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by Dean Roy L. Meek

I am honored to join in the celebration of the Bicentennial of the Constitution of the United States. This is the celebration of a wedding--the wedding of politics and law that created and sustains a system of government that is our most fundamental birthright as a free people. This bicentennial celebration should be, I believe, an occasion for the remembrance of, and a rededication to, the goals, values, and aspirations of those who established this Constitution. It is a time for taking stock of where we now stand in relation to the achievement of these fundamental principles. We must remember that the founding of the Constitution is the beginning and not the end of the process of self-government. Let us think and consider and reason together.

What is this thing that we refer to simply as "The Constitution"? It is a document that contains the fundamental law that guides the operation of our polity. It specifies the powers that the national government may exercise. It establishes and defines the governmental structures that will exercise these powers. It prescribes the method for the selection of those persons who will make binding decisions within these structures. It describes the processes through which governmental powers are to be exercised, and it specifies the limits that are imposed upon the powers of government. In short, it establishes the criteria for determining political legitimacy within our

political and legal system. The document reflects the character of its creators and it continues to shape the possible futures of a people. Constitution making is the ultimate political act and its product is the organic law of the polity. The United States Constitution is a crystallization of the interests, the understandings, and the prejudices of its framers and it guides our political thoughts and actions. Almost every political controversy of consequence in American politics introduces a constitutional dimension into the debate. Our Constitution is not a powerless symbol; it is the centerpiece of our law and politics.

One of the central debates of American life is whether the original Constitution was intended to establish a democracy. In some most critical ways, it is without doubt based upon eighteenth century versions of democratic assumptions and aspirations. It is clear that the framers saw the people to be the basis for the authority of the Constitution. The preamble clearly asserts that it is the people who have created the document. There can be little doubt that the consent of the governed was accepted as the source of legitimacy of the government created by the Constitution. The members of the convention held themselves responsible and accountable to those whom they represented. They well understood that their work would come to naught unless it was accepted and ratified by the elected representatives of the people in the various states.

The Constitution did not create a definition of the people. It accepted the

various definitions that were present in the existing states. In some cases, those enfranchised included blacks, aliens, persons without property, and in at least one case, some women. It is true that the concept of the people that prevailed in that day was narrower than our current view. Nevertheless, it was at least as broad as that held in the golden age of Greece which is so often proclaimed as our model of "pure" democracy. It was certainly broader than that which generally persisted in the world of 1787. If not democratic in our modern view, it was at least thoroughly republican in nature. All governmental power was firmly fixed in the hands of the elected representatives of the people. Even the most critical view cannot hold that the people who were to share the suffrage were limited to a narrow aristocracy of birth or an oligarchy of wealth and privilege. Although the definition of the people was cramped and narrow by today's standard, it is most important to note that the Constitution established processes that could be, and have been, used to more broadly define the people. These changes have not required any fundamental alteration of the basic conceptions and assumptions of the system.

One of the most fascinating stories of the American polity is the dramatic broadening of our definition of the people. The extension of the right to vote has been the most frequent subject of the amendments to the Constitution. The broadening of the suffrage, i.e., the redefinition of the people, is a central goal of the 14th, 15th, 19th, 23rd, 24th, and 26th amendments. No one of these amendments in itself creates a

democracy; they each represent an extension of the reach of a functioning democracy. Can one really seriously believe that democratic government does not exist today because the vote may be denied to sixteen-year-olds or resident aliens? One should remember that each of the extensions of the definition of the people represents a determination by an extraordinary majority of those who held power to share that power with some broader set of persons. One should not read history backwards in judging the democratic spirit that stands at the foundation of our constitutional system.

The founding fathers, like all of us, were the product of their place in the flow of history. They had some notions of the lessons of history and some understandings of the political ideas that history provided to them as tools. They had experience as practical men of affairs with the consequences of tyranny and political and economic instability. They had aspirations for a secure, prosperous, orderly, and free future for themselves and their posterity. They had the ambivalence about government that weighed so heavily on most of the children of the enlightenment. Government was accepted as necessary for order, security, and liberty to prevail and yet, government was understood to be the greatest single threat to the destruction of these very values. From this perspective, the founding fathers added their efforts to the historic search for the golden mean. They chose an instrument that was consistent with their experience to achieve their goals. The instrument was a written Constitution that would establish and limit a government without limiting the ultimate power of the people.

