

LENGTHENING SHADOWS

The Constitution Enters Its Third Century

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I was first invited to participate in this evening's program sometime in the far distant past. Like many of you, I am sure, I never hesitate to accept an invitation to do anything that far in advance, because I am always sure that the world will come to an end or that some other cataclysmic event will intervene. That circumstance, plus the prestigious nature of this occasion, prompted me to accept with alacrity.

One thing I never seem to have learned, however, is that no matter how far off the fatal day may appear to be, it eventually arrives, and ten days ago I suddenly realized that the big day was nigh upon me.

In the months since I was first honored by your invitation to speak on the Constitution, that document has been the subject of almost constant public attention as it moves into its third century. Promising prospects have abounded for a talk which would be of interest to this sophisticated audience in such areas as First and other Amendment rights, issues arising under the Commerce Clause and a host of others, and then there is always the fascinating history of the drafting and execution of the Great Charter itself. However, all of you, like everyone else in the country, have been deluged by the saturation coverage which has been given to all of these subjects. Topic after topic which I had considered for tonight became the basis of Sunday supplement articles, weekly magazine stories, and special editions of other periodicals, to say nothing of television extravaganzas. The thought of competing with the masterpieces which have been laid before you by scholarly staffs backed by limitless research was intimidating.

However, another possibility began to emerge. Even as the ever-lengthening shadows of the Constitution continue to spread into and affect various aspects of our national life and culture, rather shockingly the specter of a Second Constitutional Convention has begun to get more than peripheral attention. It is that possibility to which I would like to return in a few minutes.

I have already referred to the Constitution as "the Great Charter," and it is commonplace to use superlatives in referring to our guiding document. For instance, it is said to have been drafted by "the most brilliant committee of men ever assembled." From

cradle to grave, our lives are controlled by statutes and ordinances, rules and regulations, fiats and resolutions - but basically and fundamentally, underlying all else, there is always the Constitution.

One is reminded of the story of the vessel proceeding through a dense fog which received the radio message, "Change course." The ship wired back, "This is a military vessel. Change course." The response was, "Change course." Becoming irritated, the ship wired, "This is a vessel of the United States Navy! Change course!" Again came the simple response, "Change course." By this time the head man himself had had enough and he wired, "This is Admiral Schmaltz of the United States Navy, and this is the Aircraft Carrier 'Mudville!' Change course." This time the response that came back was, "This is the lighthouse. Change course!"

Similarly, ordinances and statutes and such may or may not be subject to attack and debate, but when you are on a collision course with the Constitution, you will be well advised to "Change course." The fact remains that in all areas in which it has spoken with clarity, the Constitution has laid down the absolute, unalterable law of the land.

This is not to say, of course, that even the wisdom of the Founding Fathers enabled them to forecast with accuracy the expanding scientific and cultural developments which have occurred, and which will continue to unfold with each passing year. Whether in terms of millenniums or simply decades, evolution has not been limited to the improvement of the species. Modes and means and customs of transportation, communication, habitation, protection from the elements, virtually all aspects of our lives, continue to be the subject of evolution. This manuscript, for instance, is the product of a mysterious machine called a word processor, which to my constant astonishment, insists on typing both frontwards and backwards. The typewriter, itself revolutionary not so very far back, will soon be gathering dust with the hand operated butter churn. In such a world, would it not be fatuous to suppose that in the stifling heat of that sealed room in Philadelphia in 1787, 55 men, wise though they were, could have foreseen such universal transitions?

Recognizing the impossibility of exercising such foresight, when they emerged on September 17th they presented a document which embodied not only wisdom, but also great elasticity and flexibility. Flexibility so that the words of the Constitution could be turned to follow the courses of changing currents of thought, elasticity so that provisions could be stretched to accommodate developments not yet conceived. Examples of this flexibility and elasticity can be found in nearly every provision of the Constitution, but reference to three will suffice.

