imagery" that could reveal the specific location of military forces.

So the current wartime relationships of government and the media look very much the same in the United States and the United Kingdom. But what were the responses to governmental restrictions on reporting the war? There were protests in both countries, but the most noticeable difference between the two was that in the United States a

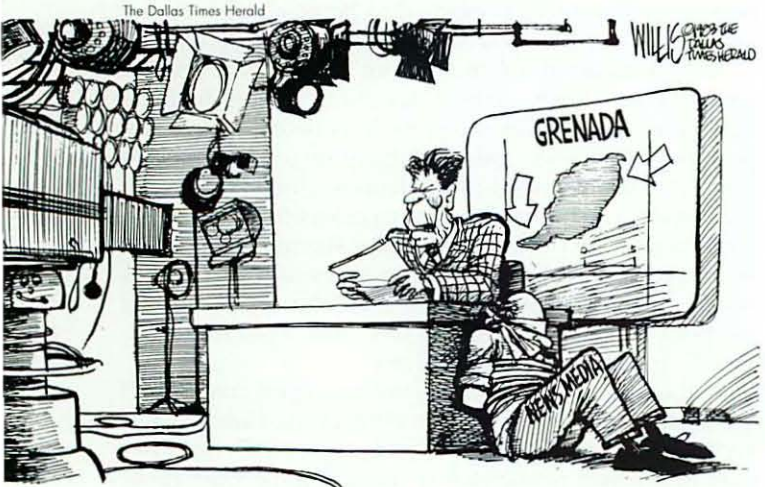
Cooke—Picture Group

Air Force police detain a news producer and the crew of an ABC plane during the 1983 Grenada invasion.

Ken Goff

British Prime Minister Margaret Thatcher (right) enters 10 Downing Street during the Falklands War. The remote battlefield made access by the press easy to control. Whether or not Thatcher mentioned this point to President Ronald Reagan, the U.S. government strove determinedly to control press access in Grenada, a point made in the cartoon below.

The Dallas Times Herald



"..THIS IS RONALD REAGAN AND THAT'S THE WAY IT WAS."

legal challenge was mounted, although not by the mainstream press. On January 10, 11 publishers and several individuals, supported by the Center for Constitutional Rights, challenged the Pentagon's rules on pool coverage and security review. Another lawsuit concerned conditions for covering the return of military dead to Dover Air Force Base. *The Nation Magazine v. U.S. Department of Defense* was heard in the Southern District of New York in front of Judge Leonard Sand. The plaintiffs advanced two main arguments: that the government's rules constituted a "continuing unlawful interference and prevention of news coverage" and that pools and special programs for "hometowners" meant a denial of fair and equal access to information. (Hometowners were reporters who, having struck up an acquaintance with officials at their local military bases, followed them to the gulf and then drew on the relationship to get inside information.)

The decision handed down on April 16 was cold comfort for the plaintiffs. In granting them standing to sue, the court declared that the military is not above constitutional adjudication and that the case had not become moot because the war was over by the time the judgment was given. Still, Judge Sand dismissed the suit, saying, "Prudence dictates that a final determination of the important constitutional issues at stake be left for another day when the controversy is more sharply focussed."

It is doubtful that such a lawsuit would have fared any better in the United Kingdom. Since no written constitution, bill of rights or freedom of information statute exists in Britain, a suit asserting that the secretary of state for defense had acted unreasonably in issuing the rules and guidelines would have to have been filed. The press might have claimed that it had a special role in bringing to the attention of the public matters it had a right to know. But this line of argument does not seem promising. According to the laws of England and Scotland, "...the press as such [do] not have any higher freedom than the freedom of speech which is generally enjoyed in this country." In any case, the principle of freedom of speech is not paramount: "It must yield to another interest of the public, viz., the need to preserve national security." This legal sentiment was echoed during the notorious *Spycatcher* case in the Court of Appeals by Lord Justice Dillon when he remarked that "...the media...have the same rights of free

Universal Pictorial Press, London

Lord Justice Dillon wrote that the media have the same freedom as anyone else and are subject to the same constraints.

speech as anyone else, subject to the same constraints."

One legal recourse for the media may be the European Convention on Human Rights, a bill of rights to which the United Kingdom is a signatory. According to some media defendants, Article 10 of the convention should give a more positive foundation in British courts for freedom of speech or the press. This was recently argued in a challenge to a 1988 directive issued by the home secretary. The directive prohibits the broadcasting of any words spoken by representatives of Ireland's Sinn Fein, the Republican Sinn Fein, the Ulster Defence Association or any other organization proscribed under the Prevention of Terrorism (Temporary Provisions) Act 1984. Article 10 requires that any restriction be for a legitimate purpose and subject to the needs of a democratic society.

However, last February the House of Lords ruled that since the convention is not a part of U.K. law, not having been incorporated by act of Parliament, legal rights and obligations cannot properly be founded on it. As Lord Templeman, one of the Law Lords, declared in the *Scotsman* case, "It is for Parliament to determine the restraints on freedom of expression which are necessary in a democratic society.... If that guidance is inconsistent with the requirements of the Convention then that will be a matter for the Convention authorities and for the United Kingdom government. It will not be a matter for the courts." So another appeal will wend its way to the European Commission and Court of Human Rights in Strasbourg. But it is not likely to do well there either. The court has just ruled that a similar ban, which was imposed by the Republic of Ireland, does not constitute a breach of the convention because it is justified as part of a national security exemption.

Her Majesty's Secrets Weapon

Unauthorized disclosures of official information—otherwise known as leaks—occur only rarely in Britain, largely because of an act of Parliament passed in 1889 and updated several times since, most recently in 1989. The Official Secrets Act, as it is called, was originally passed following a number of unsuccessful prosecutions for activities such as removing a document from the Colonial Office and passing it on to a newspaper. Drafting of legislation began after a dockyard worker sold confidential drawings of a warship to another country.

Two offenses are covered by the act's sweeping provisions: espionage, or spying on behalf of "an enemy," which carries a penalty of up to 14 years imprisonment; and passing on official information without authorization, punishable by a maximum of two years in prison and an unlimited fine. Both activities are unlawful whether the nation is at war or not; and under the law's 1989 revision, anyone who has access to information as a government employee or contractor is barred from disclosing it for life. What's more, the law does not provide for either a public-interest defense in cases where revealing information uncovers official wrongdoing or bungling, or a prior-publication defense, where it could be shown that the information was already in the public domain.

The *Spycatcher* case, settled in 1988, furnished a test of this second defense and led the Thatcher government to redraft the law. The government blocked publication of a book by a former secret agent who charged that British intelligence officials had plotted to bring down the government of the day. Published first in Australia, *Spycatcher* sold more than a million copies worldwide. Ultimately, the House of Lords Judiciary Committee, or Law Lords, Britain's highest court of appeal, ruled that in view of the book's global dissemination, it would be pointless to prohibit its publication.

The act has been used to intimidate government critics. In January 1987, BBC Scotland made a series of programs called *The Secret Society*. An installment about Zircon, an intelligence-gathering satellite, revealed that the satellite's true cost (some $750 million) had been concealed from Parliament. All information about Zircon came from publicly available sources. When the BBC decided not to broadcast the show for national security reasons, the free-lance producer, Duncan Campbell, wrote about Zircon in the *New Statesman* magazine, defying a government ban. Police responded by searching his home and the magazine's offices for source material and tapes about the story. A week later, they raided the BBC's Glasgow offices and seized two vanloads of materials related to the television series. All were subsequently returned, and the program was shown in September 1988. Campbell, however, remains legally restrained from commenting on or publishing anything to do with national security matters.

Universal Pictorial Press, London

In the Scotsman *case, one of Britain's highest judges, Lord Templeman, ruled that it is for Parliament, not the courts, to fix limits on free expression.*

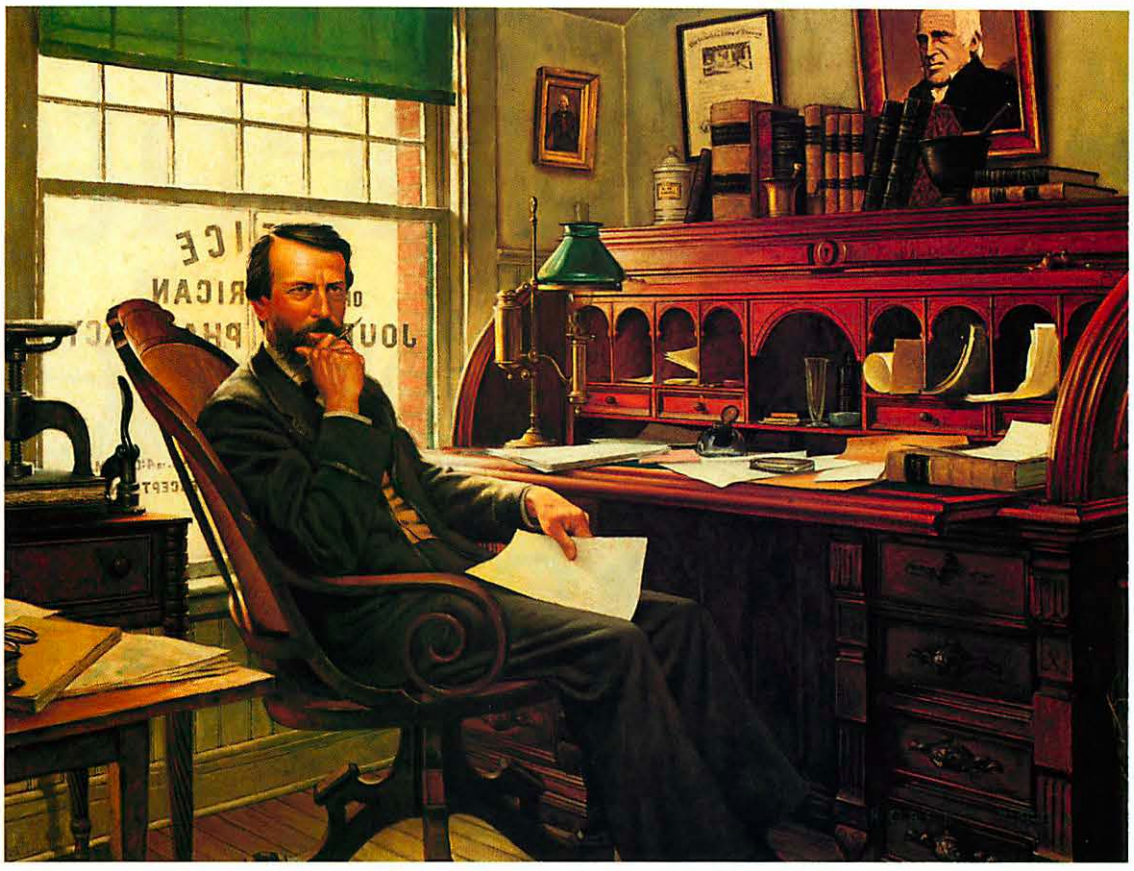
Whether or not a lawsuit protesting restrictions on press coverage of the gulf war would have succeeded in the United Kingdom, clearly, no better outcome was legally achieved in the United States. The persistent belief in the superior protections afforded the press in the United States may be partly based on the United Kingdom's lack of a formal constitutional structure. This means that protection for freedom of expression depends on self-imposed restraints by legislators and judges. Yet, Britain's constitutional design is currently in flux, and there are movements pressing for political structures analogous to those of the United States. One example is the Scottish Constitutional Convention, a broadly based organization seeking expanded Scottish home rule, especially the establishment of a Scottish parliament. Also, a recent report from the Joseph Rowntree Reform Trust, which finances groups committed to reform, suggests that many people are interested in changing the United Kingdom's government. It claims there is measurable support for abolishing the House of Lords, for developing a system of proportional representation and for regional devolution—the return of meaningful political power to local and regional governing bodies. Significantly, the report states that "support for a Bill of Rights and a Freedom of Information Act is at consensus levels across almost all social groups and supporters of the main parties." Given this degree of grass-roots backing for democratic reform and citizens' rights, even the Conservative Party may have to consider a fresh freedom of information proposal or a bill of rights (an idea supported 3 to 1 by conservative supporters polled). This could probably be accomplished by incorporating the European Convention into domestic law.

The upshot of all this is that the popular view that freedom of speech and press flourish more abundantly in the United States than in Britain may be mistaken. Distinguishing the truth is never easy, especially when comparing one society with another. But if the reforms proposed in the United Kingdom come to pass, and if verdicts like that in *The Nation* trial recur, then we will have to look carefully at our beliefs about the extent of one another's freedoms.

David Goldberg *is a lecturer in law at the University of Glasgow, Scotland, and editor of* The Journal of Media Law and Practice.

Terry Ashe/TIME Magazine

Master briefer: General Colin Powell, Chairman of the Joint Chiefs of Staff, describes the situation in the gulf for the press during Operation Desert Storm. Controlling the news by limiting access to both the theater of operations and military personnel deployed there was a radical break from practices followed in most other conflicts from the Civil War to Vietnam.



The Father of American Pharmacy

William Procter, Jr., is recognized as *the father of American pharmacy.* He served the Philadelphia College of Pharmacy as a professor for 20 years in the mid-1800s and was instrumental in the founding of the American Pharmaceutical Association. He also served as editor of the American Journal of Pharmacy for 22 years. Procter was captured on canvas by artist Robert A. Thom in a series of paintings commissioned by Parke-Davis to depict A History of Pharmacy in Pictures.

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Maryland Historical Society, Baltimore

An engraving, The Conspiracy Against Baltimore, or the War Dance at Montgomery Court House, *shows Alexander C. Hanson, co-editor of the* Federal Republican, *as a horned satan. Henry ("Light-Horse Harry") Lee (fourth from left) joins in the dance.*

The Baltimore Riots

Vocal in opposing the War of 1812, the city's Federalist newspaper became the target of a violent Republican mob.

by Donald R. Hickey

Late in the evening of July 28, 1812, a group of 20-odd men huddled together in a large cell of the Baltimore County jail. The group included Alexander Contee Hanson, the young co-editor of the city's Federalist newspaper, the Baltimore *Federal Republican,* as well as two distinguished veterans of the American Revolution, General James M. Lingan and General Henry ("Light-Horse Harry") Lee, the father of Robert E. Lee. The rest were mainly well-bred young men, scions of Maryland's finer Federalist families. The men waited apprehensively as an enraged mob, several hundred strong, sought to get at them. Already the mob had forced its way into the outer jail and was dismantling the inner doors that led to the cells. What had the prisoners done to incur the wrath of this mob? Their offense was that they opposed the War of 1812.

The War of 1812 is probably our nation's most obscure major conflict. No great wartime President is associated with it. Although his enemies called it "Mr. Madison's War," James Madison's leadership hardly measures up to that provided in later conflicts by Abraham Lincoln, Woodrow Wilson or Franklin Roosevelt. Nor was any great general able to carry the nation to victory. (The best of them, Andrew Jackson and Winfield Scott, were confined to secondary theaters of operations.) Moreover, the war effort was marred by such extensive bungling and mismanagement that only by

The National Portrait Gallery, Smithsonian Institution Attributed to James Herring, After Gilbert Stuart

Light-Horse Harry Lee, a general and the father of Robert E. Lee. In Baltimore to discuss publication of his memoirs, Lee volunteered to help defend the offices of the Federal Republican, *an offer that ultimately proved fatal.*

stretching the facts and focusing on the Battle of New Orleans, which was fought after the peace treaty was signed, can one argue that the United States won the war.

The war was an outgrowth of the Napoleonic Wars. England and France fought each other almost continuously from 1793 to 1815, and in the pursuit of victory each encroached upon American rights, mainly by interfering with U.S. trade. Federalists feared that a victory by Napoleonic France would lead to the collapse of civilization and a reign of terror throughout the Western world. They were willing, therefore, to overlook British encroachments. Republicans, on the other hand, feared that a British victory would set back the cause of democracy and enable British merchants to tighten their control of American trade.

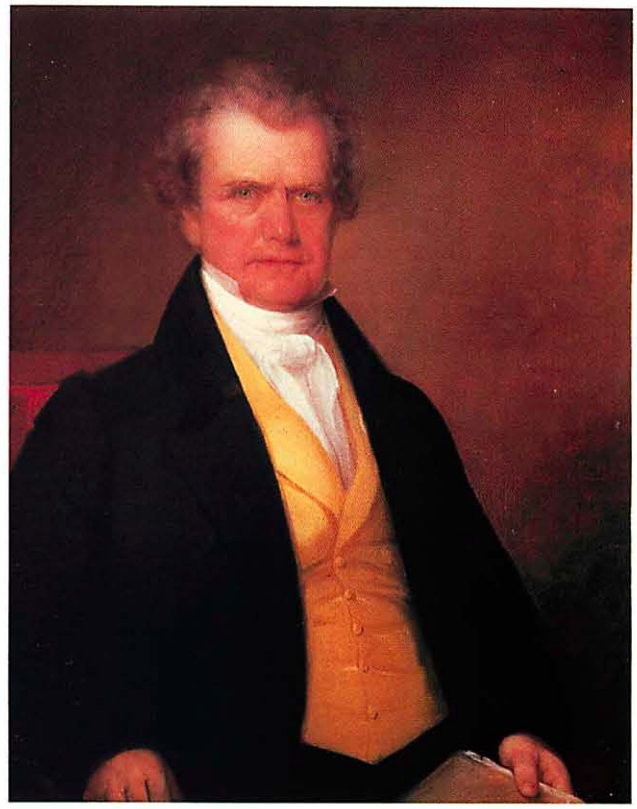
In June 1812 President Madison and his Republican allies in Congress declared war against England. Their aim was to force the British not only to repeal the Orders in Council, which compelled American merchants trading with Napoleonic Europe to ship their goods through British ports, but also to give up impressment—the British practice of taking seamen from American merchant vessels to fill out crews in the Royal Navy. In the parlance of the day, the war was fought for "free trade and sailors' rights." Republicans saw the war as a means of not only winning greater respect for American rights abroad but also unifying their party, which was beset by factionalism, and silencing their Federalist foes. "A declaration of War," said William Plumer of New Hampshire, "must necessarily produce a great change in public opinion & the State of parties—British partisans must then either close their lips in silence or abscond."

Federalists, however, refused to do either. Most greeted news of the declaration with alarm and foreboding. In New England, bells were rung, shops closed and flags hung at half-mast. The Massachusetts House called the decision for war an act "of inconceivable folly and desperation" that was "hostile to your interests, menacing to your liberties, and revolting to your feelings." The Connecticut House said a nation that declared war "without fleets, without armies, with an impoverished treasury, with a frontier by sea and land extending many hundreds of miles, feebly defended...hath not 'first counted the cost.'"

During the 1790s Federalists had pursued a policy of military and financial preparedness. After falling from power in 1801, they watched helplessly as Republicans dismantled their programs. By repealing the internal taxes, closing down the national bank and enacting trade restrictions, Republicans undermined the nation's financial health. By halting a naval construction program and decommissioning most existing warships, they seriously compromised the Navy's effectiveness; and by using the officer corps of the Army as a dumping ground for the party faithful, they demoralized the entire service.

Federalists opposed the war not simply because the nation was unprepared but also because they believed Republicans had chosen the wrong enemy. England, "the fast anchored isle," was needed to prevent the triumph of French barbarism; furthermore, her fleet could do great damage, destroying U.S. trade and all duties the federal government derived from this trade. Beyond this, Federalists were appalled by the plan to invade Canada. The best way to protect the nation's maritime rights, they believed, was by maritime means. "If you had a field to defend in Georgia," said one, "it would be very strange to put up a fence in Massachusetts. And yet, how does this differ from invading Canada, for the purpose of defending our maritime rights?"

Every Federalist in Congress voted against the declaration of war, and the final vote on the bill, 79 to 49 in the House and 19 to 13 in the Senate, was closer than that on any other declaration of war in the



Tennessee State Museum

Felix Grundy, a U.S. Representative from Tennessee, was a prominent "War Hawk," the name given to a group of militant House members led by Henry Clay who called for a war against England that would lead to annexation of Canada.

nation's history. Most Federalists accepted the New England view that the best way to bring the conflict to a speedy end was to oppose it. Hence, they wrote, spoke and preached against the war; they discouraged enlistments in the Army and subscriptions to war loans; and they opposed all proposals in Congress to raise men and money or restrict trade with the enemy. In sum, Federalists pushed their opposition further than any other antiwar party in the nation's history.

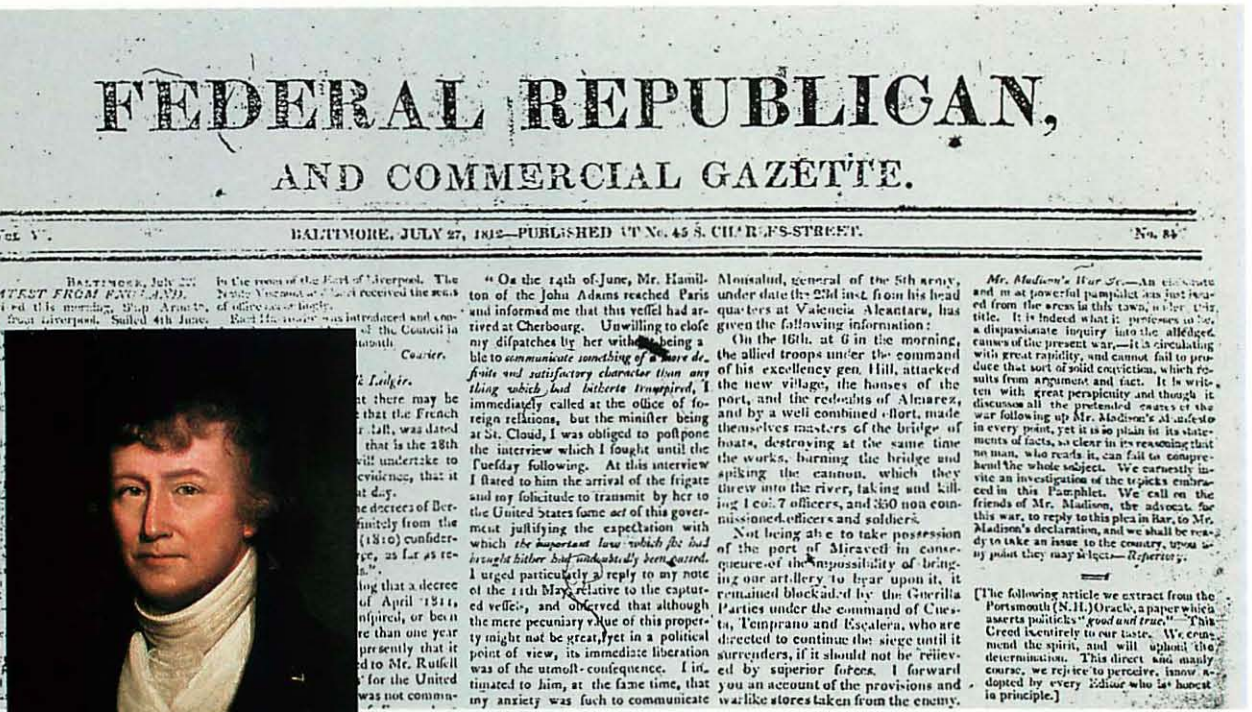
Republicans considered this resistance disloyal, if not treasonous. In the months prior to the war, they repeatedly declared that once the decision was made they would brook no opposition, and they hinted ominously at what Federalists might expect if they refused to cooperate. Once war is declared, said Felix Grundy in the halls of Congress, the only question will be "are you for your country or against it." Even Thomas Jefferson echoed this growing spirit of intolerance. In a letter written to Madison shortly after the declaration of war, the Sage of Monticello said, "The Federalists...are poor devils here, not worthy of notice. A barrel of tar to each state South of the Patomac [sic] will keep all in order, & that will be freely contributed without troubling government. To the North they will give you more trouble. You may there have to apply the rougher drastics...hemp and confiscation." Perhaps Jefferson was speaking half in jest, but other Republicans took the matter more seriously.