The Constitutional Convention was marked by both consensus and conflict -- consensus enough to make the task they had undertaken possible and conflict enough to continually remind them throughout that summer of 1787 that it was important. There was a broad consensus that a stronger central government was necessary to sustain the nation's independence in a hostile world and to develop an acceptable level of internal social and economic harmony. There was consensus that the power and influence of the states must be preserved and that unanimity must be achieved within the Convention on the final product if the document was to have a chance for acceptance and ratification. There was conflict among various theories of good government. There were competing notions of what elements should be contained in the document. There was very significant disagreement over which political and economic interests were to be served. It was the consensus that it was critical that they be successful and the real differences in interests and opinions made the Constitution a "bundle of compromises."

The product of this convention was a rather typical political document created in a democratic polity when no single interest has the power to prevail. It represented a set of compromises among a complex set of conflicting political goals. These were made possible by a shared determination by the participants that they should all remain a part of a common political community. The provisions of the document were hammered out on the anvil of intensely held political interests by those who were dedicated to

maintaining and extending their own political power. As a product of intensely fought political struggles, the Constitution was well suited to guide the politics of a nation. It did not represent a clear set of detailed substantive policy conclusions; it did provide a process and structure through which a free people could continue to struggle for justice and advantage in an orderly fashion over time. It was flexible enough to provide vitality to the politics of a growing and developing nation.

There were some core conceptions that were widely shared and that were clearly embedded in the document. Legitimate government rested on the consent of the governed. There was to be a sharing of political power by national government and the states. Government was to be limited and guided by the rule of law. Change in governmental power must be possible; but it should be relatively difficult to achieve. They sought to balance stability and change by requiring that a broad consensus of the people and their representatives be developed before major change could occur. Conversely, they did not attempt to provide any significant limits on the consensual preferences of the people. To do so would be inconsistent with the concept of a free and self-governing people.

The fear of excessive power of the new central government was, and is, a central dimension of the American constitutional system. There was an understanding that no mere written document could preserve liberty. The fundamental principles embedded in its provisions must be internalized by the

people. Its goals could only be achieved if the people were provided with formal mechanisms for the preservation of their liberty. The central feature of the Constitution that was designed to achieve this goal was a complex and delicate balance of power among the various structures that were empowered by the Constitution.

Liberty of the individual was to be preserved. Government was to be limited. The fundamental concept was that no person's life, liberty, or property could be legitimately taken by government unless there were reinforcing decisions taken by each of the three branches of government. In the simplest terms, there must be a general law enacted by a majority vote of each of the houses of a bicameral legislature that was representative of the people and the states. There must be an application of law by the executive branch headed by the president indirectly selected by the people. There must be a finding of a violation of the law by an independent judiciary composed of judges appointed for a term of good behavior and, finally, any actual burden must be imposed by the executive branch and it could be removed by a pardon of the president. Each of these activities was to be guided by the Constitution as the supreme law of the land. Changes in the Constitution could only be made by an amendment approved by a two-thirds majority in each house of the Congress and the ratification by three-fourths of the states. Thus, the whole structure of the system was designed to preserve liberty by requiring a broad consensus before the government could act. This kind of system could lead to stalemate and inaction. But,

to the framers, better governmental inaction than tyranny. There was a constitutional mechanism for achieving integration of the system. The Congress could, by a majority vote in the House and a two-thirds vote of the Senate, remove any executive and judicial officer through the process known as impeachment.

The political nature of the Constitution results in much of the document being written in general terms, and its use over two centuries has rendered the modern implications of even some of its more specific language unclear. Therefore, one of the most central issues of this and any written constitution is, how will it be interpreted and applied? Perhaps, more importantly, who shall have the ultimate authority to interpret its words and provisions in a final way? This has always been an object of concern and conflict in the American polity. This is the most important operational issue of any written constitution and the central focus of this paper.

The debate over constitutional interpretation in the United State has revolved around the concept of judicial review. From the earliest days, there has been dispute over whether the courts should be able to hold actions of the legislative and executive branches to be unconstitutional, and thereby, null and void. There were proposals in the Constitutional Convention to formally institute some form of this doctrine. Hamilton clearly argues that this concept is included in the Constitution in Federalist Paper #78. The Constitution is silent on the issue. This important issue was one of those many

significant elements that the framers simply left to be worked out in another day through the political processes they had established in the Constitution. However, there has been general agreement that the courts should play some role in the process of constitutional interpretation. There has been much less agreement on the nature of that role and its implications for the functioning of the other branches of government. The two primary lines of argument can be traced to the competing views of the two old and often bitter political adversaries--John Marshall and Thomas Jefferson.

