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PI SIGMA ALPHA REVIEW

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THE CONSTITUTIONAL THOUGHT
OF JOHN ADAMS: THE SIGNIFICANCE
OF THE PRE-PRESIDENTIAL WRITINGS

Paul S. Edwards*

Introduction

Most historians of the Early National Period agree that John Adams was "the most painstaking student of government, and the most widely read in political history of his generation," yet surprisingly little work has been devoted to his influence in framing the Constitution.¹ Although absent from the Constitutional Convention, Adams was a prolific political writer. In his 1776 correspondence, Adams eagerly gave advice to southern statesmen who were reframing their state constitutions after the nullification of the colonial charters. One such letter, to George Wythe, was eventually published as the tract Thoughts on Government and was widely read and acclaimed as the most trenchant statement on republican government of the time. In 1779 he singlehandedly penned A Report of a Constitution or Form of Government for the Commonwealth of Massachusetts, which was adopted with very few changes as Massachusetts' state constitution, and remains the oldest functioning written constitution in the world. Finally, immediately preceding the convention of 1787, he completed the first volume of what would become a three-volume work entitled A Defence of the Constitutions of Government of the United States of America.² The conservative thinker Russell Kirk said of

*Paul is a senior majoring in History. He will begin graduate work in Political Science at Brigham Young University this fall.

Adams' political writing, "This body of political thought exceeds, both in bulk and in penetration, any other work on government by an American."³ Indeed, a thoughtful reading of the essential political documents of the period makes the framing of American government understandable only if we give more generous treatment to Adams' writings.

"Thoughts on Government"

Even before the Declaration of Independence was adopted, it was clear to the Continental Congress that the colonial governments, as established in the colonial charters, were in need of restructuring. According to eighteenth-century republican theory, government is no longer credible when it begins to coerce its citizens; and Adams had argued in his 1775 tract, Novanglus, that because of the tyrannies of England many of the colonies were theoretically without the protection of legitimate government. Adams had long felt, as did many New Englanders, that the American colonies, particularly those of New England, were directed by providence, and were therefore examples to the world of how the Commonwealth was to operate socially and politically.⁴ After the official nullification of colonial charters by the Continental Congress in May of 1776, the colonies were technically without government and some of the southern delegates to the Continental Congress turned to Adams for advice. A written plan given to George Wythe was eventually published by Richard Henry Lee, under the title Thoughts on Government. This pamphlet was intended, says Adams, to be "a battering-ram to demolish the royal government and render independence indispensable."⁵

Thoughts on Government reaffirms many of the republican principles characteristic of the

revolution. First of all, it defines the republic as "an empire of laws, and not of men."⁶ Secondly, it states that the legislature should be an exact replica of the people, "It should think, feel, reason and act like them."⁷ Furthermore, the legislature should be bicameral, to guard against an arbitrary, unchecked, and potentially perpetual power. Thoughts on Government also expresses some liberal notions; for example, that happiness is the aim of good government and that the government should provide public education. Adams calls for annual elections in order to maintain "the great political virtues of humility, patience, and moderation, without which every man in power becomes a ravenous beast of prey."⁸ Finally, with these criteria in mind, he projects some admittedly tentative ideas about a continental constitution.

It is difficult to assess the influence of a document retrospectively, but Thoughts on Government was unquestionably the focus of much attention during the reorganization of state governments. The Virginia Convention of 1776⁹ was especially influenced by Adams' pamphlet. Thomas Paine, an influential member of that convention, wrote a letter complimenting Adams for Thoughts. Furthermore, Paine delivered a spirited attack against Carter Braxton when Braxton criticized Thoughts on the floor of the convention.¹⁰ The constitution proposed for Virginia by George Mason was, in many instances, taken verbatim from Adams' pamphlet; and it was Mason's proposal which was eventually incorporated as the Virginia Bill of Rights.¹¹ In its final form, the Virginia Constitution of 1776 followed the plan presented in Adams' Thoughts. As Julian Boyd asserts, although no single person is responsible for the Virginia Constitution of 1776, Adams' influence is unmistakable.¹²

In North Carolina, New Jersey, and New York, there is evidence that Adams was widely

read and admired as many of his suggestions found their way into these constitutions. After reviewing many of the new constitutions, Adams wrote to James Warren: ". . . I am amazed to find an Inclination So prevalent throughout all the Southern and middle Colonies to adopt Plans, so nearly resembling, that in the Thoughts on Government."¹³ In his own Massachusetts, Thoughts would help overturn the proposed Constitution of 1778, an episode discussed later.

The most significant contribution of Thoughts on Government to the discussion of republicanism was that it emphasized, more than anything previously, the relationship between liberty and strong constitutions. When Adams wrote, "as the divine science of politics is the science of social happiness, and the blessings of society depend entirely on the constitutions of government . . . there can be no employment more agreeable to a benevolent mind than a research after the best," he essentially created American constitutionalism: the conscious quest for the best form of government.¹⁴ Adams, a master of legal and political thought, asked American statesmen to give practical effect to the lessons of history and philosophy.¹⁵

"The Report of a Constitution . . . "

Massachusetts had effectively operated without a charter for more than a year when, on May 15, 1776, the Continental Congress resolved that "the exercise of every kind of authority under the crown should be suppressed."¹⁶ So, unlike most colonies which felt compelled to immediately reorganize their government, the Massachusetts assembly waited until September to choose a committee to draw up a plan of government. It was not until May of the following year that the assembly received the approval of the people to continue with their

constitution. The resulting constitution of 1778 was rejected by the few citizens who did, in fact, vote. It mixed the judicial, legislative and executive powers, provided no bill of rights, and seemed, to most, hastily conceived. The lack of balance between the three forms of government, one of Adams' primary concerns in Thoughts, was one of the main reasons that it was not approved.¹⁷ This aborted effort in constitutionalism, however, was far from fruitless. The debate over the 1778 constitution produced one of the masterpieces of American political writing, The Essex Result.

Penned by a young lawyer, Theophilus Parsons, The Essex Result was a petition of a delegation from Essex County who opposed the Constitution of 1778. Therein, Parsons gives a clear statement of constitutional ideals. It is interesting to note that in many ways he echoes Adams' Thoughts on Government, particularly when addressing the issue of representation in the legislature:

The rights of representation should be so equally and impartially distributed, that the representatives should have the same views, and interests with the people at large. They should feel, and act like them, and in fine, should be an exact miniature of their constituents. They should be (if we may use the expression) the whole body politic, with all its property, rights, and privileges, reduced to a small scale, every part being diminished in just proportion.¹⁸

Most of Parsons' criticisms of the proposed constitution were found originally in Adams' Thoughts. Parsons believed that the proposed constitution lacked separation and balance of powers. Like Adams, Parsons accentuated the importance of constitutionalism, and one of his

most significant contributions to the discussion was his concern for the way in which constitutions should be written. Rather than a committee of the legislature, Parsons believed that a constitution should be written by an impartial, judicious and unambitious master of political history.

It would be difficult to represent Adams as unambitious, but of all the geniuses of the Founding Era, Adams was "blessed with qualities which genius too often lacks: industry, chastity, absolute honesty, and piety."¹⁹ As we have already indicated, Adams was as well-acquainted as anyone with the history of constitutions. Speaking specifically of Adams' role in writing the Massachusetts Constitution, one historian wrote:

John Adams, now forty-three years old, was undoubtedly the greatest expert on constitutions in America, if not in the world. . . . Since his college days he had studied constitutions, ancient and modern, had read almost every book every written on political theory, in the English, French, Latin and Greek languages; and, what is more,²⁰ he had thought deeply about politics.

This assessment, though flattering, was probably shared by most of Adams' colleagues. It was precisely because of his expertise that Adams was chosen in 1779, along with James Bowdoin, and Adams' cousin Samuel, to draft a new constitution for Massachusetts. Ultimately, John Adams worked alone on the task, singlehandedly writing The Report of a Constitution as presented to the Massachusetts Convention.²¹ In convention, the language and integrity of Adams' text was overwhelmingly maintained, and the Constitution of the Commonwealth of Massachusetts has become the oldest functioning written constitution in history.

With The Report of a Constitution, Adams made perhaps his most significant contribution to constitutionalism. In writing this text, Adams benefited from Massachusetts' inability to agree on a constitution, having extra time to retrospectively consider the pros and cons of the other state constitutions. He had a wealth of political tracts, such as The Essex Result, to consult. Working alone, he was not restricted by the need for compromise and political efficacy. Faithful to the ideal of eighteenth-century compact theory, the proposed constitution derived its power from the consent of the people. It called for a distinct separation of powers, with a strong, independently elected governor. Furthermore, it provided a lengthy bill of rights, mandated annual elections, and outlined liberal suffrage requirements, which, unlike those of some states, were identical for all elections. An entire chapter of the proposed constitution was devoted to maintaining Harvard University, and encouraging public education, literature, arts, and sciences. Also, a distinction was made between representatives, senators and the governor regarding property requirements for office; and an oath of office affirming that the official was Christian was mandated. The proposed constitution became the model of republican government in the American states.

For example, the New Hampshire Constitution of 1776 was a very short declaration of intent to form a state government following the nullification of charters. The document itself had very little "architecture," and was eventually abandoned in 1784 for a more solid constitution. The New Hampshire Constitution of 1784, interestingly enough, is nearly identical, in its organization and content, to the Massachusetts Constitution of 1780.²²

The Massachusetts Constitution was noticeably different from the other early state

constitutions. Rhode Island and Connecticut continued to operate under their colonial charters into the nineteenth century. The Delaware Constitution of 1776 had no explicit Bill of Rights, had a weak legislature,²³ and was little more than a listing of articles.²³ North Carolina and New Jersey likewise drafted²⁴ constitutions containing short lists of articles.

The most complex of the early constitutions were those of Pennsylvania and Virginia. The Pennsylvania Constitution of 1776 included a distinct Bill of Rights; but once again, as a text it was merely a listing of principles and strictures. Its unicameral legislature and its weak executive both proved ineffective, requiring the constitution to be replaced shortly after ratification of the Federal Constitution.²⁵ The Virginia Constitution was significant in a number of ways. For example, it listed many of the grievances against King George III which Jefferson later incorporated into the Declaration of Independence. Despite the fact that, like the constitutions of North Carolina and New Jersey, the text is not well organized and subdivided, it became the model for the 1777 constitutions of New York and Vermont.²⁶ The distinct influence that Adams' Thoughts on Government had on the Virginia Constitution should be remembered.

Obviously, although the early state constitutions all attempted to carefully organize government, often the texts themselves lacked organization and coherence. Frequently, they were no more than lists of articles within a superficial ordering. John Adams' constitution, however, was a highly organized text, divided into lengthy chapters; one for the rights of the people, another for the structure of the legislature, one for the duties of the governor, and another for the organization of the courts.

The attempt here is not to review the pros and cons of the individual state constitutions, but rather to strengthen our understanding of the importance of Adams in the discussion of constitutionalism. The Federalist states clearly that the Federal Constitution²⁷ borrowed heavily from the state constitutions. We have already established that Adams made a significant contribution to many individual state governments with his pamphlet Thoughts on Government, suggesting that his thought, however filtered, was important in the eventual shaping of the Federal Constitution. More importantly, however, it is probable that the Massachusetts Constitution, an embodiment of Adams' thought, was the primary state constitution consulted by the delegates to the Constitutional Convention of 1787.

Much of the structure and language of the Massachusetts Constitution is echoed in the Federal Constitution. The Massachusetts Constitution was the first state constitution to include a preamble explaining the text as a compact of civil government. The Preamble carefully explains that

The end of the institution, maintenance [sic], and administration of government is to secure the existence of the body politic; to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety, and tranquility, their natural rights and blessings of life; . . . We, therefore, the people of Massachusetts . . . for ourselves and our posterity . . . do ordain and establish . . . the CONSTITUTION OF THE²⁸ COMMONWEALTH OF MASSACHUSETTS.

In The Federalist, the Massachusetts Constitution was acclaimed²⁹ for its statement of separation of powers. In fact, The Federalist frequently

complemented the Massachusetts Constitution, and often admits that the Convention borrowed directly from it.³⁰

However, the most significant contribution of the Massachusetts Constitution to the federal model was the structure or organization of the document itself. Adams' constitution divided the discussion of the enumeration of powers into chapters. Articles I, II and III of the Federal Constitution correspond unmistakably with chapters I, II and III of the Massachusetts Constitution in structure and language.³¹ So in many respects, the Massachusetts Constitution, written by Adams, made a major contribution to the discussion of republican government and constitutionalism during the era of the framing of the United States Constitution.

"A Defence . . ."

Before his Massachusetts Constitution of 1780 was ratified, John Adams found himself in Europe, negotiating treaties with European powers for the Continental Congress. During his years as a foreign minister, Adams involved himself in the European discussion of political thought, meeting many of the principal theorists of the day. The activity of Adams, Jefferson, and Franklin, the first American ministers in Europe, is a fascinating, and often neglected story. America was being watched closely by European theorists, particularly the French, and therefore the role that the American ministers played in promulgating ideas in Europe was significant. These American revolutionaries were the celebrities of their day. When the discussion in Europe turned to republicanism, America and her ministers came under closer scrutiny of European intellectuals.

During the 1780s, France was characterized by a growing concern for reform and French intellectuals sought new political ideas. However, the categories of the discussion were already delineated before the arrival of the Americans. Some thinkers were particularly fascinated with the English experiment, and were known as anglomanes. The philosophes, on the other hand, sought radical change. The debate was vigorous, and in this arena of intellectual exchange, the ideas of America's ministers were pushed to their theoretical foundations. Franklin, constantly infatuated with new ideas, became a favorite of the philosophes. Adams, steeped in the history of the British tradition, and intimately acquainted with the importance of precedence from his twenty years of law practice, clearly identified with the anglomanes. Jefferson, traditionally characterized as having a love for the radical French, probably preferred the English tradition to the new French thought, but was politic enough to find himself counted in both camps.³²

Adams, from his youth, had been distrustful of complete reliance on philosophy in framing government. He believed that appeals to history were the best proof of "the good" in political life. He was particularly upset when he read a letter from French minister Turgot to Dr. Richard Price in 1778, as published in 1786. Turgot was critical of the American state constitutions, calling them "an unreasonable imitation of the usages in England."³³ Turgot promoted a unicameral legislature as the ideal government, and from among the American state constitutions he found only Pennsylvania's to be tolerable.

Adams was infuriated. It could be construed that Adams took this criticism as a personal assault, considering his intimate connection with the Massachusetts Constitution. However, the anger was more than personal. Adams was afraid that the American states were in grave danger of

accepting the untested notions of the philosophes. Turgot's letter was published while Adams was receiving news of huge debts, Shay's Rebellion, the organization of the Society of Cincinnati and plans for a continental constitution. He feared for the political fabric of his state, and the Confederation. So in October of 1786, Adams began to furiously write Defence, subtitled "Against the attack of M. Turgot, in his letter to Dr. Price."

Adams worked at a feverish pace for months, writing lengthy comments on histories and philosophical treatises. Defence is essentially an anthology of the histories and treatises dealing with republics that Adams had discovered in his research, combined with his own commentaries. Characteristic of the period, notions of twentieth century documentation are absent. Adams quoted page after page, interspersed his own piquant commentary, never bothering to credit anyone but himself.

Adams' intent was to convince, and in his opinion, only history could verify his arguments. Unfortunately, historical narrative obscures Adams' argumentation. What ultimately comes across to the reader is an ill-constructed collage that obscures the two principles that Adams originally tried to convey. The first of these principles states that it is the nature of men to pursue power and recognition. In the process, some citizens rise above others. The government that fails to recognize and guard against this natural tendency toward natural aristocracy and monarchy, says Adams, is doomed to degenerate into oligarchy or tyranny. Secondly, Adams claims that the only method of preventing this degeneration and securing liberty for the people is to admit this tendency in man, and balance it within the government. These were not new ideas. They composed the classical understanding of the forms of government as employed in the

British Constitution and as defended by Whig theoreticians, particularly the Swiss political theorist De Lolme. Yet because of the unclear nature of this book, this was not how Adams would be understood.

At the time that Adams worked through Defence, he corresponded frequently with Jefferson, who was the minister to France. Jefferson, well aware of the contemporary European debates in political science, was pleased with Adams' book. In a letter to Adams he wrote, "I have read your book with infinite satisfaction and improvement. It will do great good in America. It's [sic] learning and it's [sic] good sense will I hope make it an institute for our politicians, old as well as young."³⁴ Jefferson immediately sought to have Adams' work translated into French since it was, in many ways, written to the French philosophes.

In America, however, the work received critical reviews. Adams was so steeped in the European debate that his arguments rang foreign in the ears of his compatriots. Instead of being read as a defence of the underlying principles of American republicanism, Defence was seen as a call for a return to the British form of government. In a letter to Thomas Jefferson, James Madison wrote of the book's implications for proceedings at the Constitutional Convention:

Mr. Adams' Book which has been in your hands of course, has excited a good deal of attention. An edition has come out here and another is in the press at N. York. It will probably be much read, particularly in the Eastern States, and contribute with other circumstances to revive the predilections of this Country for the British Constitution. Men of learning will find nothing new in it. Men of

taste many things to criticize. And men without either not a few³⁵ things, which they will not understand.

A typical commentary on Defence was written by a Williamsburg cleric who expressed his "concern" for Adams' well-being:

I fear his Optics have been too weak to withstand the Glare of European Courts. Their Air may have corrupted the plain Republican, & lest he should be farther Mortified, I think Congress wd. do well, to give him as speedily as possible, the oppy. of breathing once more the purer American Air.³⁶

However, not all Americans were opposed to Defence. Benjamin Rush, a delegate to the constitutional convention, commented, "Mr. Adams' book has diffused such excellent principles amongst us that there is little doubt of our adopting a³⁷ vigorous and compounded Federal Legislature." Richard Henry Lee wrote to Adams:

The Judicious collection that you have made, with your just reflections thereon, have reached America at a great crisis, and will probably have their proper influence in forming the foedral [sic] Government now under consideration. Your Labour may therefore have its reward in the thanks of this and future generations.³⁸

Adams himself was never optimistic about the popularity and influence his work would have. He recognized that its hasty construction left much to be desired. In a letter to Jefferson he wrote, "The approbation you express in general of my poor Volume, is a vast consolation to me. It is a hazardous Enterprise, and will be an

unpopular Work in America for a long time."³⁹ Adams felt that the need for his honest opinions should outweigh concerns for his own popularity. He wrote a similar expression to Franklin: "If it is heresy, I shall, I suppose, be cast out of communion. But it is the only sense in which I am or ever was a Republican, and in such times I hold the concealment of sentiments to be no better than countenancing sedition."⁴⁰ It is significant to note that Adams considered Defence to be a republican treatise, in accordance with his previously held ideas. Adams was afraid that Americans had begun to stray from their foundations. He never expressed that he had strayed from his own.