Feeling against those who opposed the war ran especially high in Baltimore. A rough and rowdy boomtown founded in 1729, Baltimore was the youngest of the big cities on the eastern seaboard and the only one that was firmly in the Republican camp. By the end of the 18th century, the city had become the entrepôt for the export of wheat and flour and had developed close ties with France. A large number of French refugees—mainly from Nova Scotia and Santo Domingo—lived in Baltimore, and the city traded extensively with both France and the French West Indies.

By 1812 Baltimore had more than 40,000 people, making it the third largest city in the nation, and was growing at an explosive pace. Like many frontier towns later in the 19th century, it suffered from a shortage of females—only 89 for every 100 men. French refugees gave the city a veneer of civilization with their balls, dance halls and finishing schools, yet underneath it was turbulent. The city's many French, Irish and Germans hated Great Britain, and so too did most of its native-born Americans. These groups periodically rioted against Federalists and others thought to favor the British cause. Prominent Republicans condoned this violence, and some, like Senator Samuel Smith, the most powerful of Baltimore's political bosses, even took part.

The principal target of Republican fury in 1812 was the *Federal Republican,* which Alexander Hanson had founded in 1808 when he was 22 and had consolidated the following year with Jacob Wagner's paper, the *North American.* Together the two men built the publication into one of the South's leading newspapers. So intense was the paper's Federalism and so vitriolic its style that local Republicans referred to it as "His majesty's paper." Said the Richmond *Enquirer:* "It is the most audacious, shameless, 'lying Chronicle' in the United States."

In the spring of 1812, as the nation moved closer to war, the talk in the coffee houses was that "if war was declared, the paper was so obnoxious that the editors must either alter its tone, or it must be stopped." Taking note of these threats, the *Federal Republican* declared that Federalists would not be cowed into silence nor frightened into supporting a war they considered unjust and unwise. Otherwise, "a war would put the constitution and all civil rights to sleep. Those who commenced it, would become dictators and despots and the people their slaves."



FEDERAL REPUBLICAN,

AND COMMERCIAL GAZETTE.

Vol. V. BALTIMORE, JULY 27, 1812—PUBLISHED AT No. 45 S. CHARLES-STREET. No. 84

LATEST FROM ENGLAND.

"On the 14th of June, Mr. Hamilton of the John Adams reached Paris and informed me that this vessel had arrived at Cherbourg. Unwilling to close my dispatches by her without being able to *communicate something of a more definite and satisfactory character than any thing which had hitherto transpired*, I immediately called at the office of foreign relations, but the minister being at St. Cloud, I was obliged to postpone the interview which I sought until the Tuesday following. At this interview I stated to him the arrival of the frigate and my solicitude to transmit by her to the United States some *act* of this government justifying the expectation with which *the important law which she had brought hither had undoubtedly been passed*. I urged particularly a reply to my note of the 11th May relative to the captured vessels, and observed that although the mere pecuniary value of this property might not be great, yet in a political point of view, its immediate liberation was of the utmost consequence. I intimated to him, at the same time, that my anxiety was such to communicate

Mr. Madison's War &c.—An elaborate and most powerful pamphlet has just issued from the press in this town, under this title. It is indeed what it professes to be, a dispassionate inquiry into the alledged causes of the present war,—it is circulating with great rapidity, and cannot fail to produce that sort of solid conviction, which results from argument and fact. It is written with great perspicuity and though it discusses all the pretended causes of the war following up Mr. Madison's Manifesto in every point, yet it is so plain in its statements of facts, so clear in its reasoning that no man, who reads it, can fail to comprehend the whole subject. We earnestly invite an investigation of the topicks embraced in this Pamphlet. We call on the friends of Mr. Madison, the advocate for this war, to reply to this plea in Bar, to Mr. Madison's declaration, and we shall be ready to take an issue to the country, upon any point they may select.—*Repertory*.

[The following article we extract from the Portsmouth (N.H.) Oracle, a paper which asserts politicks "*good and true*." This Creed is entirely to our taste. We commend the spirit, and will uphold the determination. This direct and manly course, we rejoice to perceive, is now adopted by every Editor who is honest in principle.]

Maryland Historical Society, Baltimore

Painting by Rembrandt Peale

An editor and his paper: Alexander Hanson is shown with the front page of the July 27, 1812, issue of the Federal Republican *that triggered the fatal riot.*

Two days after war was declared, the *Federal Republican* came out squarely against it. Calling the war "unnecessary [and] inexpedient," the editors asserted that they would use "every constitutional argument and every legal means" to oppose it. Alluding to the possibility of mob violence, they said they would "hazard every thing most dear" to prevent any attempt to establish "a system of terror and proscription." If the regular authorities were not willing to protect freedom of the press, the paper concluded, then Federalists would look to themselves.

The paper's defiant stand did not go unnoticed. Almost as soon as the issue hit the streets, rumors of violence began to circulate. The following day (at several beer gardens in Fell's Point, the rougher section of town), plans were laid to destroy the newspaper's office. The next evening, a gang of several hundred men—mostly Irish, German and native-born laborers—pulled the building down and destroyed the furnishings inside. City officials, apprised of the outrage, did not intervene. In the weeks that followed, outbursts of mob violence continued to plague the city.

Unwilling to be silenced, Alexander Hanson made arrangements to have his paper printed in Georgetown and shipped to Baltimore. Jacob Wagner had moved to Georgetown to get out of harm's way, but he subleased to Hanson a three-story brick building on Baltimore's Charles Street for use as an office. After Hanson took possession on July 25, throngs of Federalists visited him to welcome him back and encourage him in his campaign against the war. A number of the visitors—mainly young men from the country—agreed to stay in order to defend the building from possible attack. General Henry Lee, who was in the city to discuss the publication of his memoirs, also offered to help. Because of his Revolutionary War experience, he was put in charge of the defensive preparations.

On July 27, a new issue of the *Federal Republican* appeared. Under a masthead that proclaimed "Baltimore, July 27, 1812—Published at No. 45 S. Charles-Street," the paper carried a caustic editorial on the turbulence that afflicted the city. Those who took part in the rioting, the editorial said, were the "misguided instruments" of more powerful men in Washington. Who gave "the specific intimation" for the attack, the paper said, was unknown, but the evidence pointed to "the monster in Baltimore [Samuel Smith], whose corruption, profligacy and jacobinical heart, were well-suited to place such orders from his superiors in a train of execution." City and state authorities were culpable too because they had taken no firm action to suppress the lawlessness.

Incensed by the newspaper's reappearance, Republicans resolved to silence it permanently. That evening, a mob, again consisting mainly of Irish, German and native laborers, gathered in Charles Street and began stoning "Fort Hanson" (as the house had been dubbed), breaking most of the windows, shutters and sashes. The occupants warned the men to disperse, but the reply from the street was, "Fire, fire, you damned tories! Fire! we are not afraid of you." About 10:00 P.M. the Federalists fired a warning burst into the air. This scattered the attackers temporarily, but most returned armed with weapons of their own, and a doctor named Thadeus Gale urged another assault. Crying, "Follow me," he forced open the front

The Peale Museum, Baltimore City Life Museums Painting by Rembrandt Peale

Maryland Historical Society, Baltimore Painting by Charles Bird King

Baltimore's mayor, Edward Johnson (left), and General John Stricker came to Charles Street and persuaded the besieged Federalists to place themselves in protective custody. Then, with an escort of militia, Stricker marched the prisoners to the county jail.

door of the house. The defenders opened fire, killing Gale and wounding several others. For the rest of the night the mob kept the building under siege, periodically exchanging shots with those inside.

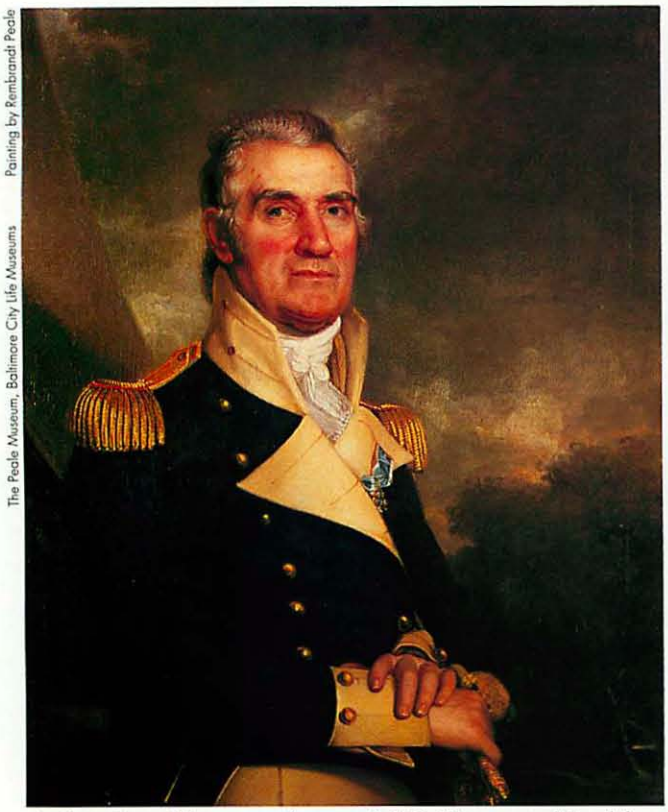
Not until 11:00 P.M., when the mob extended all the way to his house—a half-block away—and shots could be heard, did General John Stricker order Major William Barney to summon his troop of mounted militia. Barney managed to round up about 30 men but refused to march to the scene of trouble until 3:00 A.M., when two magistrates who would sign an order were at last found. Making no attempt to break up the crowd, Barney entered the house to parley with the men inside. He promised to do his best to protect them but said he had no authority to disperse the mob.

Early the next morning the crowd swelled to 1,500 or 2,000. Mayor Edward Johnson, General Stricker and other officials arrived on the scene, persuaded the Federalists (who numbered about two dozen) to surrender into protective custody, and promised to protect their persons and property. Stricker assembled a hollow square of militia to guard the officials and their prisoners as they marched to the county jail a mile away. The crowd hurled cobblestones at the formation, but no one was seriously injured.

That afternoon an inflammatory editorial appeared in the *Whig*, a paper controlled by Samuel Smith. Calling the Federalists "murderous traitors," the editorial said that the Charles Street garrison should have been leveled and those inside put to death. As darkness closed in, a laborer named George Wooleslager arrived with 30 or 40 toughs from Fell's Point. Addressing his comrades, he exclaimed, "Where are those murdering scoundrels who have...slaughtered our citizens in cold blood! in that gaol my boys; we must have them out; blood cries for blood!" Pushing the mayor and others aside, the mob attempted to batter down the jail door, which was opened from within, apparently by the turnkey. The furious mob streamed in, took apart the jail's inner doors and swarmed into the cell housing the Federalists.

The prisoners doused the lights. About half managed to lose themselves in the crowd, but the rest—including Hanson, Lee and Lingan—were seized, then beaten and tortured. Liquor flowed freely, and the mood of the mob was savage. One eyewitness said, "All I have ever read of the French [Revolution] does not equal what I saw and heard last night. Such expressions as these were current—'We'll root out the damn'd tories.' 'We'll drink their blood.' 'We'll eat their hearts.'" A number of Republican officials, including the mayor and sheriff, tried to stay the mob's frenzy, but others refused to help. By the time the violence had subsided, General Lingan lay dead, Hanson and Lee had sustained extensive internal injuries that ultimately killed them, and at least nine other Federalists were seriously injured.

Even with his injuries, Hanson managed to publish his newspaper in early August, and for a third time it caused rioting. Its columns draped appropriately in black, an issue was printed on August 3 in Georgetown and shipped to its Baltimore subscribers by mail. When the shipment arrived, a mob threatened to pull the post office down to get at it. The postmaster sent an express to Washington asking for protection, but his request was denied. President



The Peale Museum, Baltimore City Life Museums Painting by Rembrandt Peale

Ardent Republican and powerful Baltimore political boss Samuel Smith labeled the Federalists "murderous traitors."

Maryland Historical Society, Baltimore Painting by Charles Bird King

Attorney General William Pinkney urged revival of the Sedition Act, which expired in 1801, to punish foes of the war.

Madison conceded that the post office was "under the sanction of the U.S.," yet he doubted that "any defensive measures, were within the Executive sphere." Eventually militia broke up the mob, but the city was said to be "much disturbed" for almost a week afterwards, and local officials had to place a guard at the post office and proclaim a curfew.

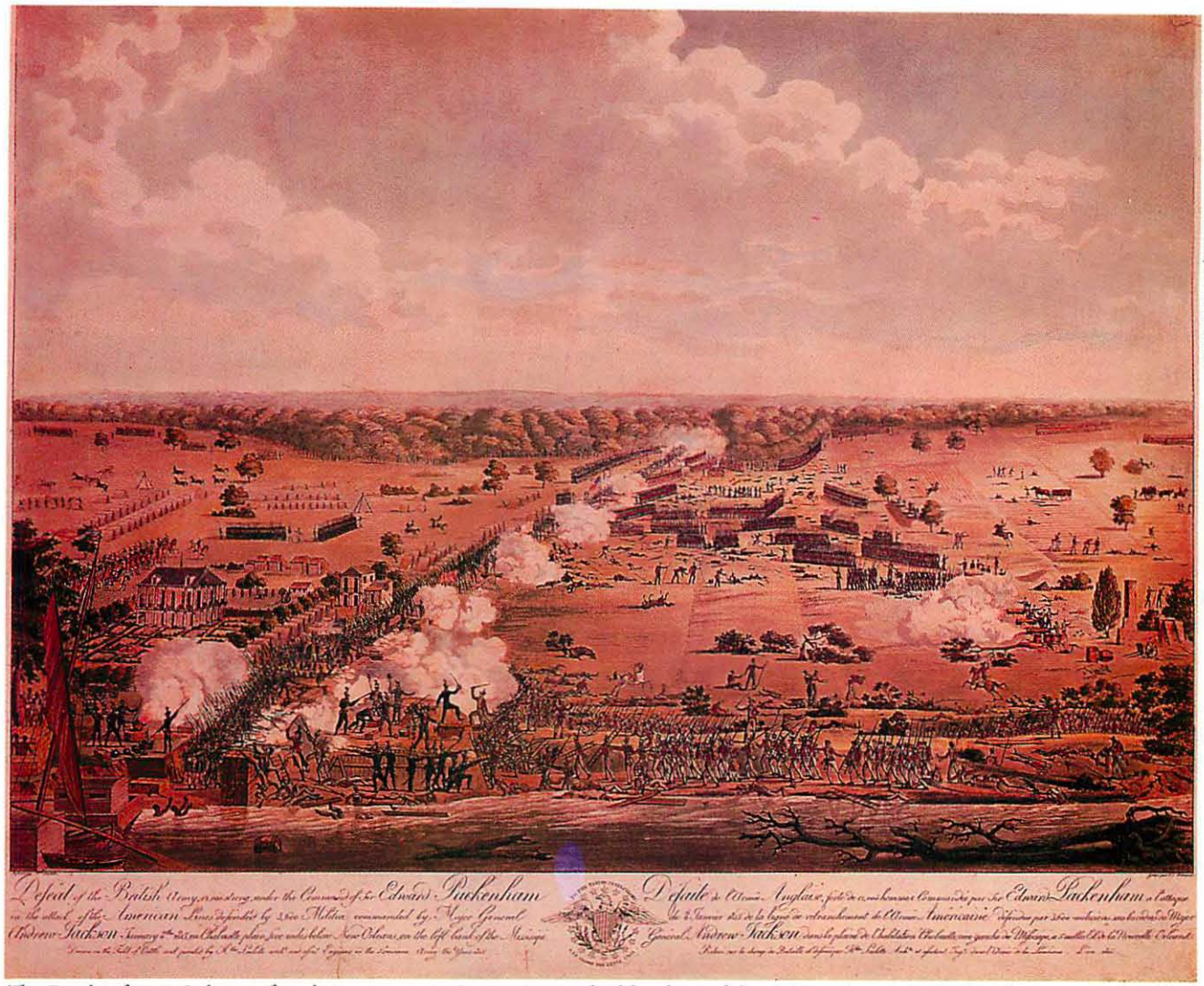
Although the Baltimore riots were as brutal as any that had yet occurred in American history, no one was punished for taking part. A grand jury indicted some of the mob leaders, but only one man was found guilty, and he got off with a small fine. Hanson and his associates were also brought to trial, charged with manslaughter in the death of Gale. Securing a change of venue to Annapolis, a Federalist city, they were all acquitted without the jury leaving its box.

Across the nation Federalists denounced the violence, comparing it to the worst excesses of the French Revolution. The Pittsburgh *Gazette* said that "the cruelty and barbarity" displayed by the mob was "unexampled in the annals of any civilized country, France excepted." The Hartford *Courant* claimed that the violence revealed the true purpose of the war. "We now see, written in bloody characters, by what means disaffection must cease. The war, pretendedly for the freedom of the seas, is valiantly waged against the freedom of the press."

The *Courant* exaggerated, but not by much. Republican mobs drove the Savannah *American Patriot* and the Norristown (Pennsylvania) *Herald* out of business in 1812, and Federalist editors in other towns in the middle and southern states complained that they had been warned to change their tune or risk a similar fate. In addition, other incidents of violence against those who opposed the war occurred.

Republican leaders found these disorders embarrassing and accused Federalists of misrepresenting the facts. To counter their charges, the Baltimore city council issued a report on the riots that discreetly avoided using the word mob and exonerated city authorities. (President Madison called the report "a seasonable antidote" to the misrepresentations of those who blamed the violence "on the friends of true liberty.") Republicans also tried to blame the upheaval on the Federalists. By arming themselves instead of seeking civil protection, said the New York *Columbian,* the Federalists in Baltimore were "guilty of a murderous intent, and [of] wilfully exciting the popular vengeance."

The widespread pattern of violence in 1812 showed that, like Federalists in the 1790s, Republicans would not tolerate opposition to their war policy. In 1798 Federalists had attempted to silence criticism of the Quasi-War, America's undeclared naval war with France, by enacting the Sedition Act, which made it a crime to incite discontent against the government. The act expired in 1801. In 1812 some Republicans, including Supreme Court Justice Joseph Story and Attorney General William Pinkney, wanted to revive the law. "Offenders, conspirators, and traitors are enabled to carry on their purposes almost without check," complained Story. Congress must "give the Judicial Courts of the United States power to punish all



The Battle of New Orleans, fought on January 8, 1815, was the bloodiest of the war and occurred after the peace treaty had been concluded. The British commander, Sir Edward Pakenham, was opposed by American forces under Andrew Jackson.

crimes and offences against the Government, as at common law." Madison, however, demurred. Unlike most wartime Presidents, he had a healthy respect for the civil rights of his domestic foes. But, taking their cue from the party leadership, Republican mobs found their own way to suppress dissent, and the result was a chilling message for those who opposed the war. By the fall of 1812, Federalists everywhere believed there was a real danger that the war would, as the *Federal Republican* had prophesied, "put the constitution and all civil rights to sleep."

What did Federalists reap from their opposition? Nothing that was good, as it turned out. Antiwar sentiment unified and strengthened the party during the conflict. But afterwards, to have opposed the war smacked of treason, and the Federalist Party faded away. It did not matter that the United States had failed to conquer Canada or achieve any of its maritime goals. Nor that the war had vindicated so many Federalist policies—particularly the importance of military preparedness and the need for internal taxes and a national bank—or that Republicans themselves admitted as much by adopting these policies during or after the war. What mattered was that the nation had emerged without surrendering any rights or territory and with enough triumphs to give the appearance of victory.

The Battle of New Orleans, fought two weeks after Great Britain had signed and ratified the Treaty of Ghent (but five weeks before the treaty reached the United States), played an important role in forging the myth of American victory. Republicans boasted that they had defeated "Wellington's invincibles." As the years slipped by, most people forgot how close the nation had come to military and financial collapse. Thus the War of 1812 passed into history not as a futile and costly struggle in which America barely escaped dismemberment and disunion, but as a glorious triumph in which the nation singlehandedly defeated the conqueror of Napoleon and mistress of the seas.