The first involves the criminal law, and is perhaps the most readily understood. The barbarities of other cultures apart, the framers of the Constitution were aware of the fact that a bare 20 years earlier Blackstone had noted in his "Commentaries" that for the crime

of treason an Englishman might be dragged to the gallows, hung, cut down, disemboweled while still living and finally put to death by decapitation and quartering. In that same year, 1769, Thomas Jefferson himself advocated the castration of any man found guilty of rape, polygamy or sodomy and the facial mutilation of any woman found guilty of a comparable offense. Public hangings, floggings and the cropping off of ears were punishments in common practice at that time. Against such a backdrop, isn't it safe to assume that when the Eighth Amendment proscribed "cruel and unusual punishment" violence to the person was contemplated?

Nevertheless, in contemporary times far less painless procedures than these corporal punishments have been held to be cruel and unusual. As a local example, our ancient Workhouse, long known as the "Colerain Chalet," came into being long after the adoption of the Constitution. Indeed, in its early days it may have provided a night's lodging not greatly inferior to those available at the inns of colonial times. Yet, as we all know, that venerable bastille has been vacated by a court order based on the finding that confinement there constituted cruel and unusual punishment. Similarly, the Supreme Court affirmed a finding that filthy conditions, confinement in eight by ten foot cells, and the serving of unpalatable food could constitute cruel and unusual punishment when prolonged over an extended period of time. As a further expansion, the Supreme Court in 1976 approved the finding that deliberate indifference on the part of prison officials to the medical needs of a prisoner also violated the 8th Amendment.

Perhaps the most widely known of all Constitutional rights is the individual's immunity from self-incrimination under the 5th Amendment. This principle had been entrenched in the common law of England, which had held since about 1700 that no man was bound to incriminate himself on any charge in court.

Probably the most far-reaching American expansion of this principle resulted from the famous case of *Miranda v. Arizona*. Actually, all this case did was to modify a rule of evidence which had theretofore permitted the prosecution to introduce into evidence nearly any inculpatory statement made by a defendant. That 1966 case rewrote criminal arrest procedures, and engendered other far-reaching consequences. This pronouncement of the "Warren Court" has been widely debated, and may well be the subject of some modification in the near future. However, one thing remains clear. *Miranda v. Arizona* and its progeny surely go further than could have been envisioned when the Fifth Amendment was adopted.

The second provision of the Constitution which I would touch on lightly is one which has cast shadows in many directions, and in intricate and lacy patterns. It is generally referred to as the "Commerce Clause," and when read in its entirety grants Congress the power "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." From that dozen words, excluding the business about

the Indians, come the myriad powers under which Congress has assumed the regulation of everything from migratory birds to stocks and bonds, from electronic media transmissions to transportation of stolen automobiles or women across state lines for immoral purposes, just to mention a few.

Because sooner or later every single person in the United States rides a bus, railroad train, or airplane or buys or consumes goods which have been transported by them, or takes a pill or some other medication dispensed on the national market, or seeks beautification from the cosmetic shelves, or buys or sells stocks or bonds or some other form of security, or does any of a thousand other things, he is doing something that is controlled under the Commerce Clause through the Interstate Commerce Commission, the Food and Drug Administration, the Securities and Exchange Commission, or one of another dozen or so agencies.

The only other area which I have time to mention is one which has received an abundance of prominence in recent times, and it has been the subject of intense controversy. In-deed, because some sought to place a Menorah on Fountain Square during the recent Holidays, the First Amendment was for a time in the daily news right here in the Queen City. The clause of the First Amendment which precludes nativity scenes on public property, prayers in public schools and a host of other things, is contained in these few words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This clause has also been the source of another whole body of law concerning such things as the rights of employees who observe a Sabbath on a day other than Sunday, and those of inmates of penal institutions whose religions mandate long hair and beards.

The next cryptic clause of the First Amendment proscribes legislation "abridging the freedom of speech, or of the press." These nine words do many things. In effect, they permit much of what is generally regarded as pornography, because a satisfactory definition of obscenity has been illusive. Absent such a definition, virtually all expression, and much conduct, is permitted as "free speech." As in other areas, hundreds of thousands of words in scholarly treatises and judicial opinions have been penned in attempts to give vitality to these two short provisions of the First Amendment.