However, the pamphleteering that greeted the publication of Defence in America was evidence that Adams had indeed been misperceived. These polemical tracts portrayed Adams as disloyal to American ideals, favoring instead monarchy and aristocracy. A widely circulated pamphlet by John Stevens forged opinion against Adams with its stirring language:

Is the cause of human nature to be thus abandoned? Must the aethereal spark of liberty, which has been so ready to kindle into flame in the human breast be suffered to expire? No, my fellow countrymen! Let us make one more generous effort in favour of human nature; let us endeavor to rescue her from the opprobrium which these writers have cast upon her.⁴¹

Oddly enough, many historians have continued somewhat in this vein, claiming that Adams underwent a change in ideology while in Europe. Joyce Appleby speaks of the "well known changes in Adams' political philosophy," asserting that he promoted republican principles in 1780, but that

by 1787 he had⁴² become a defender of English mixed monarchy.

Such claims, however, fail to make a coherent understanding of the text of Defence. As Robert Palmer contends, if anything, Defence is an illustration of Adams' long-founded fear of aristocracy.⁴³ In their correspondence regarding Defence, Adams wrote to Jefferson: "We agree perfectly that the many should have a full, fair and perfect Representation.--You ar [sic] Apprehensive of Monarchy; I of aristocracy . . . You are afraid of the one--I the few."⁴⁴ Adams was fearful that if the American states were to adopt a unicameral legislature, eventually the elites of society would usurp the power of the true representatives of the people, and America would become subject to the aristocratic squabbles that characterized European politics. Accordingly, the purpose of Defence was to reveal the failure of European states to recognize this tendency towards a powerful aristocracy. Furthermore, Adams suggested that structural safeguards such as a representative assembly and a strong executive would ensure liberty through balance in government.

Adams saw that the theories behind the English Constitution, especially as explained by De Lolme, had proven to be the most effective in securing this important structural balance in government, and hence, in securing liberty. We can trace the misunderstanding of the intent of Adams' Defence to this point. When he wrote, "I only contend that the English Constitution is, in theory . . . the most stupendous fabric of human invention," many seem to have read in fact.⁴⁵ When he wrote, "The rich, the well-born, and the able acquire an influence among the people that will soon be too much for simple honesty and plain sense in a house of representatives," many assumed he was criticizing representative democracy, and failed to see that Adams

considered the creation of a senate necessary to "ostracize" the powerful, and limit their influence in the government.⁴⁶

Given that Adams' book was composed of three volumes, we might justifiably wonder how many people read it carefully. Jefferson's initial attempts to have Defence translated into French failed because many thought it to be merely a lengthy parroting of the well-known histories of the day. On the other hand, John Stevens' twenty-page criticism of Adams was translated quickly into French, published with a lengthy and favorable commentary, and widely read during the early years of the French Revolution.⁴⁷ In America as well, problems arose in publishing such a lengthy book concerned with a European debate that was unknown to most Americans. Indeed, it seems that the book's chance for fair and objective criticism was doomed from the beginning.

Like many others, the historian Gordon S. Wood blames the "irrelevance" of Defence on Adams' esteem for British constitutional theory. Wood claims that Adams continued stubbornly in the tradition of the British Constitution, while Americans in general had revolutionized the concept of republicanism. Wood contends that Adams was never able to appreciate these "breakthroughs" in American political thought. Wood's study is one of the most extensive and respected analyses of Adams' political works. Wood clearly reveals Adams' consistent adherence to British principles, and carefully examines the essential documents as he puts together his understanding of Adams. However, he is unfair in classifying Adams as irrelevant and old-fashioned. We have already seen that many of the principles that Adams espoused during the Revolution were influential in framing the Constitution. Wood's greatest problem, though, is his underlying trust in progress. By classifying

Adams' ideas as "superannuated" and "old fashioned," while labeling mainstream American political thought as innovative, Wood marshals his language to disparage Adams' contribution. It is obvious that Wood feels he has adequately dealt with Adams, and that we can now leave his ideas behind.⁴⁸

However, Adams was not without an audience. The very fact that Adams was debated shows that the ideas of Defence were relevant to the contemporary discussion of constitutionalism. Granted, they expressed a conservative point of view, but one that even Wood⁴⁹ admits dominated the rhetoric of the Revolution.

Conclusion

The Founding of the United States is one of the most intriguing eras of history. Our collective understanding of the founding of our nation shapes our current attitudes about national life. Obviously, hundreds of individuals helped to craft our institutions when in their nascent state, and to attribute much significance to one individual demands a weighty burden of proof. The claims in this paper are not absolute, but they do suggest a need to reevaluate our understanding of the Founding by looking more closely at the texts of John Adams. As this study has revealed, his contribution to early American constitutionalism was more significant than many have previously imagined. Robert A. Rutland, an historian and editor of early American documents, has suggested that in the writings of the principal contributors to early American political thought we have one of our greatest national resources. He makes a strong and specific plea for historians to grapple with the miles of⁵⁰ microfilmed documents in the Adams Collection. I echo his plea. I suggest that these works have the possibility not only of

strengthening the understanding of our origins,
but also of aiding us in our discussions of
current constitutional issues.

ENDNOTES

¹Vernon L. Parrington, Main Currents of American Thought, 3 vols. (New York: Harcourt, Brace and Co., 1930), 1:307.

²For a compilation of Adams' principal works see The Works of John Adams, ed. Charles Francis Adams, 10 vols. (Boston: Charles C. Little, 1850-51).

³Russell Kirk, The Conservative Mind, rev. 5th ed. (Chicago: Henry Regnery Co., 1972), p. 76.

⁴Joyce Appleby, "The New Republican Synthesis and the Changing Political Ideas of John Adams," American Quarterly 25 (December 1973):585.

⁵Charles F. Adams, ed., The Works of John Adams, 5 vols. (Boston: Charles C. Little, 1850-51), 4:191.

⁶*Ibid.*, 4:194.

⁷*Ibid.*, 4:195.

⁸*Ibid.*, 4:197.

⁹Robert J. Taylor, ed., Papers of John Adams, 5 vols. (Cambridge, Mass.: Belknap Press, 1979), 4:70.

¹⁰*Ibid.*, 4:69.

¹¹Julian P. Boyd, ed., The Papers of Thomas Jefferson, 16 vols. (Princeton, N.J.: Princeton University Press, 1955), 1:366-8.

¹²*Ibid.*, 1:337.

¹³Adams to James Warren, 16 June 1776, Papers of John Adams, 4:316. Original spelling preserved.

¹⁴Adams, Works, 4:193.

¹⁵Page Smith, The Constitution (New York: William & Morrow and Co., 1978), pp. 50-51.

¹⁶Cited in Adams, Works, 4:214.

¹⁷Timothy H. Breen, "John Adams' Fight Against Innovation in the New England Constitution," New England Quarterly 10 (December 1967): 501-20.

¹⁸Theophilus Parsons, "The Essex Result," in American Political Writing during the Founding Era, ed. Charles S. Hyneman and Donald S. Lutz, Indianapolis: Liberty Press, 1:497. Compare with Adams' statement that the legislature "should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them . . . it should be an equal representation, or, in other words, equal interests among the people should have equal interests in it." Adams, Works, 4:195.

¹⁹Kirk, The Conservative Mind, p. 75.

²⁰Samuel E. Morison, "The Formation of the Massachusetts Constitution," quoted in Paul C. Reardon, "The Massachusetts Constitution Marks a Milestone," Publius 12 (Winter 1982):51.

²¹Adams, Works, 4:215-16.

²²Francis Newton Thorpe, ed., The Federal and State Constitutions, Colonial Charters and other Organic Laws, 7 vols. (Washington, D.C.: Government Printing Office, 1909), 4:2451-53.

²³Ibid., 1:562-68.

²⁴Ibid., 5:2594-98, 2787-94.

²⁵Ibid., 5:3081-92.

²⁶Ibid., 5:2623-38, 3737-49.

²⁷Jacob E. Cooke, ed., The Federalist (Middletown, Conn.: Wesleyan University Press, 1961). See in particular pp. 327-38.

²⁸Adams, Works, 4:219-20. Compare with the preamble of the Federal Constitution.

²⁹James Madison, "The Federalist, No. 47," The Federalist, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), pp. 327-28.

³⁰This is a significant point. The Federalist was written to convince New Yorkers to ratify the Constitution. The fact that the authors were willing to make appeals to other state constitutions for support, at a time when state distinctions and rivalries were still quite pronounced, reveals a real trust in those constitutions as supports to their arguments. See in particular The Federalist, ed. Cooke, pp. 464, 499, 531 and 544. The primary topic addressed is the negative of the executive or the veto. Adams favored an absolute negative for an annually elected executive. In the Massachusetts Convention the absolute negative provided for by Adams was changed to an executive veto, subject to override by a two-thirds vote of both houses, and agreed to and supported by Adams at that time. Adams' later writings reveal, however, that he considered that absolute negative an essential element of republican government. See Adams, Works, 4:231n.

³¹Adams, Works, pp. 230-56.

³²Joyce Appleby, "America as a Model for the Radical French Reformers of 1789," William and Mary Quarterly, 28(April 1971):267-86. Although her analysis of Adams is flawed, Appleby provides an excellent discussion of the role of American ideas during a critical period in European politics. See also Robert R. Palmer, The Age of Democratic Revolutions, 2 vol. (Princeton, N.J.: Princeton University Press, 1959), 1:239-82, which gives the best published account of Adams' role in the European debates.

³³Adams, Works, 4:279.

³⁴Jefferson, Papers, 11:176.

³⁵Robert A. Rutland, ed., The Papers of James Madison, 11 vols. (Chicago: The University of Chicago Press, 1977), 10:29.

³⁶Ibid., 10:44. Original spelling preserved.

³⁷Quoted in Paul C. Reardon, "The Massachusetts Constitution Marks a Milestone," Publius 12 (Winter 1982):51.

³⁸Richard Henry Lee to John Adams, quoted in a letter from William Stephens Smith to Thomas Jefferson in Jefferson, Papers, 12:205-6.

³⁹Jefferson, Papers, 11:188-89. Original spelling preserved.

⁴⁰John Adams to Benjamin Franklin, The Works of Benjamin Franklin, 12 vols., ed. John Bigelow (New York: Putnam, 1904), 11:298-99, quoted in Appleby, "Synthesis," pp. 593-94. Emphasis added.

⁴¹ John Stevens, Observations on Government, Including some animadversions on Mr. Adams's "Defence of the Constitutions of Government of the United States of America": and On Mr. Delolme's "Constitution of England", (New York: N. Ross, 1787), p. 6.

⁴² Appleby, "Synthesis," p. 579.

⁴³ Robert Palmer, The Age of Democratic Revolution, 2 vols. (Princeton, N.J.: Princeton University Press, 1969), 1:272. Palmer is one of the few historians who gives Defence serious consideration. Along with Russell Kirk, he gives one of the best published analyses of Adams's writings. See, in particular, Democratic Revolution, vol. 1, chapters 8 and 9.f

⁴⁴ Jefferson, Papers, 12:396.

⁴⁵ Adams, Works, 4:358. Emphasis added.

⁴⁶ Ibid., 4:290-91.

⁴⁷ Appleby, "Model," pp. 277-78.

⁴⁸ Gordon S. Wood, The Creation of the American Republic (New York: W.W. Norton & Co., 1972), pp. 567-92.

⁴⁹ Ibid., pp. 12-13.

⁵⁰ Robert A. Rutland, "Recycling Early National History Through the Papers of the Founding Fathers," American Quarterly 28 (Summer 1976):250-61.

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THE BROOKINGS INSTITUTION AND PUBLIC POLICY

Eric D. Feller*

Brookings in the Policy Network

At a celebration of the fiftieth anniversary of the Brookings Institution in 1966, President Lyndon B. Johnson said, "You are a national institution, so important to, at least, the executive branch--and I think the Congress and the country--that if you did not exist we would have to ask someone to create you."¹ However, presidential praise of Brookings has not always been the case. For instance, during President Hoover's administration, some of Brookings' findings were attacked as radical.² Yet regardless of its value in the eyes of presidents and others in Washington, Brookings remains a major influence in public policy formation.

Brookings describes itself as "a nonprofit organization devoted to research, education, and publication in economics, government, foreign policy, and the social sciences generally."³ Thus, it operates independently of government and all political, economic, and interest groups while maintaining the role of observer, analyst and critic.⁴

The institution has been described as

a university without students, where
learned men do research; a well-heeled

*Eric is a senior majoring in Public Policy with a minor in Economics, and will pursue an M.P.P. degree after graduation. Last year he served as director of public relations for the Academics office and is currently vice-chairman of the ASBYU elections committee.

publishing house because it produces about twenty-five books a year under its own imprint; a graduate school for federal officials because it conducts conferences and seminars on public problems for interested officials; a government in limbo because of the number of ex-high-echelon appointees in its ranks and its role in supplying and lending its people to government--and as the single most important outside economic consultant to federal fiscal policy makers.⁵

In spite of this impressive list of characteristics, Brookings is only one small subset of the larger network in which national policy is made. This policy network can be divided into three sections: government, business, and a "third force."⁶ This third force is a conglomeration of all the think tanks, universities, foundations, and other institutions that contribute to public policy. Since Brookings is only one of these think tanks, the question is raised regarding the actual extent of its influence.

This is the subject of President Kermit Gordon's review in Brookings' 1968-69 Biennial Report. Specifically, he brings up two questions: "How do you know you are really contributing to better decision making in public affairs?" and "What specific decisions by the President, or the Congress, can you trace to the work of Brookings?" He claims that these questions are difficult to answer because the forces that converge to shape policy are extremely diverse. Thus, finding a causal nexus between study and decision is possible in only a minority of cases. According to Gordon, some of the policy shaping forces are:

legislators and their staffs; policy makers and policy advisors at all levels of government; reporters, editors, columnists, and editorial writers in print and electronic communications; scholars in and out of universities; and opinion leaders in business and the professions.

Brookings feeds impulses into this network. Weak impulses--ideas judged by decision makers and voters to be deficient in validity, timeliness, clarity or practicality--will expire quickly and quietly. Strong ideas, however, will fan out through the policy network where they will "stimulate new crosscurrents of comment and criticism; . . . provoke new analytical efforts; and . . . join with related ideas [to be] recast in a different mold."⁹ So even if the original idea was important in inspiring an important policy decision, the causal chain may be untraceable.

Nevertheless, Gordon concludes that Brookings studies have influenced the course of debate, that persons at strategic points in the policy network heed the findings of Brookings' research, and that occasionally the impact of its work is substantial.¹⁰ The purpose of this paper is to document this conclusion.

To facilitate this, Brookings' three research divisions--Economic Studies, Governmental Studies, and Foreign Policy Studies--will be analyzed in order to examine emerging ideas and their impact, if any, on policy and legislation. Brookings' Advanced Study program, Board of Trustees, and personnel trends will also be described in terms of their roles in policy contribution. Before looking at these areas, however, the background and overall organization of Brookings needs examination.

Background, Organization and Operation

The Brookings Institution was incorporated in 1927 as the merging of three parent organizations: the Institute for Government Research (founded in 1916), the Institute of Economics (founded in 1922), and the Robert S. Brookings School of Economics and Government (founded in 1924). These three institutions were largely the fruits of one man, Robert S. Brookings.¹¹

Born in rural Maryland in 1850, Brookings went to St. Louis at age sixteen where his brother was working for the lumber firm Cupples and Marston. Starting out as a traveling salesman for that firm, he became a partner at age twenty-one. Ten years later, he took charge of the firm and it prospered.¹² Brookings had made the fortune he had sought.

In 1896, at the age of forty-six, Brookings retired from business and devoted the rest of his life to education. He became president of the board of trustees of Washington University in St. Louis, helping to make it a major institution. This led to a career of national service and philanthropic enterprise. He became one of the original trustees of the Carnegie Endowment for International Peace. Furthermore, at President Taft's request, he became a consultant to the Commission on Economy and Efficiency; and in this capacity, Brookings developed a concern for governmental budgeting procedures.

Brookings was asked to join the Institute for Government Research (IGR) by men he met during the time he served on President Taft's commission. The IGR was initially organized in 1916 and is regarded as the first private, national think tank. It was organized to help make government more efficient and immediately concerned itself with the national budget.¹³ Two of

the institution's original trustees (Raymond B. Fosdick and Jerome P. Greene) had ties with John D. Rockefeller; hence, early IGR studies were financed by the Rockefeller Foundation.¹⁴

During World War I, the activities of the IGR were put on a shelf, and Brookings was asked by President Wilson to become chairman of the Price Fixing Committee of the War Industries Board. After the war, Brookings returned to the IGR and became its vice-chairman. He single-handedly solicited corporations and institutions for the funds necessary to put the institute back on its feet.¹⁵

Satisfied, but not completely content with the early accomplishments of the Institute for Government Research, Brookings organized the Institute of Economics in June of 1922. With the aid of \$1,650,000 from the Carnegie Corporation, the Institute of Economics would do for free enterprise and American business what the Institute for Government Research was doing for government efficiency and organization.¹⁶ Harold G. Moulton, professor of economics at the University of Chicago, was chosen as the institute's first president and later became president of the Brookings Institution.

At age seventy-four, Brookings launched yet a third endeavor. Still president of the board of trustees of Washington University, he wanted, as he said in his own words, "to develop in the national service, and in our economic, social, and political activities, the trained intelligence essential to the ultimate success of our government."¹⁷ Thus, procuring funds from George Eastman (of Kodak fame) and the Laura Spelman Rockefeller fund, he was able to establish the Robert S. Brookings School of Economics and Government in 1924.¹⁸ The school turned out to be a disappointment to Brookings, as many of its

graduates pursued work in education rather than government.

