

Remarks for the Worcester County Chapter of ACLUM

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THE LIVING CONSTITUTION: DOES IT WORK IN MODERN TIMES?

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

So begins the document signed and proclaimed on September 17th 1788. The Constitution was a blueprint for a nation that did not yet exist. Some regarded it as a radical experiment doomed to failure. Support for it was thin at best; key states adopted it by close vote margins gained by political manipulation rather than solid agreement on concepts. The story of the making of a nation from that blueprint is fascinating and modern historians are very good at telling it. But beyond the fascination of a good story well told is a fundamental truth. The nation has grown and prospered as no other nation has in the recorded history of the world. Among the unique features of our success is a legal and political system that imposes the rule of law on everything the government does.

Our nation, like any family that has lasted for generations, has skeletons in its closet. When one examines those embarrassing moments from our history, they frequently have a common element. The government has either ignored the rule of law or been unfaithful to the principles and values expressed in our constitution. Thus it is understandable that when the government seeks to depart from those established values and rules of law, some among us will rise up to resist and to insist that the constitutional limits on government power be enforced.

We gather tonight to honor those who have risen to speak out and to persuade fellow citizens that they must join their voice in opposition to government actions which are not faithful to the values and principles of our constitution.

Our government tell us that our country faces unparalleled threats to our national security and consequently, the constitutional safeguards to our individual liberties must be set aside. Historically, war time has generated actions by the government that would be deemed unacceptable to peace time. And we are now engaged in a “war on terror,” at least that is the claim of the national government. This combination of unparalleled threat and “war on terror” has produced a climate for permanent changes to the constitutional relationship between the government and those whom it governs

Laws are now proposed and passed which challenge the traditional notions of constitutional protection against invasion of privacy and unreasonable search and seizure. Further, the notions of constitutional due process guaranteeing a speedy and fair trial are being sharply modified to facilitate government convenience at the expense of individual rights.

All of this might be tolerable if the changes were temporary in nature; after all, war time conditions have, in the past, produced sharp limitations on individual rights. But this “war on terror,” unlike other wars in our history has no clearly defined enemy, no clearly defined goals, and most importantly, no clearly defined end point. As the present administration has said repeatedly, this is a war that may never end. Thus those who are held without charges and without trial “for the duration of the war” are effectively given a life sentence. . James Madison in 1795, then a Congressman from Virginia, observed:

Of all enemies to public liberty, war is perhaps, the most to be dreaded because it compromises and develops the germ of every other.[T]he discretionary power of the executive is extended. Its influence in dealing out offices, honors and emoluments is multiplied; and all means of seducing the minds are added to those of subduing the force of the people. The same malignant aspect in republicanism may be traced to inequalities of fortunes and opportunities for fraud growing out of a state of war ... and the degeneracy of manners and morals engendered by both. *No nation could preserve its freedom in the midst of continual warfare.*”

The Bush Administration is not the first to take the unspoken position that the constitution is obsolete or at least, not applicable to current conditions. But it is the first to seek more or less permanent institutional changes that will, if they survive, last indefinitely. Further the changes sought are unprecedented in their scope.

We are not without experience in this approach by our government. In recent times, the national government has been engaged in another war that will never end. The “war on drugs” has produced a never ending plea from government authorities for greater police power to invade privacy, to conduct broad searches, to gain additional advantages in prosecuting those charged with drug crimes and to lengthen the prison terms of those convicted. Regrettably, Congress and our courts have been all too willing to set aside the wisdom and experience of the framers of our constitution and give the government the additional powers it seeks. The results of these efforts were predictable; the experience of the constitutional framers could have told us that repression of rights is ineffective at best and counterproductive at worst. But alas, our elected officials paid no attention to that experience.

