by **David T. Hardy**

If the Founding Fathers Were Alive Today...

MEMORANDUM November 15, 1991

From: *Director, Division of Computer Sciences, Bill of Rights Bicentennial Commission*
To: *Executive Director, Bill of Rights Bicentennial Commission*
Re: *Application of INTELRECON techniques, Project 91-62*

Project 91-62, approved April 15, 1991, authorized this office to reconstruct the intelligences and personalities of various of the Founding Fathers, utilizing advanced INTELRECON (Intelligence Reconstruction) techniques. As you know, INTELRECON employs artificial intelligence techniques to essentially recreate the intelligence and personality of a given human mind in "real time." The accuracy of the reconstruction depends upon the amount of information that can be considered, such as samples of the person's writings, preferred readings, and opinions of influential friends.

Under Project 91-62, this office used INTELRECON techniques to reconstruct the minds of James Madison, George Washington, and Thomas Jefferson, as of the year 1795. Fortunately, these men left abundant records of their thoughts and opinions, lists of their libraries, and voluminous correspondence. This reconstruction is thus one of the most reliable products of the INTELRECON technique. Professor David H. Torry of the Harvard Law School was selected to conduct the dialogue with these reconstructed personalities. A transcript of the dialogue follows.

PROFESSOR TORRY: I am honored to have the privilege of conversing with you gentlemen, whose names are cherished by Americans even in 1991. In addition to serving as the first, third, and fourth presidents of the United States, each of you played a distinguished role in bringing about the Constitution and Bill of Rights under which we still live. It is an honor to have your assistance at this bicentennial celebration.

GEORGE WASHINGTON: It is an honor to be here. I wish our friend Franklin could hear your words. I recall his prophecy to the Constitutional Convention: the Constitution would survive a number of years and then inevitably "end in despotism, as other forms have before it, when the people shall become so corrupted as to need despotic government, being incapable of any other."

THOMAS JEFFERSON: Our friend put little

RICHARD MARTIN

faith in paper promises. He was, I fear, more a realist than a cynic. When the first Congress defied the will of the people and the states and tried to evade its duty to promptly give us a bill of rights, I felt the end was beginning. James, you practically had to beg them before they would put aside their "pressing concerns"—primarily their plans to consolidate federal power—and grudgingly offer a limited guarantee of some obvious rights. It was a degeneracy in the principles of liberty I had not expected to see in many years, let alone in a few months.

WASHINGTON: Yet it appears that two centuries later the United States still live, and under the same Constitution.

PROFESSOR TORRY: That is precisely the point. After two hundred years, we are still proud to live under the same Constitution you gentlemen created, and we regard as sacred the same rights that you wrote into our fundamental law. What explains this remarkable longevity?

JAMES MADISON: First and foremost, the division of powers among various institutions. Under our plan, for a bill to become a law of the United States, it must usually secure the concurrence of the president (chosen by the electors), the Senate (chosen by the state legislatures and presided over by the vice president, the runner-up for the presidency in the electoral college), and the House of Representatives (chosen directly by the people). All these groups are unlikely to have the same interest or prejudice, so that laws of the United States must thus reflect a concurrence of many interests.

PROFESSOR TORRY: Excuse me, Mr. Madison. The system you describe for choosing the president and vice president was changed by the 12th Amendment, and such remnants as were left have long been disregarded in practice. The system you describe for choosing the Senate was discarded by the 17th Amendment.

MADISON: Oh. I should then suppose that the most vital feature of our Constitution was its grant of limited powers to the federal government. The powers of the national government were few and carefully defined; those retained by the states and the people were many and indefinite.

WASHINGTON: Indeed, the powers given the national government are mostly concerned with foreign policy, so that almost all the domestic powers that affect the life, liberty, and property of the people are subject to exclusive state control. Thus there is little scope for ambition or corruption at the national level.

PROFESSOR TORRY: Forgive again the in-

terruption, gentlemen, but while we revere those principles in the abstract, they have long been discarded in practice. Federal regulation of virtually every aspect of local activities—down to the regulation of crops consumed by a farmer before they even leave his land—has uniformly been upheld by the federal judiciary

WASHINGTON and MADISON: Oh.

JEFFERSON: This comes as little surprise to me. Federal judges are, after all, creatures of the federal government and must owe it their appointment, advancement, and salary. The Constitution placed no checks upon them, and they are free to expand their powers as they wish. Inevitably, they become a federal corps of engineers working to undermine the independence of the states.

MADISON: We provided no checks, Thomas, because none were needed. The Constitution provides only for one Supreme Court and such inferior courts as Congress may—not must—create. As our friend Hamilton so ably pointed out, this merely allows Congress to establish a half-dozen or so federal trial courts. Six or eight judges and as many clerks are hardly a corps of engineers. He summed it up perfectly: the judiciary is "beyond comparison the weakest of the three branches," being given under the Constitution "no influence over either the sword or the purse; no direction either of the strength or the wealth of society."

