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THE TASK AHEAD: MAKING THE CONSTITUTION WORK FOR PLURALISM

Dr. Nicholas N. Kittrie*

Distinguished guests, ladies, gentlemen, partners in the ever-continuing effort to improve the human condition — here and abroad. This symposium was put together not by and for governments. It was produced by many diverse individuals and sectors in South African and United States society who believe that flag waving, ideological confrontation, and a “rush to judgment,” do not always guarantee just, stable, and dynamic democratic governance. This symposium, therefore, was an effort at sharing communication, understanding, and conciliation.

We have presented the American facts as they exist. We showed you a few blossoms, we showed you many blemishes. We did it by design, because we wanted you to see the reality here. We did not try and create for you here what was known in Czarist Russia as a Potemkin Village — the carefully selected, spruced up and newly renovated village to which foreign dignitaries were invited to see what was described as “a typical village in Czarist Russia.” We did not present to you some idealized paradise. But we did not show you these realities in order to discourage you. One member of the South African delegation indeed insisted, while speaking to me: “This is all so discouraging, what are we supposed to learn from you?” What we hope you can learn is that progress is slow, that we must persist in our efforts, and that there are appropriate rewards at the end of our journeys.

The symposium was not intended solely or primarily as a didactic exercise for the benefit of our South African colleagues, who have come a long distance and under great constraints of time to join with us in Washington, D.C. The symposium was intended equally as a stock-taking for us Americans, some two hundred years after the making of our Constitution. It was intended as an honest effort to assess how our constitution has contributed to the process of our national maturation, and

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has served our national needs and aspirations — aspirations for governance which fosters life, liberty and the pursuit of happiness, in the words of our Declaration of Independence.

The symposium will hopefully benefit all of us taking part in this unique international and intercultural exercise. It will hopefully enhance our learning from the lessons of the past — errors and mistakes, as well as successes — to permit the building of a better future. The symposium was built on the premise that men and women can learn from the experiences of other men and women, that one nation and state can hopefully learn, however much or little, from the life, struggles, and attainments of other nations and states.

May I, at this late hour, attempt to redefine three *terms* we, the symposium's planners, have been struggling with in putting this event together. These terms have been critical in our joint work in the past two days, and in days and years to come. Let me address the first term, which has become a popular buzz word — constitution. Constitutions, as "formulas" for the governance of men, and women, have indeed been known since classical times. Aristotle is reputed to have assembled some 158 constitutions reflecting the governing rules of the ancient Greek city-states.¹

The American rebels against English colonialism not only advanced a Declaration of Independence in 1776, but eleven years later, in 1787, followed it with a constitution, which proclaimed life, liberty and property among the institutions requiring protection. The leaders of the French revolution likewise articulated their major goals and slogans of Liberty, Equality and Fraternity, giving them expression in the 1789 Declaration of the Rights of Man — or the Rights of Humans, as we would say today.

What is a constitution? A constitution, wrote Yale Professor Walton Hamilton in 1930, "is the name given to the trust which men and women repose in the power of words engrossed on parchment to keep a government in order. The writing down of the fundamental law, beyond peradventure and against misunderstanding, is an important political invention. It offers exact and enduring language as a test for official conduct [but] at the risk of imposing outworn standards upon current activities."²

1. K. VON FRITZ & E. KAPP, *ARISTOTLE'S CONSTITUTION OF ATHENS AND RELATED TEXTS* (1950).

2. 4 *Encyclopedia of the Social Sciences* 255 (1934).