Although the power of judicial review had been assumed to be operative in earlier cases decided by the Supreme Court, the first example of a formal judicial determination that an Act of Congress was in conflict with the Constitution and unenforceable occurred in the case of Marbury v. Madison in 1803. In this case, Marshall speaking for a unanimous court, argued that, "It is emphatically the province and duty of the judicial department to say what the law is."(1) The implications of that pronouncement were worked in the following way. As the Constitution, by its own terms, was the supreme law, any statute in conflict with it must be unconstitutional and, thereby, null and void. The judges have the duty to hold it so. Any other judicial response would require the judges to violate their oath of office to uphold the Constitution. This argument has been read, and was probably meant to be read, to mean that there was a unique and final constitutional interpretative power lodged in the justices of the Supreme Court. Parenthetically, as a

good Federalist, Marshall did not work out and make explicit the implication of his argument that the members of the first Congress, which was dominated by his political party, had violated their oath of office in passing this unconstitutional Act as did President Washington in signing the Judiciary Act of 1789. Each member of Congress and the President, of course, also must take an oath to uphold and defend the Constitution.

The Jeffersonian argument can also be stated quite simply. The Constitution has established three independent, coordinate, and co-equal branches of the national government. Each of the persons serving in these offices is responsible to the Constitution and the people. Each must consider his or her constitutional duties as they perform their official responsibilities. Therefore, each has the final power to interpret the Constitution as it governs the exercise of that branch's duties and responsibilities. The Justices, under this formulation, do have the authority to interpret the Constitution and the duty to be guided by it in cases that are properly before the Court. However, the other branches are not bound to accept or support these interpretations except upon their own sound discretion. Thus, a court is free not to enforce a law or action that it deems to be in conflict with the Constitution, but it has no power or authority to impose that interpretation on the other branches of the national government. The central issue is not whether the courts have the power to interpret the Constitution and exercise the power of

judicial review; it is the uniqueness of that power and its power to control the activities of the other structures of the national government.

These shifting perspectives on the historic debate over the power of constitutional interpretation define one of the most fundamental issues of American constitutionalism, and unfortunately, one of the least understood of American law and politics. This debate is not only of historical interest. It is a recurring issue of American law and politics. It has been refueled by recent speeches by Attorney General Meese and Justice Thurgood Marshall and the reactions to these speeches by the press and the legal community. It was a central element in the "Watergate Affair" and it is being raised as an issue in the current "Iran/Contra" controversy. It will be the critical issue as the Senate debates the confirmation of Robert Bork.

Paradoxically, the Jeffersonian view has prevailed in American law and the Marshallian view has been accepted as a fundamental part of our political ideology. Incomprehensibly, much of the acceptance of Marshall's claim in the political arena is based upon the false belief that his view is directly required by the Constitution and is necessary in a democratic form of government. It is most important that we consider and come to understand thee arguments and their implications for democracy in America.

Let us look at the functioning of the constitutional interpretation in the American legal system in an over-simplified sequential

pattern. Anyone who has followed any important congressional debate must know that one of the central elements of such debates is the question of how proposed legislation squares with the Constitution. Self-evidently the exercise of the congressional law-making power is punctuated by issues of constitutional interpretation. It is obvious that important pieces of proposed legislation have been defeated or significantly modified by the belief of a majority of the members of at least one house of the legislature that elements of the proposal were inconsistent with the Constitution. Such a determination represents a "final" interpretation of the Constitution relative to that particular proposal--at least for the time being. There is no opportunity for any other branch of government to review or alter this negative judgment. The appeal, if there is an appeal, is to the people through the electoral process.

Similarly, presidents have often vetoed bills proposed by the Congress on the ground that some element of the bill was in conflict with the Constitution. Constitutional interpretation often is a significant component of veto messages of presidents. Under the Constitution, these presidential vetoes are final unless overridden by a two-thirds majority in each house of the Congress. In that sense, the Congress, again, has a final power to interpret the Constitution.