WASHINGTON: Hamilton was right. I recall the difficulty I had finding a chief justice; of the four to whom I offered the position, three declined. I couldn't persuade anyone with a solid career as a governor or state senator to sit on a court that met in a basement room under the Senate chambers and ruled on obscure questions of state boundaries and treaty provisions. The judiciary is so weak that we should be more concerned with protecting it than with limiting its almost nonexistent powers.

PROFESSOR TORRY: How things have changed since your days! Today our federal judiciary numbers not only the Supreme Court but 144 appellate judges and 515 trial judges, not to mention about 7,000 other personnel. There is scarcely a state law or, for that matter, a criminal conviction that can be considered final until one or, more typically, several federal courts have given it their seal of approval. Federal judges rule on whether a local school may expel a pupil or impose a given regulation, on the propriety of welfare programs and building projects, and even on how many prisoners may be placed in a given county jail.

WASHINGTON: This is a stranger to any constitution I have read. While so expanding the power of that which we left unchecked because of its impotence, have you not imposed checks of your own devising?

This is a stranger to any Constitution I have read.

PROFESSOR TORRY: No, that would have been inconsistent with the system you gentlemen helped to create, and which we still follow.

MADISON: This becomes more confusing by the minute. But apart from all that, I cannot understand why there is a need for such a judicial expansion. Surely the legislature—which must, after all, examine legislation in detail—pays close attention to the Constitution and to the rights of people and states.

PROFESSOR TORRY: Unfortunately, Congress has become quite overloaded. Debate over a nearly trillion-dollar budget consumes most of its time, and all other bills are enacted after at best a cursory debate in which few members take part. Almost no one actually reads the bills he is voting on, and often legislation is more the product of congressional staff than of the members of Congress themselves.

Congress often lacks the expertise to write a comprehensive code for citizens to follow, so it simply enacts general statements of policy and then delegates to administrative agencies the power to translate these policies into regulations and punish violations in their administrative courts. This saves Congress the trouble of deciding the details of legal codes and lets the actual decisions be made by persons uncorrupted by popular pressure. Frankly, the constitutionality of legislation is virtually never raised in Congress and, if raised, would likely be taken as a mere cover for the real objection—usually harm to some particular interest group.

JEFFERSON: As I live and breathe, professor, you do not live under any constitution we drafted, let alone one hallowed by time or the genius of our people. The system you describe is infinitely more corrupted than that of Great Britain. It is tory, it is base...

WASHINGTON: What our friend means to say is that perhaps the survival that you mention is not attributable to paper guarantees but to the very foundations of the nation. A republic perishes when it must draw upon the mobs (rich or poor) of its cities, men with no independence, no discipline, no strength, and no tradition—except perhaps a hatred for any who have such, and a desire to impose upon such persons the tyranny the mob feels in its own heart. We founded our republic upon freeholders of land, persons tied thereby to the community, persons able to support themselves and thus maintain an independent stance toward the government. Whatever a mob might do, these freeholders will not allow their own independence, liberty, and property to be tampered with.

PROFESSOR TORRY: Well, we have long since moved past the primitive, rural stage; over three-quarters of our population is now urban and proud to be cosmopolitan. Frankly, we rather look down upon the parochial "redneck." We are proud to boast that over three hundred billion dollars a year is used to support depressed urban areas that lack agriculture, industry, or any other means of production. Today the national government supports arts and music, parks and industry, and in fact employs over three million persons.

MADISON: Three million agents of the federal government? That is more than the total population of America in our time! But surely few of these persons are landowners?

PROFESSOR TORRY: True, but in many cities almost no one owns land, and all are heavily dependent upon one government program or another. In any event, the electorate is much broader than in your day; we view limiting the vote to property-owners as discrimination based on wealth.

JEFFERSON: A strange view, considering

that we set the limits so low that the poorest farmer could vote and the wealthiest merchant or speculator, who was unwilling to tie himself to the land, could not. We linked the vote to land, not to money, since ownership of land alone ties a person to the community and gives him independence. We wanted no mobs fed upon government patronage, no cries of "*panem et circensis.*"

PROFESSOR TORRY: We have long since moved past that stage; the District of Columbia recently extended its franchise to persons who sleep on heating grates and lack even a mailing address. The vote is, after all, a universal right.

JEFFERSON: Curious that you would still deny it to a youth of independence and intelligence. I have heard enough. We know what must be done, do we not, gentlemen?