Early on Brookings wanted to merge the three institutions, and two considerations became clear:

The new institution must seek to supplement rather than duplicate the facilities offered by the universities of the country; and it must confine its training activity to advanced students, since the resources which the capital [city] offered were of unique importance only to those who¹⁹ had completed their formal education.

Thus the Brookings Institution was born. On December 8, 1927, after a year spent unifying the three separate elements under the leadership of Harold Moulton, the institution was incorporated. The school was abolished and the two research organizations were made departments of the new institution. Thus, "the training function was transferred to the institution as a whole and lifted to the super-graduate level."²⁰ At the time of Mr. Brookings' death in 1932, the infant organization was healthy and growing.

Over a period of sixty years, the institution has evolved into a veritable bureaucracy run by a president and a board of trustees (whose roles will be discussed later), and with a staff of over two hundred people. Furthermore, the institution has an annual budget exceeding twelve million dollars. Accordingly, the Office of External Affairs was created in 1981 to establish a resource development program for Brookings.²¹ This was an addition to the existing offices of Economic, Governmental, and Foreign Policy Studies, the Advanced Study program, the Social Science Computation center, and the Publications Office. These structural elements comprise the

major subdivisions that make up the present day Brookings Institution.

In its 1970 annual report, Brookings claimed that its funds come from its own endowment, the support of philanthropic foundations, corporations, private individuals, and occasional government contracts on request.²² The late President Kermit Gordon had a policy of keeping the income from these federal contracts below an arbitrary ceiling of 15 percent of Brookings' income.²³ In 1978, this rule was abolished by the trustees committee,²⁴ and contract income began to exceed 20 percent.

Brookings' role with respect to government contracts is very limited for several reasons. It will not undertake classified research and insists that, like the government, it be given the right to terminate a study. In addition, it maintains the right to publish its findings and select its staff for all projects.²⁵

In 1977 Brookings found itself in financial trouble. Bruce MacLaury, former chairman of the Federal Reserve Bank of Minneapolis, was chosen as the new president and is credited with putting the institution on a sound footing.²⁶ He did this by creating the Office of External Affairs, appointing a fellow conservative Republican, Roger Semerad, as its director. The office has been a valuable asset in attracting corporate donors. In 1978 for example, only \$95,000 was donated by thirty-eight corporations and corporate foundations. In 1984 however, some \$1.6 million was donated by roughly two hundred corporate donors. Speaking of its reputation as a liberal think tank, Mr. Semerad has said, "Corporations are realizing that Brookings defies easy categorization. We're no longer tied to decades of theology."²⁷

Increasing financial support is not the only mission of the Office of External Affairs. Its second function is to "bring the findings and analyses of Brookings scholars to the attention of decision-makers and the public at large." Because of the relative growth of other think tanks (like the American Enterprise Institute and the Heritage Foundation), Brookings competes not only for funds, but for influence on opinion as well. This need to promote the institution's research has brought about a new magazine entitled The Brookings Review. This publication is mailed to "37,000 decision makers, opinion leaders, and institutions."²⁹ Other promotional activities include press releases for publications, press conferences, arranging television and radio interviews for scholars, and offering opinion/editorial pieces to major newspapers. In addition, Brookings has compiled a Directory of Scholars and sends it to over 2000 journalists to encourage them to contact Brookings experts for comment,³⁰ and information in emerging news stories. The institution even holds weekly luncheons and regular briefing sessions for journalists as part of what President MacLaury calls the "psychic income" of Brookings.³¹ These and other actions show that, in an effort to influence decision makers and the public, Brookings is increasingly turning to the media.

Having examined the history, organization, and operations of the Brookings Institution, a look at its Board of Trustees is now in order. This is necessary because before we can attempt to show how Brookings affects policy externally, we need to have some knowledge of its internal policies.

The Board of Trustees

According to Brookings, its trustees are "responsible for general supervision of the

institution, [approving] fields of investigation, and safeguarding the Institution's independence."³² Under President MacLaury's leadership, the Board of Trustees has become more involved in running Brookings. It has even gone so far as to veto proposed research projects, causing controversy within the institution. Mr. MacLaury has responded to staff complaints by saying that "There is always the question about the role of the trustees, particularly with regard to academic freedom. But we are a think tank. We are not a university."³³

Political scientist Thomas Dye, in his address to the Southern Political Science Association, called Brookings' directors "as impressive a group of top elites as any assembled anywhere."³⁴ For example, Robert V. Roosa, the board's president chairman, is a senior partner in Brown Brothers, Harriman & Co. Moreover, he is a director of American Express Co., Anaconda Copper, Owens Corning Fiberglass Co., and Texaco. Not surprisingly, three of these four corporations appear on the list of Brookings' corporate donors. Roosa's other duties include serving as a trustee for the Rockefeller Foundation and working as a director of the Council of Foreign Relations.³⁵

Other Brookings trustees hold prestigious positions, such as chairman of IBM (Frank Cary), chairman and chief executive officer of BankAmerica Corp. (Samuel Armacost), and president of the University of Chicago (Hanna Gray), to name a few.³⁶ Yet it is doubtful that these influential individuals manipulate the activities of Brookings to their own will. It seems that it would be difficult for all thirty-four trustees to come to a consensus on exactly how to influence government. Also, if the trustees failed to create an atmosphere of academic autonomy, using their veto power only infrequently, they

would probably have encountered more difficulty in attracting scholars than has been the case.

One particularly noteworthy item is the strong correlation between the companies represented by the members of the board of trustees and the companies that Brookings thanks for financial support.³⁷ For example, of the twenty-four members of the board with corporate ties, fourteen represent companies that contribute financially to Brookings.³⁸ One could conclude, therefore, that to promote funding, Brookings will sometimes increase the number of members serving on its board of trustees.

Yet, as stated before, there is no conclusive evidence that these corporate leaders channel influence through Brookings to government. A more direct relationship can be found in the spheres of Brookings' research influence--especially regarding economic issues.

Influence in Economic Policy

Perhaps in no other area of research and publication has Brookings' influence been as widespread as in economic policy. The late President Kermit Gordon, himself an economist, encouraged and fostered economic research. Moreover, Gordon's successor, Bruce MacLaury, was president of the Federal Reserve Bank of Minneapolis.³⁹ Since the days of Robert Brookings, who took an active interest in economic affairs, the institution has provided a powerful example of economic policy influence.

The Institute of Economics began making its mark even before its absorption into the structure of Brookings. After World War I, the institute published a treatise on Germany's war debt called Germany's Capacity to Pay. It was set before the Reparations Commission and laid the foundation

for the transfer of payments mechanism in the Dawes Plan.⁴⁰ The Dawes plan was instituted to restore and stabilize the German economy and allow Germany's gradual payment of reparations to her former enemies.⁴¹

Later examples of Brookings' power to influence policy were early studies by its economists which helped convince the Hoover administration that the plan to create a St. Lawrence waterway project was too expensive.⁴² Brookings also contributed to policies that established more unified transportation regulation in the 1930s.⁴³ Throughout the Roosevelt era, the institution remained an opponent of the New Deal, and the NRA (National Recovery Act) died at the hands of the Supreme Court only five weeks after a Brookings report condemned it.⁴⁴ It has been claimed⁴⁵ that the Supreme Court studied that report.

More recently, the negative income tax has emerged as a brainchild of the Economic Studies Program. Though never adopted, the importance of this proposal is demonstrated by the fact that it was considered by Presidents Johnson, Nixon, and Carter. Also, reforms in the congressional budgeting process were foreshadowed by Brookings scholars Alice M. Rivlin and Charles Schultze.⁴⁶ These predictions led to the Congressional Budgeting and Impoundment Act of 1974, which created the Congressional Budget Office (CBO), as well as the House and Senate Budget Committees.⁴⁷ This probably contributed to the selection of Ms. Rivlin as the CBO's first chief, a position she filled until 1982.

Since 1971, Brookings has published an annual series of volumes entitled Setting National Priorities, critiquing the current administration's budget. These critiques usually include suggestions for reform. For example, the publication Setting National Priorities: The 1984 Budget,

contains the subheading, "How to Reduce the Structural Deficit."⁴⁸ But despite their importance as helpful policy suggestions, many ideas that originate in Brookings are kicked around a long time before being adopted. For example, senior fellow Joseph Pechman's recommendation for federal government revenue sharing was rejected by Lyndon Johnson, but was later implemented during the Nixon Administration.⁴⁹ Furthermore, Pechman has long been an advocate of tax reform and simplification, an issue currently being pushed by the Reagan Administration.

In a recent Brookings publication entitled Economic Choices 1984, edited by Alice M. Rivlin, this tax reform issue is heavily treated.⁵⁰ Supply-side economists have praised the book; others, however, have condemned it--especially its sections advocating a "cash flow tax."⁵¹ Nevertheless, the book has been said to have "joined liberal democrats such as Rep. Richard Gephardt and Sen. Bill Bradley in coming to terms with the supply-side revolution."⁵² It is evident that Congress heeds Brookings' research.

Publications by Brookings' economic staff are respected by the academic world as well as Congress. Besides full-length books and numerous articles, the staff produces the biannual journal Brookings Papers on Economic Activity. Sometimes Brookings strategically releases reports just before events of important consequence. For example, it released a ten-page report on world economic recovery and growth a month before President Reagan was to meet with world leaders at an economic summit in Virginia in 1983.⁵³ Besides being scholarly, Brookings' reports can be very timely.

Having provided examples of Brookings' influence on economic policy, we will examine the influence

on public policy of Brookings' Governmental Studies office.

Influence on Government Policy

One of the first priorities of the Institute for Government Research was to help establish a national budget. President Taft's Commission on Economy and Efficiency (to which Mr. Brookings himself had been a consultant) submitted a report in 1912 recommending a model national budget; and in 1916, the IGR was organized, immediately confronting the issue with a publication by W. F. Willoughby (then IGR director) entitled The Problem of a National Budget. Besides recommending an executive budget, Willoughby recommended the creation of an executive agency to prepare, oversee, and audit the budget.⁵⁴

Influenced by IGR's work, Congress finally relented and passed the Budget and Accounting Act in 1921. In fact, the legislation was drawn in the IGR office. President Harding signed the bill in June of 1921 and summoned General Charles Dawes (of the Dawes plan mentioned earlier) to become his Budget Director. It was early staff members of the Institute for Government Research that helped Dawes with his first budget proposal.⁵⁵

More recently, Brookings has contributed to smooth presidential transitions. When President Kennedy took office, it gave him "detailed memoranda on the organizational and administrative problems which would be raised by the transfer of power to a new President and his administration."⁵⁶ These memoranda were successfully implemented, so an expanded version was published for President Nixon for the transition of 1968-69. This was a 614-page volume entitled Agenda for the Nation, edited by Kermit Gordon. More recently still, Brookings'

scholar Stephen Hess wrote Organizing the Presidency. Just after Jimmy Carter's election, he phoned Hess to commend him on the study, and Hess promptly responded by sending thirteen memoranda with additional details to the president-elect.⁵⁷ In fact, at least ten of the forty-six fellows then⁵⁸ at Brookings assisted Carter with his takeover.

Martha Derthic, presently director of the Governmental Studies Program, has written the book Policy Making for Social Security, wherein she argues that Social Security benefits should not be treated as rights that are immune from reduction.⁵⁹ Nevertheless, Derthic and senior fellow Henry Aaron have been called "the nation's leading scholarly defenders of Social Security," giving Brookings voice in the polemics of Social Security.⁶⁰

In addition, senior fellow James Sundquist has claimed that the formula for community development block grants and revenue sharing were policy contributions of Brookings. But he also said

it's hard to claim a cause-and-effect relationship with many ideas because of the way policy comes together in this town. Revenue sharing is another example. It gained some attention on the Hill years ago because of programs in Britain and New York State. Then it lay dormant. When it was revived here at Brookings, people started taking it seriously again. I suppose, with that example, it's safer to say that we elevate ideas here more than we originate them.⁶¹

This is in harmony with Kermit Gordon's statements about policy formulation cited earlier. Sundquist's statement is not only true with

regard to Brookings' role in economic and governmental policy, but in considering foreign policy influence as well.

Influence in Foreign Policy

The Brookings Institution has long been influencing foreign policy--it aided in the formulation of the Dawes Plan after World War I and the formulation of the Marshall Plan after World War II.⁶² Later, in the early 1970s, Senator Barry Goldwater (R.-Ariz.) and Senator Strom Thurmond (R.-S.D.) accused Brookings of fostering major cuts in the Pentagon budget through its defense analyses.⁶³

Brookings' foreign policy influence under the Carter Administration was vast and far reaching. The Brookings Defense Analysis Projects were begun in 1969, and results came in the form of several recommendations. In Modernizing the Strategic Bomber Force by Alton Quanbeck and Archie Wood, it was recommended that the B-1 bomber be dropped from the U.S. arsenal. Published in February 1976, the report was read by Carter and announced as policy in July 1977. Another book, Deterrence and Defense in Korea by Ralph Clough, recommended the withdrawal of ground troops from Korea. This book was released in 1976 and announced as policy by Carter only a year later. Both policies were adopted in spite of military opposition.⁶⁴

A third example of foreign policy influence under Carter revolves around the Brookings publication Toward Peace in the Middle East. Published in 1975, the study group report favored a comprehensive Arab-Israeli peace settlement rather than a step-by-step approach. It was embraced by Carter and served as the basis for his Mideast approach.⁶⁵ This and the previous examples of Brookings influence under

Carter were due in part to the fact that he attended briefings and luncheons on economic and foreign policy at Brookings in July 1975.

Policy influence has not been limited to the executive branch. For example, district judge John J. Sirica struck down a law prohibiting women from going to sea in Navy vessels other than hospital ships and transports, frequently citing the Brookings study Women in the Military by Martin Binkin and Shirley J. Bach in his opinion. This study by the Foreign Policy Study program encouraged an increased role for women in the military.⁶⁶

Sometimes, Brookings studies make conclusions and reform proposals on the basis of historical analysis. For example, the study Force Without War: Armed Forces as a Political Instrument, by Barry Blechman and Stephen Kaplan, concluded that the U.S. had threatened military force 215 times and the U.S.S.R. had done likewise 115 times since 1945. This makes a total of 330 threats--an average of one per month since the end of World War II. The work concluded that discreet use of military force was effective in achieving foreign policy objectives, but that the nation should flex its military muscles only infrequently.⁶⁷

Thus far we have seen that policy and legislation often results from Brookings research and studies. We will now turn to the Advanced Study Program to analyze its input into the policy network.

Influence of the Advanced Study Program

Though not as far reaching as the research divisions of Brookings, the influence of the Advanced Study program can nevertheless be felt. As a center for public policy education, it

provides continuing education to America's leaders of business, government and non-profit organizations. Also, in an effort to promote wiser and more cooperative policy, the center stimulates informal discussion among these leaders.

In doing this, the program sponsors many activities, including conferences for business executives on federal government; national issues seminars; roundtables on government, the economy, and American society; conferences for senior executives and science executives; conferences on business policy and operations; and executive leadership forums on critical public policy issues. These are only a few examples of the activities of the Advanced Study program, in which over 2500 executives took part in 1983.⁶⁸

Because the Advanced Study Program transmits ideas through the education of powerful people, its policy injections are more indirect than those of Brookings' research branches. Educating executives and government leaders, however, can exert a great influence, creating constituencies that are favorably disposed toward Brookings' ideas. More direct policy influence can be seen through examples of personnel who step in and out of government work from Brookings.

Influence of Personnel

Aside from the research and publications they produce, Brookings staff members themselves have contributed to policy as government appointees. In 1946, for example, Harry Truman named Brookings vice-president, Edwin Nourse, as the first chairman of the newly created President's Council of Economic Advisors (CEA). Before becoming president of Brookings, Kermit Gordon was Budget Director under both Kennedy and Johnson. Staffer Herb Stein was chosen as

chairman of President Nixon's CEA.⁶⁹ President Carter appointed scholar Nancy Teeters to a post on the Federal Reserve Board and senior fellow Charles Schultze as chairman of the CEA.⁷⁰ Besides economic personnel, foreign policy personnel have also had influence, as fellow C. Fred Bergstein served as the Assistant Treasury Secretary for International Affairs under Carter, and Barry Blechman directed his Arms Control and Disarmament Agency.⁷¹

The above cases are only highlighted examples of Brookings' personnel influence. In 1972 it was reported that, "half the senior staff in the governmental studies program [was] comprised of former federal officials."⁷² This was probably the result of an outflow of Democratic appointees after Nixon's election, as major influxes and outflows governmental personnel are generally more common after the arrival of a new administration. Judging from recent annual reports, it seems that more Brookings personnel are now moving to universities and private institutions rather than government.

Besides governmental appointments, Brookings staff members influence policy in less formal ways. Being located in Washington, D.C., the scholars are only a phone call away from national decision makers. The late Senator Hubert Humphrey, for example, often received advice from staff member Joseph Pechman.⁷³ Furthermore, Brookings scholars are called upon to testify before congressional committees. In 1982, for example, Charles Schultze testified before the Senate on the damaging effects of the deficit.⁷⁴ Thus, besides providing government with new ideas and personnel, Brookings often influences the course of debate in less formal ways.

Brookings' Adaptation to a Changing Network

This paper has attempted to show examples of contributions by the Brookings Institution to public policy formulation over the years. This influence has been formal as well as informal, direct as well as indirect. In discussing Brookings' role in the policy network, senior fellow Gil Steiner commented that Brookings undertakes to "raise the kind of questions that it is politically inexpedient or undesirable for members of Congress to raise."⁷⁵ In being able to raise these questions from outside government, Brookings has been increasingly successful in exerting influence and initiating reform.

Besides changing policy, however, the institution itself has changed. In a 1938 New York Times article, S. T. Williamson wrote:

[Brookings] publications cause something of a stir in the world. Newspapers print summaries of them on their front pages. Economists, editorial writers and some politicians cite them much as Fundamentalist preachers draw upon Holy Writ. Although the emotional appeal of these books is nil, their statements have caused many highly placed or otherwise prominent persons to yell bloody murder.⁷⁶

The days when Brookings was the only "think tank" in Washington are long past. A 1983 New York Times article said, ". . . Brookings now finds itself competing for funds, prestige, publicity, and the ability to make a mark on this capital city."⁷⁷

Nevertheless, Brookings is rising to the occasion. It has intensified efforts to increase corporate donations and to maintain support from foundations and others. Furthermore, Brookings

remains a respected source of scholarship and research; in fact, its senior staff members are quoted an average of twenty-five times per year by other social scientists.⁷⁸ With regard to publicity, Brookings is working to form closer ties with the media. Finally, in the policy arena, Brookings still has the attention, and sometimes the alumni, of many national policy agencies. Its reputation and continued efforts have reserved a prominent place for Brookings in the policy network.