Donald R. Hickey, *John F. Morrison Professor of Military History at the U.S. Army Command and General Staff College at Fort Leavenworth, is the author of* The War of 1812: A Forgotten Conflict *(University of Illinois Press), from which this article was adapted.*

ASIAWEEK

COOKING
LIGHT

DANCYU

ELLE JAPON

ENTERTAINMENT
WEEKLY

FORTUNE

HIPPOCRATES

IN HEALTH

LIFE

MARTHA
STEWART
LIVING

MONEY

PARENTING

PEOPLE

PRESIDENT

PROGRESSIVE
FARMER

SOUTHERN
ACCENTS

SOUTHERN
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ILLUSTRATED

SPORTS
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CANNOT BE
LIMITED
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thomas
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The Creation of the Republican King

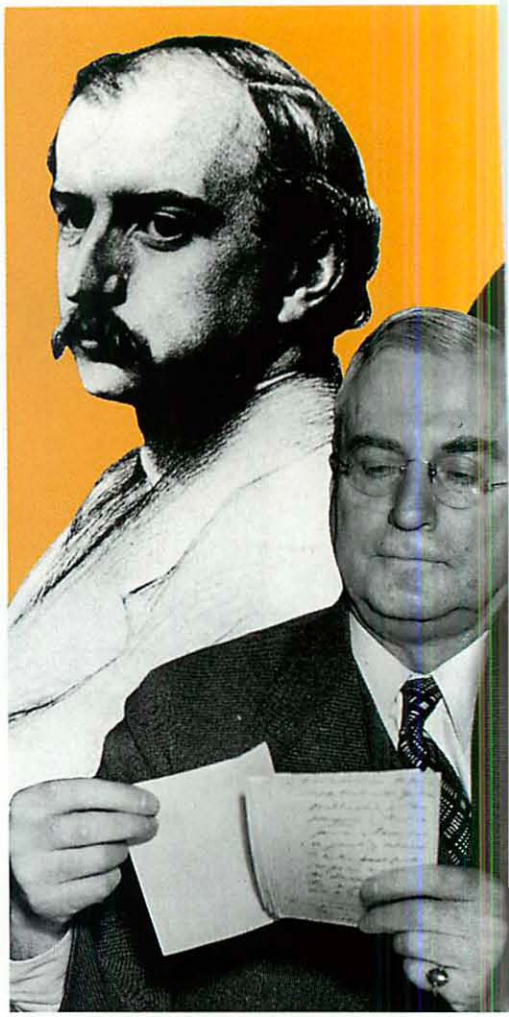
Over the past six decades, presidential conduct of foreign policy has become disturbingly monarchical.

by Walter LaFeber

Illustration by Mike Witte

In the late 1890s, at the beginning of the American Century, the opportunities and needs of swelling American global responsibilities created a new American presidency. The unexpected mass horrors of World War I formed a pivotal chapter in the formation of that presidency. Guiding the nation into the conflict in 1917, President Woodrow Wilson realized that total war could undermine constitutional democracy.

Americans, caught up in the excitement of killing, would "forget there ever was such a thing as tolerance," he remarked privately; "the Constitution would not survive it." Indeed, overly patriotic Americans conducted witch-hunts to search out, imprison and even murder people who were slack in supporting the war. These searches sometimes received the support of the Wilson administration and the



Supreme Court. Wilson had demanded, after all, the country's full commitment to realizing his vision of a "world safe for democracy."

When the terrible bloodshed ended in November 1918, however, the devastated Western world had seemingly been made safe not for democracy but for the spread of the Bolshevik revolution. In 1919-20 U.S. officials vented their frustration by rounding up thousands and deporting hundreds suspected of having revolutionary ideas. Other people, led by bitterly anti-Wilson members of the Senate, expressed their disillusionment by turning on the President and his dream of U.S. participation in the new League of Nations. Both his health and his dream were destroyed.

Some observers quickly decided that the villain of this tragedy was not Wilson but a democracy that had gone haywire when it had to deal with complex foreign-policy problems. Walter Lippmann, a young adviser of Wilson's during the war, had deserted the President by 1920. He traced the roots of his frustration back to 1914-17 when, Lippmann later claimed, unbridled democracy made such demands on Western leaders that they "lost control of the war." In his widely discussed book of 1922, *Public Opinion,* Lippmann concluded that the public does not judge issues on the basis of facts, which are complex and too easily distorted, but by "stereotypes" or "pictures inside their heads" that are created by the immediate culture. These pictures may have little to do with reality and are likely to be profoundly ill informed. Lippmann therefore demanded that government policy be managed "only by a specialized class" of informed "insiders."

During the 1920s the U.S. foreign-policy elite, led by Secretaries of State Charles Evans Hughes, Frank B. Kellogg and Henry L. Stimson, and Secretary of Commerce Herbert Hoover, agreed with Lippmann. Working out of the government's executive branch and the New York–Chicago business communities, this elite found two devices to help it avoid Wilson's fate. First, the policymakers worked out quiet, informal channels of communication through which the State Department or the Commerce Department could develop foreign policy (especially with the help of the business community) outside the glare of Congress's scrutiny or the public's attention. One result was the establishment in New York City of the powerful Council on Foreign Relations where government and business leaders could privately discuss their problems. Second, officials defined vital foreign-policy dilemmas as economic, not political or military. As Hughes phrased it in 1922, "Our international problems tend to become mainly economic problems." And these problems were to be handled by the private business community, not by politicians or soldiers subject to public oversight. To adapt a 1980s' term, foreign policy was "privatized" in the 1920s to escape the unpredictable demands of a presumably misinformed public.

This privatization created a gimcrack economic system resting on shaky foundations. Herbert Hoover, then serving as secretary of commerce, encountered the problem firsthand. In 1921-22 he had worked out a deal with the top bankers: they could invest globally where their chances for profit took them, but they were to clear the deals informally with the executive branch (that is, Hoover and Hughes) so they would not run counter to U.S. policy interests. By the late 1920s bankers had helped rebuild Germany, but they continued throwing so much money into highly speculative projects in that country (and into get-rich schemes in Latin America) that Hoover was rightly worried. When he tried to pull the bankers back, however, they paid scant attention, and he had little leverage to discipline them. After the stock market crashed in New York in 1929, the West European and Japanese markets, heavily dependent on U.S. capital, rapidly declined in 1930-31. By 1933 Japanese and German militarism had arisen from the economic debris.

The attempt in the 1920s to marry the powers of a new executive to those of the business community, and to do so largely outside the purview of Congress and the public, had not merely failed. It had created economic conditions and political dangers even greater than those of the World War I era. Public reaction was severe. Congress reclaimed some of its foreign-policy power by passing (frequently over President Franklin D. Roosevelt's objections) Neutrality Acts between 1935 and 1939. These aimed to keep Americans, and especially business people, out of the foreign squabbles that could lead to the next world war. Roosevelt had been Wilson's assistant secretary of the Navy and a Democratic vice-presidential

L. to r.: Bettmann Archive; AP/Wide World; Alfred Eisenstaedt/LIFE; AP/Wide World

American intellectuals have both strongly supported and vigorously criticized presidential monopoly of foreign policy. Among the more prominent writers and historians of the past hundred years who have dealt with this theme are (from left) Henry Adams, Edward S. Corwin, Clinton Rossiter and Walter Lippmann.

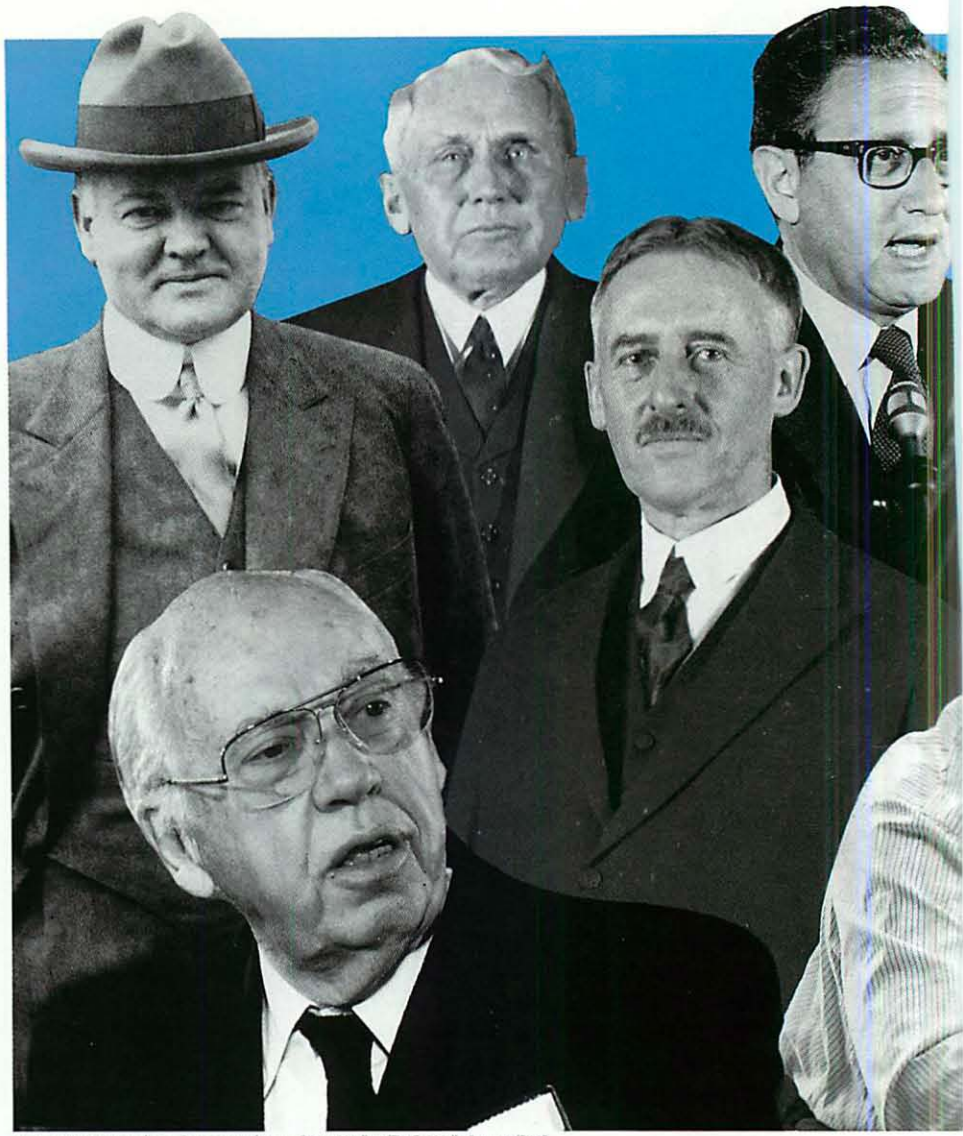
candidate in 1920 who espoused internationalism, but during his first term in the White House, he gave priority to domestic problems.

Early in his second term, however, Roosevelt's attention shifted. Japan's brutal invasion of China in 1937 and Hitler's cynical use of the Munich accords in 1938 threatened, in FDR's eyes, America's security. Moreover, the economy of the United States suffered one of its sharpest downturns ever during 1937-38—a disaster that led many close observers (including Roosevelt) to conclude that New Deal domestic policies had failed and that a new economic policy focused on the international arena was required. More important, in 1938 FDR pumped up the economic system with a $3 billion military-spending program that included large sums for battleships. The building of the U.S. Air Force accelerated. Seen in another context, these actions were creating muscle for the President's exercise of his constitutional powers as Commander in Chief of the Army and Navy.

By 1940, therefore, a chain of events lasting a half-century had created four conditions that were to shape U.S. foreign policy and presidential power over the next half-century. First, U.S. interests had become global; prosperity, and even national survival, could depend on events half a world away, as in China. Congress's Neutrality Acts had not been able to immunize the nation against foreign cataclysms. Second, the Neutrality Acts seemed to support Lippmann's argument: public and congressional control of foreign policy was apparently a recipe for disaster. Parochial Americans, misled by "pictures in their heads," had fiddled while Asia and Europe burned. Third, a sense of world crisis combined with new U.S. military power to throw the initiative in foreign affairs to the Commander in Chief. During the next 50 years that sense of crisis seldom abated. At century's turn, America's greatest historian (and grandson and great-grandson of Presidents), Henry Adams, had warned that it was dangerous to place "unlimited power" in the hands of "limited minds." His concern about the Commander in Chief was too little in evidence in arguments over post-1940 presidential power.

Finally, even as the role of Congress in foreign-policy debates diminished, the third branch of government gave its stamp of approval to presidential supremacy. In 1936, Justice George Sutherland wrote a majority Supreme Court opinion *(Curtiss-Wright Export Corporation v. United States)* upholding the President's right to prevent arms from being shipped to Latin American belligerents. But Sutherland did not stop there. In remarks without direct relevance to the case, he declared that there existed "the very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."

There was a delicious irony in this remarkable statement, for Sutherland was an arch conservative who disliked FDR (and Woodrow Wilson) and had helped the Court kill New Deal programs. But Sutherland was also in a trap: as an American conservative he hated presidential interference in domestic affairs, but he wanted U.S. power to be exercised decisively abroad. To escape the trap, in *Curtiss-Wright* the Justice neatly separated the former from the latter. Could Sutherland properly make such a separation? This central question has long haunted Americans. More specifically, were American conservatives correct in believing they could restrain the presidency at home but allow a virtually unrestricted presidency to act abroad? Or were American liberals correct in believing (especially after the Vietnam conflict) that they could have a presidency that was active at



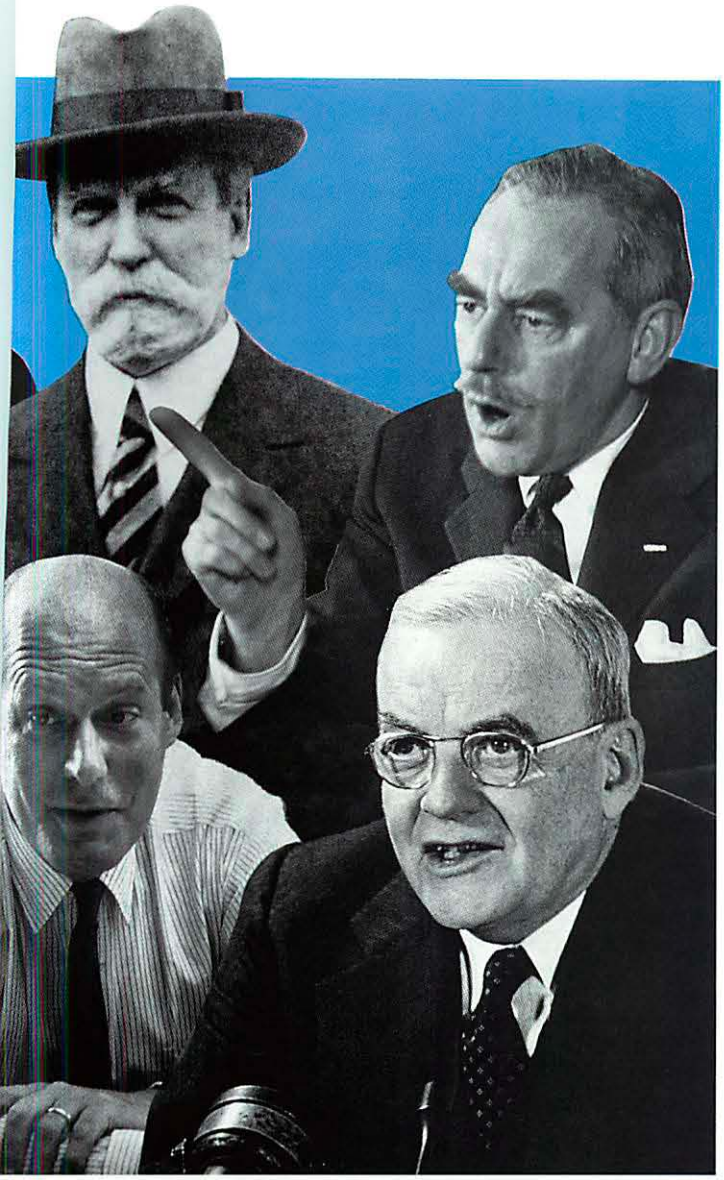
Top row: Bettmann Archive Bottom row, l. to r.: Diana Walker/TIME; Wally Bennett/TIME

home but legislatively circumscribed abroad? It turned out, of course, that such a neat separation was hopeless, but that impossibility became clear to many Americans only after the Watergate scandal of the 1970s and the Iran-*contra* debacle a decade later. Contrary to the popular saying, politics did not stop "at the water's edge," and neither could the Constitution.

In 1940-41 Roosevelt exploited these four conditions to lead Americans into another war. In mid-1940, on his own authority, which he based on a tortured reading of earlier legislation, he gave 50 aged U.S. destroyers to besieged Great Britain in return for long-term leases on British bases in the Western Hemisphere. Americans were becoming allies of Great Britain in its war against Germany, although Congress had never approved any such alliance. In 1941 FDR did work with Congress to obtain Lend-Lease legislation that made the United States "the arsenal of democracy" (as he termed it) for "the government of any country whose defense the President deems vital to the defense of the United States" (as the legislation phrased it). Later that year, however, without consulting Congress, he deployed U.S. warships in combat zones to ensure the passage of goods to Great Britain. When one of those ships, the U.S.S. *Greer,* was attacked by a German submarine, he misled the American people about the circumstances. Meanwhile FDR privately told British Prime Minister Winston Churchill (according to the British record of the conversation) that "he would become more and more provocative. If the Germans did not like it, they could attack American forces." The President added, "Everything was to be done to force an 'incident' that would lead to war."

Writing in late 1941, and without knowing of this FDR-Churchill conversation, which became public some 30 years later, the distinguished scholar of the Constitution, Edward S. Corwin, warned that "the growth of presidential power within recent years" required constitutional reform. "Otherwise," he said, "what was the result of democracy may be democracy's undoing." No President, Corwin protested, can constitutionally conduct foreign policy "according to his own sweet will." Given the enormity of the crisis that the nation confronted in 1941, Corwin's view may seem arguable. What is less debatable is Senator J. William Fulbright's explanation for the high-handed presidency of the Vietnam War years: "FDR's deviousness in a good cause made it much easier for [President Lyndon Johnson] to practice the same kind of deviousness in a bad cause."

An enormous growth of presidential power occurred during the four years of total war after 1941. When Congress stymied a key part of his domestic program in 1942, FDR warned that if "Congress should fail to act, and act adequately...I will act," although he added that after the war, his powers to act would "automatically revert to the people—to whom they belong." Corwin responded to that remark by declaring that it was from the Constitution that the President's war powers were derived; to assert they were directly from the people was "a doctrine closely akin to the Leadership principle" of Adolf Hitler that Americans "are combating today in the four quarters of the globe." Abroad, Roosevelt met twice with the other Big Three leaders, Churchill of Great Britain and Joseph Stalin of the Soviet Union, to make secret arrangements for the postwar world. New European boundaries, the severe terms demanded by Stalin for his entry into the war against Japan, fundamental economic agreements (such as the amount of repara-



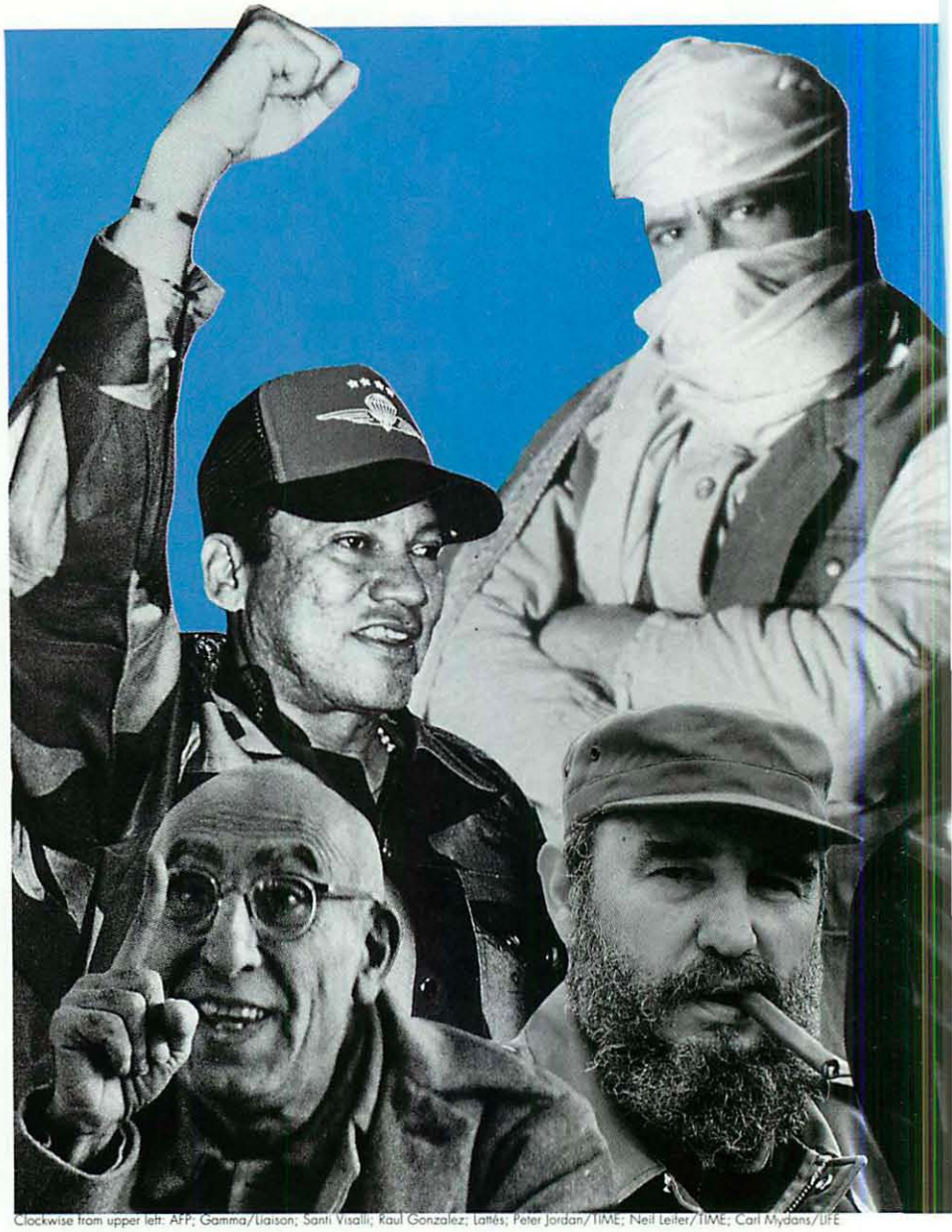
Lawyers and businessmen called to Washington have tended to view Congress's role in foreign policy as a nuisance at best. Some powerful supporters of that tradition: (top row from left) Herbert Hoover, Frank B. Kellogg, Henry L. Stimson, Henry Kissinger, Charles Evans Hughes, Dean Acheson, and (bottom row) William J. Casey, Nicholas de B. Katzenbach and John Foster Dulles.

tions defeated Germany should pay)—all were decided at these meetings. Few of the deals he concluded were revealed to Congress, although the President, having closely observed Wilson's destruction in 1919-20, did work carefully with Capitol Hill to broaden American support for the new United Nations. The Big Three, however, not the U.N., determined the postwar world's contours.