MADISON: Strange it is for me to speak these words, for I argued long against this idea in my own time—but let a constitutional convention be summoned, and the sooner the better.

PROFESSOR TORRY: But you would be upsetting the system under which this nation was created, the traditions, now sacred to us...

MADISON: By your own words, that has already been done. The system you describe bears no relation to any that we created, except in its name—the same resemblance that the Rome of Scipio Africanus bore to that of Tiberius. One name was that of a nation, the other that of a mass of persons thrown into a common area. The Constitution as we created it is all but destroyed; we must act with haste to preserve it.

JEFFERSON: What is there to fear? The power of the states? The power of the people? We fought the most powerful nation in Europe for six years on less provocation. Your convention would not have to draft a constitution—its function would be to draft and submit to the states a small number of amendments. If that is beyond the power of your people, then surely it is likewise beyond their power to rule themselves.

PROFESSOR TORRY: But that would be revolutionary!

JEFFERSON: Precisely. But when government abuses its powers in pursuit of despotic aims, it is a people's right, it is their duty, to throw off such government and to provide new guards for their future security. Are you not familiar with our Revolution of 1776?

PROFESSOR TORRY: But this is unconstitutional.

JEFFERSON: Strange that you invoke that term now, when it escaped you while describing all those corruptions.

MADISON: In any event, professor, you are wrong. The Constitution provides for the calling of a convention to amend it if two-thirds of the states apply for such. It is their perfect right, one we inserted for

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a good reason—that Congress might someday refuse necessary amendments because doing so would limit congressional power and privilege.

PROFESSOR TORRY: But this would be so radical...

JEFFERSON: Opposition I can stand; hypocrisy I cannot. The real radical changes have already been forced upon Americans, and to their obvious harm. If we had ever dreamed that the delicate balances between the prerogatives of the states, the rights of the people, and the very limited powers of the national government were to be destroyed, that the government we meant to serve the people would instead swallow them, that a branch so weak as to need no checks would instead become an unelected Venetian Council, we would have imposed appropriate protections. Instead, it seems, the checks we created have been destroyed, the powers we left unchecked have been expanded, and now you plead respect for our handiwork to justify its further vitiation.

I see no risk at all in calling a convention. What more powers could the national government obtain, should a convention be so debased as to propose such an amendment? What it does not have now, it can have for the asking. Let us suppose that a convention were to will such a grant. The one surviving protection of the states—equal representation in the Senate—is one of the few things that the Constitution says a convention may not amend!

MADISON: And in any event, amendments proposed by the convention must, like those proposed by Congress, be approved by no fewer than three-quarters of the states before they become law. The states—let alone three-quarters of them—are hardly likely to ratify a surrender of their own power. I see no risk and a possibility of great gain.

Professor, there was a movement to call a convention in our own time, led by Patrick Henry. I opposed it because the Constitution had not yet had time to prove itself. Have there been similar calls since?

PROFESSOR TORRY: Fairly frequently. And some came dangerously close to passing. In the 1950s there was a call for a convention to limit federal taxes, which came within two votes of the necessary number; in the 1960s a drive for an amendment to override certain reapportionment decisions came within one state; and in the last decade only a few more votes would have been needed for a convention to pass a balanced-budget amendment. All were fought with great tenacity by the national government.

The challenges were simple; the state resolutions generally called for a limited convention. Some even tried to define the exact words that any resulting amendments would bear and to revoke the state's consent if the wording was changed. Obviously, where the different resolutions used different terms and placed different conditions upon the proposed convention, it was difficult to determine whether any proposal had the necessary two-thirds support. Moreover, the Justice Department (which obviously had great reason to resist any lessening in federal powers) argued that the calls for a limited convention were not proper.

MADISON: A remarkable conclusion! If these modern tories felt a general convention was a drastic process, they surely could not have honestly believed that we would deliberately force it upon future Americans when a less drastic means, a limited convention, would do. But putting all this aside, if the limitations of the convention were improper, it seems that the call for a convention is not. Why did they not conclude that the states had indeed called a convention of

the nation, but that the limitations put on the convention were improper?

PROFESSOR TORRY: They concluded that a call for a limited convention was the same as no call for a convention at all.

JEFFERSON: The tyrant, as Raleigh observes, betrays himself by his sophisms. Professor, we are indebted for your assistance. Gentlemen, how shall we proceed?

WASHINGTON: I am no lawyer, but it seems that to achieve a limited convention we must call for a general one, with a provision limiting the convention, to the extent it can properly be limited, to certain objects. Our opponents will be trapped; to oppose a limited convention would be to force a general convention, which they will fear still more.

At that point, I believe we would find not a voice raised against limited conventions. Not that I believe there would be any great risk with one. As you gentlemen have observed, the convention merely proposes amendments; to become final any amendment must be ratified by three-quarters of the states, which is a most exacting barrier to any but the most sensible proposals.