How many members of a population, of what gender, age, race and position, are entitled to create a constitutional document and endow it with authority over themselves and over all the other population which occupies a country or state? When democracy was first founded in ancient Athens, during the Fifth Century B.C., women, foreigners, and slaves were kept out of the constitutional and governmental processes. When democracy was revived in the New World — in the newly created United States — after practically a two-thousand year eclipse, indigenous people, slaves, women, foreigners, and the unpropertied classes were again denied a voice in government. Only in 1870 were Blacks granted full rights of franchise, only in the 1920s were women accorded the right to vote, and only in the 1930s were Native Americans permitted access to the ballot, in this country which views itself as the modern embodiment of constitutional democracy. The struggle to attain these rights in this republic was not easily won. I have indeed written a volume on this subject entitled: *The Tree of Liberty: A Documentary History of Rebellion and Political Crime in America*.³

The much wider distribution of political power in contemporary America, and in other democracies, does not fully supply the answer with regard to another and continuously haunting question as to what right one group of people, one generation, has to constitutionally bind its successors. Radical challenges to the supposed claims of a constitution over time and over new generations are being raised not only today and here, but were raised a century and a half ago. Lysaner Spooner, an American abolitionist lawyer from Massachusetts, set out the claim in his 1870 treatise, *No Treason*, that the constitution as then existing was unconstitutional.⁴

With the prospects of hearing this very argument reverberating, in our country and in yours, today and in years to come, it is essential that we always remember that a constitution cannot be constantly enforced by the sharp points of bayonets. For a constitution to persist, to survive, to thrive, indeed to become transcendental, it must rely on the people's continuing support — today, tomorrow and in the future. It must rely on an inter-generational acknowledgment of its ongoing legitimacy. It must count on a continuing popular subscription to its tenets.

That is a most difficult task. France saw several constitutions come

3. Nicholas Kittrie, *THE TREE OF LIBERTY: A DOCUMENTARY HISTORY OF REBELLION AND POLITICAL CRIME IN AMERICA* (1986).

4. L. SPOONER, *NO TREASON: THE CONSTITUTION OF NO AUTHORITY* (1870 & photo. reprint 1966).

and go since its own revolution of 1789. The American republic has been able to accommodate new aspirations and the wishes of new and diverse generations through a process of constitutional amendments and judicial interpretation. Ask yourself, will you be satisfied with a constitution for two years, five years, a decade, a generation? Or should you search for the greater stability and tranquility that might come from a longer-lasting constitutional formula?

The second term I wish to address is that of federalism. American federalism has been the product of the American colonial heritage — under which each of the colonies developed somewhat differently — politically, economically and socially. But federalism in America stands for much more than the ever-changing balance between national-federal and state-local functions, laws, and safeguards. It stands for an elaborate system of local self-government, on the county, township, municipal, school board and special purpose district level. It stands for a separation of state and church, separation of state and labor, separation of state and the business world — letting municipalities, school boards, labor unions, businesses, churches, and political parties govern themselves. Broadly speaking, this approach reflects an initial belief, and an ongoing confirmation of the conviction, that the best government is that closest to the people — the one most responsive to their smallest and most direct interests and concerns. Accordingly, I can assure you that not all second, fourth, or sixth grade classrooms in my state of Maryland discuss the same chapter in the same book every day of the year. Unlike the boast of one French Minister of Education that if the day is Tuesday, the 2nd of February, and the time is 9:30 in the morning, all French fourth grade school children throughout the land are invariably discussing the fall of the Bastille, in my state, the scheduling of the discussion of George Washington's crossing the Delaware is left to the locally elected school board (elected by parents), the school principal and individual teachers. It is for this reason that I, personally, usually take a stronger interest in the issues and electoral events of the school district where my children earn their education, than in the supposedly more "important," yet more "distant," issues of state and federal elections. So, when you hear the term federalism in America, remember that what we generally mean by it in American English is the broad decentralization of political power as well as grass roots citizen involvement, as contrasted with governance by distant bureaucracies. Thus, to us federalism stands for the very opposite of this century's, and now hopefully extinct, leftist and rightist totalitarian and authoritarian regimes.