ENDNOTES

¹Paul Dickson, Think Tanks (New York: Atheneum, 1971), p. 301.

²S. T. Williamson, "Finder of Elusive Economic Facts," New York Times, 20 March 1938, sec. 8, p. 14.

³Brookings Institution, Biennial Report, 1968-69 (Washington, D.C.: Brookings Institution, 1970), p. vi.

⁴Brookings Institution, The Study of Public Problems (Washington, D.C.: Brookings Institution, 1961), p. x.

⁵Dickson, Think Tanks, p. 302.

⁶Leonard Silk and Mark Silk, The American Establishment (New York: Basic Books, 1980), p. 18.

⁷Brookings, Biennial Report, p. 1.

⁸Ibid., p. 2.

⁹Ibid.

¹⁰Ibid.

¹¹Brookings Institution, Annual Report, 1983 (Washington, D.C.: Brookings Institution, 1983), p. 3.

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"U.S. FOREIGN POLICY TOWARD
THE SOVIET UNION: PROJECTIONS
FOR THE YEAR 2000."

Mary Astrid Tuminez*

In a recent interview with Time magazine,
Soviet premier Mikhail Gorbachev said:

You asked me what is the primary thing
that defines Soviet-American relations.
I think it is the immutable fact that
whether we like each other or not,¹ only
together can we survive or perish.

Indeed, Soviet-American relations are such that
the world's survival is dependent upon a harmon-
ious interaction between these two countries. For
this and other reasons, the Soviet Union is and
will long remain a prime concern for U.S. foreign
policy. In projecting future directions for U.S.
policy, it is important to keep in mind domestic
trends and developments in the Soviet Union that
may affect the formulation of that policy. These
domestic concerns include economics, politics, and
ideology and culture.

Soviet Economy

Western scholars agree that the Soviet
economy faces some formidable problems.
Foremost is the slowdown in economic growth.
Annual Soviet GNP growth has dropped from 5.5

*Astrid is a senior from the Philippines
majoring in Russian and International Relations.
Last summer she participated in an intensive
Russian language study program in Moscow.
Upon graduation she will begin a master's degree
in Russian Area Studies.

percent in 1955 to 3.7 percent in 1975, and, finally, to 2.7 percent in 1980. It has not increased significantly in the last five years.² The labor force also continues to diminish due to declining birth rates and increasing retirement. The situation is further exacerbated by military demands for manpower, extracting a considerable number of eligible workers from the labor force. The Soviets are also unsuccessful in effectively substituting labor with capital; capital is not increased or modernized at a rate sufficient to compensate for the decrease in the labor force. Moreover, many Soviets prefer employment at white-collar jobs, and steer their children in that direction, hence lessening available resources for more labor-intensive occupations. Accordingly, agriculture suffers most from the labor shortage. This is aggravated by increasing rural-urban migration, leading to a projected 1.5 percent annual decrease in₃ the agricultural labor force until the year 1995.

The decline in the size of the labor force results in low productivity and prompts the government to subsidize agricultural and other consumer goods. Annually, the government spends 40 billion rubles on milk and meat subsidies and 6.5 billion rubles on housing subsidies. Nonetheless, shortages exist and consumers remain discontented.⁴

Besides a declining labor force, Soviet agriculture is fraught with other challenges. The Soviets continue to heavily import grain from the West. Between 1984-85 alone, they imported 43 million tons of grain from the West.⁵ Development in infrastructure, capital equipment, and material inputs also lag. Bad roads make it very difficult to transfer produce from one center to another, and poor packaging materials and practices increase product losses. Although 33 percent of total investment is absorbed by agriculture, mechanization, nevertheless, remains a problem.

The Soviets continue to produce machinery impressive in quantity but poor in quality. Finally, planning and coordination in industry often do not coincide. One sector may produce enough fertilizer but other sectors fail to produce bags or ⁶ machines to pack and spread the fertilizer.

Oil is another major economic concern, particularly with the recent decline in oil prices. In 1985, oil production in the Soviet Union was 226 million barrels below target. This lag threatens the modernization of the Soviet economy as well as the trade advantages they have over Eastern-bloc nations. With less oil to export, there will be less hard currency, and the Soviet Union will be unable to import badly needed grain and technology. The Soviets might therefore tighten domestic energy consumption in order to save energy for export. This could heighten the discontent among the people.

Domestic economic problems further include a very high savings rate (187 billion rubles in 1983--making the total savings increase greater than the retail sales increase of the same year), a growing black market, and labor innovations such as shabashniki. Shabashniki are groups of workers hiring themselves out as carpenters, agricultural workers, or construction workers on collective or state farms. They do regular work that needs to be finished by specific deadlines and they do it quickly and efficiently. Often, they have to travel great distances to find work, but they are paid three to four times as much as the normal worker. The success of the shabashniki reaffirms a growing consumer mentality in the Soviet Union and the important role that initiative and incentive play in the accomplishment of tasks. This suggests a need for reform in the economic system--a reform that will allow both consumers and producers to move more freely.

Economic reform in the Soviet Union will involve multiple strategies. To increase their labor force, they will have to either decrease the size of the army¹⁰ or find ways to fuse military training with economic production.¹¹ Decreasing the military force can be feasible only when the Soviets see less threatening and less taut relations with the United States. Once the labor force is increased, efforts to improve the quality of production must follow. This may be done through better use of improved equipment which may be procured from the West. With products of higher quality, Soviet consumers will most likely spend more and save less, thus¹² allowing for greater investment in the economy.

In the agricultural sector, reforms for higher production have been decreed¹³ (a total of 150 decrees in the last few years), but with no concrete results. Unless more tangible results are seen, the legitimacy of the Soviet government will be questioned; for people continue to have rising expectations and want their government to deliver the goods it promises.¹⁴ Much can be done through cooperation with the West; however, it is doubtful that the Soviet Union would undertake radical changes in its political-economic structure in order to direct the economy more efficiently.

Soviet scholars agree that saving their economy is a workable proposition. The Soviet economy has always had problems and the people are used to hardships. But although they are determined to boost their economy, the Soviets are generally unwilling to take risks¹⁵ that may undermine their military superiority. Their leaders constantly emphasize the state's victories in two world wars, the industrialization of the country, the achievement of military parity with the United States, and the attainment of a higher standard of living.¹⁶ Much has been accomplished in the past, and despite the

slowdown in economic growth, the economy is, nevertheless, growing, and not stagnating. Besides, the Soviet Union is the world's second major economic power.¹⁷ "Why, [then], should its leaders conclude that the problems they face today are fatal?"¹⁸ Because of this relatively hopeful Soviet outlook on their economy, the United States cannot count on the Soviet Union's full dependence on the West in achieving economic recovery. Rather, current developments suggest that avenues in the economic sphere are open for greater U.S.-Soviet cooperation. American exports of foodstuffs and consumer goods in particular will alleviate the long lines that cause absenteeism and low productivity in the Soviet Union.¹⁹ The United States will benefit by increasing its international trade, and the Soviet Union will be able to use money bonuses as a work incentive because the workers would have something to buy. Further, the Soviets will view the United States less as an adversary than as a trade partner--and this, perhaps, will lead to more meaningful efforts at developing friendly U.S.-Soviet relations.

Soviet Politics

Soviet politics is another area of concern for U.S. foreign policy. The CPSU (Communist Party of the Soviet Union) and its political body, the Politburo, preside over the Soviet political system. The core of the Politburo and of the Central Committee of the Communist Party is made up of older men who came into power in the 1930s, have a low level of education, and generally come from peasant families.²⁰ Despite this background, Soviet political leaders nevertheless form an elite group, unwilling to yield substantial political power to the workers. Although they comprise 61 percent of the population and 43 percent of the party, workers make up only 6 percent of the Party Central

Committee.²¹ Due to these facts, some scholars concede that there is no pluralism in Soviet government. However, substantial evidence suggests otherwise. From the Khrushchev and Brezhnev eras, some decentralization and a movement toward a stabilized oligarchy has taken place in the Soviet Union. Although strong leadership exists, Stalin's one-man rule is no longer prevalent because there is competition within the Party apparatus. In fact, once a leader is chosen, his first major challenge is to consolidate his power by gaining the confidence of the other members of the political elite. His innovativeness and effectiveness will be directly proportional to his ability to dissolve competing elements in the political hierarchy²² and to consolidate the decision-making authority.

It can be further asserted that decision-making in the USSR has developed a more institutionalized and consensual nature. Government is no longer by dictatorship but by "commission and rule through alliance and factions," particularly during the Brezhnev regime.²³ Thus, for U.S.-Soviet foreign policy,

. . . it would be a grievous error to accept claims and pretense as reality, and to neglect the evidence of a multitude of tensions, functional and jurisdictional disputes, role conflicts, special groups, lobbies, vested interests, intellectual and perceptual differences, regional and ethnic rivalries, power struggles, technical disputes and various other antagonisms [in Soviet government].²⁴

The current Soviet leadership is of particular interest. Mikhail Gorbachev, a relatively young leader, is at the helm. He will be only 69 in the year 2000, and thus assumes the responsibility of formulating long-run policies

in the Soviet Union. So far, he has performed very satisfactorily, consolidating power by removing his major rivals in the Politburo and replacing them with men who will most likely support his programs for industrial growth and change in social policy.²⁵ He has shown himself an able diplomat in meetings with English prime minister Thatcher and in the more recent summit meeting with President Reagan. He has visited France and Germany and will most likely pursue improved relations with both Japan and China. He sees economic reform as his main task, and views the current period of economic slowdown as one conducive to policy innovation. Gorbachev realizes that he cannot successfully carry out his reforms if American military expenditures increase and if relations with Japan and China worsen. Accordingly, to facilitate his reforms, he would most probably opt for renewed detente, but with more precise "rules of the game."²⁶ Some scholars disagree and claim that so far Gorbachev has not pursued detente, but has only strengthened the bureaucracy and centralization in the Soviet Union.²⁷ Still others conclude that as a young leader with no war memory, Gorbachev may be inclined to be more adventurous and expansionist, especially if the domestic situation looks bleak. However, the consensus is that the current Soviet leadership is unlikely to go to extremes.²⁸

Gorbachev perceives that harmonious relations with the United States can lead to decreased Soviet military spending and therefore increased domestic economic investment plus easier access to badly needed technology from the West. The United States, in turn, can receive trade benefits and greater political leverage over the Soviet Union by cooperating with a leadership disposed to augmented cooperation with the United States. However, it would be naive to assume that the United States will be able to dictate policies to the Soviet Union; and if ever any

political leverage is gained in the future, it will have to be used in very discrete and diplomatic ways. The Soviet economic and political system will not collapse without aid from the West since alternatives for economic cooperation may be found. For example, the Soviet Union imported 12 million tons of grain from Argentina in 1980-82, after the United States declared a grain embargo.²⁹ New avenues may be opened for increased freedom and human rights for Soviet citizens if the United States learns to properly use political and economic leverage in its foreign policy towards the Soviet Union.

Soviet Ideology and Culture

In the United States, the belief persists that the Soviet Union is, above and beyond other considerations, a messianic state adhering to what its people believe is superior ideology. They may not have conquered the world, but the victory of communism has no timetable and the Soviet government believes that communism will ultimately triumph.³⁰ Robert Osgood has succinctly expressed this idea by stating that many believe the Soviet Union is a revolutionary and expansionist state intent on conquering the world, not "because of geopolitical insecurity, but because of an inner compulsion that arises from an ideological fixation, the totalitarian nature of the regime, and its search for domestic legitimacy."³¹

The preceding interpretation of Soviet ideology may be popular but not entirely accurate. True, the Soviet Union remains the bastion of communist ideology, but this ideology is used more as a legitimizing principle than as a strict basis for internal and external policies. The Soviet Union, like other countries, is affected by external realities and actions, including world opinion.³² Its leaders want to

maximize power and use ideology to shape the political and economic perceptions and expectations that may vary from one leadership to another. Domestic concerns also continue to grow in complexity, and awareness of this complexity influences Soviet interpretation of ideology.³³ For example, the growing discontent of the people because of their leaders' inability to make their words and deeds coincide renders it increasingly difficult to move the people in the name of ideology. Moreover, the government no longer has total control over the agents of political socialization. Legally or otherwise, information from the outside world continues to flow into the country, diversifying the people's perception and interpretation of ideology.³⁴ Finally, the Soviet people realize that the major expectations stemming from their ideology (e.g., the expansion of communism, the downfall of the capitalist world, and extensive Third World gravitation to the Soviet camp) have not been realized; the Soviets are not so naive as to overlook all the facts.³⁵ They are willing to learn from experience.

Domestic concerns rather than ideology, then, will play the major role in Soviet foreign affairs. If that is the case, future U.S. foreign policy must be geared towards mutually beneficial cooperation with the Soviet Union. Trade-offs may be negotiated in a way that will ensure maximal satisfaction for both sides. The United States, as well as the Soviet Union, must emphasize abstract ideology less, in favor of more tangible and beneficial points of cooperation between the two countries.

Russian nationalism is another issue to explore. It remains the "strongest element in Russian political culture"--a product of Russia's religious and political history. It is the cohesive force within the political elite and between the elite and the masses. It is a nationalism which respects power, from the days of Peter the

Great, to Stalin, to the current regime. It provides legitimacy (or at least an emotional base) for authoritarianism and promotes a disapproval of dissidents who threaten the national unity.³⁶ It gives people the necessary strength to endure what their government demands and to tolerate and even support the deceptions propagated by their society--such as government slogans declaring the "dictatorship of the proletariat" and that "the Party and the people are one."³⁷ Solzhenitsyn, perhaps the Soviet Union's most famous dissident, provides insight into Russian nationalism:

Communism will become less popular only if proven incompatible with Russian nationalism. The ideology is no longer believed by many and ultimately, disastrous expansionism will be relegated to a lesser position after "demands of internal growth."³⁸

Thus, although the Soviet Union may be more disposed towards cooperation, future U.S. foreign policy must nevertheless remember that a transfer of loyalty from the Soviet Union to the United States is unlikely to transpire among the majority of the Russian people. Concessions from the Soviet people and government, then, must be expected in the context of Russian nationalism and self-respect which the people have earned and will undoubtedly want to keep.

In domestic economics, politics, and ideology, it appears that the most beneficial direction the Soviet Union can take is that of greater cooperation with the United States. However, it is dubious that this cooperation will completely obliterate the very fundamental and seemingly irreconcilable differences between the two countries. But much can be done to mitigate existing hostilities and tensions. United States foreign policy has a crucial role to play. It is in

the best interest of the United States to take advantage of opportunities for cooperation with the Soviet Union. In so doing, perhaps only a minimal amount of material benefits will accrue to the United States. Notwithstanding, other more significant and valuable benefits may be received, such as greater human rights and lesser regimentation of action and thought for the Soviet people. These are reforms that the U.S. government continually pressures the Soviet Union to carry out. Cooperation, not big power aggression, may be the catalyst in the realization of these reforms. As Allman has so aptly expressed in his article "Nice Guys Finish First," "When dealing with your neighbor, a business rival, or the Soviet Union, the way to get ahead is to get along." He formulated this conclusion based on a game called "Prisoner's Dilemma," where the more ³⁹two people cooperate, the better off they are. Finally, Schevchenko, the highest Soviet official to defect to the United States, says: "The USSR cannot be erased from the earth or removed from its position at the center of power in the modern world. The survival of mankind may depend upon temperate relations between the Soviet Union and the U.S."⁴⁰ Indeed, in the year 2000 and subsequently, U.S. foreign policy must continue to find ways to increase cooperation, lessen hostilities, and build trust with the Soviet Union.

ENDNOTES

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²⁶Archie Brown, "Gorbachev: New Man in the Kremlin," Problems of Communism 34 (May-June 1985):1-23.

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³⁶Bialer, Domestic Context, pp. 4-6, 425-26, 180-81.

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EXPANSION OF PRESIDENTIAL AUTHORITY
IN FOREIGN AFFAIRS:
THE TREATY-MAKING POWER AS
INTERPRETED BY THE SUPREME COURT

Brent J. Belnap*

In creating an apparently simple and distinct division of powers in the Constitution outlining legislative and executive responsibilities to conduct foreign affairs, the Founding Fathers did not foresee fundamental constitutional questions that would arise as a result of increasingly complex foreign entanglements. Despite the intended clarity of the Constitution, which is surprisingly reticent about foreign affairs powers, numerous cases have arisen necessitating the clarification of the proper role of the Executive in exercising his constitutional authority.

Recognizing the political nature of many of the cases which have come before it, the Supreme Court has refrained from limiting or separating presidential duties into a specific sphere of authority; rather, the Court has upheld the evolution of the Chief Executive into his current role as world leader and spokesman in the international arena for the United States. The political, and thus non-justiciable, nature of his office has forced the Court to support and promote the increasing power of the President. Thus, since the early days of the Republic, he has steadily accumulated immense powers in the field of foreign affairs.

*Brent is a senior majoring in Political Science. Last spring he served an internship with the U.S. Court of Appeals, D.C. Circuit. A National Merit scholar, Brent is this year's president of Pi Sigma Alpha. He plans to attend law school this Fall.

Early issues over the treaty-making power were often concerned with the newly acquired lands from Spain and France. As the people of the nation began to inhabit these lands, the treaty-making power regarding (vis-a-vis) the "sovereign" Indian nations was frequently questioned. Rapid changes in international relations set the stage for constitutional conflict between the political branches of government. As the United States became more involved in international affairs, especially following its burst upon the world scene of diplomacy and commerce after World War I, the expanded powers of the Executive in foreign affairs were subjected to suit.

Over the years the Supreme Court has declared the authority of the President's treaty-making power to be almost absolute in scope, limited only by those restrictions imposed by Congress. This paper will review chronologically those landmark cases delineating the evolution of the treaty-making power of the Chief Executive, marking how his responsibility over foreign affairs has grown.