It is fair to ask whether our constitution is obsolete. After all, a constitutional scheme created more than 218 years ago could not have contemplated the national and international difficulties we face today. And the framers of that scheme were wise enough to include provisions for change. And we have made some substantial changes in that scheme through that amendatory process. Consider: we have assured the right to freedom of conscience and expression; we have specified individual legal rights in civil and criminal trials while imposing limitations on government power to investigate and prosecute the accused; we have rearranged the manner in which the President and the Senate are elected to better reflect the will of the people; we have extended the right to human dignity to a whole class of persons previously regarded as property of as economic servants; we have extended and guaranteed the right to vote to women, racial minorities and young adults (who by the way, made up a majority of the population when the nation was formed); we have guaranteed basic federal rights, privileges and immunities to individuals previously at the mercy of the state political systems. These examples offer a guide to the pattern of our society. Over the more than 200 hundred

years since the framing of the constitution our “corrections” to the system have almost universally been extensions of freedom rather than retractions of freedoms granted by the founding fathers and mothers. From this record one might conclude that if the constitutional scheme is obsolete, it is more likely to need stronger restrictions on government rather than greater government power over the individual.

But we are told our present situation presents threats not previously experienced and certainly not experienced by those who framed the constitutional rights we have come to expect. Let us briefly look at the life and times of founders to test the claim that modern threats are unique. Were the framers abstract thinkers who idealized the relationship between the government and individuals? Did they structure a government that was not practical in times of crisis? For those who know our history these questions are almost laughable. The framers of the constitution included dedicated patriots who put their lives on the line by declaring independence from Great Britain and by taking up arms in defense of personal freedom and the right to have a voice in government. These were men –George Washington,, Thomas Mifflin, Charles Pinckney and Charles Cotesworth Pinckney, Nathaniel Gorham and Rufus King – who endured the worst of the Revolutionary War era at the lost of personal fortunes and countless friends. They experienced and witnessed the measures taken by the English government to suppress what it regarded as treason, insurrection and terrorism. And following the end of hostilities, these men saw the effect of public insecurity – sometimes producing armed resistance to government and to the rule of law. These were not academic theoreticians. These were men of action, men of practical experience with crisis; I dare say that the threats we face today pale in comparison to the threats which were a way of life for these men everyday, in every way for more than eight years.

Nor were the framers without experience in government. We must recall that the Constitutional convention was called to reform a failing system – The Article of Confederation installed in 1781. They were confronted with a failing system of government at a time when we were threatened militarily and diplomatically by the two great powers in the world- France and Britain; the states were competing with each other for land, for commercial advantage both in foreign and domestic trade; and there was

some chance that either the New England states or the Southern states would cut a separate deal with Britain. For more than five years the framers struggled without success, to make that system work. In the end, they decided to scrap their system of government and build a new one. Abstract exercises in political science did not drive them to that conclusion; rather it was practical experience. The chief obstacle they faced was the reluctance to create a strong central government. They came by that reluctance honestly. They saw how power was exercised by the King, by the British Administration of the Colonies and for some like Benjamin Franklin, by the foreign governments in France and Holland. On the other hand, absolute state sovereignty made national government impossible. At bottom, the task was to create a government which could unite the nation without creating a government which could oppress its people. They knew that power without limitations was tyranny yet a government without sufficient power was not worthy of support.

It is true that the framers expected protection of individual rights to be the job of the states. Thus the record of debates at the convention reveals that the overwhelming attention was paid to the relationship between the branches of government and between the federal and state governments. This view, subsequently rejected by the ratifying conventions, was based on the belief that the national government could be held in check so that enumerating rights was unnecessary and, in fact, dangerous to the extent that broad limitations on powers not granted opened the door to the claim that the power must exist if limitations to it are set out.

Several state ratified the constitutional while urging amendments providing for the additional protection of individual rights. Congress made that a priority when it convened in 1789; it proposed 12 amendments which the states considered, adopting 10 of them as our “Bill of Rights” in 1791. Now, it must be observed that the state ratifying conventions for the Constitution and the state legislatures approving the “Bill of Rights” were not academic theoreticians either. These were practical men with constituencies to be served. Many shared the experience of the framers in war and government.