FDR's sudden death in April 1945 prevented him from sharpening those contours. That job was left to Harry Truman, a former Missouri senator who was initially highly insecure in the White House. He had little knowledge of foreign affairs and even less of Roosevelt's secret arrangements. But Truman intended to preserve presidential authority, especially when it came to dealing with Stalin, whom he quickly mistrusted. On his own the President warned the Soviets to cease pressuring Iran and Turkey, although Stalin had good reason to believe that he and Churchill had explicitly recognized Soviet interests and influence in these two nations. When communist rebels threatened Greece in 1947, and Western Europe faced starvation and the possibility of leftist governments in 1947-48, Truman knew he had to go to Congress to obtain great sums of money for help. It was, to say the least, an uphill fight, for the Congress of 1947-48 was dominated by Republicans who disliked him and were reluctant to send taxpayers' money overseas.

Truman solved the problem brilliantly, for both himself and his successors of the next four decades, by appearing before Congress on March 12, 1947, and asserting that his listeners must now "choose between alternative ways of life [—the] free peoples [or the] totalitarian regimes." Presented with the stark alternative, Congress gave Truman $400 million for Greece and Turkey and $13 billion over the next five years under the Marshall Plan for Western Europe. But the President obtained much more than that, for by convincing Congress (and most Americans) that the world was divided into two camps and that they had to choose which side they were on, he had discovered a magic formula for creating a political consensus out of the factionalized American public. On this consensus Truman built his foreign policy. The Truman Doctrine, as it came to be known, put pictures in American heads that allowed the President tremendous authority, at least as long as the electorate believed he was fighting communism. Moreover, the doctrine defined a foreign, not domestic, policy problem as the greatest crisis facing Americans. That definition enriched presidential power because Americans willingly gave the office more authority to act abroad than at home, and the Commander in Chief could command headlines by confronting foreign enemies. Suffering some of the lowest public-opinion-poll approval ratings in presidential history before he issued the Truman Doctrine, afterward the President enjoyed a surge of popularity that helped carry him to his amazing come-from-behind victory in the 1948 election.

In late June 1950 Truman invoked the communist threat when he committed U.S. forces to repelling an invasion by North Korea into U.S.-supported South Korea. Recent scholarship has revealed that the origins of the invasion were complex; they stemmed more from internal Korean civil pressures than from plotting by Stalin. But Truman blamed the conflict on an attempt by communist North Korea to spread its power through "armed invasion and war." With the guidance of Secretary of State Dean Acheson, a brilliant lawyer who shared Sutherland's view of presidential



Clockwise from upper left: AFP; Gamma/Liaison; Santi Visalli; Raul Gonzalez; Lattès; Peter Jordan/TIME; Neil Leifer/TIME; Carl Mydans/LIFE

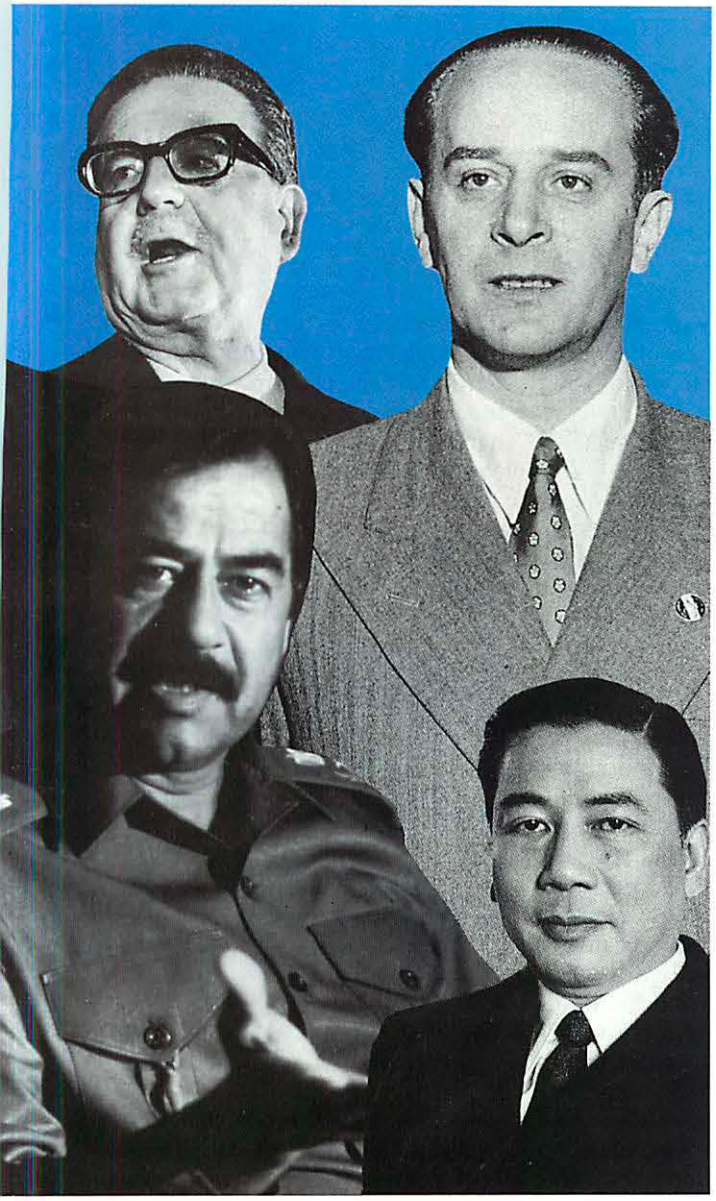
powers abroad and Lippmann's disdain for the public's intelligence at home, Truman did not go to Congress to obtain a declaration of war.

The State Department instead explained his right to send Americans into battle by arguing that "the President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof. He also has authority to conduct the foreign relations of the United States." These unmodified claims, among the strongest ever made on behalf of executive power, are not anchored in the Constitution or, certainly, in the *Federalist Papers,* where Alexander Hamilton wrote in No. 69 that the Commander in Chief's power "would amount to nothing more than the supreme command and direction of the military and naval forces," while "the *declaring* of war and...the *raising* and *regulation* of fleets and armies... would appertain to the legislature." Hamilton added the emphasis. Truman's claims, however, were not effectively challenged by Congress and became a historic precedent. Within a year Truman and Acheson again used the Commander-in-Chief clause to justify the President's stationing of U.S. troops in Europe, where many observers feared a war might break out with the Soviets. Congressional protests now erupted, especially since several months before, communist China had intervened in Korea to inflict stunning defeats on the U.S. military.

Truman's "police action," as it was termed, had suddenly become a war with the world's most populous nation. Despite plummeting political popularity, Truman stayed on his course in both Korea and Europe. He was stoutly supported by those who, like Acheson, believed that only the President could adequately respond to foreign challenges in a world that was dangerously unpredictable, ever smaller and now overshadowed by the nuclear bomb. For his part, Corwin acidly condemned "our high-flying prerogative men [who] appear to resent the very idea" that Congress must constitutionally control the President.

Dwight Eisenhower, an immensely popular war hero and a midwesterner who had a highly developed sense of the fragility of Americans' willingness to sacrifice in order to save the world from communism, cut back Truman's commitments. The new President agreed to a Korean truce, met with post-Stalin Soviet leaders in 1955 to ease Cold War tensions and moved to protect the economy from swollen defense budgets.

Behind the scenes, however, Eisenhower quietly expanded his power in a manner recently described by scholars as a "hidden-hand presidency." He used a legacy from Truman. The National Security Act of 1947 had streamlined the executive institution's ability to carry out foreign-policy decisions, and also centralized the President's access to and control over intelligence by creating the Central Intelligence Agency. The CIA's work was largely hidden from congressional and public scrutiny. In 1953 Eisenhower secretly used the CIA to help overthrow a nationalist regime in Iran and restore the pro-American Shah to his Peacock Throne. The next year the President authorized the agency to destroy a constitutionally elected Guatemalan government he suspected of having moved too far to the left. He replaced it with military rule. Also he and his secretary of state, John Foster Dulles, worked intensely after the fall of Dien Bien Phu in May 1954 to remove the losing French colonial



Opposed to U.S. policies, many foreign leaders have become bitter foes of American Presidents. Some have been targets of undercover operations aimed at toppling them. Shown at left, Panama's Manuel Noriega and, clockwise, Libya's Muammar el Qaddafi, Chile's Salvador Allende, Guatemala's Jacobo Arbenz, Vietnam's Ngo Dinh Diem, Iraq's Saddam Hussein, Cuba's Fidel Castro and Iran's Mohammed Mossadegh.

forces from Vietnam and replace them with U.S. advisers and a carefully selected Vietnamese leadership that was to protect a new South Vietnam from the communist north. Eisenhower thus greatly, and dangerously, expanded executive power. Not the least part of the danger was that this expansion occurred secretly or with little debate as Americans placed their trust in the avuncular, smiling Ike.

Among Eisenhower's legacies to his successor, John F. Kennedy, was another CIA plan that aimed at overthrowing the new revolutionary regime of Fidel Castro in Cuba. Kennedy and his advisers so mismanaged the invasion at the Bay of Pigs in April 1961 that it was dubbed "the perfect failure." But the aura of the presidency was by then so strong that Kennedy received his highest ever public-opinion approval ratings after the debacle. In October 1962 the young President dramatically demonstrated the real measure of his office's power. Discovering that the Soviets had begun placing short- and intermediate-range missiles in Cuba, Kennedy, consulting no one but a carefully selected group of 14 close advisers, went on national television to demand the missiles' removal. He also declared that he had ordered the U.S. Navy to blockade Cuba and warned that if any of the missiles were fired, the United States would retaliate by attacking the Soviet Union. After tense negotiations, both Kennedy and the Soviets compromised enough so that an agreement for the removal of the missiles was reached. But the world had been taken closer to a nuclear Armageddon than ever before or since.

Kennedy's demands in the missile crisis, his charismatic personality, his ability to use the new medium of television and his conviction that, in his words, he "must be prepared to exercise the fullest powers of his office—all that are specified and some that are not" pushed the chief executive's authority to new heights. Kennedy's conviction had for some years been strongly supported by intellectuals who mistrusted Congress and exalted presidential powers. As Eisenhower and Kennedy expanded their power, Clinton Rossiter, in his widely read book, *The American Presidency,* flatly declared that "we can be well satisfied with our 'republican king.'" The office's vast power, he argued, was not "'poison,' as Henry Adams wrote." On the contrary, said Rossiter, the power "has elevated often and corrupted never."

Yet within a decade of Kennedy's assassination in 1963, corruption seemed to be rampant and to threaten the Constitution itself. President Lyndon Johnson, whose expansive view of his office matched Kennedy's, and whose ability to have his way with Congress far exceeded that of his predecessors, undertook to save South Vietnam from Communism and simultaneously to turn the United States into a "great society." Without an explicit declaration of war from Congress, Johnson moved half a million men and their war machines some 7,000 miles away into Vietnam. His administration justified this action constitutionally by pointing to the Gulf of Tonkin Resolution, passed overwhelmingly by Congress in August 1964 after Johnson asked for authority to respond to attacks by North Vietnam on U.S. warships. Within two years, however, the war was appearing unwinnable and doubts began to arise about whether Johnson had told the full truth when he claimed the attacks had occurred. Congressional leaders

Bettmann Newsphotos

Alarming omen for U.S. security: Japanese troops invade a Chinese city in 1937.

argued that the Tonkin Resolution had not been a blank check for the President's war-making authority. His undersecretary of state, Nicholas de B. Katzenbach, responded sharply that the resolution and later congressional acts were the "functional equivalent" of Congress's war-declaring power under the Constitution. Anyway, he observed,"the expression of declaring a war is one that has become outmoded in the international arena."

Such cavalier dismissal of criticism and Johnson's inability to win or wind down the war created growing congressional opposition and massive antiwar protests. Not even the Truman Doctrine could save Johnson; when the President used anti-Communist rhetoric, critics persuasively argued that the North Vietnamese were driven as much by nationalism as by communism. Nor could Sutherland's legacy help. Too often acting as the "sole organ" in foreign affairs, Johnson became almost the sole target for blame for the bloody, apparently never-ending war.

Amid the ruins, Richard Nixon arose phoenixlike from his 1960 defeat by Kennedy. As Eisenhower's Vice-President, and with the example of Johnson's disaster, Nixon came to understand both the virtues of a hidden-hand presidency and the limits of American tolerance for foreign-policy sacrifices. Nixon wanted to end the war, but not lose it—at least not until his own presidency was over. Thus in 1969 he announced plans for a phased withdrawal of U.S. troops while turning the struggle over to U.S.-supplied Vietnamese. Secretly, however, he extended the war by bombing North Vietnamese bases in Cambodia. Nixon also transformed the National Security Council, which had been developed by Truman to expedite decision making. Nixon

Bettmann Newsphotos

U.S. dispatched jeeps and trucks to Greece, then threatened by communists.

used it and its director, Henry Kissinger, as his own private foreign-policy apparatus, one that was safe from prying congressional eyes. With no congressional authorization whatever, Nixon ordered the CIA to prevent a victory by Salvador Allende as president of Chile. Unsuccessful in this effort, Nixon and Kissinger helped anti-Allende forces until Chile's government was overthrown in 1973. When news leaked about the Nixon-Kissinger secret operations in Cambodia and elsewhere, the panicked President set up a "plumbers" unit to stop the leaks. Several of the plumbers' helpers were discovered in mid-1972 breaking into Democratic Party headquarters in Washington's Watergate complex. When the President tried to cover up this criminal act and publicly attempted to justify this and other questionable activities, he used a time-honored argument with roots that went back to Franklin Roosevelt and beyond: he said he

Charles Herbert

Planes lined up on Hawaii's Wheeler Field in 1930s reflect both FDR's concern about Japan and increased military spending to stimulate a sagging economy.

David Douglas Duncan

U.S. Marines retreating down Nightmare Alley in Korea. Part of a U.N. force dispatched to reverse the takeover of South Korea by the communist north, these leathernecks took 7,500 casualties before they could be evacuated.

was protecting the national interest, which only the President could define. (Or as Nixon remarked after he left the White House, if the President does it, it cannot be illegal.) He had gone too far. Congress decided that secretly bombing part of Southeast Asia was not an impeachable offense, but raiding the Democratic Party's offices and then trying to cover up the break-in might be. In August 1974 Nixon resigned.

The "imperial presidency" had fallen, the pundits announced in the mid- and late-1970s, and an "imperial Congress" had arisen. Reports of the death of the strong presidency, however, were greatly exaggerated. In 1973 Congress had passed the War Powers Act to curtail the President's Commander-in-Chief powers and restore to Capitol Hill some say over declaring wars. No President to date has deigned to recognize the act, although most have informally abided by some of its demands for information. In 1983 the Supreme Court indirectly, but effectively, eviscerated a key part of the act by striking down Congress's power to control presidential actions through the so-called legislative veto—that is, through House-Senate concurrent resolutions that the President cannot veto.

The weakest of the elected post-Nixon Presidents was Jimmy Carter. Yet, during his single term Carter used his office's authority to broker singlehandedly a surprising peace between Egypt and Israel; to force the Panama Canal treaties through a reluctant Senate; to organize a secret military expedition to rescue U.S. hostages in Iran; to announce on his own in 1980 a "Carter Doctrine" that pledged Americans to use military force if the Soviets threatened Middle Eastern interests that the President only vaguely defined; and, without formal congressional approval, to use military aid in early 1981 to involve Americans on one side of a brutal, complex civil war in El Salvador. Carter was so unpopular by 1980 that one critic claimed he "couldn't get the Pledge of Allegiance through Congress." He could nevertheless exercise vast presidential powers.

Ronald Reagan enjoyed both public and congressional support, not least because of his ability to use the media. In October 1983, 19 U.S. lives (and 24 Cuban and 45 Grenadan lives) were lost when Reagan invaded Grenada, replaced its government and did not trouble to consider Congress's war-declaring powers. In 1986 he again ignored Congress when he decided to bomb Libya, which had been linked to terrorism. To satisfy his supporters' anticommunist ideology, circumvent what remained of the War Powers Act and indulge CIA Director William Casey's passion for covert actions, the President authorized agency help in 1981 for the *contras,* who hoped to overthrow Nicaragua's Sandinista government. That action led him to ignore

AP/Wide World Photos

Responding to orders from U.S.S. Barry, *these Soviet sailors strip off a section of canvas to show a missilelike object aboard a Soviet freighter during Cuban crisis.*

UPI/Bettmann Newsphotos

1970: Smoke rises after a U.S. bombing raid in support of Cambodian troops. U.S. long denied its active role in Cambodia.

congressional acts later in the 1980s that limited, and then cut off, U.S. aid to the *contras*. Ultimately, Reagan's authorization led to the Iran-*contra* scandal, which nearly ruined his presidency in 1987.

Iran-*contra* did not mark an aberration in the use of executive power. On the contrary, the use of institutions such as the NSC and the CIA for the covert overthrow of governments, based on an obsessive fear of communism, has ample precedent. The problem was not merely an absentee President, as the Tower Commission investigation pictured Reagan, nor was it the misguided behavior of officials such as Lieutenant Colonel Oliver North, the NSC staff and CIA Director William Casey. The problems were historical and structural.

The Bush Administration continues to enlarge presidential powers, albeit openly in the manner of McKinley, rather than by subverting the law as Nixon did. In December 1989 Bush ordered 27,000 troops to overwhelm the Panamanian dictatorship of Manuel Antonio Noriega and replace it with a weak pro-U.S. regime. Congress (and most of the press) offered no resistance and little criticism. No hearings on the invasion were held on Capitol Hill to help Americans understand why Bush committed troops and killed at least 240, and possibly more than a thousand, mostly civilian, Panamanians. In August 1990 the President quickly deployed troops after Iraq's Saddam Hussein invaded Kuwait and threatened the oil reserves of Saudi Arabia. In January 1991 Bush asked Congress for a resolution authorizing him to wage war, if necessary, to free Kuwait. Congress passed the resolution by narrow margins and, unlike any other President since Franklin Roosevelt, Bush fought a massive, successful campaign after formally asking the legislative branch for authority to conduct such a conflict.

But Bush consistently claimed that he had the power to plunge the nation into war regardless of congressional action. When asked whether he could order military action even if Congress voted against authorizing it, the President replied, "I still feel that I have the constitutional authority, many attorneys having so advised me." The constitutional implications of that remark, which are enormous, brought only isolated responses from Congress. Bush had, moreover, used his Commander-in-Chief powers during the previous five months to narrow Congress's options, notably on November 8, 1990 (two days after the national congressional elections), when he suddenly doubled the number of U.S. troops in Saudi Arabia. That decision put the forces into an offensive posture and, because of the enormous supply and political problems associated with keeping 400,000 troops battle ready in a distant desert, limited the time they could wait for nonmilitary sanctions to work.

Bush's public popularity soared after the war to levels rarely seen in peacetime during the 20th century. That history, however, had taken a sharp turn between 1890 and 1920 when the United States ascended to great-power status, and a new kind of presidency arose with it. This presidency was built by an imaginative use of the Commander-in-Chief provision, the availability of immense overt and covert military power and a continual sense of international crisis. A Wilsonian faith in America's

David Rubinger/TIME Magazine

A presidential peacemaker, Jimmy Carter, shown with Egypt's Anwar el-Sadat and Israel's Menachem Begin following conclusion of the Camp David peace accord.

J. Ross Baughman/Visions

In the 1980s units of the Army's Special Forces provided weapons training to soldiers of the Salvadoran army.

democratic mission and Truman's brilliance in formulating his doctrine created the necessary political consensus. Executive powers were institutionalized in the shadowy world of the NSC and, with few exceptions, stamped with approval by the Supreme Court. Congress, especially after the 1930s, effectively offered only infrequent resistance; or, by passing such measures as the 1947 National Security Act (which provided for little congressional oversight), it actually ceded significant authority to the executive. The political party structure crumbled after 1900, in almost inverse proportion to the growth of presidential powers, and made organized congressional response even more difficult.

The power of the executive was of primary concern to the founders in the 18th century. A similar concern about the powers of the newer "republican king" will no doubt preoccupy those in the 21st century who are sensitive to the need for checks and balances in democracy.

This concludes a two-part article.

Walter LaFeber *is Marie Underhill Noll Professor of History at Cornell University. His books include* The American Age: U.S. Foreign Policy at Home and Abroad Since 1750.

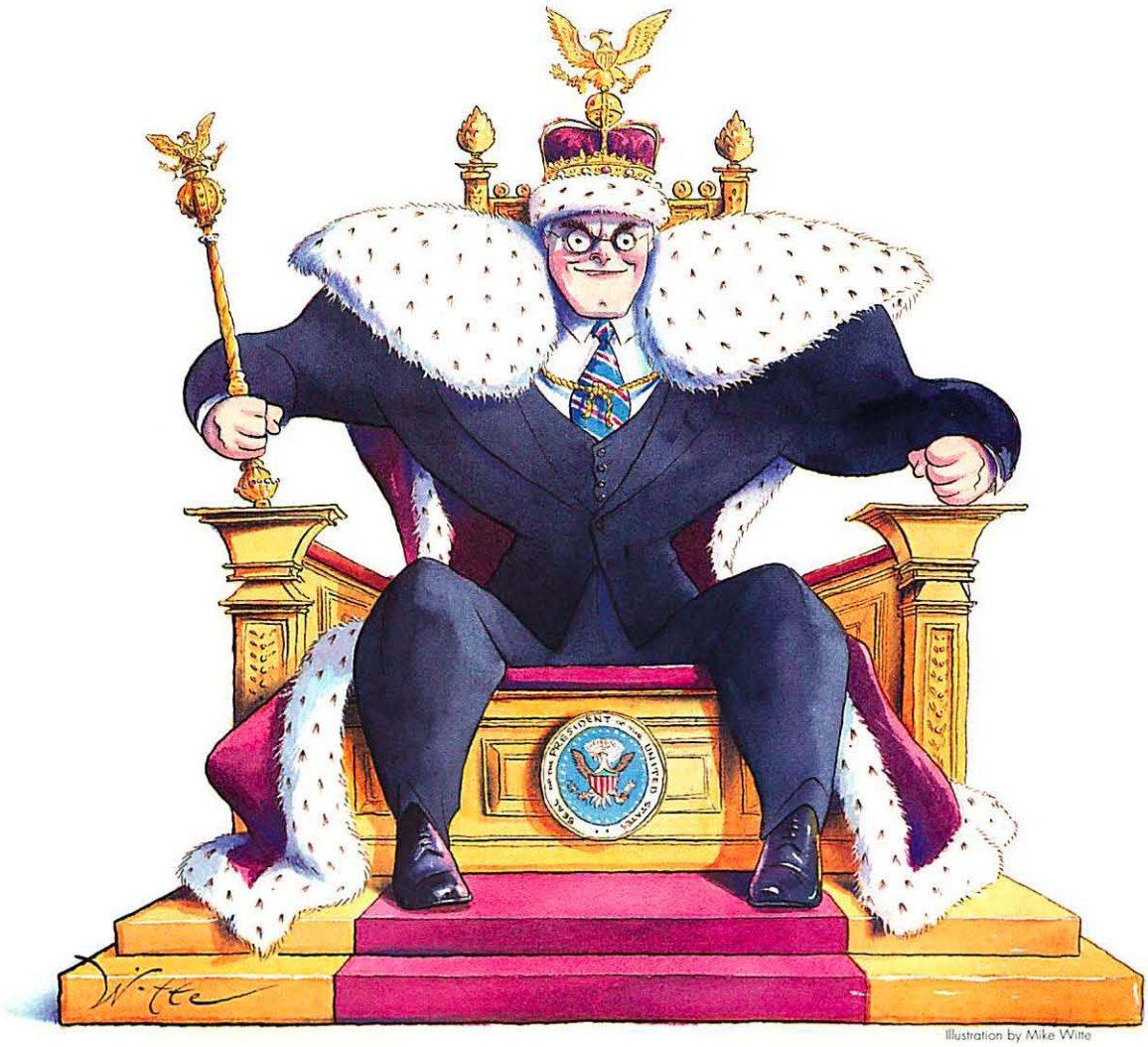


Illustration by Mike Witte

A view of the painter as political activist

George Caleb Bingham

by Alan R. Martin, Jr.