Any bill that becomes law is, and has always been presumed to be, constitutional unless its constitutionality is raised by a party in an appropriate case in a court of law. One of the options that is available to

any judge is to determine that the statute is null and void because it is in conflict with the Constitution. However, if such a decision requires some affirmative act by government to render it enforceable, the court must rely on the executive branch for the enforcement. Executive actions are guided by the sound discretion of the President, and in cases where appropriate, the unlimited power of pardon. Presidents such as Jackson and Lincoln have purposely and clearly refused to enforce specific rulings of the Supreme Court.

If the Congress rejects either the judge's interpretation or the President's response to his duty of enforcement, it may remove the offending party from office through the process of impeachment. An alternative approach is available. The Congress may, by a two-thirds vote in each house, propose a constitutional amendment to correct the "mistake" of the Court. If ratified by three-fourths of the states, the amendment becomes a part of the supreme law of the land. The 11th, 14th, 16th, 18th, 24th, and 26th amendments are examples of the successful use of this technique. Each of these amendments overrules specific constitutional interpretations of the Supreme Court. Thus, in the final analysis the legal relationships under the Constitution identify the Congress as the final governmental interpreter of the Constitution. The appeal from such judgments is always to the people through the electoral process. Therefore, the original notion that the people are the ultimate interpreters of the Constitution is fully preserved in the technical operation of the American legal system.

One additional question in this regard: Are the people in general obligated to follow the "law" made by the court in this process of constitutional interpretation? As we have rejected the abhorrent notion of common law crimes, i.e. judicially created crimes, from the earliest days, the question would appear to be nonsensical except that this issue continues to be broadly raised as a self-evident truth and there have even been allegations that Supreme Court decisions become a part of the supreme law of the land. One needs only to read the quasi-legislative opinion in Roe v. Wade(2) to quickly understand the potential for mischief inherent in that growing acceptance of the court as a legitimate source of law in this society.

The central feature of law that binds individual behavior is that any law enacted by the legislature, enforced by the executive, and that results in an adjudication of guilt by the judiciary can subject the individual to the forfeiture of his life, liberty, or property. Can such an outcome flow from a judicial judgment? It obviously can in the case of persons who are parties to the case that is being decided by the court. Named litigants can be punished for contempt of court if they do not follow an order of the court, assuming that the executive branch sees fit to enforce the judgment and the President does not choose to provide a pardon. However, a judicial ruling does not, and cannot, empower the executive branch to enforce the court's interpretation of the Constitution on persons who are not the specific subjects of a specific court order.

Two examples may clarify this important

point. The Supreme Court has held that prayers in the public schools are contrary to its interpretation of the Constitution. What happens, as a matter of law, if a particular school continues to have prayers? Some private individual with standing to sue may seek a court order stopping that particular activity. However, there can be no punishment ordered by the court for the activity prior to a new order of the court that is addressed to that specific official. Thus, as Jefferson has argued, the court is limited to interpreting the Constitution to those cases that are before it and no other person is legally bound to accept that interpretation. School desegregation in the South provides another very instructive example. There was very little desegregation in the years of 1954 to 1964 when the only national ruling requiring desegregation was a series of decisions of the judicial branch. One should also remember that no one was, or could be, punished for violating the general dictates of the court during this period. There was massive desegregation immediately after the passage of the Civil Rights Act of 1964 that specified generalized duties and provided for executive enforcement. The relative efficacy of a judicial interpretation and a statute enacted in pursuance to the Constitution by the Congress should be self-evident.

There is one other element of the Jefferson-Marshall debate that needs to be introduced before we can fully understand what it means for constitutional government and democratic values to say that Marshall's ideas have prevailed in American political ideology. The second major confrontation

between Jefferson and Marshall developed in the Burr(3) case in 1807. In that case, Marshall issued a subpoena duces tecum ordering Jefferson as President to appear before the Court and produce certain documents and papers under his control. This order, of course, assumed that a court had the power through compulsory process to force the President to carry out a duty defined by the court. This of course was the sole precedent for this principle that became central to the "Watergate affair' when Judge Sirica ordered President Nixon to provide certain tapes to the Court. In the first Sirica case, President Nixon provided the information requested, but he rejected the power of the court to impose its powers of compulsory process on a sitting President. In the second case, the President initially resisted and the Supreme Court upheld the legitimacy of the subpoena. In law, the Nixon(4) and Burr cases were nearly identical. However, the final results of the two cases were very different.