MADISON: We faced that barrier with the Bill of Rights. Any drafter of an amendment must keep in mind that if it displeases only a quarter of the states, it will fail, and his time will have been wasted. The real check on radical or dangerous innovations was never the Congress but the states.

What the convention should have as its object is a more difficult decision. Yet if the General has offered good legal counsel, perhaps a lawyer may suggest the tactics. There are many objects we could include, but the more we list the more we stir those who have profited by the decay of the Constitution. The ideal would be one amendment that would retransfer the vital powers of government to the states. Once this is gained, our other desiderata will come in due course. Our opponent is strong; we must strike for the heart rather than try to weary him with many assaults.

At the same time, we can afford to speak in broad terms. We are fixing the agenda for the convention, not writing the precise terms of the amendments. We might even want to leave room for the convention to propose various amendments along these lines, allowing the states to select which one they prefer. And we should fix a time and a place for meeting in the event that Congress fails to act on the application.

JEFFERSON: The key to the federal position seems to lie in the power of the national government to bind the states by its most casual decrees, without any reciprocal check by the states. Thus a bill passed by Congress in deference to a single member's interests binds all the states, while the most considered action of all the states cannot abate the most trivial federal action. If this is changed—if the states, acting in concert, are empowered to both enact and repeal laws at the federal level—we may yet revive something resembling the Constitution of 1787.

MADISON: My drafting may not meet with your complete approval, gentlemen, but how does this seem:

APPLICATION FOR A CONSTITUTIONAL CONVENTION

1. The (insert legislative body) of (insert state) hereby makes application to the Congress of the United States, in accord with the provisions of Article V of the Constitution of the United States, to call a convention to draft and propose amendments to that Constitution. To the extent permitted under that Constitution, and not otherwise, such amendments shall be limited to the following, which may be subject to such exceptions as the convention deems appropriate: Amendments providing that a designated bill, resolution, or proposal for a bill or resolution shall become a law of the United States, or a law of the United States shall be repealed or modified, upon approval by a proportion of the states, such proportion being greater than a majority of the same.

2. This resolution shall be deemed an application for a convention to encompass either the above amendment or a group of amendments on this subject.

3. Unless the Congress shall first elect otherwise, the convention shall begin six months from the date that any application for such convention shall first be approved by the required number of states; it will be held in the capital city of that state which then contains the population center of the United States; and each state shall send three delegates elected by its legislature. Each state shall have one vote, and a majority of the delegates sent by the state shall be sufficient to cast its vote.

4. The governor shall transmit certified copies of this application to the President of the Senate and the Speaker of the House of the United States, and to such other officials as may be deemed proper recipients of such application.

WASHINGTON: You seem to have singled out the point at which they are weakest, but the conquest of which will inflict the most damage on their position. Our opponents will be forced to argue to the state legislatures, which must vote upon this application, that they are untrustworthy while federal authorities are infallible. It is hard to argue that a law that has met the approval, not of one legislature, but of perhaps two-thirds or three-fifths of the state legislatures, should not be enacted as a true "law of the United States." I think the amendment would open the door to some very interesting possibilities.

JEFFERSON: It would open up the solidified mass of federal power that is strangling the states, much as breaking up encrusted soil opens the way for new and more vigorous crops. If the states do not rally to cast off their chains, then indeed they deserve them.

MADISON: Beyond this, we may achieve our object without the convention ever being called. You doubtless remember how Patrick Henry stirred the states with his call for a second convention, only a year after the first? I fought him then, yet his efforts forced the adoption of the Bill of Rights. The threat of radical reform does much to concentrate the minds of legislators.

WASHINGTON: Let a dozen states apply for a convention, and Congress will no longer menace their rights; let the two levels of government serve as checks on each other, and the individual's rights will be better observed by each. This short resolution holds much potential, gentlemen, for those who love freedom.

[TRANSCRIPT ENDS ABRUPTLY]

Director's note: *Running of the INTELRECON program was terminated at this point pursuant to personal requests from a number of members of the Bill of Rights Bicentennial Commission. These members maintained that the program, however accurate, was no longer fulfilling its aim of providing "a quality constitutional experience" and was instead promoting action based upon anachronistic views. They expressed concern that, were the results to be made public, calls for a convention would be made. Since the described convention would not be held in Washington, its members would be selected by the 50 state legislatures, and each state would have an equal vote, it would be most difficult to establish necessary federal control over the proceedings and the results might imperil the power and prestige of persons whose support is important to this project. The program was accordingly terminated. This office awaits further instruction.* ◻

David T. Hardy is an attorney. He has written on the Second Amendment and various other subjects.