While Missouri artist George Caleb Bingham, one of America's foremost genre painters, is famed for his images of rustic life during the westward expansion of the United States in the 19th century, a new study of the artist suggests that there is more than meets the eye in his scenes of river life, settlers and rural politicking.

In her book, *The Painting & Politics of George Caleb Bingham,* recently published by Yale University Press, Nancy Rash, a professor of art history at Connecticut College, contends that most of the artist's major paintings were infused with political purpose. Her carefully documented study reveals a consistent effort by Bingham to have his paintings—which portray western scenes involving issues of commerce, settlement, the political process and civil liberties—speak to a wider national audience.

An ardent Whig, active in politics all his life, Bingham was a member of the Missouri legislature. He attacked slavery, upheld the preservation of the Union and defended the principles of the Constitution. He served as state treasurer during the Civil War and later became Missouri's adjutant general. That political thought informed his art comes as no surprise. What is surprising is how much greater insight this gives us into works heretofore admired solely for their mythic vision of frontier America.

Rash's book enhances our picture not only of Bingham but also of a young nation grappling with expansion, new social concerns and rights set forth in the Constitution.

From the Art Collection of The Boatmen's National Bank of St. Louis

The County Election *(2), 1852. The sketch below is a study for the painting.*

The Saint Louis Art Museum Courtesy of the People of Missouri (detail)

Veteran of '76, *1851-52*

Noting the types and behavior of the characters in *County Election,* many scholars once believed that Bingham may have been mocking the electorate and the democratic process. But the banner inscribed "The Will of the People the Supreme Law" echoed Bingham's strong political belief. Painted at a time when major political decisions affecting Missourians were made behind closed doors in the legislature, this scene of ordinary citizens voting under a banner celebrating the will of the people had immediate meaning for Bingham. In 1852 he wrote to his engraver to change some of the local references so that the reproduction would be "as national as possible—applicable alike to every Section of the Union, and illustrative of the manners of a free people and free institutions."

Lighter Relieving a Steamboat Aground, *1847*

To Missourians in the 1840s, the river represented commerce, and the steamboat economic progress. St. Louis was a major trading center, the gateway to the far west. A key issue in the campaigns of 1846 and 1848 was the need to improve and maintain the navigation of rivers made dangerous by obstacles, snags and sandbars. A Whig-inspired bill to secure federal funding for clearing the rivers and harbors twice passed Congress but was twice vetoed by Democratic President James K. Polk. It was not by chance that Bingham's river paintings, especially *Lighter Relieving a Steamboat Aground,* dealt with the realities and ever-present risks of river commerce. Contemporary eastern critics chided Bingham for his dull tones, but Missouri politicians, press and public realized that he was trying to portray more than boatmen, waterways and sky.

The goal of westward expansion, to some, was merely the discovery of new lands. The Whig vision of expansion, embraced by Bingham, was the settlement of new territories—homes becoming towns, creating commerce that would be sustained and furthered by federally funded roads and canals linking the nation together. Unlike other artists of the period who celebrated or romanticized explorers or discovery, Bingham in 1851 chose settlement as a theme when he painted *The Emigration of Daniel Boone with His Family from North Carolina to Kentucky.* Also known as *Daniel Boone Escorting Settlers Through the Cumberland Gap,* this was a tribute by Bingham, not to Boone but to those who would bring civilization to the wilderness. He inscribed the prints of his painting "To the Mothers and Daughters of the West."

Washington University Gallery of Art, St. Louis Gift of Nathaniel Phillips, Boston, 1890

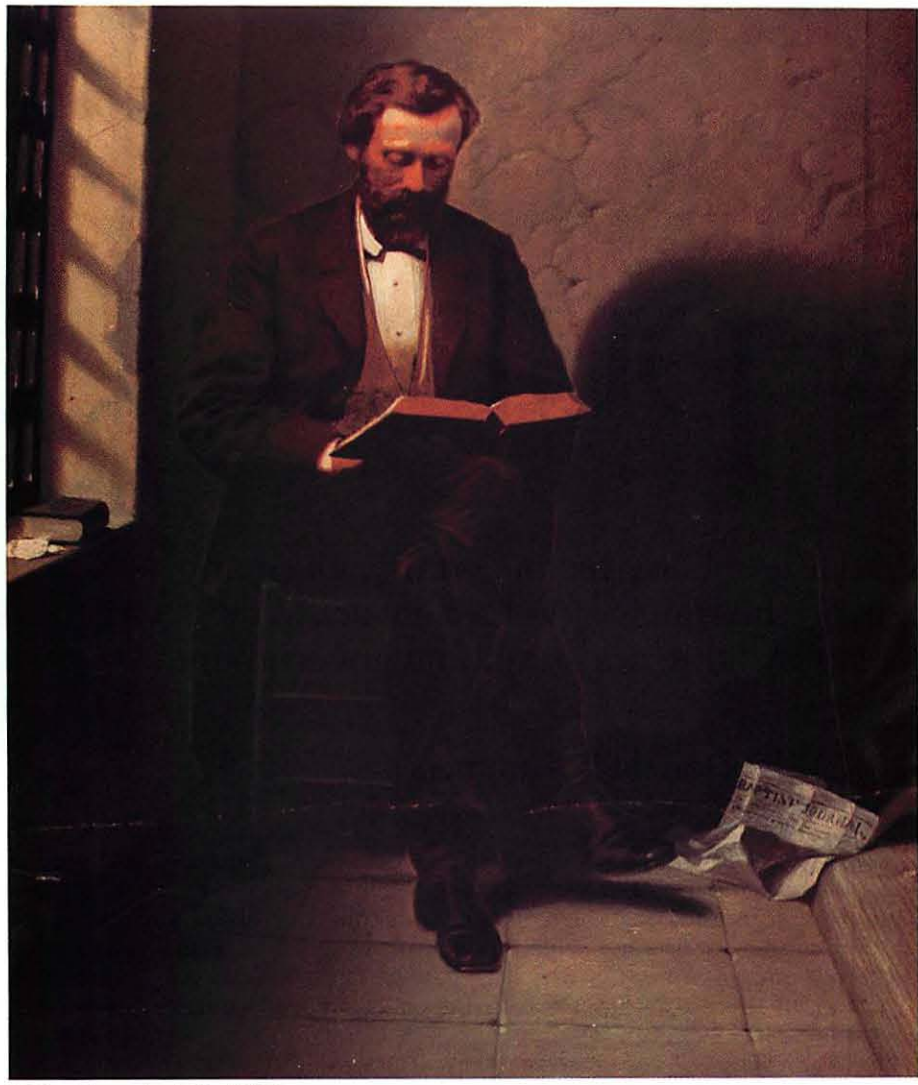
Daniel Boone Escorting Settlers Through the Cumberland Gap *or* The Emigration of Daniel Boone, *1851*

Martial Law *or* Order No. 11, *(2), ca. 1869-70*

The painting best known as *Order No. 11* expressed Bingham's outrage at the brutal enforcement of a Union Army order in 1863 to depopulate the Missouri settlements in areas bordering on Kansas. Acting to deter guerrilla raids into Kansas by pro-Confederate Missourians, Union troops carried out the order. Many of the soldiers were Kansans, who burned and pillaged the homes of evicted families regardless of their sympathies. Although pro-Union himself, Bingham decried this arbitrary use of military power and repeatedly aired his views in speeches and pamphlets. The fundamental rights of citizens—to life, liberty and property—had been totally disregarded. Bingham intended his painting to "keep alive popular indignation.... May the American people never forget that hatred of tyranny is but another name for the love of Liberty."

Courtesy State Historical Society of Missouri, Columbia

In 1865, the Radical Republican Party controlled the Missouri government and in a new state constitution demanded a loyalty oath of all voters, all candidates for office, all lawyers, jurors, corporation officials, teachers and ministers. It was designed to disfranchise those who had "committed any one of eighty-six different acts of supposed disloyalty against the state and the Union." Vehemently opposed to the oath, Bingham saw in the jailing of Major Dean, a Baptist minister who refused to take the vow, a chance to dramatize his sentiments. Major Dean had served in the Union Army as a chaplain, aiding civilians and soldiers, Confederates and Unionists alike. The painting was popular and photographs of it were sold, the proceeds going to Methodist and Baptist churches. The St. Louis *Dispatch* noted it would "illustrate to future generations an ignoble period of our State's history."



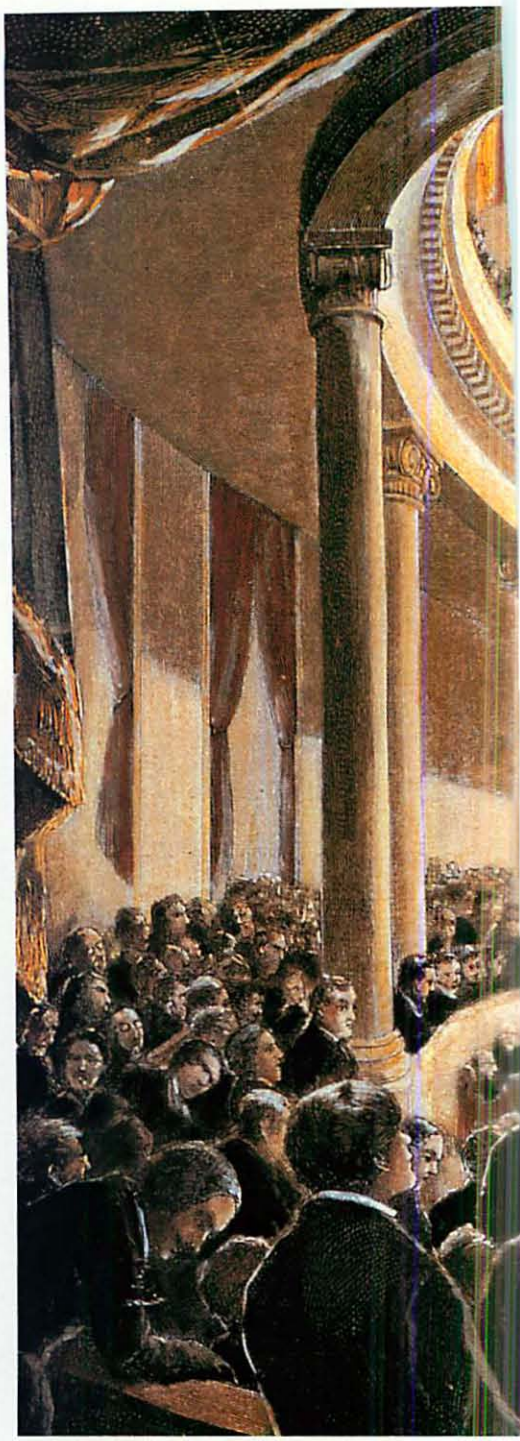
William Jewell College, Liberty, Missouri

Major Dean in Jail, *1866*

From Reich to Republic

Reunified after nearly half a century, Germany stands on the threshold of a new era in its long quest for stable constitutional government.

by Donald P. Kommers

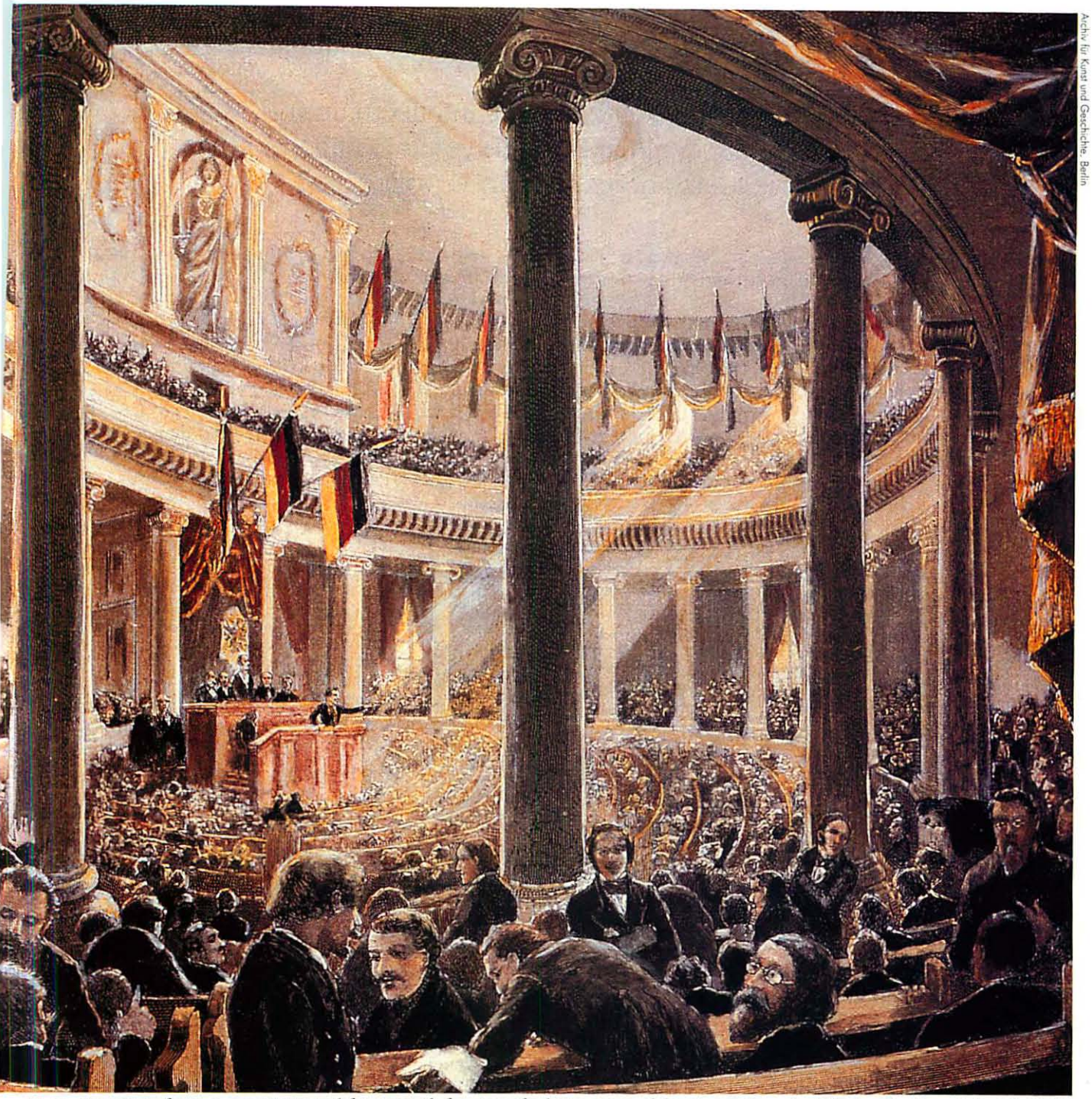


A national assembly meets at Frankfurt.

German constitutionalism has traveled a tortuous path over the past two centuries, a path marked by political extremism and discontinuity. Recurrent patterns of revolution and reaction, the struggle between liberalism and illiberalism, and competing conceptions of constitutionalism have left the nation with a diverse and fragmented political legacy comprising elements of democratic, authoritarian and even totalitarian systems of government.

To some it may come as a surprise that Germany, a nation formed out of a heterogeneous collection of states bound principally by a common language, has a democratic constitutional tradition. Important landmarks in this tradition include Germany's national constitutions, dating from 1849, 1871, 1919 and 1949. The 1849 and 1919 constitutions were both the result of democratic revolutions; both established democratic, federal systems of government, and both succumbed to the superior strength of antidemocratic juggernauts. These failures should not blind us to what the documents have meant to adherents of liberal constitutionalism in Germany.

After revolution swept Germany in 1848, a galaxy of notables from the universities, the professions and the world of letters—the famed Frankfurt National Assembly—convened in 1848 to draft a constitution. Prominent delegates included many reformers—denigrated in some circles as romantic



Archiv für Kunst und Geschichte, Berlin

In an attempt to form a constitutional framework for a unified Germany, delegates gathered at St. Paul's Church in 1848-49.

idealists—who drew some of their inspiration from the political ideas of the French and American revolutions.

The reformers dreamed of combining national unity with political democracy under a hereditary monarch. They created Germany's first parliamentary and constitutional Rechtsstaat (a state based on the rule of law), replete with a bill of rights, an independent judiciary and even a supreme court, the Reichsgericht, with wide-ranging powers of judicial review. The constitution they wrote separated church and state and abolished capital punishment. Its guarantee of the Basic Rights of the German People reflected the influence of the French Declaration of the Rights of Man; its provisions on divided and separated powers owed as much to the American ideas of federalism and judicial review.

American constitutional ideas migrated to Germany through Alexis de Tocqueville's *Democracy in America,* through the commentaries of two of America's most important 19th-century legal figures—Justice Joseph Story and New York Supreme Court judge James Kent—as well as through the *Federalist Papers,* which had been translated in the 1830s.

When Prussia's King Frederick William IV refused to accept the crown, the assembly collapsed and the Frankfurt constitution was stillborn. Despite this, it served as an inspiration for future generations of democratic constitution makers.

Unlike Frankfurt's gathering of intellectuals and academicians, the Weimar Assembly was dominated by party leaders and experienced politicians.

German liberals, like the counter-revolutionaries who routed them, now put national unity at the top of their political agenda. They placed their hopes for it in Otto von Bismarck. Bismarck's genius, his statesmanship, his powerful personality, his experience in foreign affairs—even his wars—served to unify the German nation. The Austro-Prussian War of 1866 led to the creation of the North German Confederation, an alliance of 22 northern and central German states or *Länder*. Four years later the southern German states came to the confederation's aid—as Bismarck had calculated—during the Franco-Prussian War of 1870-71. After the defeat of France, a new German empire was born in the Hall of Mirrors at Versailles. Ironically, Eduard Simson, who had headed the delegation that offered the crown to Frederick William in 1849, now approached the King of Prussia, William I. This time, the crown was accepted.

Whether the imperial constitution of 1871—largely Bismarck's creation—belongs to Germany's democratic tradition is open to question. After all, it rejected the Frankfurt Assembly's equating of constitutional authority with popular consent; self-government was instead the emperor's gift

A Turbulent Evolution

Reunited just over a year ago, Germany has experienced a rebirth of nationhood. The German people have manifested a national political consciousness for almost 12 centuries—far longer than many other peoples in Europe. Germany's frontiers have rarely been stable, and never have all who called themselves Germans lived within them. Germany has sometimes been organized into hundreds of principalities; sometimes, as now, divided into state-sized entities called *Länder* within a larger federation. Its history offers short periods of orderly government and interludes of tragic misrule. A brief chronology:

800 Pope Leo III crowns Charlemagne ruler of the Western Roman Empire, later known as the Holy Roman Empire.

1806 The Holy Roman Empire is dissolved following Napoleon's defeat of Austrian and Russian forces. A few years earlier Napoleon had reduced the 300 German states to roughly 30. Most of Germany outside Prussia and Austria is reorganized into the Confederation of the Rhine.

1815 The German Confederation is set up by the European allies after Napoleon's defeat. A federal diet or Bundestag is created to promote cooperation; but states retain complete sovereignty, and all have veto power.

Otto von Bismarck unified Germany.

1848 Following revolutions across Europe, representatives of the German Confederation meet at Frankfurt to write a constitution for a united Germany. In March 1849, the Frankfurt Assembly offers Frederick William IV of Prussia the imperial crown. He declines.

1866 War lasting seven weeks between Austria and Prussia is decided by the Prussian victory at Königgrätz. Otto von Bismarck creates the North German Confederation, comprising all German states north of the Main River.

1871 Prussia is victorious in a Bismarck-led war against France. William I of Prussia is proclaimed German emperor, and the Second Reich is launched.

1914 World War I begins.

1918 A democratic government is announced in Berlin on November 9. William II abdicates, ending the Second Reich. World War I's armistice is declared on November 11.

1919 Weimar republic is officially born on August 11, 1919, following a constitutional assembly in Weimar.

1933 Adolf Hitler is named chancellor on January 30 by President Hindenburg. The Third Reich is born.

1934 Hindenburg dies; Hitler assumes the office of president.

1939 World War II begins on September 1.

1945 Germany surrenders May 7.

1949 The Federal Republic of Germany is proclaimed on May 23. The Soviet zone of occupation is reconstituted as the German Democratic Republic, or East Germany.

1961 Construction of the Berlin Wall, dividing Federal Republic and German Democratic Republic.

1990 The Berlin Wall is demolished. The unification of Germany becomes official on October 3.

—The Editors

Bildarchiv Preussischer Kulturbesitz, Berlin

In the Battle of Königgrätz on July 3, 1866, Prussia defeated Austria to become the undisputed leader of the German states.

to his people, and it was strictly limited, leaving vast powers in foreign affairs and national defense in the emperor's hands. In practice, of course, the decisions were made by the chancellor, Bismarck, the government's chief policymaking officer; and Prussian domination continued to increase, as it had since the 18th century. Unlike the earlier constitutions, the imperial constitution had no bill of rights. On the other hand, it imitated the Frankfurt constitution in important ways: it maintained the Rechtsstaat, it established a parliamentary system that provided for a popular assembly (the Reichstag) with representatives elected by universal male suffrage and secret ballot, it required power sharing between crown and parliament, and it encouraged party competition.