John Locke, in The Second Treatise of Government, defends the occasional need for an executive to act "without the prescription of the law and sometimes even against it." Giving his reasons, he states that

in some governments the lawmaking power is not always in being, and is usually too numerous and so too slow for the dispatch requisite to execution, and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public.¹

Careful to limit the power of the Executive, the Framers of the Constitution granted the

President "titular" responsibility for the nation's diplomatic relations in concert with, and subject to, the will of Congress. Construed to be a rather benign but symbolic power, the Constitution granted to the President the power, "by and with the Advice and Consent of the Senate to make Treaties," and the power to nominate and appoint "Ambassadors, [and] other public Ministers and Consuls."² The Chief Executive was thus entrusted with flexible power over foreign affairs to present a unitary voice on behalf of the United States. To Congress the Constitution granted the power to try "Offenses against the Law of Nations"³ and, most importantly, "To declare War."⁴ Both the President and Congress were given authority over distinct fields of international affairs, i.e., the President was assigned diplomatic authority, while Congress, the more representative body, was granted power to define the conduct and provide support for the military. It would appear that the division of powers intended by the Framers of the Constitution was carefully and clearly formulated.

The Federalist Papers, a sort of textual exegesis on the Constitution, reveals best the diplomatic scope of foreign affairs intended exclusively for the presidency. John Jay, in The Federalist No. 64, outlined the President's unique role in implementing treaties:

It seldom happens in the negotiation [sic] of treaties of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. . . . The convention have [sic] done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

Jay said further that because of the tenuous condition of foreign affairs, where time and circumstance require special judgment, the President is best suited to manage:

Thus we see that the constitution provides that our negotiations [sic] for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations on the one hand, and from ⁶secrecy and dispatch on the other.

In The Federalist No. 75, Alexander Hamilton stated that the treaty-making power did not fall exclusively within either the executive or the legislative branches, although

it will be found to partake more of the legislative than of the executive character. . . . The qualities elsewhere detailed, as indispensable in the management of foreign negotiations, point out the executive as the most fit agent in those transactions. . . .

To have entrusted the power of making treaties to the Senate alone, would have been to relinquish the benefits of the constitutional agency of the president⁷, in the conduct of foreign negotiations.

Thus the apparent intent of the Framers, according to Jay and Hamilton, was to grant the Senate firm control over the negotiation process, while permitting the Executive a supportive voice.

During his first term as President, George Washington developed the practice of appointing envoys without the consent of the Senate. The President firmly believed that the Senate would function as an advisory council for conducting

foreign affairs. Over difficulties encountered with the Senate in working out Indian treaties in 1789, Washington was led to remark that he "would be damned if he ever went there again."⁸ Though refusing to appear before the Senate, Washington continued to transmit only limited information concerning the scope of any further treaties. Presidents Adams and Jefferson followed Washington's practice. Thus the role of the Senate in actively negotiating treaties was reduced to giving or withholding consent to agreements in which it took no active part. The President, therefore, assumed the power to refuse to submit a signed treaty to the Senate, as that body had not participated in its formulation.

Soon after the ratification of the Constitution, the judiciary effectively eliminated itself from playing a role in adjudicating treaties. As early as 1796, the Supreme Court in Ware v. Hylton⁹ listed several crucial questions concerning adjudication of treaty violations. It noted that "These are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a Court of Justice."¹⁰

In 1801, speaking on behalf of the Court in United States v. Schooner Peggy,¹¹ Chief Justice Marshall noted the President's exclusive role in foreign affairs:

The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true, that the execution of a contract between nations is to be demanded from, and in the general, superintended by, the executive of each nation; and therefore, whatever the decision of this court may be, relative to the rights of

parties litigating before it, the claim upon the nation,¹² if unsatisfied, may still be asserted.

President Thomas Jefferson, in considering legal methods of acquiring the Louisiana Purchase of 1803, believed it necessary to adopt a constitutional amendment. Finding this narrow interpretation of the Constitution impractical for quickly acquiring the territory, he next considered submitting the proposal to both houses of Congress. Wanting to expedite the purchase even sooner, Jefferson used the treaty power, requiring only the approval of the Senate. Of course, it was necessary for both houses of Congress to approve the appropriation bill.¹³

Following involvement in the War of 1812, Chief Justice Marshall in 1818, in United States v. Palmer,¹⁴ recognized the Executive's inherently superior role in foreign policy. He noted that

questions [concerning treaty provisions] are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations.¹⁵

Eleven years later, in Foster & Elam v. Neilsen,¹⁶ Chief Justice Marshall reaffirmed that a treaty "addresses itself to the political, not the judicial department."¹⁷

Charles Williams sought reimbursement from the Suffolk Insurance Company of Boston for a schooner seized near the Falkland Islands by the government of Buenos Aires (later Argentina). The executive branch had repeatedly refused to

recognize the territorial claims by Buenos Aires over the Falklands. In Williams v. Suffolk Insurance Company,¹⁸ the Supreme Court upheld the right of the ship's captain, who was acting according to the stated interests of the United States, to travel in waters near the Falklands; and the Suffolk Insurance Company was ruled liable to pay for the loss of the vessel. The Court declared:

When the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department. And in this view it is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character.¹⁹

Beginning in the 1830s, the trend for presidents to conduct foreign affairs through executive

agreements increased rapidly. During the first fifty years following 1789, twenty-seven executive agreements were entered into by presidents without the consent of the Senate, while sixty treaties were ratified. During the next fifty years, 238 executive agreements were signed as compared with 215 treaties. For the third fifty years, 917 executive agreements and only 524 treaties were signed. As early as 1845, John C. Calhoun, in commenting upon the procedure used to annex Texas, noted the extra-constitutional method used by the President and Congress in formulating agreements to resolve questions international in scope. He commented:

It is now admitted that what was sought to be effected by the Treaty submitted to the Senate, may be secured by a joint resolution of the two houses of Congress incorporating all its provisions. This mode of effecting it will have the advantage of requiring only a majority of the two houses, instead of two-thirds of the Senate.

This same means was employed fifty years later when the United States acquired the Hawaiian Islands. Unable to muster a two-thirds majority in the Senate to approve the annexation measure, President McKinley pushed a joint resolution through both houses of Congress. This time, the constitutionality of such an action was brought before the Supreme Court. In Hawaii v. Mankichi,²¹ the Court approved the annexation. Justice White even implied in one of the Insular cases that acquisition of territory outside the North American continent required the approval of both houses of Congress. By 1912, in B. Altman & Co. v. United States, the Supreme Court recognized executive agreements as equal to treaties, greatly expanding the powers of the President over foreign affairs.

The Court in Doe v. Braden²² continued to uphold the personal discretion of the Executive in matters of foreign affairs. The question of whether the King of Spain had the power to annul a grant (important in this case in determining land ownership in Florida) was deemed political and not judicial. The Court refused to go behind the treaty, saying that the President and the Senate ought to determine who was empowered to represent and speak for Spain. Since they had recognized the King as possessing this power, it was not up to the Court to inquire whether they had erred. Chief Justice Taney stated that "the courts of justice had no right to annul or disregard any . . . [treaty] provisions, unless they violate the Constitution of the United States." He continued:

It would be impossible for the executive department of the Government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.²³

Such decisions, the Court decided, were the exclusive prerogative of the political branches. In De Lima v. Bidwell²⁴ the Supreme Court continued to uphold its position of non-interference with the political branches over international affairs by avoiding the question of whether the House of Representatives was required to appropriate funds to activate a treaty.

In B. Altman & Company v. United States,²⁵ the Supreme Court ruled on the validity of

executive agreements as treaties. Consistent with the terms of the Tariff Act of 1897, the United States had entered into a reciprocal trade agreement with France, whereby duties on certain imports were set at fixed rates. Under Presidents McKinley and Roosevelt, numerous such executive agreements had been negotiated under this act. In this case the Federal Government surprisingly argued against the proposition that an executive agreement had the same efficacy as a treaty.

The plaintiff brought suit against a high duty on imported statuary which he believed should have fallen under the negotiated agreement with France. He argued that the agreement was a treaty; that the terms "agreement," "treaty," and "convention" had historically been used interchangeably; that the Supreme Court had upheld numerous acts of Congress authorizing the contraction of executive agreements; and that these acts were deemed by Congress as formal, legal, and binding upon all parties, i.e., they were treaties. The plaintiff went so far as to argue that the treaty-making power of the President, in conjunction with the Senate, was subordinate to the legislative powers of Congress.²⁶

The question before the Court was whether it had jurisdiction, according to the Circuit Court of Appeals Act of 1891, to hear the case. That act retained the right of the Supreme Court to review cases involving the construction of treaties. Justice Day, commenting upon executive agreements, ruled on behalf of the plaintiff that executive agreements were, in effect, treaties, and that the Court had jurisdiction. He declared:

While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, sec. 3, was not a treaty possessing the dignity of one

requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act.²⁷

The Court thus recognized the authority of the President to conclude commercial agreements with foreign countries, equal in authority to treaties, as prescribed by Congress.

An act passed by Congress in 1918 implemented the Migratory Bird Treaty signed between Great Britain and the United States in 1916 designed to protect the migratory birds of Canada and the United States from extinction. Although a law had earlier been passed by Congress legislating the terms of the second law, it had been held unconstitutional. This second act, now claimed to be in force by the treaty, was also challenged. The conflict arose in Missouri over restrictions on hunting migratory birds, with Missouri declaring violation of the Tenth Amendment.

In Missouri v. Holland,²⁸ Justice Holmes declared: "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."²⁹ The distinction made here, but often

ignored, is that there is a fundamental difference between treaties and executive agreements.

We do not mean to imply that there are no qualifications to the treaty-making power. . . . It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress [i.e., reference to the previous act passed by Congress or an executive agreement granted congressional authority] could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. . . . The treaty in question does not contravene any prohibitory words³⁰ to be found in the Constitution.

In May 1934 Congress passed a joint resolution empowering the President to forbid the sale of arms to Bolivia and Paraguay, who were then fighting over disputed territory. President Roosevelt issued a proclamation, in force for 1½ years, embargoing the sale of arms to either nation. The Curtiss-Wright Export Corporation was indicted for selling arms to Bolivia during this period.

In³¹ United States v. Curtiss-Wright Export Corp., the Supreme Court ruled again on the validity of executive agreements. This time the appellees declared that Congress had abdicated its constitutional functions by delegating them to the President, saying that the joint resolution left the enforcement decision "to³² the uncontrolled discretion of the President."

Justice Sutherland stated that the contention between treaties and executive agreements was unimportant. "The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs."³³ The issue of whether the resolution constituted a delegation of powers by Congress to the President was invalid in this case; the President is delegated authority to conduct the nation's foreign affairs. Judicial responsibility in determining the proper execution of enumerated powers necessary and proper for the functioning of government, said Sutherland, applies only to the nation's internal affairs. Justice Sutherland stated further:

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.³⁴

In speaking further on executive authority, Justice Sutherland stated:

We are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus 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, but which . . . must be exercised in subordination to the applicable provisions of the Constitution.³⁵

Justice Sutherland strongly stressed the President's need for "discretion and freedom from statutory restriction,"³⁶ citing President Washington's refusal to lay before Congress the documents of negotiation for the Jay Treaty. The Court thus upheld executive agreements as valid, declaring them binding and constitutional by time-honored legislative practice.

In 1933 the United States and the Soviet Union signed the Litvinov Assignment, part of an executive agreement allowing each nation to settle claims still standing since the Russian Revolution. Each nation was assigned title to claims within its borders. The Federal Government attempted to recover funds deposited with August Belmont, a private banker who passed away in the interim. Belmont's executors claimed protection under New York law prohibiting confiscation of property.

The Supreme Court in United States v. Belmont³⁷ quickly declared that "no state policy can prevail against the international compact here involved."³⁸ The President, who had recognized the Soviet government and had established normal relations, created, in effect, an "international compact . . . And in respect of what was done here, the Executive had authority to speak as the sole organ" of the United States.³⁹ The Court declared further that an international compact "is not always a treaty which requires the participation of the Senate."⁴⁰ The Court pointed out the difference, citing B. Altman & Co. v. United States. In that case the Court upheld executive agreements arising under the Tariff Act of 1897, "authorizing the President to conclude commercial agreements with foreign countries in certain specified matters."⁴¹ In commenting upon the Altman decision, Justice Sutherland said:

We held that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and

proclaimed under the authority of the President, and as such was a 'treaty' within the meaning of the Circuit Court of Appeals Act.⁴²

Thus the Court placed those executive agreements properly concluded under Altman and Curtiss-Wright precedents on par with officially ratified treaties and extended the arguments used for treaties in Missouri v. Holland to all executive agreements.⁴³

A second case stemming from the Litvinov Assignment was United States v. Pink,⁴⁴ which concerned the recovery of funds from a Russian insurance company. The Supreme Court upheld the validity of the agreement, explaining that the resolution of claims between both nations was vital in normalizing relations. Thus two cases discussing the binding power of executive agreements reconfirmed the agreements to be enforceable as treaties.

As late as 1953, Chief Judge Parker of the Fourth Circuit declared that "it is clear that the executive may not through entering into such an agreement [with Canada restricting potato importation not authorized by Congress] avoid complying with a regulation prescribed by Congress."⁴⁵ On appeal the Supreme Court in United States v. Capps⁴⁶ overturned the decision by the lower court, finding that the agreement did not contravene a congressional statute.

In Reid v. Covert,⁴⁷ the Supreme Court overturned its own earlier ruling on the same case two years earlier. Mrs. Clarice Covert had been convicted of killing her husband, a sergeant in the U.S. Air Force, while residing in England. A civilian, she was tried by a court-martial for the murder. This time the Court ruled that military law cannot be applied to dependents of servicemen living in foreign countries. Justice

Black, speaking on behalf of the Court, ruled against an executive agreement between the United States and Great Britain granting United States military courts exclusive jurisdiction in Great Britain over servicemen or their dependents for crimes committed. His opinion outlines the restrictions placed upon the Executive in formulating agreements. Quoting the supremacy clause of the Constitution (art. VI), he states:

There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in "pursuance" of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights--let alone alien to our entire constitutional history and tradition--to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were

designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by ⁴⁸the Executive and the Senate combined.

Therefore, agreements cannot bypass prohibitions or grants of power of the Constitution, but law can be formulated through them, as upheld in Missouri v. Holland.

Justice Brennan, delivering the opinion of the Court in Baker v. Carr,⁴⁹ summarized the Court's authority to rule upon treaty law. He declared that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. . . . A court can construe a treaty" for an answer, but will not do so "in a manner inconsistent with a subsequent federal statute."⁵⁰ In outlining further the power of the courts to decide upon treaty law, Justice Brennan, speaking for the Court, declared:

While recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called "a republic of whose existence we know nothing," and the judiciary ordinarily follows the Executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area. Similarly, recognition of belligerency abroad is an executive responsibility, but if the Executive proclamations fall short of an explicit answer, a court may construe them seeking, for example, to determine whether the situation is such that

statutes designed to assure American neutrality have become operative.⁵¹

Here the authority of the Executive is beholden to judicial interpretation once the necessary political decisions by him have been made.

On December 23, 1978, President Carter notified Taiwan of the United States' intention to terminate the Mutual Defense Treaty between the two nations, a precursor to the normalization of relations with the People's Republic of China. Senator Goldwater filed suit against President Carter for the unilateral cessation of the treaty, although a clause permitted its abrogation after one year's notice. A case involving eight United States senators, Goldwater v. Carter,⁵² directly confronted the constitutional question of whether the approval of the Senate was required in the termination as well as the ratification of treaties.

The U.S. Court of Appeals for the District of Columbia concurred with the President's actions, rejecting the district court's decision that the President's powers in foreign affairs were plenary. The appellate court noted the President's role as the first and last voice in implementing treaties.

The Supreme Court vacated judgment and remanded the case to the district court, instructing it to dismiss the complaint. The view that this case involved a political question did not command a majority of the Court. Justice Rehnquist, in a concurring opinion, argued that the issue was political in part because the Constitution "is silent as to [the Senate's] participation in the abrogation of a treaty;" therefore, the question was "controlled by political standards" and was non-justiciable.⁵³ Justice Powell rejected the "political question" precedent and stated that the issue was not yet ripe for adjudication, Congress not yet being united in its response to

the President.⁵⁴ Justice Brennan, in a dissenting opinion, also rejected the political question issue; however, he recognized the precedents that "firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes."⁵⁵

It has been argued that presidential authority in foreign affairs is the product of past unchallenged uses of power. Thus, in Dames & Moore v. Regan,⁵⁶ the Supreme Court, following the Iranian hostage crisis, recognized the power of the Executive to settle foreign claims because congressional acquiescence to this long-standing presidential practice had created a powerful precedent.

On November 4, 1979, Iranian Islamic fundamentalists overran the United States embassy in Tehran and held their American hostages captive for 444 days. Ten days after their capture, on November 14, 1979, President Carter blocked the removal or transfer of all property and interests of the government of Iran subject to the jurisdiction of the United States, as United States practice had solidly established the resolution of claims settlements through executive agreements.

The day before leaving office, on January 19, 1981, President Carter issued a series of executive orders implementing the terms of agreements between the United States and Iran negotiated through Algeria calling for the establishment of an Iran-United States claims tribunal to arbitrate claims not settled within six months.⁵⁷ Pursuant to the agreement, on January 20, 1981 the American hostages were released by Iran. One month later, President Reagan reaffirmed the prior executive orders of President Carter and required banks holding Iranian assets to transfer them to the Federal Reserve Bank in New York. President Reagan suspended all further claims

based on the resolution of the tribunal, saying they would no longer have effect in United States courts.

Dames and Moore challenged the President's position, claiming the President had no authority to implement the Algerian Agreement that, in effect, amounted to the taking of property in violation of the Fifth Amendment. The Supreme Court upheld the validity of the Algerian Agreement between the United States and Iran creating the international tribunal, stating that no violation of the Fifth Amendment had occurred.