In another era of our history, government – and the constitution – faced a truly

unparalleled threat. State sponsored armed insurrection in 1861 led to the attempt of 11 states to secede from the United States. The President and the Congress found the government figuratively and literally, located on the edge of the battlefield. The dead and wounded were brought by the thousands to hospitals in the nation's capital. Desperate times called for desperate action. President Lincoln and the Congress responded. In the aftermath of the war, repressive government actions were rescinded and sometimes criticized as unnecessarily harsh and extreme. And significantly, the Constitution was amended in what some have called the "Second American Revolution" to guarantee the vote, due process and equal protection of the law to all persons subject to the laws of the states. The men who fashioned those amendments were not fuzzy-headed intellectuals who were seeking some idealized form of government. They were practical politicians doing the best they could to address what they experienced as obstacles to achieving an acceptable level of justice in society.

Accountability

Of course, the Constitution is merely a piece of paper. Its worth rests in the extent to which it is made to work as a system of rights. The philosophers who studied government in the 16th and 17th Century observed that absolute power is a corrupting force. The American thinkers who struggled with a form of government for our states and nation concluded that not only must power be dispersed but some system of accountability must be built into that system. In our constitutional system, the Courts provide the means to hold the Congress, the President and the state governments accountable to the constitutional limits.

Throughout our history the Courts have been the guardians of our liberties. As is true with any institution, the judiciary is no better than the people who operate it. Over history the course of judicial protection of liberty has been anything but consistent. Part of the explanation for the inconsistency is the changing attitudes toward the power of the national government to limit state invasions of individual liberty. For the first 40 years of federal court history, national power was dominant in the view of the Court; politicians including Jefferson, Madison, Monroe and Jackson did not share that view. For the next 30 years, states asserted their "sovereignty" to the extreme, culminating in a direct

challenge to federal power and the Civil War. The Civil War Amendments settled the general legal questions surrounding federal powers but the Courts construed the Amendments narrowly permitting the states considerable powers in restricting personal and civil liberties. In the post World War I era the Courts began to recognize the values expressed and implied in the Bill of Rights and for the next 50 years the federal courts were at their apex as the guardian of liberties. Since the 1970's the Supreme Court and hence the federal courts, have taken a much more reserved position, deferring to the legislative and executive branches to fashion individual protections. Congress, and many state legislatures, has indeed enacted categorical protections for speech and religion and protections for special classes such as disabled persons and the aged. But in the past 20 years, a much more conservative court has ruled that Congress lacks the power to impose broad protections on the states.

With that brief excursus into history, we return to our current situation. Our liberties are held hostage to claims of national security by a government that is hostile to personal freedoms. We are in a "war on terror" that has no end. In the name of fighting that never-ending war, Congress has enacted sweeping provisions for increased law enforcement power and restricted protections against unreasonable searches and seizures. Until the politics of the Congress and of the Executive branch changes, our only protection will be the Constitution and the courts. Will the courts allow the government to conduct secret searches? Will the government be permitted to conduct investigatory searches without a particularized warrant and without judicial authorization? Will the government be able to arrest a citizen and hold them indefinitely without charges and without a trial?

In passing let me observe that the questions I just posed have a familiar ring to them; they almost mirror the grievances against the King recited by Thomas Jefferson in the Declaration of Independence. But our question is whether the Constitution is suited to deal with modern problems. As noted, our history reveals that we have faced crises before. I have cited the larger crises to demonstrate that our current crisis is hardly unique even if you compare it to war time. In fact it might be instructive to review "war time" actions by the government in dealing with national security issues. In the interest

of time and focus, permit to review just one such action with which I believe you are all familiar. In World War II, the President acting as Commander in Chief, authorized exclusion and incarceration orders for the West Coast to remove and imprison tens of thousands of Japanese-Americans, 80,000 of which were citizens of the United States. Two years after the “detainees” had been locked up, their case reached the US Supreme Court. The government won that case in a 5-4 decision over strong dissenting opinions. Put aside the fact that we subsequently learned that the government lied and misrepresented the facts in the judicial process and the fact that the government action and the court decision came to be a national disgrace. The point is that the constitutional processes were available and functioned. I suppose it is worth noting further that due process of law does not guarantee the correct result. But Dred Scott could have told you that 150 years ago.