Like its precursor, the imperial constitution also established a federal system that guaranteed the independence of Germany's states under a national government. Bismarck's constitution strengthened the central government by conferring on it the bulk of legislative power, while leaving the responsibility for administering national laws to the *Länder*. During this period, the *Länder* participated in the national legislative process through an institution known as the Bundesrat, which functioned as an upper house of parliament. Its representatives, apportioned by the size and power of each state, were appointed by the state governments. Like the Reichstag and the office of the Reich chancellor or chief minister, the Bundesrat was a political structure that future constitution makers would recreate.

World War I ended with the collapse of the German monarchy, violent popular uprisings and a new constitution drafted by the Weimar National Assembly. Weimar, a city in central Germany—the home of Goethe and Schiller—symbolized the liberal spirit of the new constitution. Unlike Frankfurt's gathering of academicians and intellectuals, this assembly was dominated by party leaders and experienced politicians—men such as Friedrich Ebert and Philipp Scheidemann, who would play major roles in the sad, 14-year history of the Weimar republic. Hugo Preuss, a distinguished constitutional lawyer and one of the assembly's leaders, initiated the drafting of the constitution. The assembly's elected representatives, mainly Socialists, Centrists and Democrats, saw to it that the 1919 constitution provided for universal adult suffrage, referenda on pending legislation, popular initiatives, numerous social rights and a strong commitment to political liberty.

Many of the institutional structures of the Weimar republic were carryovers from the 1871 constitution. A popularly elected president who shared power with the chancellor replaced the kaiser. The Reichsrat and Reichstag were successors to the imperial upper and lower houses of parliament. However, the power to resolve constitutional disputes between levels and branches of government was vested, for the first time during the modern period, in a constitutional tribunal. (Under the imperial constitution this power had been vested in the Bundesrat.) Unfortunately, the distribution of authority within the system, together with an election system based on proportional representation, produced weak coalition governments and political instability. Plebiscites and popular initiatives were intended to strengthen democracy, but the strong position of the popularly elected president, who could dissolve parliament, dismiss the chancellor and issue emergency decrees, worked against democratic governance. There was nothing wrong with these institutions, but in a "republic

Ullstein Bilderdienst, Berlin

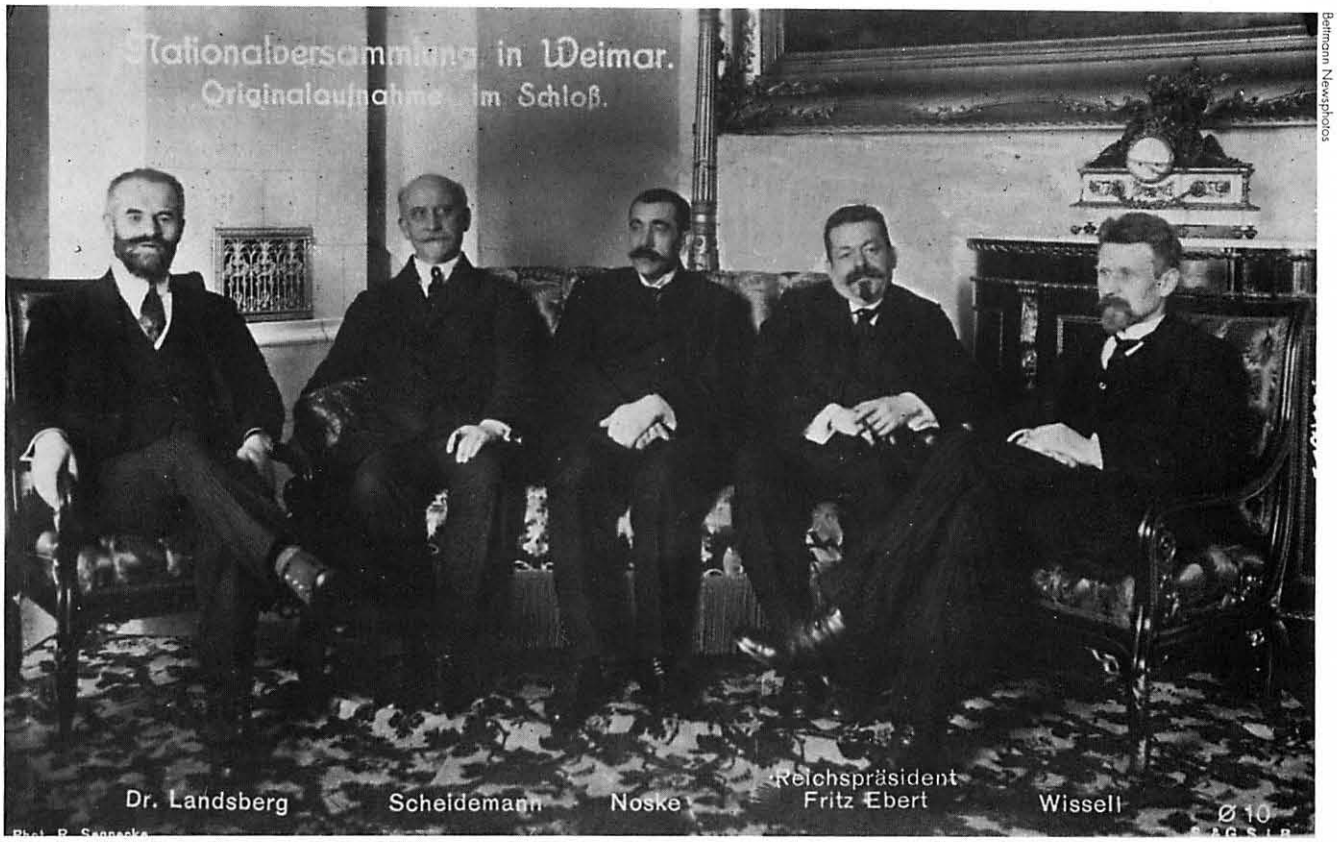
Bismarck's campaign to unify Germany under Prussian leadership ended in triumph in 1871 in the Hall of Mirrors at Versailles after a series of battles that routed the French. Bismarck (in white tunic) watches as Prussia's king is proclaimed German emperor.

without republicans" they were almost bound to fail. With the advent of Adolf Hitler, a German dictatorship emerged to smash every vestige of Weimar's constitutionalism, including its federal structure.

Given Germany's history of independent *Länder*, it was not surprising to find that regional, or state, governments were the first to arise out of the destruction of World War II. They provided delegates to the Parliamentary Council, the body entrusted with drafting a "basic law" for the western sectors of Germany. Meeting in Bonn's Pädagogische Akademie under the supervision of the Allied military governors, Lucius D. Clay of the United States, Britain's Sir Brian Robertson and Pierre Koenig of France, the council elected Konrad Adenauer as its president. Like some of the other council members, Adenauer had been imprisoned by the Nazis. Some council members, such as Ludwig Bergstrasser and Georg-August Zinn, had been active in the anti-Nazi resistance. Social Democrats and Christian Democrats each claimed 27 members; the remaining 11 represented minor parties, including two Communists who eventually voted to reject the constitution.

The military governors exercised no explicit control over the council but simply directed it to "draft a democratic constitution which will establish a federal type governmental structure for the participating states [and] which will protect the rights of...states and... contain guarantees of individual rights and freedoms." The council's discretion was broad, although a sharp Allied-German exchange erupted over the extent of federal decentralization. The United States and France wanted considerable decentralization, especially in the area of tax and fiscal administration, whereas the German drafters proposed more federal control in these areas. Both sides compromised, just as Christian Democrats and Social Democrats were able to compose their differences on matters such as family law and how much the constitution would be oriented to social welfare. (In return for granting strongly protected private-property rights, the Social Democrats received the right to nationalize basic industries and some natural resources and lands.) The result was the Basic Law for the Federal Republic of Germany of 1949 and the creation of the Federal Republic of Germany.

In writing the Basic Law, council members looked to Germany's constitutional tradition for guidance. As in the past, the Bonn constitution confers most legislative power on the national government while placing the authority to carry out federal laws —such as social-security legislation



Bettmann Newsphotos

Leading figures in Germany's short life as a republic between the world wars were socialists Philip Scheidemann (second from left), the first chancellor, and Friedrich Ebert (second from right), who served as the first president of the Weimar republic.

(which Bismarck instituted in the 1880s)—in the hands of state and local officials. At the same time, the *Länder* retain autonomy in some significant areas, such as education, cultural policy and law enforcement. Finally, the *Länder* retain an important role in the enactment of national laws through a Bundesrat vested with formidable powers of suspension and consent. Each state is entitled to three to five votes, depending on its population, and each casts a block vote. The Bundestag, the main parliamentary body, replaces the Reichstag.

The Basic Law recreates many political structures established by Weimar but eliminates those crippling defects that facilitated Hitler's destruction of the constitution in 1933. Bonn divides authority among executive, legislative and judicial institutions, as did Weimar. Executive authority continues to be shared by a president, a chancellor and a cabinet of federal ministers, except that now the role of the federal president is largely ceremonial. The key official in the executive branch is the chancellor, and his position is far more secure than it was during the Weimar republic. Parliament may dismiss him only by electing a successor, an innovation that prompted observers to label the Federal Republic a "chancellor democracy." The description is apt, for it reflects the personalities of many who have held the office, men such as Konrad Adenauer, Willy Brandt, Helmut Schmidt and Helmut Kohl. All have been strong chancellors and party leaders.

Bonn maintains Weimar's commitment to democracy. After defining the Bonn republic as a "democratic and social federal state," the constitution declares that "all state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs." Yet only deputies to the Bundestag are to be "elected in general, direct, free, equal, and secret elections." One interpretation of these provisions is that they establish an indirect democracy that bars the use of popular initiatives and referenda at the federal level, practices that created instability during the Weimar period. Finally, drawing from Weimar's provision that "each state must have a republican constitution [and] the confidence of the people's representatives," the Basic Law requires all state governments to abide by "the principles of republican, democratic and social government based on the rule of law."

The Bonn constitution includes a ringing declaration of individual rights. Freedom of speech, press, assembly, association and religion, and rights to property and equality under law are

AP/Wide World Photos

Weimar's Textbook Constitution

When Adolf Hitler bowed formally to President Paul von Hindenburg at a ceremony in the Garrison Church in Potsdam on March 21, 1933, he had been Germany's chancellor for just over a month. Hitler's bow was proper protocol: under the Weimar constitution, the chancellor was the president's subordinate. But Hitler was also saluting *Field Marshal* Hindenburg, Germany's great hero, a national icon. By 1933 that icon was senile, a weak prop for a republic born in defeat, nurtured on humiliating compliance with the Versailles Treaty and battered by economic storms.

Historian A.J.P. Taylor calls the Weimar constitution the "most mechanically perfect of all democratic constitutions, full of admirable devices—parliamentary sovereignty, the referendum, the most elaborate and perfect system of proportional representation ever conceived—a textbook constitution for the professor of political science."

The "mechanically perfect" constitution did not take into account two realities. First, it depended on the support of a middle class committed to parliamentary democracy. But inflation in the early postwar years had eliminated the power of the middle class by wiping out its savings. Second, in building a democracy ruled by the legislature (Reichstag), the constitution ensured governments constructed not to govern but to balance party interests.

The economic collapse of 1929 doomed this fragile structure. By March 1930 German unemployment was 2.3 million; two years later the figure was 6.1 million. On the advice of his scheming adviser, Kurt von Schleicher, Hindenburg asked Heinrich Brüning to form a new government. After it lost its majority in the Reichstag, Brüning's government ruled by decrees signed by the president under the constitution's emergency powers.

When the Reichstag demanded the emergency decrees be rescinded, it was dissolved. In the ensuing elections, extremist parties gained strength. Adolf Hitler's National Socialist Party went from 2.6 percent of the total vote in 1928 to 18.3 percent in 1930—second after the Socialists.

In 1932, at Schleicher's suggestion, Hindenburg named Franz von Papen chancellor. To blunt troublemaking by the Nazis, Papen offered Hitler the post of vice-chancellor. Hitler refused. In new elections Papen's Nationalist Party won only 8.8 percent of the vote. He resigned, to be replaced on December 2, 1932, by Schleicher. Hitler and Papen soon patched up their quarrel, and Papen persuaded Hindenburg to dismiss Schleicher. On January 30, 1933, Hindenburg appointed Hitler chancellor, with Papen as vice-chancellor. Eighteen months later Hindenburg died, and Hitler proclaimed himself president and chancellor.

—The Editors

AP/Wide World Photos

After World War II, occupied Germany was divided into four zones. Work on a provisional constitution for the noncommunist zones was supervised by Allied military governors (from left), Britain's Sir Brian Robertson, France's Pierre Koenig and Lucius D. Clay of the United States.

guaranteed. But some of these can be limited. For example, "everyone shall have the right to the free development of his personality," but only "insofar as he does not violate the rights of others or offend against the constitutional order or the moral code." The rights of speech, press, assembly and privacy may be restricted by laws passed in the general interest. Other freedoms, like freedom of religion, of conscience (especially conscientious objection to military service), and of teaching and research, are cast in less restrictive terms.

Unlike the Weimar constitution and East Germany's postwar constitutions, which show distinct socialist influence, the Basic Law does not contain a catalog of social and economic rights. Yet the state's obligation to provide for the basic social needs of its citizens is implied in the social state clause of Article 20: "The Federal Republic of Germany is a democratic and *social* [emphasis added] federal state." The social state clause has also been interpreted to require affirmative state assistance. An example is subsidies for private schools.

Equally important, the constitution grants "special protection" to "marriage and family" and entitles "every mother...to the protection and care of the community," just as it obligates the national community to respect the "natural right" and "duty" of parents to provide for the "care and upbringing of [their] children." The constitution also imposes "duties" on property, admonishing owners that their property should "serve the public weal." As these provisions suggest, the German bill of rights speaks in the language of duties as well as rights.

If many of the features of the agreement reached in Bonn were borrowed from earlier constitutions, three aspects broke radically with the past. First, the Basic Law is difficult to amend. While the Weimar constitution could be amended by popular initiative or legislation, the Basic Law can be changed only by extraordinary majorities (two thirds of all members of the Bundestag and two thirds of all votes in the Bundesrat). Second, previous constitutions, while judicially enforceable in some respects, did not generally have the status of supreme law; many of their provisions served rather as political directives. The Basic Law, by contrast, is the supreme law of the land, absolutely binding on all government officials and citizens. Finally, in earlier constitutions individual rights could be restricted or abolished at the whim of the legislature; the Basic Law proclaims these rights immutable and establishes a powerful Federal Constitutional Court to enforce them.

In addition, the so-called eternity clause prohibits any constitutional amendment that would erode the principle of federalism, the general right of the states to participate in legislation or the values laid down in Articles 1 and 20. These two articles express the constitution's core values. Article 1 provides the foundation of the bill of rights, declaring, "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority." Article 20 sets forth the guiding principles of the new constitutional order: popular sovereignty, representative government, federalism, separation of powers, the rule of law and the principle of the social welfare state. Germany's Federal Constitutional Court has declared its readiness to strike down any amendment to the Basic Law that conflicts with these values.

Any assessment of contemporary German constitutionalism must take into account the role of this court in building a living tradition of constitutional government, a role comparable

Public Relations Division, HICOG Photo by Claude Jacoby

After heading the Parliamentary Council that drafted a provisional constitution, Konrad Adenauer became the first chancellor of the new Federal Republic. Here he is shown addressing the Allied High Commissioners at a ceremony marking formation of his government.

to that of the U.S. Supreme Court. With extensive powers to decide constitutional disputes among levels and branches of government, authority to hear the constitutional complaints of ordinary citizens and an established record in protecting individual rights and defending political democracy, the court has shaped the content and character of German public life.

Two other features of the Bonn constitution are significant. First, Article 24 of the Basic Law allows Germany to transfer sovereign powers to international organizations, such as the European Economic Community or the Council of Europe, the 25 nations that are signatories to the European Convention on Human Rights. Article 25 provides that the "general rules of public international law shall be an integral part of the federal law." Thus, German citizens who feel their rights have been violated can appeal to the European Commission on Human Rights in Strasbourg.

Second, on the domestic scene the constitution recognizes political parties as major agencies of political representation: "They may be freely established" and "participate in the forming of the political will of the people," but "their internal organization must conform to democratic principles." Indeed, the Federal Constitutional Court has actively defended the rights of parties—even to the point of encouraging the state to reimburse them for their campaign expenses.

Furthermore, the court has elevated the so-called 5 percent clause—a provision of the original electoral code of 1949—virtually to the rank of a constitutional norm. Designed to prevent the proliferation of splinter parties, the bête noire of Weimar's system of proportional representation, the rule requires that a party wishing to be represented in the national legislature either receive at least 5 percent of the vote in a federal election or win at least three district seats. The Greens lost their parliamentary representation when they failed to top the 5 percent hurdle in the December 1990 federal election. They had entered parliament for the first time in 1983 on a radical environmentalist, antinuclear and countercultural platform.

Finally, the court has inferred from the language and structure of the constitution the principle of a "militant democracy." Article 21, for example, a provision that traces its roots directly to the Nazi experience, prohibits parties that "by reason of their aims or the behavior of their members seek to impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany." To make sure that political leaders do not arbitrarily use this provision to put down opposition parties, the Basic Law permits the banning of a party only after the Federal Constitutional Court has declared it unconstitutional. The court has done so twice: in 1952 it banned a neo-Nazi party, and in 1956 it banned the Communist Party. Assets of the parties banned by the court were seized, further political activity was outlawed, and candidates representing such parties were barred from holding public office.

As recent events showed, history occasionally reverses—or, perhaps more accurately, repeats—itself. What happened in 1989, when East Germans rose up and the Berlin Wall came tumbling down, was a replay of the movement that led to the Frankfurt constitution of 1849. This time, however, rather than creating a constitution, the nation came together under West Germany's time-tested charter.

Some Germans may be excused for wondering whether unity will signal the start of a new era of constitutionalism. After all, unification has altered German society, making it more Protestant as well as culturally more diverse. It may be asked, too, whether 16 million citizens with little or no experience of political democracy can rapidly become full participants in the dramatic epic spun by 40 years of political life under the Basic Law.

The Unification Treaty, signed at the Kronprinzen Palais in East Berlin on August 31, 1990, seeks to accommodate the special interests of the new eastern *Länder*. It provides that certain provisions of the Basic Law shall not apply to the old German Democratic Republic for two years, by which time parliament is expected to pass new laws applicable to the whole nation. (In the area of federal-state

AP/Wide World Photos

West German President Richard von Weizsäcker thumbs through a copy of the Unification Treaty between East and West Germany, signed August 31, 1990.

relations, East German *Länder* may deviate from the Basic Law for up to five years.) Some of these provisions —those dealing with the settlement of property claims, the legal status of persons in public service, and abortion, for example—are divisive. East Germany permits abortion on demand during the first three months of pregnancy, whereas West Germany bans abortion at all stages of pregnancy except for serious reasons specified by law. Whether the treaty can mandate such suspensions of the constitution is a controversial question, now being considered by the Federal Constitutional Court. However the challenges to these disputed provisions turn out, the Constitutional Court will have the last word on the validity of any legislation enacted concerning them.

The two republics have also agreed to consider within two years the introduction of state objectives into the Basic Law. This represents a concession to East Germany's interest in committing the state to such goals as full employment, higher levels of social security, a clean environment, adequate housing and medical care, and a right to education. The present governing coalition in Bonn is likely to resist such amendments. Its members could argue, and plausibly so, that these directive principles are implicit in the Basic Law's concept of human dignity as well as in its concept of the social state.

Less controversial are treaty provisions providing for the repeal of the accession clause, under which "other parts of Germany" may be absorbed into the Federal Republic, and the deletion of references to the goal of unification. These clauses effectively freeze Germany's existing borders and make it impossible for Germany to lay legal claim to lands taken by Poland and the Soviet Union after World War II.

More troublesome from the point of view of many Germans is a treaty provision changing the last article of the Basic Law. It reads, "This Basic Law, which is valid for the entire German people following the achievement of the unity and freedom of Germany, shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force." Many observers fear that dissident forces within Germany will use this clause to campaign for a new constitution. Such a campaign in this view could unsettle the compromises worked out so laboriously nearly a half century ago, as well as cast doubt on four decades of constitutional interpretation.

The provision will almost certainly trigger proposals to incorporate elements of direct democracy into the Basic Law, a matter that has been long debated. Indeed, the Greens have already called for a constitution that is "radically democratic," a demand that is likely to receive the support of many East Germans. Such a charter, however, could erode the core values of the Basic Law and the new constitutionalism it was intended to promote, that is, the rule of law, limited government and the inviolability of rights.

Most Germans will probably resist radical changes in the Basic Law, just as they are likely to oppose a call for a new constitutional assembly. (No procedures for convening such an assembly are set forth in the Basic Law.) A referendum on the Basic Law is a more realistic possibility. But some Germans doubt the advisability of even this, since a low voter turnout or approval by less than an overwhelming majority could undercut the Basic Law's legitimacy, established by 40 years of political stability and democratic government.

In all likelihood, what the future holds for the new Germany will be reflected in political rather than constitutional change. Perhaps President Richard von Weizsäcker had it right when, on the eve of unification, he told the German people, "We can fuse the constitutional patriotism of the one side with human solidarity experienced by the other into a powerful whole."

Donald P. Kommers, *a professor of law and government at the University of Notre Dame, is editor of* The Review of Politics. *His most recent book is* The Constitutional Jurisprudence of the Federal Republic of Germany *(Duke University Press).*


PORT of ENTRY
CUSTOM &
IMIGRATION
No Parking
LEAVE
UNITED STATES
ENTER
FREE STATE OF -
SOCORRO !
MORTON'S

One Nation, Divisible

The map of the United States would be radically different if secessionists had their way.

by Eleanor N. Schwartz

Say the word secession to any American and two words will come back: Civil War. But secessionist movements hardly began or ended with the southerners who fired on Fort Sumter. The formal breakaway of one government from another goes back to at least 933 B.C., when 10 northern tribes seceded from Jerusalem's rule and set up the new kingdom of Israel. The word secession derives from the Latin verb *secedere,* to go or move aside, a reflection of three occasions when Rome's oppressed plebeians actually withdrew from the republic, refusing to return until their grievances were satisfied.