The Court held that under the terms of the International Emergency Economic Powers Act of 1977,⁵⁸ intended by Congress to severely limit the emergency powers of the Executive, the President was authorized to nullify any attachments upon Iranian assets following November 14, 1979. It also ruled that, pursuant to the Economic Powers Act and the Hostage Act, the President's authority in dealing with international crises was proper. Since Congress had implicitly approved the practice of claims settlement by executive agreement, the President was also able to suspend the claims. However, the Court, by striking down a section of the United States Code forbidding further claims, ignored the important treaty exception, thereby allowing further claims to be heard in the United States Claims Court.⁵⁹

One scholar, in discussing the far-reaching implications of the Dames & Moore decision, declares the decision incorrect. He states that instead of extending the powers of the President in foreign affairs, the decision may have had the opposite effect. The Supreme Court ruled section 1502 (the treaty exception) of Title 28 of the United States Code unconstitutional, and thus "the Court created a significant problem for the conduct of United States foreign policy."⁶⁰ He continues: "The Supreme Court departed from

this tradition [relief of claims in the political arena] by recognizing an unprecedented judicial remedy for those whose interests are adversely affected by United States foreign policy. . . . [The Court] ignored a longstanding jurisdictional principle" known as the Meade Doctrine which bars judicial reexamination of international arbitration awards, thereby creating "potential complications for the conduct of United States foreign policy."⁶¹

Since President Washington's administration, successive presidents have taken advantage of their special access to information and the lack of clear constitutional definitions in dealing with other nations to formulate foreign policy. As can be seen, the complexity of the treaty-making cases such as Dames & Moore indicates the fundamental constitutional challenges in defining the enormous scope of power of the Chief Executive. The ability to act swiftly, secretly, and unitarily is a powerful force of the President.

The Supreme Court recognized early the responsibility of the Executive in formulating the nation's foreign policy. Later, as congressional acquiescence in foreign affairs decisions became a noticeable trend, presidential immunity from congressional restriction was often upheld by the Court because of the undefined scope and relative freedom of the President's foreign policy powers.

Yet the issue of how broad those powers are remains unresolved. Splits in the Supreme Court, as indicated in the discussion of Goldwater v. Carter, reveal a lack of a coherent approach to the definition of what constitutes a political question. Meanwhile, the use of executive agreements, now held to be legally binding as treaties when compatible with the Constitution, continues to increase. Further challenges in foreign policy and litigation in America's courts await as the three branches of federal government continue to

fill in the gray areas of the treaty-making power in the Constitution.

ENDNOTES

¹ John Locke, The Second Treatise of Government (London, 1690), cited in "The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power," Harvard Law Review 99 (March 1983):1102.

² U.S. Const. art. II, sec. 2, cl. 2.

³ *Ibid.*, art. I, sec. 8, cl. 10.

⁴ *Ibid.*, art. I, sec. 8, cl. 11.

⁵ Alexander Hamilton, James Madison, and John Jay, The Federalist Papers (1787-1788; reprint ed., New York: Bantam Books, 1982), 64:327.

⁶ *Ibid.*, 64:328.

⁷ *Ibid.*, 75:379-81.

⁸ Cited in Myers S. McDougal and Asher Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," Yale Law Journal 54 (March 1945):206-7.

⁹ 3 U.S. (3 Dallas) 199 (1796).

¹⁰ *Ibid.*, p. 260.

¹¹ 5 U.S. (1 Cranch) 103 (1801).

¹² *Ibid.*, pp. 109-10.

¹³ McDougal and Lans, 54:262.

¹⁴ 16 U.S. (3 Wheaton) 610 (1818).

¹⁵Ibid., p. 634.

¹⁶27 U.S. (2 Peters) 253 (1829).

¹⁷Ibid., p. 314. The distinction between self-existing and non-self-existing treaties traces back to this case.

¹⁸38 U.S. (13 Peters) 415 (1839).

¹⁹Ibid., p. 420.

²⁰McDougal and Lans, 54:181, 262.

²¹190 U.S. 197 (1903).

²²57 U.S. (16 Howard) 635 (1853).

²³Ibid., p. 657.

²⁴182 U.S. 1 (1900).

²⁵224 U.S. 583 (1912).

²⁶Ibid., pp. 584-90.

²⁷Ibid., p. 601.

²⁸252 U.S. 416 (1920).

²⁹Ibid., p. 433.

³⁰Ibid., p. 433.

³¹299 U.S. 304 (1936).

³²Ibid., p. 309.

³³Ibid., p. 315.

³⁴Ibid., p. 319.

³⁵Ibid., pp. 319-20.

³⁶ *Ibid.*, p. 320.

³⁷ 301 U.S. 324 (1937).

³⁸ *Ibid.*, p. 327.

³⁹ *Ibid.*, p. 330.

⁴⁰ *Ibid.*, p. 330.

⁴¹ *Ibid.*, p. 331.

⁴² *Ibid.*, p. 331.

⁴³ Numerous federal cases have upheld executive agreements as treaties, including Yassin v. United States, 76 F. Supp. 509 (Ct. Cl. 1948); Hughes Aircraft Co. v. United States, 534 F.2d 899 (Ct. Cl. 1976); and Weinberger v. Rossi, 456 U.S. 25 (1982).

⁴⁴ 315 U.S. 203 (1942).

⁴⁵ U.S. v. Capps, 204 F.2d 655 (4th Cir. 1953).

⁴⁶ 348 U.S. 296 (1955).

⁴⁷ 354 U.S. 1 (1957).

⁴⁸ *Ibid.*, pp. 16-17.

⁴⁹ 396 U.S. 186 (1962).

⁵⁰ *Ibid.*, p. 195.

⁵¹ *Ibid.*, p. 196.

⁵² 444 U.S. 996 (1979).

⁵³ *Ibid.*, pp. 1002-6.

⁵⁴ *Ibid.*, p. 997.

⁵⁵Ibid., p. 1007.

⁵⁶453 U.S. 654 (1981).

⁵⁷"The Iranian Hostage Agreement Under International and United States Law," Columbia Law Review 81 (November 1981):822-70.

⁵⁸"International Emergency," 99:1102-1120.

⁵⁹This case was the first this century to come before the Supreme Court involving an international claims settlement. The first case interpreting the treaty exception was United States v. Weld, 127 U.S. 51 (1888). It is this case which the Court cited, noting there must be a direct link between a treaty and a claim, thereby overturning the Meade Doctrine (mentioned below).

⁶⁰Phillip R. Trimble, "Foreign Policy Frustrated--Dames & Moore, Claims Court Jurisdiction and a New Raid on the Treasury," Columbia Law Review 84 (March 1984):317.

⁶¹Ibid., pp. 318-19.

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THE MORAL FOUNDATIONS OF LIBERTARIAN RIGHTS

Mark Field*

Coercion occurs when one person's actions are made to serve another person's will, not for his own but for the other's purposes.¹ Obviously, then, when coercion is present, individual freedom is necessarily absent. Thus, if one advocates a free society, he must realize that an essential element of any such society is the requirement that individual members be protected against illegitimate,² coercive intrusion into their lives. An important implication of this protection is the existence of private individual spheres of authority wherein any unsolicited interference is strictly prohibited. These private spheres are defined in terms of individual rights which guide a person's actions as well as preserve and protect that person from the actions of others in a social context.³ If these private spheres are not themselves to become an instrument of coercion, the individual rights which define the range and content of such spheres must not be determined by the will of any person or group of persons. To do so would simply transfer the power of coercion to that will.⁴ If this consequence is to be avoided, the existence of individual rights that are independent of any particular will must be possible.

Libertarianism, the doctrine that every person is the owner of his or her life and that no

*Mark graduated from the University of California at Irvine with a degree in Philosophy. He continues his education at Brigham Young University, and will graduate in June with a master's degree in Political Science. He plans to attend law school this fall.

one is the owner of anyone else's life,⁵ claims that such rights do exist. The doctrine asserts that each person is in possession of a core of fundamental rights⁶ that are grounded in a foundation that is, ultimately, objective, i.e., beyond the power of personal will.⁷ Nevertheless, even though this assertion is made, it seems that a comprehensive, systematic demonstration of such a foundation has never been given. Indeed, one of the crucial drawbacks of perhaps the most well-known statement of libertarian doctrine⁸ is that no attempt is made to establish a foundation for the rights that are so fundamental to libertarian political theory. If libertarianism is to present a serious challenge to other political views, it must at least explore these foundations.⁹ In view of this shortcoming, this essay is to present an argument¹⁰ for a foundation to the libertarian rights to life, liberty, and property that is independent of the will of any person or group of persons. In order to accomplish this aim, the essay will be divided into two main sections. The first section will demonstrate that natural, or human rights, when conceived of within the libertarian tradition, have an objective foundation. The second section will then show that the rights to life, liberty, and property are natural rights. In doing this, an objective foundation for libertarian rights will be established.

I

In arguing for a foundation of natural rights, this first section is separated into four parts, each one serving as a basis for the next. In part one, a grounding for value in general is provided, and, in part two, the same is done for moral value. From the conclusions reached in these two sections, the argument continues by considering that concept which constitutes the ultimate moral value as well as the standard of

moral value. Finally, in part four, the argument is expanded in order to demonstrate that human life, in the sense of living well, is the foundation of natural rights.

Value in General

Perhaps the best way to initiate the argument is to give a general definition of value:

- (1) A value is an object, an end, or a goal of an action.¹¹
- ∴ (2) In order for value to exist, there must be goal-directed action.

Given this conclusion, and in order to make progress, it is necessary to present the conditions that must be met for goal-directed actions to even exist. To begin, it seems apparent that if no alternative outcomes of action exist, then there is no possibility of achieving a goal,¹² and there can be no reason to act to gain it. In addition, it seems permissible to assume that if success or failure with respect to a goal is not conditional on some entity, then there can be no reason for that entity to act to achieve the goal.¹³ From this, the third premise should read as follows:

- (3) In order for goal-directed action to exist, the following conditions must obtain:
 - (a) There must be an alternative.¹⁴
 - (b) There must be an entity whose actions determine success or failure, with respect to some goal.¹⁵

However, if the consequences of success in achieving some goal are no different to an entity than the consequence of failure to achieve that goal, then there can be nothing to differentiate between achieving some goal and not achieving it.¹⁶ This would imply, then, that the entity

faces no real alternative. We postulated above, however, that goal-directed action requires the existence of an alternative. Thus, our third condition is:

- (c) There must be an alternative that makes a difference to (i.e., has a consequence for) the entity which faces it.¹⁷

Only when conditions (a), (b), and (c) are satisfied is it possible for value to exist. With this in mind, in order to proceed with the argument, the class of entities for which these conditions obtain must be defined.

As a means of initiating this segment of the inquiry, two general claims need to be stated. First, any object is either living or nonliving; and second, it appears to be the case that there is only one fundamental alternative in the universe--existence or nonexistence.¹⁸ From these two propositions we can construct the following complex disjunction: for any object, either (1) it is living and faces the fundamental alternative or does not or (2) it is nonliving and faces the fundamental alternative or does not. An analysis of the implications of this disjunction will provide a conclusion that will enable us to proceed with the argument.

To begin, the existence of all nonliving objects is not dependent upon any specific course of action, i.e., they exist unconditionally.¹⁹ Thus, if an object, X, is nonliving, we can conclude that X exists unconditionally. However, if X exists unconditionally, then, although X may change or evolve toward increasing²⁰ complexity or simplicity, it cannot cease to be. And inasmuch as X cannot cease to be, it is impossible for X to either achieve or fail to achieve its own existence. But this means that X cannot face the fundamental alternative. Thus, from disjunct

(2), we can conclude that if an object is non-living,²¹ then it cannot face the fundamental alternative.

The first disjunct indicates that each instance of life is a process of self-sustaining and self-generating action,²² and that if this kind of action ceases, then life necessarily ceases also. This means that the existence of any living entity, Y, is conditional, i.e., it can cease to be.²³ And if Y can cease to be, then it is possible for Y to face the fundamental alternative. Thus, all living entities are capable of facing the alternative of existence or nonexistence.²⁴

However, since existence or nonexistence constitutes the fundamental alternative, all other alternatives are, ultimately, derived from it (i.e., it creates all other alternatives).²⁵ Thus, if an object cannot face the fundamental alternative, then it cannot face any alternatives at all. Since we concluded above that nonliving objects cannot face the fundamental alternative, we can also conclude that these objects are incapable of facing any alternatives. But if an object cannot face any alternatives, then it is not possible for the conjunction of conditions (a)-(c) to obtain for that object. The result is that these conditions are inapplicable to nonliving objects. This is not the case with living entities.

First, as stated previously, living entities are capable of facing the fundamental alternative. This satisfies condition (a). Second, since each instance of life is a process of self-sustaining and self-generating action, if this action ceases to exist, life also ceases to exist. Thus, the actions of living entities are capable of success or failure with respect to their own existence. This satisfies condition (b). Finally, since it is possible for the actions of a living entity, in the pursuit of a particular goal, to result (ultimately) in either its existence or nonexistence,²⁶ and

since there is an obvious difference between these two extremes, we can easily conclude that there is a difference in the results of a living entity's effort to achieve or not achieve the particular goal or end it pursues. This conclusion shows that the existence of the fundamental alternative allows for the differentiation between achieving and not achieving some goal or end.²⁷ However, if an alternative allows for this kind of differentiation, then we can conclude that the fundamental alternative makes a difference to, or has²⁸ a consequence upon the entity which faces it. This satisfies condition (c).

As we can see, the conjunction of conditions (a)-(c)²⁹ is applicable to the class of living entities. However, at the beginning of this section it was stated that for any object, it is either living or nonliving. Therefore, seeing that the conjunction of conditions (a)-(c) cannot apply to nonliving objects and yet does apply to living entities, the following proposition can be introduced:

- (4) Life, i.e., the class of living things, is the only class of entities that is³⁰ capable of fulfilling conditions (a)-(c).

With proposition four in place, we can now present the remainder of the argument for the foundation of value:

- (5) Proposition (3) shows that if conditions (a)-(c) obtain, then goal-directed actions are possible.
- ∴(6) Since life fulfills conditions (a)-(c), life makes possible goal-directed actions.
- (7) In addition, proposition (2) shows that if goal-directed actions exist, then it is possible for value to exist.
- ∴(8) Since life makes goal-directed actions possible, life also makes value possible.

- ∴(9) Inasmuch as life fulfills conditions (a)-(c), life makes possible the existence of value.
- (10) Furthermore, if Y makes possible the existence of Z, then Y is said to be the foundation of Z.³¹
- ∴(11) Since only life fulfills conditions (a)-(c), life is the foundation of all value.

This conclusion establishes the concept of life (the process of self-sustaining and self-generating action) as the only source of value. The analysis now turns to the foundation of moral value.

Moral Value

As before, perhaps the best way to initiate this part of the argument is to give a brief definition of a moral value:

- (12) A moral value is an object, an end, or a goal that is chosen to be an object, an end, or a goal of an action.³²
- ∴(13) In order for moral value to exist, there must be goal-directed action that is aimed at an object which has been chosen to be the object (or goal) of that action.

Once again, in order to make progress we need to present what conditions must be met in order for this type of goal-directed action to exist. It is apparent from previous conclusions that, since moral value is a subset of value generally, conditions (a)-(c) are also required for moral value to exist. Thus, proposition (14) should begin as follows:

- (14) In order for goal-directed actions to exist that are aimed at an object which has been chosen to be the object of

that action, the following conditions must obtain:

- (a) There must be an alternative.
- (b) There must be an entity whose actions are capable of succeeding or failing with respect to some goal.
- (c) There must be an alternative that makes a difference to the entity which faces it.

However, given the definition of moral value, if the capacity for freedom of choice is not possessed by some entity, then it will not be possible for an object to be chosen as an object of goal-directed action. Thus, the fourth condition must be:

- (d) There must be an entity which possesses ³³the capacity for freedom of choice.

Only when these four conditions are satisfied is it possible for moral value to exist. With this in mind, in order to proceed with the argument, the class of entities for which these conditions obtain must be determined.

As with value generally, there is only one known class of entities that can fulfill the conjunction of all four conditions:

- (15) Human life, i.e., the class of human beings, is the only class of entities that satisfies conditions (a)-(d).

The justification for this proposition is clear. As concluded in the previous section, life is the only class of entities that fulfills conditions (a)-(c). Since human life is a subset of the class of living things, we can also conclude that human life fulfills these three conditions. Furthermore, it is also the case (empirically) that only human life is

known to possess the capacity for freedom of choice.³⁴ Thus, only human life can satisfy condition (d).

With the justification of proposition (15) complete, presentation of the remainder of the argument for the foundation of moral value can be made:

- (16) Proposition (14) shows that if conditions (a)-(d) obtain, then it will be possible for goal-directed action to exist that is directed toward an object which has been chosen to be the object of that action.
- ∴(17) Since human life fulfills conditions (a)-(d), human life enables an object to be chosen as an object of goal-directed action.
- (18) In addition, proposition (13) shows that if there exists goal-directed action that is directed at an object which has been chosen to be the object of that action, then moral value is possible.
- ∴(19) Since human life makes possible goal-directed action that is directed at an object which has been chosen as an object of that action, human life also makes moral value possible.
- ∴(20) Inasmuch as human life fulfills conditions (a)-(d), human life makes possible the existence of moral value.
- (21) Furthermore, if Y makes possible the existence of Z, then Y is said to be the foundation of Z.
- ∴(22) Since human life fulfills conditions (a)-(d), human life is the foundation of moral value.

Thus, human life is the final source of morality. With the aid of this conclusion, and as a means of progressing toward the foundation of natural

rights, we must now argue that human life is the standard of all moral value.