In the Burr case, Jefferson ignored and did not comply with the subpoena and prepared himself to resist any judicial finding of contempt. However, Marshall made no effort to enforce his order. At the end of the trial, Jefferson sent a message to Congress asking for the impeachment of Marshall. The recommendation might well have been followed if the Congress had not been so deeply drawn into the events that were related to the growing threat of war with England.(5) The final Nixon story is almost too familiar to tell. Nixon complied with the order after the Supreme Court ruling. The revelations included in the tapes so damaged his

credibility that he resigned from office under the threat of impeachment. The Constitution had not changed. The law had not changed. What had occurred to so dramatically shift the power relationship among the branches of government? In a phrase, political expectations.

In order to indicate that the Nixon case is not an isolated incident and to evade too great concentration of our thought on the character of Richard Nixon, I should add that the Court has alleged in the case of Powell v. McCormick(6) in 1969 that the Congress is bound to follow the Supreme Court's view of the provisions of the Constitution that describe the internal procedures of Congress. However, in this case the Court did have the good judgment not to issue any order to the Congress to act in any particular manner. In addition, there has been a pervasive assumption in the press in recent weeks that the Court would have the power to order the release of the most private personal documents of the President even in the area of foreign affairs in the on-going Iran/Contra controversy. Please remember that the fundamental decision in United States v. Nixon was that it was the Court and not the President who could decide the limits and scope of executive privilege.

The political change that has so dramatically concentrated the power to finally interpret the Constitution in the hand of the court in the public mind has been the result of a slow erosion of faith in democracy in America. The repeated extreme claims of power embedded in pronouncements of the Supreme Court have been reinforced by the

growingly powerful legal profession promoting its own self-interest in the hegemony of complicated legal processes. This trend has been well received by a naive and frequently self-serving and anti-democratic press. This set of forces has led many Americans to accept John Marshall's extreme claim that the Supreme Court is the ultimate interpreter of our Constitution. Even political scientists have come to favorably recite Justice Hughes' dictum that, "we live under a constitution, but the constitution is what the judges say that it is."(7) This is more than judicial arrogance. It is a very serious modification of the central concept of our Constitution and a straightforward rejection of the democratic aspirations of its framers. Even in the context of this modern sophistry, without doubt, the Constitution assumes and dictates that the people are the ultimate interpreters of the document.

Rousseau once wrote that, "The first man who, having enclosed a piece of ground, bethought himself of saying THIS IS MINE, and found people simple enough to believe him, was the real founder of civil society."(8) In a similar vein, I would argue that, "The first judge who in deciding a case, bethought himself of proclaiming that the Court is the ultimate interpreter of the Constitution, and found the people gullible enough to believe it, seriously undermined our great experiment with democracy."

Although the arrogance and the attendant usurpation of governmental power by the judges is quite distasteful, it is the subtle and sinister acceptance of this notion that the people should rely on the least

accountable branch of government to protect themselves from themselves and their elected representatives that tends to crush the life out of the democratic spirit that must be central in a free society. It has contributed to a less responsible Congress, a more timid executive, and a frustrated and cynical citizenry. The proclamation of this doctrine is dangerous; the acceptance of the doctrine is devastating.

There is a democratic spirit that underlies our Constitution. It provides ample mechanisms for the people to govern themselves. However, these provisions cannot preserve liberty and stability unless the people choose to jealously preserve and effectively use them. Although judges may to some degree be at fault for the growing claims of judicial power, the real responsibility must always, in a democratic polity, rest with the people themselves. In conclusion, I must agree with the great jurist Learned Hand when he wrote, "For myself it would be irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."(9) People or the Judges; the choice is ours!

ENDNOTES

1. Marbury v. Madison, 1 Cranch 137 (1803).

2. 410 U.S. 113 (1973).

3. United States v. Burr, 25 Fed. Cas. 187 (1807).

4. United States v. Nixon, 418 U.S. 683 (1974).

5. See Alfred J. Beveridge, The Life of John Marshall (Boston: Houghton Mifflin, 1919) pp. 533-545, for a detailed treatment of this reaction.

6. 395 U.S. 486 (1969).

7. See Henry J. Abraham, The Judicial Process (New York: Oxford University Press, 1975) for example.

8. Jean Jacques Rousseau, Discourse on the Origin of Inequality, 1755.

9. Learned Hand, The Bill of Rights (Cambridge: Harvard University Press 1958) pp. 93-94.