Many nations have been born via the secession route, among them Belgium, which broke from the Netherlands in 1830; Ecuador and Venezuela, which sprang from Gran Colombia, also in 1830; Norway, which separated from Sweden in 1905; and Bangladesh, which won its independence from Pakistan in 1971.

Less successful was the secessionist struggle of Katanga, which declared itself independent of the Congo when that country separated from Belgium in 1960. Katanga gave up in 1963, defeated by United Nations troops. Biafra, a breakaway province of Nigeria, fought for its freedom for four years, until starvation forced it to surrender in 1970.

A devastating conflict raged for 30 years in East Africa, where Eritrea harbored hopes of pulling away from Ethiopia. Canada has lived with the specter of an independent Quebec since the early 1960s, and separatist sentiments fuel the unrest in the Soviet Union and Yugoslavia, as well as the clashes now engulfing the Indian regions of Punjab, Kashmir and Assam.

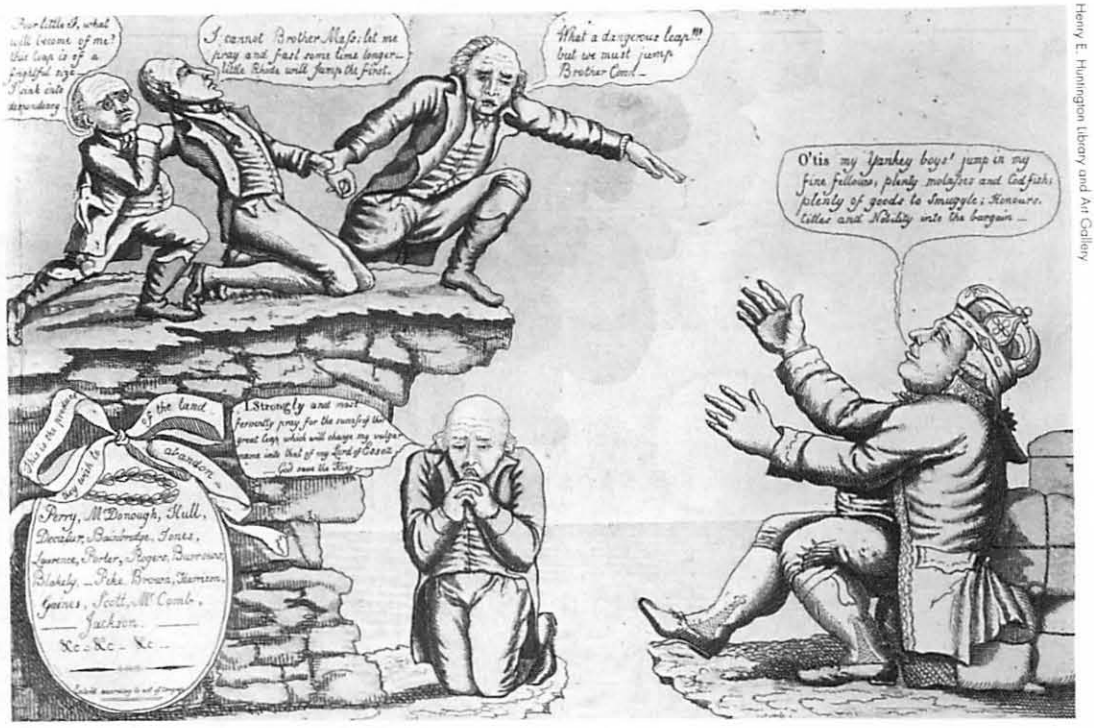
In the United States, as historian Daniel Boorstin has observed, the secessionist tradition is older even than the Revolution, which, after all, was the grandest secession of them all. From the early 17th century to the middle of the 19th century, secession was "characteristically American," Boorstin writes, and it was because of this that the Colonies acquired their "varied character." When Roger Williams founded Rhode Island and Thomas Hooker opened up Connecticut, what they were doing, in effect, was withdrawing from the Massachusetts Bay Colony. Similarly, the colony created in Maryland by Lord Baltimore for English Catholics like himself and the haven for Quakers established by William Penn marked a flight from Protestant England to separate places of refuge.

Even after the Declaration of Independence was signed, two territories, Vermont and Kentucky, wanted nothing more than to be free of everybody else. Fed up with disputes by New York and New Hampshire over its lands, Vermont declared itself a republic in 1777 and remained that way, though shakily, until it joined the Union as the 14th state in 1791. Unhappy as part of Virginia and resentful of the U.S. government's inability to protect them from the Indians, many Kentuckians in the late 1780s talked of creating an independent country allied with Spain. Instead, Kentucky became the 15th state in 1792.

The U.S. Constitution says nothing about secession. Article IV, Section 3 deals only with accession, the formation and admission of new states: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." Lacking any constitutional bar, proponents of secession

---

Tracking down a local ordinance in 1953, a district judge discovered that amid all the transfers of territory to the United States after the Mexican War, Socorro County, New Mexico, had somehow escaped notice. A secession movement ensued that was more comic opera than politics: local wags declared the county a free state, hand-lettered a sign and opened a port of entry where tourists could obtain visas.



Henry E. Huntington Library and Art Gallery

Three New England states plotted secession at the Hartford Convention. Cartoonist William Charles drew them debating the leap into George III's arms. Beneath the ledge, plot leader Timothy Pickering prays to be knighted.

during the early days of the republic found authority for their actions under the general heading of states' rights.

According to the states' rightists, any state was legally entitled to withdraw from the Union if it felt the federal government was infringing on its rights. Nationalists like Daniel Webster opposed this point of view, but its legitimacy was not questioned until 1819, when Chief Justice John Marshall tackled the issue of federal supremacy in *McCulloch v. Maryland*. The implication of Marshall's affirmation of federal sovereignty was that if a state could not tax a federal bank, as Maryland tried to do, then secession was not going to be acceptable either. Even so, states' rightists continued to insist that the states had the right to nullify federal laws, and it took the Civil War to settle this argument.

Until *McCulloch v. Maryland,* talk of secession was heard on both sides of the political fence. The first serious muttering came in 1798 from a disgruntled Jeffersonian, John Taylor of Caroline, a member of the Virginia House of Delegates and a former U.S. senator. Taylor found the Alien and Sedition Acts passed by the Federalist-controlled Congress so inimical to southern interests that he deemed secession the only possible protest. Thomas Jefferson persuaded Taylor to moderate his views. Three years later, when Jefferson became President, a group of Federalists from New England presented him with another secessionist threat.

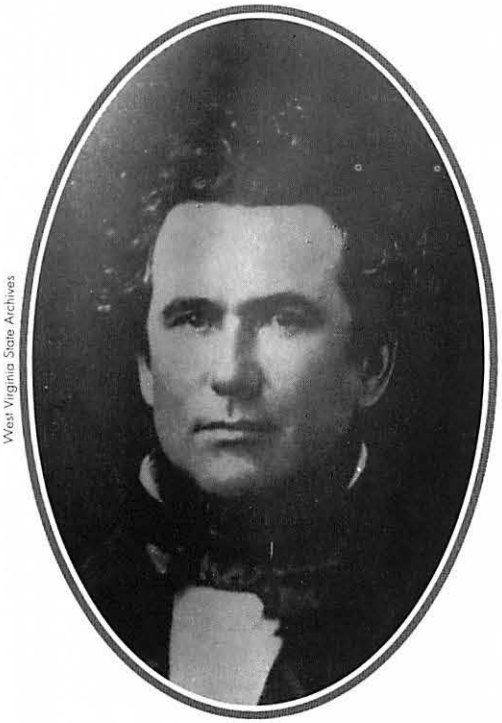
According to historian Milton Lomask, what haunted New Englanders' dreams and left them no peace was the emergence of Virginia as the dominant state in the Union. Deepening their nightmare was the Louisiana Purchase, which, they imagined, would cause a shift of power from the industrial East to the agricultural South and West, "a movement certain in their opinion to fasten the incubus of Virginia on their backs for years to come."

Convinced that New England's interests would be neglected if it stayed in the Union, Senator Timothy Pickering of Massachusetts sponsored a plan for the five states (Maine was still attached to Massachusetts) to secede and establish their own independent confederacy. But recognizing that New England could not really go it alone, the secessionists turned to New York, a state of similar commercial bent, and invited that powerful neighbor to join them. Sweetening the offer, they proposed that New Yorker Aaron Burr be the federation's first president. Pickering's plans did not get very far. Scorned by other Federalist leaders and lacking popular support, the movement disintegrated after Burr killed Alexander Hamilton in a duel in 1804.

Nothing loath, a group of about 30 New England Federalists from Massachusetts, Connecticut and Rhode Island found another reason to secede 10 years later. This time it was the War of 1812, which they disdained as "Mr. Madison's War." Led once again by Timothy Pickering, the New Englanders found their new cause in the government's demand that they surrender their militias to federal control. These meetings were held in secret in Hartford, Connecticut, between December 15, 1814, and January 5, 1815. Talk at the convention centered on secession and a separate peace with England, but the Treaty of Ghent, ending the war, was signed only a few weeks after the convention adjourned, and serious talk of secession never again arose in New England.

As the rumblings about states' rights dried up in the North, they blossomed in the South, where grievances were accumulating against federal economic policies, especially the tariff, and resentment was building against the antislavery fervor of the North. Between 1815 and the outbreak of the Civil War, talk of secession and the nullification of federal laws was rife in the southern states, yet, as the cataclysm approached, the South saw another kind of secessionist emerge: the southerner who wanted to remain with the Union.

On January 11, 1861, following the example set in the previous month by South Carolina, Alabama enacted an ordinance dissolving the union between it and the other states. This action was cheered by the citizens of southern



West Virginia State Archives

After they refused to join the Confederacy, the people of Virginia's western counties chose Francis H. Pierpont to lead them to statehood.

West Virginia State Archives

While federal troops patrolled outside, western-county delegates met at the Wheeling Custom House in June 1861 to plan the break from Virginia.

Alabama but was greeted with dismay in the northern third of the state, a mountainous region of small farmers where the geography and population were closely related to those of eastern Tennessee. Holding their own meeting in Montgomery later in the month, the north Alabamians expressed their displeasure with the secession measure and declared their unwillingness to be removed from the Union until the Ordinance of Secession was submitted to a popular vote.

During the next few weeks serious consideration was given to combining northern Alabama and eastern Tennessee into a new state called Nickajack—the name of a long-lost Cherokee village in the area. The war broke out too soon for any further move toward statehood, but the Nickajack counties remained opposed to secession and the region proved helpful to the Union during the war. Not only did Tennessee provide more troops to the Union Army than any other Confederate state, but some northeast Alabamians also went so far as to name a town, not far from Huntsville, for Ulysses Grant.

It was during the Civil War that the only effective secession movement in the United States developed: the breaking away of Virginia's western counties to form the state of West Virginia. Unrelated in temperament and geography to the plantation society of the eastern counties, victim of inequitable taxes and inferior public services, western Virginia employed few slaves and had long sought statehood. The obstacle was Article IV, Section 3 of the Constitution, which requires the consent of the legislature to form a new state from the territory of an existing one. Virginia's legislature had always refused to give its consent.

After Virginia joined the Confederacy, however, the westerners saw their chance. They declared the Confederate legislature in Richmond illegal and devised a "restored government" for the state, naming Francis H. Pierpont as governor. President Abraham Lincoln acted quickly to recognize the Pierpont administration as Virginia's de jure government; this action and the defeat of the Confederate forces in the western counties were critical milestones on West Virginia's road to statehood. It entered the Union as the 35th state in June 1863, having decided against calling itself Kanawha.

During the mid-19th century, talk of secession was not confined merely to the states of the Confederacy. There was a serious secessionist movement in California, which had achieved statehood in 1850, much to the unhappiness of many citizens in its five southern counties: San Luis Obispo, Santa Barbara, Los Angeles, San Diego and San Bernardino.

Spurred by the gold rush, the development of California had begun in the north, where San Francisco became the hub of the state's financial, commercial, industrial

and cultural life. Southern California, by contrast, was essentially rural, marked by vast agricultural estates with small settlements in between. Los Angeles, though not without schools or libraries, was described as "not much more than a frontier cow-town."

Feeling like strangers in a strange land and fearing that punitive economic measures—for example, the breakup of their estates—would be forthcoming from the state legislature, the five counties hardly waited for the ink to dry on the statehood documents before petitioning Congress for permission to organize into a separate territory. Ignored in Washington, the petition was followed by another in 1851, this one pleading that for southern California, statehood was only a "splendid failure."

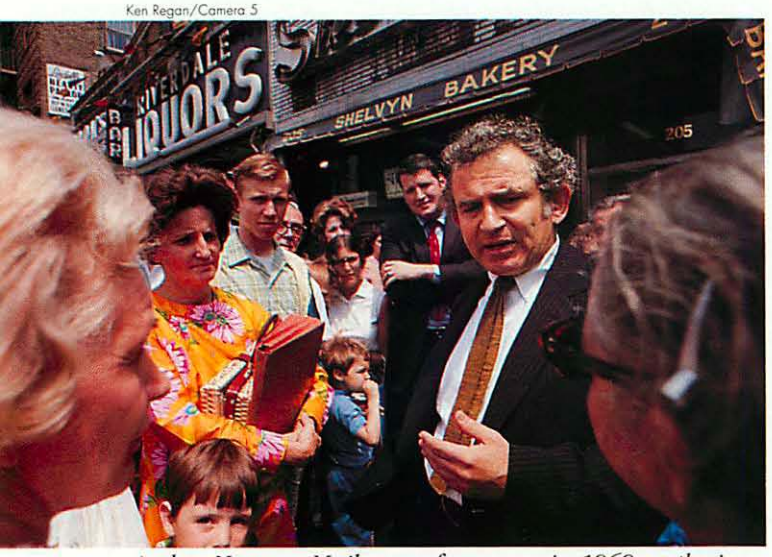
Culver Pictures Photo by Mathew Brady

The first New York City mayor to talk about secession was Fernando Wood, in 1861.

Bettmann Newsphotos

Flamboyant mayor Jimmy Walker also spoke of getting the city out of Albany's grip.

Ken Regan/Camera 5



Author Norman Mailer ran for mayor in 1969 on the issue of making New York City the 51st state. He lost the election.

The closest the five counties came to seceding was in 1859, when, acting under the provisions of Article IV, Section 3, the state legislature gave them permission to establish a separate political entity to be called the Territory of the Colorado. The measure got as far as the federal Congress but disappeared there under the weight of the slavery issue and the approach of the Civil War.

Such are the twists of history that a century later, in 1956, the Los Angeles region had grown so "imperialist" and "aggressive" that the eight northernmost counties of California were talking of leaving it and organizing the 49th state, for which they chose the name Shasta. While the most important issue was water and the draining of the north's supplies to slake the thirst of the south, the words spoken by a northern California secessionist in 1956 could just as easily have been uttered by an Angeleno 100 years before: "We have become merely a satellite state without sufficient voice to protect ourselves in Sacramento."

The Civil War years also heard the first rumblings of secession ever to come out of New York City, a place that seems to be continually at war with its state legislature in Albany. Thundered Mayor Fernando Wood in 1861: "The political connection between the people of the city and the state has been used by the latter to our injury. Our burdens have been increased, our substance eaten out and our municipal liberty destroyed. Why may not New York disrupt the bonds that bind her to a corrupt and venal master?"

Echoes of Mayor Wood came more recently from mayors Jimmy Walker in the 1920s and Robert Wagner in the 1950s and from author Norman Mailer, who ran for mayor in 1969 on a platform calling for New York City to become the 51st state. Two years later Mayor John Lindsay commissioned a study on statehood, which reported that it is "not an unrealistic possibility; indeed, it may well be the only sensible approach to government in New York City."

The subject died in the city for lack of interest, but the issue of secession recently cropped up on Staten Island, one of New York City's five boroughs, where many citizens would like nothing better than to free themselves from the almost bankrupt metropolis and set up a separate municipality. In elections held in November 1990, more than three fourths of those who voted approved the formation of a commission to explore secession and draw up a charter for a new city government.

Secession has never been more than an impossible dream in the upper peninsula of Michigan, whose residents as early as 1829 hoped to combine the area with what is now northern Wisconsin to form the separate Territory of Huron. The peninsula was joined to Michigan in 1837, when Michigan became the 26th state, but the vision of secession has never completely faded. The

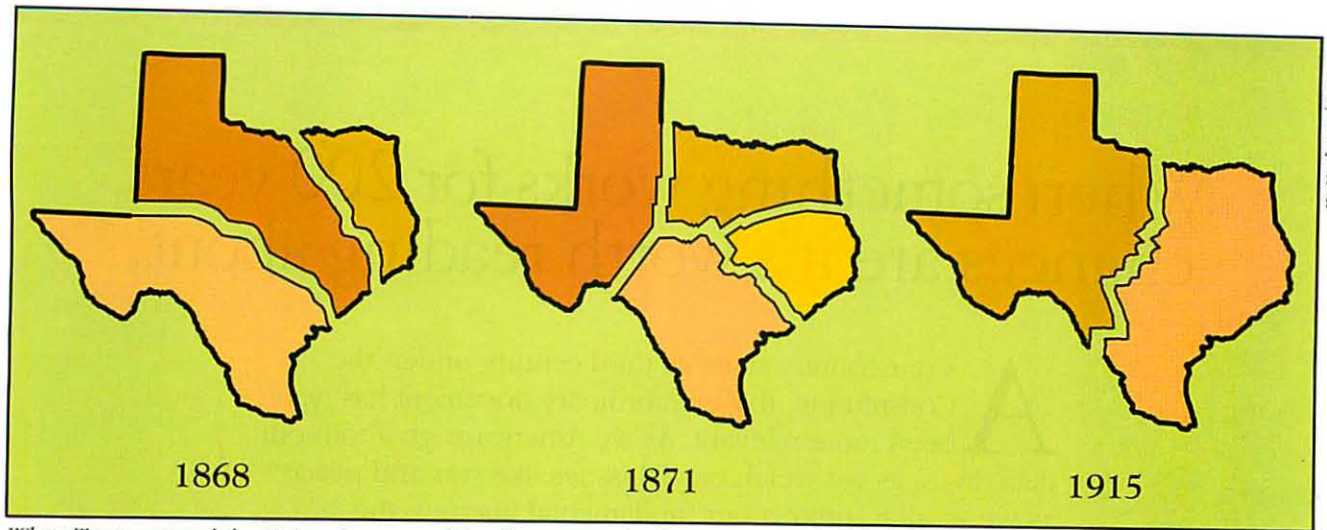


Illustration by Lillian J. Fuentes

When Texas entered the Union, it came with a five-state rule, that is, congressional permission to divide itself into as many as five states. Three of the more serious proposals would have created shapes like these. A five-state split was suggested in 1975 but soon dropped. The thought of 10 Texas senators was appealing, but the prospect of building four new state capitals was not.

peninsula has even figured out two ways to achieve it. The first is to withdraw from Michigan and become the 51st state, a scheme that has been bandied about for years. The second is to become part of a new state, Superior, which would encompass not only the land for the proposed Territory of Huron but also the Lake Superior counties of Minnesota. All three regions feel alienated from the legislatures far to the south that govern them. Discussing this "often quaint and always quixotic" movement in 1977 in an issue of the *Wisconsin Magazine of History,* historian Charles E. Twining commented, "That nothing has resulted from the effort of those who have advocated a separate 'State of Superior' nor seems likely to, need not diminish its significance. As we all know, redrawing political boundaries even for the very best of reasons has often proved an impossible task."

A 1977 Massachusetts redistricting plan led to talk of secession on Martha's Vineyard, but designing a bumper sticker was as far as it got.

The phrase quaint and quixotic is certainly applicable to most of the secession proposals that have been aired in this country, such as on Martha's Vineyard, when it learned it would lose its seat in the Massachusetts legislature; or on Block Island, which threatened to quit Rhode Island over the issue of mopeds; or in the panhandle of Nebraska, where most of the 98,000 residents would like to join Wyoming; or Socorro County, New Mexico, which, after learning that it had not been officially transferred to the United States in the 19th century, thought of becoming the Socorro Free State.

Quaint and quixotic is not quite an appropriate description of the secession situation in Alaska, where the Alaska Independence Party was founded in 1970 by a Fairbanks businessman named Joe Vogler, who says of the United States, "I hate that country." Until the gubernatorial elections of 1990, the party was a tiny fringe group, twice unable to gain Vogler the governorship. Independence seemed a moribund issue until Walter Hickel came along and, minutes before the filing deadline, joined the Independence ticket as its candidate for governor. To everyone's surprise, he won. Hickel had been governor of Alaska in the 1960s, before Richard Nixon hired and then fired him as secretary of the interior. In the spring of 1991, angry at Hickel's obvious lack of interest in the independence movement, a few party members began a campaign to get him recalled from office, saying that his last-minute switch to the party was illegal. Whatever the outcome, it is clear that the dispute will do little to further the cause of independence in Alaska.

One state that holds a unique position on secession is Texas, the only state with enabling legislation that gives it the authority to break itself up. The legislation is called the five-state rule, and it derives from the joint congressional resolution providing for Texas' admission to the Union in 1845. The rule says, "New States of Convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by consent of said State, be formed out of the territory thereof, which shall be admitted to admission under the provisions of the Federal Constitution..."

There have been few decades since 1845 in which some proposal or other has not been made for the division of Texas. The last one was in the mid-1970s, when two state legislators thought that by increasing its number of U.S. senators from two to 10, Texas would gain "a great deal more clout on the national scene." Cooler heads prevailed in the 1970s as they had in previous years. With Texas remaining in one piece and secession movements stymied elsewhere, it seems that if the United States is to get a 51st state, it will most likely be Puerto Rico. But that's another story.

Eleanor N. Schwartz, *a contributing writer to* Constitution, *was formerly a reporter for* Time *and* Fortune *magazines.*

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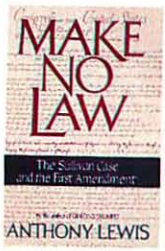
Review
Books of Interest



Make No Law
The Sullivan Case and the First Amendment
by Anthony Lewis
Random House; 368 pages; hardcover, $25.00; 1991

Make No Law is not just a book about a southern police chief who sued a New York newspaper for half a million dollars. It is a superbly woven tapestry of First Amendment law that shows how our written Constitution fulfills the hope and promise of those who framed it, who with pen and parchment prescribed the limits of what government can do.