Ultimate Value/Standard of Value

In order to show that human life constitutes the standard of moral value, we must first demonstrate that human life is the ultimate moral value. To begin, suppose that Z is an object of choice. If goal-directed actions exist that are aimed at objects which have been chosen to be objects of such action, then it is possible for Z to be chosen as an object of such action. Proposition (17) shows, though, that in order for an object to be chosen as an object of goal-directed action, human life must exist. Thus, human life makes it possible for Z to be chosen as an object of goal-directed action. In addition, from proposition (12) we know that if Z is an object that is chosen to be an object of goal-directed action, then Z is a moral value (i.e., Z is morally valuable). Thus, human life makes Z as a moral value possible. However, it also seems that if a person morally values Z, then that person must also morally value the conditions by which Z³⁵ as a morally valuable object, is made possible. This means that if a person morally values Z, then that person must also morally value human life. Since a moral value is an object that is chosen to be an object of goal-directed action, if a person chooses Z as the object towards which his action will be directed, then those actions must also be directed towards human life. Thus, we can conclude that:

- (23) Since human life is the foundation of morality and, therefore, makes it possible for an object to be chosen as an object of goal-directed action, all goal-directed actions which are directed toward an object which has been chosen to be an object of that action are

(ultimately) directed toward human life.³⁶

This allows us to continue the argument as follows:

- (24) If all goal-directed actions which are directed toward objects which have been chosen to be objects of such actions are (ultimately) directed toward human life, then human life must be the final moral end or goal of all such action.³⁷
- ∴ (25) If human life is the foundation of morality, then human life is the final moral end of all goal-directed actions that are aimed at an object which has been chosen to be an object of such action.
- (26) However, the final moral end or goal to which all lesser (moral) goals are the means is considered to be the ultimate moral value.³⁸
- ∴ (27) Inasmuch as human life is the foundation of morality, human life is also the ultimate moral value.

Given this statement, the conclusion that human life is the standard of moral value can easily be reached:

- (28) In addition, inasmuch as the ultimate moral value is the final (moral) end or goal to which all lesser (moral) goals are the means, it necessarily sets the standard by which all lesser goals are morally evaluated.³⁹
- ∴ (29) Human life is also the standard of moral value.

What we have shown to this point is what we have sought: that the concept of human life, as the foundation of morality, is also the ultimate moral value as well as the standard of moral

value. Nevertheless, to simply conclude that human life is the standard or morality is not sufficient. In order for this standard to be better understood, an elaboration is necessary.

Living Well

First, it is necessary to demonstrate how (at least some) libertarians perceive the concept of living well, and also, that human life, in this sense of living well, is the standard of moral value. To start, since a standard is a basis for judgment,⁴⁰ and since moral value is concerned with conditions, situations, or circumstances that are good or bad, right or wrong,⁴¹ we can conclude that a standard of moral value is a basis for judging or determining⁴² what kinds of conditions or situations are morally good or bad, right or wrong. An important implication of this particular conclusion is that the concept or principle which determines whether or not a condition is morally right is equivalent to the standard of morality. Thus, if we can identify the concept which determines moral rightness, then we will have also identified the standard of morality. However, in order to determine whether or not a condition is morally right, we must first become clear on what it means to say that a condition is right for something.⁴³ To do this, we must know, (1) what kind of thing the object is, and (2) what the unique goal, end, or purpose of the object is.⁴⁴ If these two criteria are defined, then to say that a condition is morally right for an object is to say that the condition is conducive to the satisfaction⁴⁵ of the object's unique goal, end, or purpose.

In order to satisfy the first condition, it is important to remember that we are dealing with moral value and that morality applies only to those entities whose natures are such that they are capable of possessing the capacity for freedom of choice. Since only human life has a nature

that can satisfy this condition, morality only applies to human life (i.e., it applies only to human life (qua human life)). Thus, moral rightness refers only to those conditions that are right for human life (qua human life). However, when criteria (2) is added to this conclusion, we obtain a more accurate characterization of moral rightness: that it refers to those conditions that are conducive to the satisfaction of the unique end or purpose of human life (qua human life).

Nevertheless, even this definition of moral rightness can be made clearer through an attempt to better understand the content of the second criteria. For instance, when we speak of human life (qua human life), we are considering human life not, for example, in the capacity of a lawyer or a teacher but in the capacity of a human being. This analysis concerns human life as the kind of life that it is, i.e., given its nature. From this we can conclude that human life (qua human life) is equivalent to the natural end of human life.⁴⁶ This allows us to make the statement that a condition is morally right if the condition is conducive to the natural end of human life. This means, of course, that the natural end of human life is the basis for determining moral rightness. Therefore, since we have already concluded that what determines whether or not a condition is morally right is the same as the moral standard, we can now conclude that the natural end of human life must be the standard of moral value. This statement is obviously more specific than the previous conclusions, but it is still unsatisfactory. At this point, what constitutes the natural end of human life must be determined. If we can do this, then we will have a more definite standard of morality.

We can initiate this part of our inquiry by stating that the proper or natural end of any living thing is constituted by the successful use of that life (given the kind of life that it is).⁴⁷

The natural end of human life, then, would be constituted by the successful use of that individual life (as the kind of life that it is, i.e., given its nature as human life). In order to become more clear on this statement, we need to make use of the following general principles: first, if there is some need or requirement, Y, which explains or accounts for the existence of some object, X, then X functions well if and only if its use or enactment satisfies Y;⁴⁸ and second, the result of X performing its function well (i.e., the satisfaction of Y) constitutes the successful use of that object (Z) toward which the satisfaction of Y is aimed.⁴⁹ What we must do now is to discover what kinds of conclusions are brought about when these principles are applied to human life.

It seems undeniable that the very possibility of sustaining human life (as the kind of life that it is) depends upon the successful completion of numerous processes which involve the performance or utilization of various actions, capacities, activities, faculties, etc. (i.e., what we might call acting successfully).⁵⁰ However, acting successfully in this way depends upon the process of choosing to pursue and maintain the proper goals (i.e., what we might call moral valuation).⁵¹ We can conclude from this that the existence of the process of moral valuation is necessary for successfully performing and utilizing those activities and faculties which sustain human life (as the kind of life that it is). Thus, acting successfully in this way explains or accounts for the process of moral valuation. From this conclusion, and in accordance with the first general principle stated in the previous paragraph, we know not only that the function of moral valuation is its use in regard to the satisfaction of acting successfully to sustain human life (as the kind of life that it is), but also that moral valuation performs its function well if and only if its use actually satisfies successful action

in this way. In addition to these statements, and in accordance with the second general principle, it is also clear that acting successfully in order to sustain human life (as the kind of life that it is) constitutes the successful use of that object toward which such action is aimed. And, since this type of action is necessarily aimed at human life, we can finally conclude that the successful use of any individual human life (as the kind of life that it is) is equivalent to successfully performing and utilizing those activities and faculties which sustain human life (as the kind of life that it is). It is this conclusion that represents the natural end of human life and, ultimately, the standard of moral value.

From this conclusion, not only have we achieved the desired degree of specificity, but we have also demonstrated the overall intent of this particular section. It is apparent that acting successfully, in the way we have described it, is the same as living successfully as a human being (given the nature of human life). This is equivalent to the notion of living well.⁵² Thus, not only is it clear how (some) libertarians perceive the concept of living well, but it is also clear that we can conclude first, that living well is the natural end of any individual human life and finally, that:

.'.(29') Human life, i.e., living well, is the standard of all moral value.

Given the conclusion of proposition (29'), we can now continue with our argument for the foundation of natural rights. We will begin anew by reexamining the idea of a moral standard:

(30) A standard of moral value is the basis for determining whether or not a particular condition, situation, or circumstance is morally right or wrong, good or bad.

- (31) Moral value deals only with those conditions that are good or bad, right or wrong for human life (qua human life).
- ∴ (32) Human life, i.e., living well, is the basis for determining whether or not a condition is right for human life (qua human life).

However, the context within which a condition may be right for human life (qua human life) is variable; e.g., a condition may be right in either an individual or a social context.⁵³ From this, the argument continues by indicating the context we choose:

- (33) A particular condition may be right for human life (qua human life) in a social context.
- ∴ (34) Human life, i.e., living well, is the basis for determining whether or not a particular condition is right for human life (qua human life) in a social context.

With this conclusion, a brief characterization of the libertarian notion of a natural right is necessary.

Natural or human rights are no different from any other rights we might possess, except that our entitlement to them is fundamentally justified by the fact that we are human beings. As one prominent libertarian thinker has stated, "If someone has a human right to X or to do Y, then (a) he or she is a human being, and (b) it is because of this fact alone that certain conditions or circumstances are both possible and right for him in a social context."⁵⁴ These kinds of rights indicate the social conditions that are good or right for people, by virtue of their humanity, in a social context.⁵⁵ From here, we can continue our argument by giving a definition of a natural right:

- (35) A natural right is a condition that is right for human life (qua human life) in a social context.
- ∴ (36) Human life, i.e., living well, is the basis for determining natural rights.
- (37) This means that human life (in the sense of living well) makes natural rights possible.
- (38) If Y makes Z possible, then Y is said to be the foundation of Z.
- ∴ (39) Human life, i.e., living well, is the foundation of natural rights.

To this point we have shown that the concept of life is the foundation of value in general, and that the concept of human life is the foundation of morality. In addition, as a means of establishing a foundation for natural rights, we also demonstrated that human life is the ultimate moral value as well as the standard of moral value. Nevertheless, we stated at that point that to simply conclude that human life is the standard of moral value was not sufficient. In order for this standard to be more workable, we had to show that human life, in the sense of living well, is the standard of moral value. From this, we finally concluded that human life, i.e., living well, is the foundation of natural rights. This brings us to the end of section one. From here we will want to demonstrate that the most fundamental libertarian rights are natural rights.

II

In order to conclude that libertarian rights are natural rights, we must show that they represent conditions that are right for human life (qua human life); i.e., that they are conducive to living well, in the way we have defined it, in a social context. Perhaps the most convenient way to begin is to simply state that:

- (40) The most fundamental libertarian rights are the rights to life, liberty, and property.⁵⁶

Now, by considering the conclusions reached in section one, we can expand the argument by presenting the following sequence of premises:

- (41) From proposition (35) we know that a natural right is a condition that is right for human life (qua human life) in a social context.
- ∴(42) The rights to life, liberty, and property are natural rights if and only if life, liberty, and property constitute conditions that are right for human life (qua human life) in a social context.
- (43) Furthermore, a condition is right for human life (qua human life) in a social context if that condition is conducive to the satisfaction of the natural end of human life in a social context.
- (44) The natural end of human life is living well.
- ∴(45) The rights to life, liberty, and property are natural rights if and only if life, liberty, and property constitute conditions that are conducive to the satisfaction of living well in a social context.
- (46) And, living well (in a social context) is equivalent to successfully performing and utilizing those activities and faculties which sustain human life (qua human life, i.e., as the kind of life that it is) in a social context.

At this point in the argument we must pause and provide some sort of content for the phrase "the kind of life that human life is."

We can single out two conditions that must be satisfied for persons to even exist; these

conditions therefore constitute the nature of man. Although the question of whether or not man has a nature is somewhat controversial, many, including libertarians, argue that the very act of talking about man (in the ways we have been discussing him, i.e., with respect to morality) implies that his nature is, at least to some degree, knowable. The first condition for human existence (one we have already discussed) is that man is free, i.e., capable of choice. The second is that man is capable of conceptual awareness, i.e., he is rational.⁵⁷ Each individual person possesses (at least) both of these conditions. From this brief discussion we can state that:

- (47) Human life (i.e., human life (qua human life)) is life that is free and rational.

We can further conclude that:

- ∴(48) The rights to life, liberty, and property are natural rights if and only if life, liberty, and property constitute conditions that are conducive (in a social context) to the successful performance and utilization of those activities and faculties which sustain human life as the kind of life that it is, i.e., as life that is free and rational.

If the conditions of this conclusion can be met, then the goal of establishing a foundation for libertarian rights will be achieved.

In this final segment of the argument, we will briefly consider the conditions represented by life, liberty, and property in order to determine whether or not they are conducive to the natural end of human life within a social context. It is important to indicate, however, that the rights to these conditions, when conceived of within the libertarian framework, are freedom rights or

rights to action.⁵⁸ Thus, these concepts represent conditions of action.

The first, and most important⁵⁹ condition we will examine is that of life. As was mentioned earlier in this essay, life is a process of self-sustaining and self-generated action. However, within the context of our consideration of life, its definition is slightly more expansive: it is the self-generated process of behavior that leads to the continued existence of some entity in a given form so that it may persist in sustaining its own existence.⁶⁰ In reference to the class of human beings, our definition of life may be equated with the freedom of a person to take all actions required by the nature of a rational being for the support, the perpetuation, and⁶¹ the fulfillment of that person's own existence. It is readily apparent that in the absence of this condition, living well is inconceivable. Thus, life is essential to the very possibility of acting successfully to sustain human life (qua human life) in a social context. From this, we are justified in claiming that:

- (49) Life constitutes a condition that is conducive to the successful performance and utilization of those activities and faculties which sustain (one's own) life as a life that is free and rational (in a social context).

The second condition we will examine, (political) liberty, may be characterized as the freedom to choose the ends that one desires to pursue in his life, without the fear that those ends might be frustrated by the arbitrary will of others or coercion by the state.⁶² In the absence of any such freedom, it is reasonable to assume that if a person is to have any ends at all, those ends (in addition to the actions required to obtain them) must be forced or imposed upon him.⁶³ But if this is the case, then it is not possible for an

individual to act for himself in successfully sustaining his life.⁶⁴ And since realizing the natural end of human life is something that each person can only (fully) achieve for himself,⁶⁵ without (political) liberty, the achievement of living well in a social context is inconceivable. From this we are justified in claiming that:

- (50) Liberty (political) constitutes a condition that is conducive (in a social context) to the successful performance and utilization of those activities and faculties which sustain one's own life as a life that is free and rational.

The final condition for examination is the right of property. Strictly speaking, property is the product of a person's own effort. However, it was mentioned earlier that libertarian rights are freedom rights or rights to action. In this context, property is not to be identified as any particular object. Rather, it is the actions for, and consequences of, producing or earning an object. Thus, the condition represented by property may be characterized as the freedom to gain, keep, use, and dispose of material value.⁶⁶ However, since (as we indicated above) the natural end of a person's life is something that only he can (fully) achieve for himself, i.e., by his own effort, then, without the condition that property implies, the achievement of living well in a social context is not possible. Thus, we can state that:

- (51) Property is a condition that is conducive (in a social context) to the successful performance and utilization of those activities and faculties which sustain (one's own) life as a life that is free and rational.

Given these three propositions, we know that life, liberty, and property represent conditions

that are conducive to the natural end of human life within a social context. The argument continues by concluding that:

- ..(52) The fundamental libertarian rights to life, liberty, and property are natural rights.

From here, we can finally make the following statement:

- ..(53) Inasmuch as human life, i.e., living well, is the foundation of natural rights (see proposition (39)), human life, i.e., living well, is the foundation of the fundamental libertarian rights to life, liberty, and property.

This is the conclusion that the overall analysis has sought to verify.

At the beginning of the paper, our stated aim was to present an argument for an objective foundation for libertarian rights, i.e., rights that are independent of the will of any person or group of persons. Human life in the sense of living well satisfies this objectivity. In dealing with the concept of humanity, we do not determine what it means to be human, rather, we discover this.⁶⁷ We can no more control the nature of human life, those essential characteristics of freedom and rationality which define us as human beings, than we can alter the past. These essential characteristics are facts of reality that exist regardless of any personal or group desires or actions to change them. Thus, we are not in a position to alter the fact that the nature of man is such that he is free and rational and that living well (in the way it has been defined in this paper) is the natural end of his life.

In conclusion, we should keep in mind that the argument presented here is simply a

description of what some, though certainly not all, libertarians feel is the foundation of the rights they advocate. The argument may, in fact, be unsound. In any case, it is hoped that what has been presented in this essay might provide a basis for informed comment upon the libertarian alternative.

ENDNOTES

¹Friedrich A. Hayek, The Constitution of Liberty (Chicago: University of Chicago Press, 1960), p. 133.

²Tibor R. Machan, Human Rights and Human Liberties (Chicago: Nelson-Hall Co., 1975), p. 116. There are occasions when coercive intrusion into the life of someone is legitimate, for example, the case of a person who violates the law. Punishment, then, is a legitimate method of constricting freedom.

³Ayn Rand, "Man's Rights," The Virtue of Selfishness (New York: New American Library, Signet Edition, 1964), pp. 92-93. Rand states that "rights are a moral concept--the concept that provides a logical transition from the principles guiding an individual's actions to the principles guiding his relationship with others--the concept that preserves and protects individual morality in a social context--the link between the moral code of a man and the legal code of a society, between ethics and politics. Individual rights are the means of subordinating society to moral law."

⁴Hayek, The Constitution of Liberty, p. 139.

⁵John Hospers, "What Libertarianism Is," in The Libertarian Alternative ed. by Tibor R. Machan (Chicago: Nelson-Hall Co., 1974), p. 3.

⁶Ibid., p. 13.

⁷Ayn Rand, "The Objectivist Ethics," The Virtue of Selfishness (New York: New American Library, Signet Edition, 1964), p. 14. See also Machan, Human Rights and Human Liberties, p. 51.

⁸Robert Nozick, Anarchy, State and Utopia (New York: Basic Books, 1974).

⁹Thomas Nagel, "Libertarianism Without Foundations," in Reading Nozick, ed. by Jeffrey Paul (Oxford: Basil Blackwell, 1981), pp. 192-93.

¹⁰The argument that will be given is a synthesis of the work already accomplished by various libertarian authors. As such, I am not specifically defending a libertarian position; rather, I am merely presenting (or describing) what some libertarians view as the foundation of the rights they advocate.

¹¹Rand, "The Objectivist Ethics," p. 15.

¹²Douglas Den Uyl and Douglas Rasmussen, "Nozick on the Randian Argument," The Personalist 59 (April 1978):189.

¹³Ibid.

¹⁴Ibid.

¹⁵Ibid.

¹⁶Ibid., pp. 189-90.

¹⁷Ibid.

¹⁸Rand, "The Objectivist Ethics," p. 15.

¹⁹Ibid., pp. 15-16. To say that an object, X, exists unconditionally is to assert that the existence of X is not dependent upon the existence or occurrence of another condition or event. Thus, the existence of X is not limited by any conditions. Obviously, we can conclude from this statement that if X is conditional, then its existence is dependent upon other conditions.

²⁰Den Uyl and Rasmussen, "Nozick on the Randian Argument," p. 190.

²¹Rand, "The Objectivist Ethics," pp. 15-16.

²²Ibid.

²³Ibid.

²⁴Ibid.

²⁵Den Uyl and Rasmussen, "Nozick on the Randian Argument," p. 190.

²⁶Rand, "The Objectivist Ethics," p. 16.

²⁷Den Uyl and Rasmussen, "Nozick on the Randian Argument," p. 190.

²⁸Ibid.

²⁹Ibid.