My title this evening was occasioned by the picture of a tree that arose in my mind's eye in which the Constitution formed the trunk, while legislative enactments and regulatory promulgations formed the branches and twigs. Thus the trunk was of the sturdiest proportions, bearing as it must long and tall branches. This trunk cast a straight and ever-lengthening shadow indicative of the shape of our central government. A generally cautious judiciary has permitted the growth of a system of branches and twigs, casting in their turn an ever widening mosaic of shadows. The very magnitude of this growth, it seems to me, negates the need for further amendment of our basic document.

Had the tree been of other proportions, with a trunk of high girth and height blueprinting in detail all of the dos and don'ts of governmental control, and thus holding the number of branches and twigs' to a minimum, certainly amendments would be the order of the day, nearly every day. A writer to the Enquirer stressed this point only yesterday by complaining that his copy of the Constitution didn't mention anything about three co-equal branches of government nor many of the rights mentioned this evening.

Instead of a detailing document, we have a living, malleable constitution , and some may be surprised to learn that a constitutional convention is very much in the minds of many. For example, I have on my desk a published monograph prepared by a prestigious board and extending over some 75 pages, designed for guidance if a Second Constitutional Convention is convened. And I hasten to say that this particular document is not an isolated voice in the wilderness. The obvious question which immediately arises is, who wants what changes?

The answer is that those who at the moment most loudly clamor for a Constitutional Convention are among those who are alarmed at the dramatic and frightening escalation of the national deficit, but have no confidence in the legislature to cause reductions.

The startling fact is that 32 of the States of the Union have petitioned for a Constitutional Convention, and only 34 are required to put the Congress under an obligation to call a convention. One student of the situation has observed, "With only two more states needed to petition Congress to call a Constitution under Article V of the Constitution, and with Congress apparently unable or unwilling to discipline itself to a balanced budget, it is not unrealistic to anticipate the petition of two more states in the near future."

We look first at the Alabama petition, both because it leads the list alphabetically and because the first clause of its preamble is substantially identical to that of many of the other petitions. That clause reads:

"[W]ith each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars."

As you have doubtless surmised from the tenor of the preambles, these petitions do not request a Constitutional Convention for general revisionary purposes. Rather, the convention they seek would convene for the stated purpose of adding Article XXVII to the Constitution, which would require a balanced budget . A laudable objective, I can almost hear you saying, but who is to say that, once convened, a convention would remain within the limits of its mandate? Although he favored a Constitutional Convention for a variant purpose, even Senator Jesse Helms recognized that the risk of a "run-away" Convention

existed, to which the safeguard of the ratification process is not a sufficient answer. It should always be kept in mind that the Constitutional Convention of 1787, which far exceeded its mandate of revising the Articles of Confederation, was itself a "run-away Convention."

The only sure way to avoid that risk is to refrain from calling a Second Constitutional Convention, and the clear path to that goal is by inducing the Congress to balance the budget. Each of us should make every effort to urge his senators and his congressmen to give the highest priority to the goal of a balanced budget.

However, our morning newspaper earlier this week suggested an alternative method of achieving this goal. It editorially urged that in scanning the fields of presidential candidates care should be taken to select those dedicated to a reduction of the deficit. The last presidential candidate who pledged himself to that end went on to a landslide defeat, but perhaps 1988 voters are wiser.

Only if our elected representatives and chief executive can be made to realize that the bulk of the electorate want the deficit reduced can that result be achieved. So convinced, they will act. In that way only can we avoid the risk, not to say the perils, of creating a Frankenstein monster in the form of a Convention with the ability to undo two centuries of painstaking expansion and implementation of the "wisest document ever produced by the minds of man. "Far better we should permit the Constitution to enter its Third Century in pristine form.

Wholesale amendment of the Constitution of the United States would accomplish a drastic pruning of the trunk, branches and twigs which cast ever-lengthening shadows symbolic of good government, and of that most basic of all aims, the pursuit of happiness.

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Society of Colonial Wars in the State of Ohio
Queen City Club, Cincinnati, Ohio
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