Federalism, to reiterate, stands for the greater exploration and implementation of sub-state forms and units of self-government by pluralistic states. It stands for the pluralistic theories and doctrines developed by the liberal and often socialist thinkers of pre-World War II England and the Continent. These people, including my own teacher, Harold Laski, at the London School of Economics, were opposed to the notion of one encompassing state sovereignty — which often ignores the rights, interests and aspirations of smaller and more specialized human groups and communities: such as extended families, labor unions, cooperatives, and local councils — all of which can better meet the popular needs. The 19th century notion of the nation-state, a unitary entity in which one “nation” resides in one “state” is outdated. It is not responsive to the pluralistic realities in countries such as the United States and South Africa.

Finally, I wish to comment briefly on yet another popular but also greatly misunderstood term — democracy. There is hardly one person left in the whole world who would openly admit that he or she is against democracy. Democracy is the ultimate buzz word at the end of the 20th century. We all love it — but often we cannot readily agree about its contents. Is democracy merely an entitlement to take part in a multi-party and secret election? Or does it also mean an independent judiciary and a high degree of privacy to be accorded to the populace? Moreover, does democracy’s guarantee of liberty conflict with the quest for equality? And does democracy require a civil culture and a certain social, cultural, and economic, as well as political, quality of life?

It will not do to merely proclaim our support for democracy, as an all encompassing creed. The fathers of Judaism, Christianity, and Islam, as well as the proponents of Pan-Slavic, Pan-Arab and other “Pan” movements, all originally promised that the full brotherhood of men and women and the millennia will be attained under their creeds and political unions. Yet more blood has been spilled in intra-religious, intra-racial, and internecine conflicts and warfare than has been shed in wars between strangers. Waving vigorously the newly sewn flag of democracy — without working out its contents, without balancing the rights of the multitudes of diverse ethnic, cultural, linguistic, and economic communities that make up the modern pluralistic state — is not likely to produce justice and tranquility. Without balancing the rights of the ‘haves’ and the ‘have nots’ — an emphasis on a relatively open and even fair electoral system is a mere structure or process with little inner substance, content or life.

We must be careful, finally, to promote enlightened interest and in-

volvement of the citizen in the workings, and restructuring, of his or her democratic government. Voter apathy is indeed one of the greatest dangers for the future of democracy. Many analysts of the Athenian democracy, as I pointed out in my opening address, have concluded that the main accomplishment of Athens was its ability to maintain the citizenry's interest in the public affairs of their city-state. Through a greater reliance on direct democratic processes, Athens was able to keep its people involved in the legislative, executive, and judicial workings. Contemporary democracies, including America, have transplanted the Athenian democratic idea to larger continents with populations in tens and hundreds of millions. They had, thus, possibly placed too much reliance on the people's delegation of powers to elected but distant representatives. Unless this distance between the citizen and his or her government is overcome by innovative techniques of governance, democracy, whose day — after 2000 years — has possibly finally come, may continue to be an endangered species. It is to prevent the dangers of alienation between the people and their system of governance that we must do our utmost.

At the same time, we must be careful not to confuse democracy with mob rule, or with the lowering of the standards of justice to a lowest common denominator, the possibility of which was the greatest fear of the ancient Greek philosophers. In the history of the world we have seen oligarchies, aristocracies and monarchies abuse their powers. We have seen abuse of power under tyrannies and dictatorships, under communism, fascism and nazism. It is imperative that we guard against an abuse of government and its powers in the name of democracy. It is imperative that we remember that in modern pluralistic societies we must protect the interests of all, old and young, rich and poor, black, yellow, brown and white.

We hope and pray that you move on and are soon on the road to creating for your country of South Africa an exemplary system of governance. You have in your society Gentiles, Jews, Muslims, and members of native African creeds. You have men and women of all colors, some better educated and others less educated, some living in the country and others living in the city. For all of them you must provide a friendlier, more receptive, more creative and sunnier place. And for your country you must earn the respect of the community of nations.

May the Lord bless you and us and may the lessons of history guide all our constructive endeavors.