³⁰Ibid. See also Rand, "The Objectivist Ethics," pp. 15-16.

³¹Rand, "The Objectivist Ethics," pp. 16-17. What is being said here is that the concept of "Life" makes possible the concept of "Value." A foundation is that upon which something, Z, is founded; it constitutes the basis, groundwork, or fundamental principle of Z. Without such a foundation, the existence of Z becomes impossible.

³²Den Uyl and Rasmussen, "Nozick on the Randian Argument," p. 191.

³³Machan, Human Rights and Human Liberties, pp. 70-71. See also Den Uyl and Rasmussen, "Nozick on the Randian Argument," p. 191.

³⁴Tibor R. Machan, "A Reconsideration of Natural Rights Theory," American Philosophical Quarterly 19 (January 1982):62.

³⁵Den Uyl and Rasmussen, "Nozick on the Randian Argument," p. 191.

³⁶Ibid.

³⁷Rand, "The Objectivist Ethics," p. 17. According to Rand, it is a metaphysical and epistemological impossibility for a series of means to go off into an infinite progression toward a nonexistent end. There must be a final end (or end in itself) in order for the existence of values to be possible at all.

³⁸Ibid., pp. 16-17.

³⁹Ibid.

⁴⁰The Random House Dictionary of the English Lanugage, Unabridged (1983), s.v. "standard."

⁴¹Machan, Human Rights and Human Liberties, p. 65.

⁴²The Random House Dictionary, s.v. "judge."

⁴³Machan, Human Rights and Human Liberties, p. 65.

⁴⁴Ibid., pp. 65-66.

⁴⁵Ibid.

⁴⁶Ibid., pp. 49-50, 64-65. The statement "human life (qua human life)" is equivalent to such statements as "human life as the kind of life that it is" or "human life given the nature of human life."

⁴⁷Eric Mack, "How to Derive Libertarian Rights," in Reading Nozick, ed. by Jeffrey Paul (Oxford: Basil Blackwell, 1981), pp. 289, 292-93.

⁴⁸Ibid., pp. 292-94.

⁴⁹Ibid.

⁵⁰Ibid.

⁵¹Ibid.

⁵²Ibid., p. 286. In the context of libertarian thought, the notion of living well is not to be characterized as a state of pleasure, fun, or excitement. Rather, it is a "self-acknowledgement of worth, a sense of being a successful living entity of the kind human beings are" (Machan, Human Rights and Human Liberties, p. 73). Ayn Rand implies that living well is happiness, which she characterizes as "a state of non-contradictory joy--a joy without penalty or guilt, a joy that does not clash with any of (one's) values and does not work for (one's) own destruction. . . . Happiness is possibly only to a rational man, the man who desires nothing but rational goals, seeks nothing but rational values and finds his joy in nothing but rational actions" (Ayn Rand, For the New Intellectual, (New York: New American Library, Signet Edition, 1963), p. 132).

⁵³Machan, "A Reconsideration of Natural Rights Theory," p. 62.

⁵⁴Machan, Human Rights and Human Liberties, pp. 53, 106.

⁵⁵Ibid., p. 107.

⁵⁶Machan, "A Reconsideration of Natural Rights Theory," p. 62. The three fundamental libertarian rights are (1) the right to life: inasmuch as the nature of each person is such that he is able to choose to live, one's life is no other individual's domain or sphere of authority; (2) the right to (political) liberty: since choosing to live requires actions to carry out such a choice, it is impermissible for others to undermine one's liberty to make this choice and effect it; and (3) the right to property: since choosing to live requires creative and productive activities (in one's own sphere or in the company of others who have chosen to do the same) and making use of the results may not be interfered with by other human beings.

⁵⁷Machan, Human Rights and Human Liberties, pp. 73-74.

⁵⁸Rand, "Man's Rights," p. 94. See also Machan, "A Reconsideration of Natural Rights Theory," p. 61.

⁵⁹Ibid., p. 93. She states that "there is only one fundamental right (all others are its consequences or corollaries): a man's right to his own life."

⁶⁰Machan, Human Rights and Human Liberties, p. 118.

⁶¹Rand, "Man's Rights," pp. 93-94.

⁶²Machan, Human Rights and Human Liberties, pp. 111, 118-20. See also John Stuart Mill, On Liberty, ed. by Currin V. Shields (Indianapolis: Bobs-Merril Co., 1976), p. 16; John Rawls, A Theory of Justice (Cambridge, Mass.: Belknap Press of the Harvard University Press, 1971), p. 515; and Hans Reiss, ed., Kant's Political Writings, (Cambridge: Cambridge University Press, 1977), p. 23.

⁶³Ibid., p. 119.

⁶⁴Mack, "How to Derive Libertarian Rights," p. 290.

⁶⁵Ibid. See also Machan, Human Rights and Human Liberties, pp. 111, 119.

⁶⁶Ibid., p. 121. See also Rand, "Man's Rights," p. 94.

⁶⁷Ibid., p. 51.

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PI SIGMA ALPHA ACTIVITIES 1985-86

Officers

President	Brent J. Belnap
Secretary	Teressa Nielson
Publicity	Rebecca Noah
Socials	G. Wade Leak
Speakers	Stephanie Spong
Colloquia	Michael Knudsen
New Projects	Wendy Bird
Faculty Advisor . . .	J. Scott Dunaway

Dialogue and Doughnuts

Dr. Thomas Greene addressed a summer Pi Sigma Alpha audience on Marx: "What Marx Said That is Right and What Marx Said That is Wrong."

Steven Hood began the fall lecture series with a talk entitled "Burying Mao: The 'Right' Takes Charge in China."

Gerrit Gong, special assistant to the Undersecretary of State for Political Affairs, gave his perspective on political science: "A 3-D Look at Applied Political Science: Politics, Bureaucracy, and Foreign Affairs."

Elizabeth Pond, noted author and Bonn correspondent for the Christian Science Monitor, spoke at a lecture co-sponsored with S.A.I.S. on international espionage.

Gunn McKay, former U.S. Representative from Utah, spoke from experience on "The Way Congress Functions: Can It Respond to Current Issues?"

Dr. Robert Rottberg, political science professor at M.I.T., discussed "The Continuing Crisis of Black Africa: Famine and Population."

Professor Michael G. Stathis spoke on a relationship often in the news: "Reagan and Khadafy: Comparative Politics of Antagonism."

Dr. Gary Bryner, recipient of a Women's Research Institute Grant, discussed his current findings in a lecture entitled, "Affirmative Action: The Search for Common Ground."

Lee Wilson spoke immediately before the French elections with "The French Elections: Headed Toward Chaos?"

Paul Rich of the University of Warwick spoke on race relations in South Africa.

Howard Ruff, well-known author and speaker, addressed Pi Sigma Alpha on "The Rational and Philosophical Foundations of Capitalism."

Pi Sigma Alpha sponsored a forum debate on Reagan's strategic defense initiative entitled "SDI: To Research or Not to Research," between BYU physics professors Larry Knight (pro) and Kent Harrison (con) with Steven Hood moderating.

The War College Current Affairs Panel visited BYU in January. The visiting lecturers, in addition to addressing classes, gave four PSA lectures: "Terrorism and Anti-Terrorism" (Lt. Col. Taylor), "The Reorganization of the Joint Chiefs of Staff (Lt. Col. Roe), "The Department of Defense Budget and Strategy" (Col. Hansen), and an open panel discussion involving the above three officers as well as Cols. Smith, Hunter, and Welde, wherein they introduced themselves and the aims of the War College.

Welches and Cheese

Pi Sigma Alpha held its annual opening orientation for the purpose of recruiting new members and introducing the officers. Drs. Dennis Thompson and David Bohn gave brief messages explaining the organization. This orientation, in part, led to the largest membership ever in BYU's Beta-Mu chapter.

In September, PSA members met at Dr. Ray Hillam's home and heard him speak about Israeli politics with a special emphasis on the controversy surrounding the building of the BYU Jerusalem Center.

The annual "Oktoberfest" was held at Dr. Monroe Paxman's cabin in Provo Canyon. The evening's activities included an "entertaining" faculty talent show.

Dr. Gary Bryner hosted a November Welches and Cheese in which he shared his insights on the underlying philosophy and the implementation of social welfare policy.

Two War College lecturers, Cols. Smith and Roe, gave a presentation on ethics and the military at the home of Dr. Richard Vetterli.

Dr. Keith Melville hosted a February Welches and Cheese, discussing the evolving powers of the U.S. presidency.

Dr. Ed Morrell described the role of the L.D.S. Church in European politics at the final Welches and Cheese.

The Pi Sigma Alpha closing banquet was held at the East Bay Country Club. Elder Neal A. Maxwell was the keynote speaker.

Colloquia

Papers presented this year by Political Science faculty members to Pi Sigma Alpha included the following:

"Foreign Policy in an Era of Economic Interdependence: The Case of the United States"

--Dr. Earl Fry

Paper Discussants:

Dr. Stan Taylor

Dr. Gary Bryner

"Sufficiency is Sufficient"

--Dr. David Bohn

Paper Discussants:

Dr. Ladd Hollist

Dr. Michael Stathis

"The New Uncertain Sound: A Response to Jack Newell"

--Dr. Louis Midgley

"Nagging and Dragging: U.S.-Japan Relations"

--Dr. Lee Farnsworth

Paper Discussant:

Steven Hood

Constitutional Convention

In celebration of the bicentennial of the U.S. Constitution, the BYU chapter of Pi Sigma Alpha sponsored an exercise in Constitution making. BYU students played the roles of delegates from the fifty states in an attempt to create or modify the U.S. Constitution, their purpose being to gain a deeper understanding of current political problems and practice, and a greater appreciation for the document created by the Founding Fathers in 1787. Most of the delegates also participated

in a six-week preparation class taught by Dr. Louis Midgley that discussed underlying Constitutional principles as well as more topical issues. All delegates worked in small committees before and during the two-day Convention to hammer out proposals for discussion in the General Assembly. The students, after much hard work on several issues including congressional term length, school prayer, the right to privacy, a reorganization of the Electoral College, and an attempted rewrite of the first Article of the Constitution, failed to ratify any of the proposals at the closing banquet. However, they did learn much about the realities of political bargaining and the value of the present Constitution.

Financial grants for the Constitutional Convention were received from the national Pi Sigma Alpha organization and ASBYU. Judge Monroe McKay, justice with the U.S. Tenth Circuit Court of Appeals, delivered an entertaining and informative keynote address to the Convention delegates entitled "The Living Constitution." He stressed the need to understand the fundamental principles underlying the Constitution and warned against the tendency to legislate through the Constitution. He also attended the closing banquet and commented upon the weekend's efforts.

New Projects

This year Pi Sigma Alpha sponsored a current events class at the Eldred Senior Citizens' Center. Each week society members volunteered to give presentations on various issues of interest. Some of the subjects covered were terrorism, the Gramm-Rudman Act, the national debt, SDI, and Utah legislation on health services for senior citizens. The class promoted a lively

discussion and was enjoyed by both the senior citizens and PSA members.

Pi Sigma Alpha organized a career night in which professionals in various fields answered questions concerning career opportunities for political science graduates.

FACULTY NOTES

Donna Lee Bowen was on leave Winter Semester, 1986, in Morocco.

David Bohn has had his article "The Failure of the Radical Left in Switzerland: A Preliminary Study" published in Comparative Political Quarterly. In addition, an essay concerning nuclear arms buildup entitled "Sufficiency is Sufficient" will be published this April through the BYU David M. Kennedy Center.

Gary Bryner is working with other Political Science faculty members to edit two books on the Constitution. Dennis Thompson will help edit The Constitution and the Regulation of Society, and Noel Reynolds is co-editor of Constitutionalism and Rights. Bryner's article "Equal Employment Opportunity and Affirmative Action: The Search for Common Ground," is appearing in a larger work entitled Ethics, Government, and Public Policy, James Bowman, ed., Greenwood Press. Professor Bryner has received two research grants. He is studying the issue of equal opportunity employment for women with a grant from the Women's Research Institute, and will soon travel to Canada with a Canadian Government Faculty Research Grant to do comparative environmental policy research. In addition, his review of Serge Taylor's book Making Bureaucracies Think will be published in the Journal of Politics in May of 1986.

Lee Farnsworth spent two months in Japan in the fall of 1985. While there, he gave several lectures for the U.S. Information Service on U.S.-Japan relations. He has presented papers on the same topic at the 1985 Western Political Science Association meeting in Las Vegas, and at the 1985 American Political Science Association meeting in New Orleans. In addition, Dr.

Farnsworth served on a U.S. government-sponsored panel in Washington, D.C., where he discussed Japanese policymaking. His article "Nichibei 'surechigai' no kozo," a work which presents a framework for analyzing misunderstandings between the U.S. and Japan, was published in Gekkan Jiyuminshu in February of 1986.

Early Fry has published two articles dealing with Canada-U.S. relations. "The Legal Aspects of Sectoral Integration Between the United States and Canada" appeared in Canada-United States Law Journal, and a work that was also presented at the biennial meeting of the Association for the United States entitled "Canada-U.S. Free Trade: Prospects and Challenges," was published in International Perspectives: The Canadian Journal on World Affairs. Dr. Fry co-edited a book published through the BYU David M. Kennedy Center entitled Canada-U.S. Economic Relations in the "Conservative" Era of Mulroney and Reagan. He also recently travelled to Switzerland to present a paper on "The International Economic Activities of Subnational Governments in Federal States: Challenges to Central-Regional Policy Coordination" to the Comparative Federalism Study Group. In addition, Dr. Fry has received a Canadian Government Faculty Research Grant to study bilateral trade relations this spring and summer.

Martin Hickman was on leave Fall and Winter Semesters, 1985-86, in Vienna and London.

Ray Hillam spoke at the twenty-first annual Virginia F. Cutler Lecture Series at BYU on "War and the Family." He also wrote an article on war, Mormons, and foreign policy, which will appear in the April edition of BYU Studies.

Ladd Hollist has finished a book written with F. LaMond Tullis entitled Food, the State, and

International Political Economy, which will be published by the University of Nebraska Press. He is co-editor and author of two chapters on international hunger, and poverty and hunger in rural Brazil which will appear in Food Security: Dilemmas in Africa, Asia, Latin America, and the Middle East. Professor Hollist also continues to work with Dr. Tullis editing the IPE Yearbook, an annual journal of international political economy.

Eric Jones presented a paper entitled "Graham Allison's Conceptual Models and the 1983 Korean Airline Incident: An Analysis of Soviet Foreign Policy Behavior" at the III World Congress of Soviet and East European Studies in Washington, D.C. He is currently revising his doctoral dissertation on "Bureaucratic Politics and Soviet Energy Policy."

David Magleby has had several publications within the last year. An article on "Ballot Access for Initiatives and Popular Referendums: The Importance of Petition Circulation and Signature Validation Procedures" was published in the Journal of Law and Politics. Other articles include "Legislatures and the Initiative" in State Government, "Participation in Mail Ballot Elections," forthcoming in Western Political Quarterly, and "California's Direct Democracy" which will appear in a conference report on research needs in California government and politics. In addition, Dr. Magleby presented a paper entitled "Participation in Initiative and Referendum Elections in Switzerland and the United States" to the XIII World Congress of the International Political Science Association in Paris, France.

Keith Melville has written "Joseph Smith, the Constitution, and Individual Liberties," an article accepted for publication in BYU Studies.

Louis Midgley has written an article entitled "History and the Crisis of Faith Reconsidered" which will appear in a book of essays honoring Hugh Nibley. The book is one in a series published by the BYU Religious Studies Center.

Noel Reynolds was on leave Fall and Winter Semesters, 1985-86, as a visiting professor at the University of Edinburgh, Scotland.

Stan Taylor lectured on "The Role of Congress in National Security Policy" at the Air Command and Staff College in Montgomery, Alabama. He also presented a three-day seminar on terrorism for naval base commanders in Washington, D.C., and was an invited guest at another terrorism seminar at the Naval War College in Newport, Rhode Island.

Dennis Thompson has edited two books this year. The Private Exercise of Public Functions has recently been released by Associated Faculty Press, and Ethnicity, Politics, and Development will be available in June from Lynne Reiner publishers. He is the author of "Private Organizations: An Ethical Base for Political Society and a Focus for Brigham Young University" in President Holland's book On The Lord's Errand, published by Brigham Young University Press. Dr. Thompson also delivered a paper entitled "Lacunae in Theory, and Knowledge About Politics and Ethnicity: Goals and Paths for Future Research" to the XII Conference of the International Political Science Association in Paris, France.

Richard Vetterli recently finished a book co-authored with Gary Bryner entitled In Search of the Republic. The book is the first in a series of four that will be written by Dr. Vetterli on the roots of American government. Professor Vetterli also served as a director of the London

Study Abroad program during the Fall Semester, 1985.

Lawrence Walters, the newest member of the Political Science faculty co-authored "Productivity and Organizational Economies of Personnel Services," an article published in Human Resource Policy Analysis: Organizational Applications, R. J. Niehaus, ed., Praeger, 1985. He also presented a paper to the Institute of Management Science entitled "Interurban Comparisons of Housing Deficiency: An Application of Data Envelopment Analysis."

Carwin Williams presented a paper on "The Social Psychology of Political Change" at the 1985 American Political Science Association meeting in New Orleans.

Visiting and Temporary Appointments

Joseph E. Black, formerly of the Rockefeller Foundation, was a visiting professor Fall Semester, 1985.

Vincent Breglio, President of Decision Making Information, was a visiting professor Fall Semester, 1985.

Byron Daynes of DePaul University will be a visiting professor during the 1986 Summer Term.

Steven Hood of the University of California, Santa Barbara, was a visiting instructor Fall and Winter Semesters, 1985-86.

Gunn McKay, a former member of Congress, was a visiting professor during the 1986 Winter Semester.

Chris Mitchell of London City College will be a visiting professor during the Summer Term, 1986.

Nafez Nazzal of The Jerusalem Center for Near Eastern Studies will be a visiting professor during the 1986 Summer Term.

Michael Stathis of the University of Utah was a visiting professor Fall and Winter Semesters, 1985-86.

Frank L. Wilson of Purdue University was a visiting scholar Winter Semester, 1986.

Nathan Yanai of the University of Haifa will be a visiting professor during the Summer Term, 1986.