Anthony Lewis weaves his story with the scrupulous care for detail that is the hallmark of the journalist-historian he has become. The case, *New York Times Co. v. Sullivan,* originated with a full-page advertisement, "Heed Their Rising Voices," which was signed by 64 civil-rights leaders ranging from Eleanor Roosevelt to Jackie Robinson, from A. Philip Randolph to Nat King Cole. The advertisement, which pleaded with the nation to understand the deprivations and indignities suffered by the black citizens of the southern states, appeared in the New York *Times* on March 29, 1960. A total of 394 copies of the newspaper was sold to subscribers and on newsstands in the state of Alabama. The Montgomery *Advertiser* ran an angry editorial castigating the *Times* for publishing such a tissue of "lies, lies, lies." If it hadn't been for that editorial written by its angry editor, Grover Cleveland Hall, Jr.—who carried in his bosom a deep hatred for "the hysteria and mendacity of [the 19th-century] abolitionist agitators" and for the 20th-century journalists and "liars" who keep the racial poison alive in the northern press—city commissioner L.B. Sullivan would never have contemplated suing for libel.

Commissioner Sullivan's name was not mentioned in the advertisement, but he claimed that because he was in charge of "law and order" in Alabama's capital, the *Times* had charged him with "grave misconduct" and "improper actions and omissions as an official of the City of Montgomery." Goaded by Hall's editorial, Sullivan demanded a full and fair retraction of "Heed Their Rising Voices," and when the *Times* refused, he ordered his Montgomery lawyers to bring suit for $500,000.

Herbert Wechsler, a professor of constitutional law at Columbia University, was retained by the *Times* to argue *New York Times Co. v. Sullivan* before the Supreme Court. He elevated the case to a debate about the nation's 18th-century constitutional blunder, when it criminalized seditious libel in the Sedition Act, and about the impact of the nation's 20th-century libel laws on a free press. Wechsler's 95-page brief to the nine Justices of the Warren Court stated that no prior Supreme Court decision had "sustained the repression as a libel of expression critical of governmental action." That principle, he wrote, was the essence of "what was at stake here." The "mere label" of libel had no "talismanic insulation" from the First Amendment.

Lewis's description of Professor Wechsler's appearance before the 1964 Supreme Court resonates with the memory of other decisive moments in Court history—Daniel Webster arguing in the case of *McCulloch v. Maryland,* Roger Taney in *Barron v. Baltimore,* Louis Brandeis in *Muller v. Oregon,* Thurgood Marshall in *Brown v. Board of Education,* and Alexander Bickel in the Pentagon Papers case (then yet to be heard)—but mostly it evokes the image of a fiery advocate changing the way the Constitution will be interpreted with the strength of his own convictions.

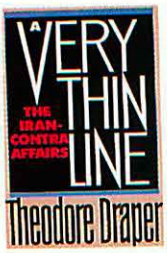
Wechsler riveted the Court's attention with his quiet opening salvo. This is not a routine case, he explained. "It summons for review a judgment of that court [the Alabama Supreme Court] which poses, in our submission, hazards to the freedom of the press with a dimension not confronted since the early days of the Republic."

Wechsler's target was clearly the Sedition Act. Justice William Brennan certainly understood that message, as did the Court majority that joined him. By arguing that the government could not pass laws to silence its critics, Wechsler invited the court to rule clearly that the First Amendment also barred government officials from using libel suits in the courts to accomplish that same result. Author Lewis explains that Brennan then did what the modern Court rarely does—he took "a fresh look at an entire area of the law." His opinion set the tone right from the top. "We are required in this case," Brennan wrote, "to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."

The judgment of the Alabama Supreme Court had been reversed, Sullivan had lost, and Justice Joseph Story's decision in *Martin v. Hunter's Lessee,* which established the fundamental principle of federal jurisdiction over state courts, had been sustained. Alexander Meiklejohn, a professor of constitutional philosophy, saluted the Court's opinion by declaring, "It is an occasion for dancing in the streets."

It is surprising that Anthony Lewis's absorbing book fails to credit Jefferson for his letter to Madison in 1787 that forced the First Congress to add a Bill of Rights to the Constitution. Nonetheless, *Make No Law* is a summons to journalists to do a jig of their own in the newsrooms of America. But as we dance we must not forget that it was "we, the people" whom both Madison and Brennan were protecting, and that the First Amendment was never intended as a license for slothful or negligent journalism.

—Fred W. Friendly, *Director, Columbia University Seminars on Media and Society*



A Very Thin Line

The Iran-Contra Affairs

by Theodore Draper

Hill and Wang; 690 pages; hardcover, $27.95; 1991

For many reasons, Iran-contra represents a more serious constitutional crisis than Watergate. In the Watergate affair some officials within the Nixon administration were willing to tell the truth (if only to save themselves). Documents and tapes revealed the scope of the cover-up and forced top officials to pay a heavy price. Attorney General John Mitchell, among others, went to prison, and President Richard Nixon resigned in disgrace. But no one within the Reagan administration has yet told a credible story about his involvement with the Iran-contra affairs. The explanations by President Ronald Reagan and Vice-President George Bush have been unconvincing. Vast numbers of official documents were destroyed while the investigation was under way. Thus far, penalties have been meted out only to mid- and low-level officials. We know that shadowy figures conducted criminal activities, but no one has been able to pull back the curtain to reveal the operators. Despite investigations and trials, the picture remains confused. As a consequence, some variation of these events is likely to recur.

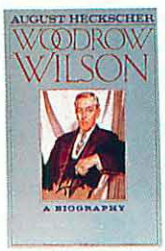
Theodore Draper reviews and analyzes the mass of public documents that now exist on Iran-contra. In a methodical and lucid style, he explains how the shipment of arms to Iran violated the Reagan administration's professed policy, while assistance to the contras violated congressional policy enacted in the Boland Amendment. He also outlines how administration officials, with winks and nods from President Reagan, solicited money from Saudi Arabia, Taiwan and other countries, as well as from private citizens. "By finding a substitute source of money," Draper comments, "the administration in effect found a substitute for Congress."

Draper shows that prominent figures in the administration believed Reagan's reliance on nonappropriated funds could justify impeachment proceedings against him. Despite this concern, the attorney general never prepared a legal memorandum on the issue—nor did the President's counsel, the legal adviser to the State Department, the counsel to the Defense Department, the CIA's general counsel or the counsel in the National Security Council. Why this willful ignorance?

Draper answers many important questions. He does not regard CIA director William Casey as the "driving force." Instead, he argues persuasively that Oliver North exaggerated Casey's role to justify his own actions. Still, the reader is left with an incoherent tale. Draper has followed it as far as the public record—"well over 50,000 pages" of hearings, depositions, reports and other material—allows him. But the story is checkered with implausible accounts by administration officials and often leads to dead ends.

On the issue of who the key players were, Draper equivocates. At times he suggests that Iran-contra was the work of "a small, strategically placed group," a "handful of little-known officials," a "junta-like cabal." Yet he demonstrates that assistance was required (and obtained) from the CIA, the Defense Department, the State Department, the Joint Chiefs of Staff, the National Security Agency and the Drug Enforcement Agency. This was no cabal. Hundreds of people at high levels in the Reagan administration gave crucial assistance. Many others averted their eyes. How could that possibly have happened? After all the studies, we still lack an answer.

—Louis Fisher, *Congressional Research Service*



Woodrow Wilson

by August Heckscher

Charles Scribner's Sons; 752 pages; hardcover, $37.50; 1991

Woodrow Wilson is one of a handful of Presidents who continue to intrigue literate Americans. Now the former president of the Woodrow Wilson Foundation, August Heckscher, has mined imaginatively the voluminous *Papers of Woodrow Wilson*, so meticulously edited by the Princeton historian, Arthur S. Link. The result is a perfect marriage of abundant sources and sympathetic scholar. What emerges is not a new portrait but a clearer one, of an idealist driven relentlessly by the ambition to lead.

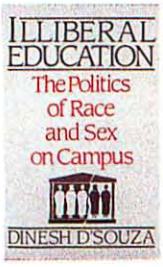
Heckscher is luminous in bringing his man to young adulthood. As a Princeton alumnus unsure of how he must spend his life, Wilson was inspired by the exemplars of greatness he encountered in the pages of history and literature books, his closest companions. He was possibly dyslexic, hammered into shape by a father who fostered in him rigid intellectual standards, and pampered by a no less domineering mother who was sure her Tommy could do no wrong. Heckscher takes the future chief executive through the vicissitudes of his academic career (he became one of the most accomplished teachers of his generation) and on to the presidency of Princeton. He reviews the now famous struggle with Dean Andrew West over the location of the Princeton graduate school and Wilson's consequent departure from academia for the hurly-burly of politics, a career for which he wrongly believed his years as a student of political science had prepared him.

The rest of the story—the governorship of New Jersey, the presidency, the Great War—is elegantly and absorbingly provided, but it is an oft-told tale. At the expense of other detail, Heckscher has concentrated on the formation of Wilson's nature. Never before has a biographer had such plentiful material for revealing a President's character, since Wilson was one of the last great American letter writers. He often wrote affectedly, but he seems to have worn his heart on his sleeve. Heckscher has been able, therefore, to illuminate Wilson's relationships with his

two wives, Ellen Axson and Edith Galt, as well as his dalliance with Mary Peck. (The curious will regret that more is not made of Wilson's erotic side, which once led him to translate a salacious French novel.)

Wilson's stubbornness, combined with the enmities he sowed and with history itself, shattered his dream of a League of Nations ornamented by United States membership. Whether his obduracy resulted from the circulatory ailment that drained his life and mind for years, culminating in the massive stroke he suffered at the height of the fight over the Treaty of Versailles, nobody can say for sure. But certainly Wilson felt morally bound to validate his zeal for the war in 1917 by holding his ground three years later. In the end, he threw himself on the funeral pyre of the young Americans whose death on the battlefields of France he believed he had caused—the hero of a tragedy more searing than any classical tragedy he read while growing up. Wilson will continue to captivate historians, but Heckscher's mastery of the man and his age sets a high standard for those who write about him hereafter.

—Henry F. Graff, *Professor of History, Columbia University*



Illiberal Education

The Politics of Race and Sex on Campus

by Dinesh D'Souza

The Free Press; 319 pages; hardcover, $19.95; 1991

American colleges and universities have changed and are changing. That is a fact. They have changed in the number and kinds of people who attend and in what people study once admitted. Whether such alterations are for the better or worse is a matter of opinion. Dinesh D'Souza's belief is that American higher education has grown worse.

After examining admissions policy, curriculum and campus life at six major universities, D'Souza concludes the following: under the banner of affirmative action, colleges and universities have gone to extreme lengths to recruit minority students, many of whom are ill prepared to take advantage of college studies. Having admitted less qualified students, college officials must then offer remedial courses and programs that protect them from the demands of a rigorous academic curriculum. Both good students and weak ones recognize the hypocrisy of such policies, and their responses exacerbate ethnic and racial tensions on campus. As a result, minority students retreat into closed enclaves, creating a segregated environment sanctioned by college officials. Anyone who criticizes these practices may be labeled a racist and censured by students, faculty and administrators. The result is that colleges and universities today are less challenging academically, more segregated and less tolerant of the free expression of opinion than in the past.

D'Souza's book will be remembered more for its criticisms than for the remedies it offers. After some 250 pages of biting commentary, the author offers only three brief proposals. He suggests that universities continue to give preferential treatment to disadvantaged students but base it on economic hardship, not race; that they deny recognition and funds to clubs that exclude students by skin color but sanction those organized around a cultural or intellectual interest; and that they require a course or a sequence of courses that exposes entering freshmen to issues of equality and human differences through a study of classic texts.

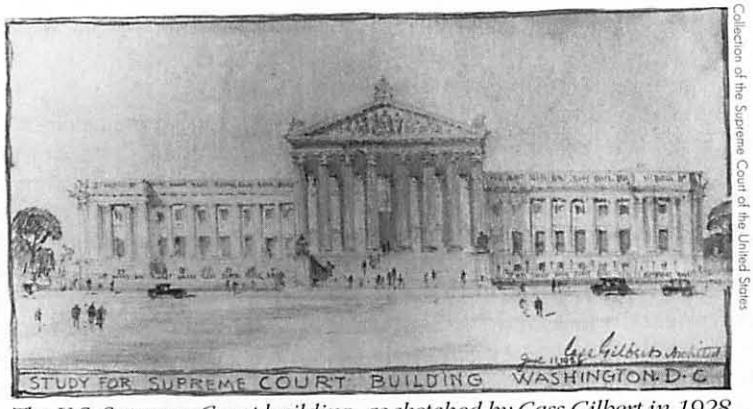
D'Souza based his conclusions on interviews with students, faculty and administrators at Berkeley, Duke, Harvard, Howard, Michigan and Stanford, as well as on data from newspaper and journal articles, books and specialized studies. Despite his efforts to explore his topic thoroughly, he provides neither a balanced treatment of affirmative-action policies nor an adequate context for them. Indeed, readers of his book might conclude that white males are the most abused group in American society and black people and white women the most powerful. College officials are dismissed as weak, stupid and opportunistic. D'Souza suggests that his "unique cultural perspective" may be useful in understanding the current conditions in universities. His perspective is that of India, where caste and remnants of purdah survive. From that vantage point, racism and sexism in the United States may seem trivial, but those affected by them are not likely to agree.

—Howard D. Mehlinger, *Director, Indiana University Center for Excellence in Education*

For broadcast later this year

The Road from Runnymede. *The Constitution Project* and Oregon Public Broadcasting have co-produced a one-hour PBS special, which explores the English roots of the U.S. Constitution. In taking viewers from Magna Carta to the debates at the Constitutional Convention in Independence Hall, actor Christopher Reeve explains how people at critical junctures of history have dealt with abuses of governmental power and shows the transformation in thinking that changed subjects to citizens and spurred the development of concepts such as the rule of law, limited government, due process of law and individual rights. Introduction and epilogue are by commentator Roger Mudd, who interviews constitutional scholar A.E. Dick Howard. Plans call for the program to be broadcast nationally late this year.

Videotapes will be available for school and home use. The educator's version consists of two segments, each one-half hour long, and includes a curriculum package and teacher's guide. For information and to order, call 1(800) 776-1610.



Collection of the Supreme Court of the United States

The U.S. Supreme Court building, as sketched by Cass Gilbert in 1928.

Washington's Temple of Karnak

When Chief Justice William Howard Taft met with architect Cass Gilbert in 1926 to discuss a building for the U.S. Supreme Court, he made three demands: "The building must conform in design with the Capitol," he said. "It must be enduring. And Mrs. Taft says it should be easy to keep clean."

Established in 1789, the Supreme Court had never had a permanent home. Its opinions had come down from eight different venues in New York, Philadelphia and Washington. Since 1861 it had been housed in the original Senate chamber of the Capitol, and Taft felt it was high time the Court had a place of its own. Setting to work on this grand project, Gilbert found he could satisfy all three of Taft's demands with one word: marble.

By the time the $10 million structure was finished, in May 1935, it had consumed more marble than any other building in U.S. history, some 450,000 cubic feet of it, shipped in from quarries in Alabama, Georgia, Vermont, Italy, Spain and Africa. Though the public largely approved the building, Gilbert's structure was fraught with problems, not least of them the gleaming white stone itself.

Outside, the vast expanse of marble cast so much glare that the guards had to wear sunglasses. And light reflected from the four inner courtyards was so intense that the windows of the rooms around them, including those of the courtroom, had to be draped with heavy curtains. While satisfying Mrs. Taft's dictate about cleanliness, the marble promoted chills, and the corridors and courtroom required more heating.

Nor were all the Justices impressed by their splendid new home. Justice George Sutherland reportedly said the monumental edifice made him and his brothers feel like "nine black cockroaches in the Temple of Karnak," while Harlan Fiske Stone commented, "I feel we ought to go in here on nine white elephants."

Moreover, the acoustics were so bad that Justice Owen Roberts at one end of the bench could scarcely hear Justice Benjamin Cardozo at the other, and any lawyer who did not bellow his arguments risked not being heard at all. The lighting was sufficiently dim that Louis Brandeis brought into Court his own battered, goosenecked student lamp. The Justices, however, had little choice but to settle in.

It was years before substantial alterations were made. In 1954, Chief Justice Earl Warren installed an amplifying system, and each Justice had to press a button when he wished to speak. In 1972, Chief Justice Warren Burger directed that the 30-foot-long bench be canted into a half-hexagon, so the Justices at its extreme ends could finally see one another.

The lighting has remained poor, however, requiring that each of the nine seats be provided with its own small reading lamp. The outside guards still wear sunglasses, and it is recommended that visitors do the same.

The building's size, though, is a success. The number of Justices has remained unchanged (despite Franklin Roosevelt's best efforts), but the staff and facilities that support the Justices' work have grown exponentially. Yet the needs of the Court's expanded docket for library facilities, communications equipment and security police, and for services for the press and the public have all been met without effort. The Court may be facing the 21st century with poor lighting, but it will, at least, have ample elbow room.

A reader comments

In his article "The Lion in the Path" (CONSTITUTION/Spring-Summer/1991), Walter LaFeber stated, "Events outpaced the constitutional debate: on February 4, 1899, two days before Congress was to act, the President learned that Aquinaldo's forces had finally fired on U.S. troops."

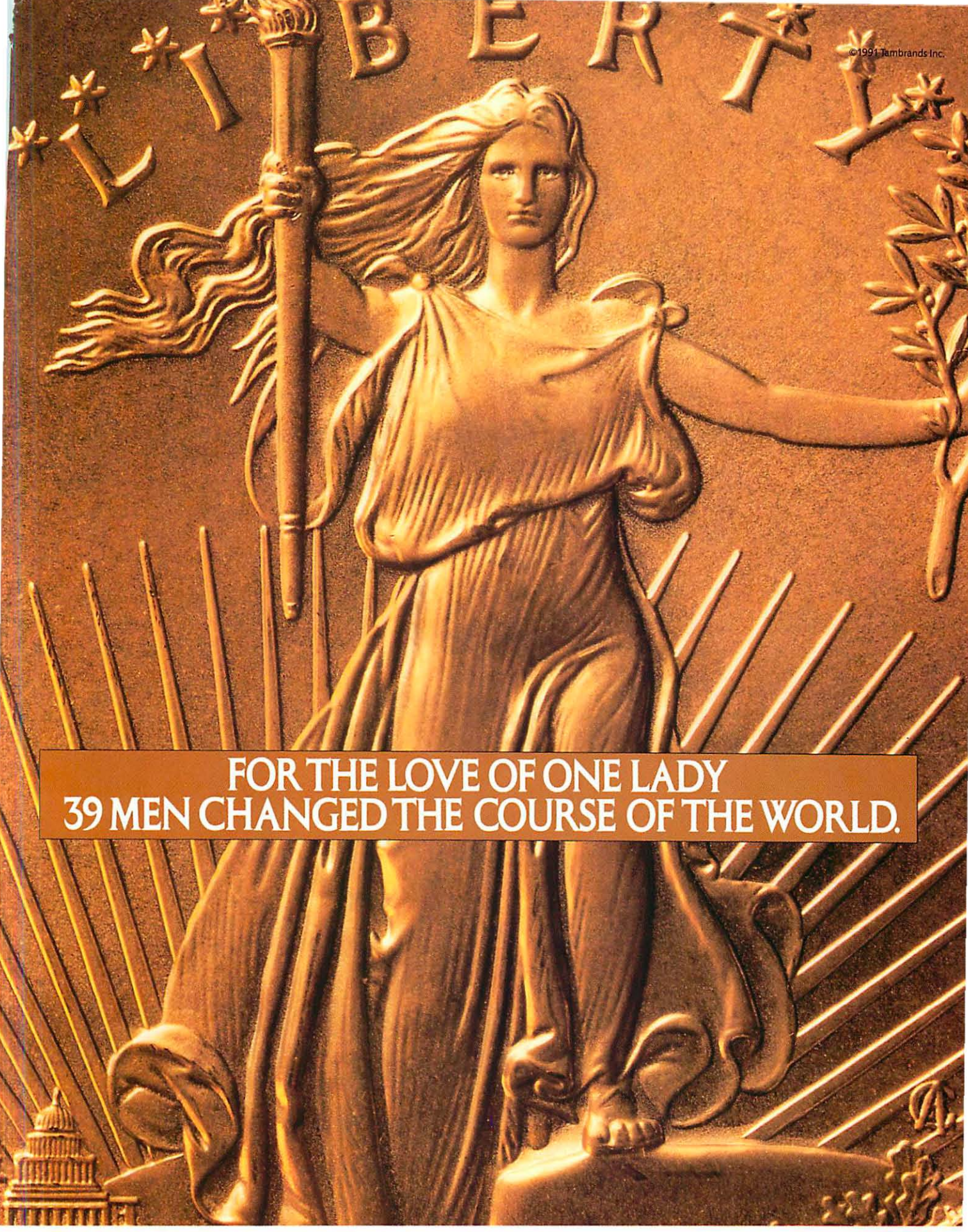
However, Private W.W. Grayson, a U.S. soldier involved in the incident, says he fired the first shot. Grayson's account is quoted in C.E. Russell's *The Outlook for the Philippines,* p. 93. In addition, Stanley Karnow, in his history of American-Philippine relations, *In Our Image,* sees Grayson's shot as critical: "Like the start of a race, Willie Grayson's first shot hurtled the Americans forward against the Filipino positions around Manila."

—Rodolfo A. Arizala,
Consul General, Philippines

The author replies

The consul general's comments are appreciated. Who maneuvered whom into firing first is key, and complex (see, for example, testimony by a Filipino in *Report of the Philippine Commission to the President,* 4 vols. [1900], II, 384-385, which throws interesting light on Willis Grayson's story). McKinley initially heard from his commander, General Elwell Otis, that Filipinos fired first. My point was that until McKinley told Congress that Filipinos had fired on U.S. troops (who, as I wrote, had been carefully ordered to "bottle up" the Filipinos), the President's annexation treaty was in jeopardy. McKinley used his privileged access to information to pass the treaty by a narrow margin.

—Walter LaFeber, *Cornell University*



The men who signed the Constitution loved liberty more than life itself. In 1787, that love would seal the fate of America. Today, it serves to lead the world.

TAMBRANDS

The declaration of the Basic Rights of the German People, passed by the Frankfurt National Assembly on December 21, 1848, was strongly influenced by the American Declaration of Independence and France's Declaration of the Rights of Man. Among the rights it guaranteed were freedom of press, assembly, speech and religion. Austro-Prussian rivalry, combined with reaction to the revolutions that swept across Europe in 1848, ultimately proved fatal to the entire constitution adopted by the assembly. See ***"From Reich to Republic,"*** *page 60.*