How does the Constitution respond to crisis like the national security threats we face? If the claim is that the Constitution isn't up to the task, we should at least note what the Constitution does provide. To begin, we need to understand that the Constitution is the text and the gloss put on that text by over two hundred years of judicial interpretation. To boils things down to a manageable discussion, generally, the Constitution does not recognize “emergency” as a justification for suspending the requirements of the Constitution. Presidents have frequently made that claim in one form or another, and in one context or another and the Court has universally rejected it. The meaning is clear; the constitutional processes are deemed adequate to deal with emergency situations. And what are those processes? Again cutting to the chase so to speak, since almost no constitutional rights are absolute, the government can infringe those rights if and only if it can show that it has a compelling governmental interest and that its action is necessary to serve that interest. It is not easy for the government to meet this exactly standard and that is as it should be. Infringement of constitutionally protected rights should not be easy.

The long history of government claims of national security as a justification for deprivation of rights is instructive. From 1798 when the Alien and Sedition Acts suppressed criticism of the government policy and officials to 2001 and the US Patriot

Act, the government agenda is driven, as much by partisan interests as it is by security needs. Just like Madison Avenue selling the latest fad of over the counter medicine, politicians drum up the need in order to sell the product. As Lincoln is reported to have advised, you can fool some of the people some of the time. But sooner or later enough people cannot be fooled. And at this point we should be reminded that the Constitution places the ultimate power in the people. In our history, the political solution has removed restrictions on civil liberties that were enacted in times of crises; that is the solution which the Bill of Rights Defense Committee has so effectively advanced. Over the long haul, that may be a satisfactory solution. But people sitting in prison without charges and without trial understandably, do not want to wait- nor should they have to. And when you apply for a job ten years from now and are denied because of information in your government file which information was gathered in a secret search 10 years earlier, long haul solutions don't help much.

Our Constitution is a piece of paper, a contract between the people and the government as some like to say. But like any other contract, it isn't worth much if it can't be enforced. The terms of the contract are not obsolete nor do crisis conditions require setting the contract aside. Its terms provide for dealing with crisis and its processes are adaptable enough to deal with contemporary problems. But your government has not asked for expedited processes to deal with the world as it exists today. Instead it has asked to be excused from meeting constitutional standards in a broad array of situations.

The framers of our constitution created a government based on their hopes for a better, more just society. They had every reason to respond to their fears but they chose a more promising path. We have legitimate fears today just as our founders had legitimate fears. Are we not able to deal with those fears without sacrificing our hopes for a better, more just society? Are we less able or courageous than our forefathers? We are better educated, more experienced and have more resources than our American ancestors. Surely we can find the strength, courage and wisdom to establish a proper balance between liberty and security.

1955 marked the 200th Anniversary of the birth of Chief Justice John Marshall, the great lawyer, statesman and jurist who defined our constitution and establish the rule of law for our nation. In that celebration, Chief Justice Earl Warren noted Marshall's many accomplishments then turned to the balance between stability and freedom. For all his accomplishments, Marshall "could not perpetuate either stability or freedom. Every generation must earn those things for itself. Our problems ... are as pressing as [the problems] in the days of John Marshall and call for the same devotion to constitutional principles." This year marks the 250th Anniversary of John Marshall's birth and the message remains the same. Each generation must earn its freedom. Are we up to the task?