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# Our Constitutional Faith

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In this address, I propose to discuss the concept of our Constitutional Faith.

The Constitution is an instrument of practical government; it is also a declaration of faith—faith in the concept of liberty, freedom, and equality.

As an instrument of government, it has served us well for almost two hundred years—a great testimonial to the wisdom and foresight of its framers and the judicial statesmanship and legal skill of its ultimate interpreter, the Supreme Court. For the Court's role, we owe a great and lasting debt to Chief Justice Marshall and his historic decision in *Marbury v. Madison*,[1] asserting the evolutionary character of our Constitution and the right and duty of the judiciary to declare void an act of Congress that contravenes the Constitution. His decision laid the foundation for the proposition that the constitutional safeguards of our fundamental personal liberties are instilled with an innate capacity for the growth necessary to enable them to meet new needs. The concept was well stated by Justice Joseph McKenna in his opinion in *Weems v. United States*:[2]

> Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power.

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1. 5 U.S. (1 Cranch) 49 (1803).

2. 217 U.S. 349, 373 (1909).

> Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

This power of the Court to act as the living voice of the Constitution and of the conscience of the people is responsible in great measure for the endurance and vitality of that great document.

As a declaration of faith, the Constitution, as I have said, is a testimonial to the commitment of Americans to the great goals of our revolution—liberty, freedom, and equality. Yet, at the time the Constitution was adopted, liberty, freedom, and equality were for whites only; the enslavement of blacks was continued even by those who fought to free this country from English oppression. The nation's commitment to equality in its fullest sense awaited the passage of the thirteenth, fourteenth, and fifteenth amendments, and the full implementation of these amendments has not been fully realized to this day. Nevertheless, the Constitution affords the continuing means to remedy injustices and remains the embodiment of America's commitment to protection of human rights.

But have we consistently kept our constitutional faith? The honest answer can only be, on the whole, yes, but on many occasions, no. All too often we have been disposed to question whether we can afford liberty. Some examples from our national history will demonstrate the validity of this observation.

An early Congress, containing men who either wrote or participated in the ratification of the Constitution, enacted the infamous Alien and Sedition Act. This repressive measure, abridging freedom of speech and of the press, was passed during the term of President Adams. It was enforced by lower federal court judges who sentenced political dissenters to jail and fines. Fortunately, the statute expired by its terms in 1801, but it took President Jefferson's election to bring about the pardoning of those sentenced under the law, and it was not until half a century later that the fines levied in its prosecution were repaid by an Act of Congress. In *New York Times Co. v. Sullivan*,[3] Justice Brennan, delivering the opinion of the Supreme Court, aptly observed that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."

The Alien and Sedition Act was the first, but by no means the last, law enacted or action taken by Congress abridging the liberties, freedom, and equal rights of Americans.

3. 376 U.S. 254, 276 (1964).

Although invalidating an Act of Congress was characterized by Justice Holmes to be "the gravest and most delicate duty that this Court is called upon to perform,"[4] the Supreme Court, nevertheless, has been impelled to declare unconstitutional actions of Congress abridging or denying the civil rights and liberties of Americans on a significant number of occasions. In fact, Professor Abraham in his book, *The Judicial Process*,[5] observed in 1968 that fifteen federal laws were struck down by the Warren Court on the ground that they infringed personal liberties safeguarded by the Constitution.

The Executive, all too frequently, also has lapsed in constitutional faith to the great impairment of our liberties. Thus, for example, all of the fifteen federal statutes invalidated by the Warren Court through March 1968, as abridging constitutional rights and liberties were signed by Presidents—not a single one was enacted over presidential veto. And to compound Executive failures in this regard, there are notable instances of Executive action without foundation of law, which deprived persons of their fundamental rights.

To mention only a few instances, our greatest President, Abraham Lincoln, unconstitutionally suspended the great writ of habeas corpus during the war between the states, permitting allegedly disloyal citizens in the nation's capital to be arrested and detained in military custody. The Supreme Court later held that the writ could not be suspended in the District of Columbia while the civil courts were open and functioning. President Truman, another great President, ordered the seizure and control of the steel mills during a time of national emergency without any statutory authority for doing so, and his action likewise was overturned. Other more recent examples of presidential disregard of the Constitution include, for example, the commitment of substantial American combat forces in Southeast Asia without a declaration of war by Congress and the continued bombing of Cambodia despite a congressional enactment cutting off appropriations for this purpose; the unjustified assertions of executive privilege to frustrate the public's right to information; presidential authorization of wiretaps for domestic surveillance without compliance with fourth amendment requirements; and the impounding of funds whose expenditure was explicitly authorized by Congress.

Thus, not only do hard cases make bad law, but times of crisis tempt Presidents to jeopardize basic liberties. In times of national emergency, it is important to recall what the Supreme Court said in the

4. Blodgett v. Holden, 275 U.S. 142, 148 (1927).

5. H. ABRAHAM, THE JUDICIAL PROCESS (3d ed. 1975).

great case of *Ex parte Milligan*:[6]

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Fortunately, some of the executive actions described above subsequently were declared unconstitutional by the Supreme Court. In the case of others, the Court elected to avoid decision by the exercise of its discretionary right to deny certiorari.

The Court itself, I regret to say, has also on occasion proved to be blind to the Constitution's true light, although to its credit it has overruled some of its most unfortunate decisions.

*Dred Scott*,[7] overruled by the thirteenth amendment, is almost universally recognized as one of the most ill-supported and ill-advised decisions in the Court's history. This decision, refusing to recognize the citizenship of a slave and declaring unconstitutional a federal law banning slavery in the territories, was not only legally unsound but has been characterized by some scholars as having been motivated by the political and sectional biases of certain members of the Court.

*Plessy v. Ferguson*[8] negated the great purpose of the equal protection clause of the fourteenth amendment, and although overruled in recent times, its discredited "separate but equal" doctrine has contributed to the perpetuation of the racial problems which still afflict us.

The decisions invalidating New Deal Legislation during the Depression almost brought our country to its knees and the country was saved only by Justice Robert's "switch in time."

In *Betts v. Brady*,[9] the Court let stand a state court decision holding that refusal to provide counsel to indigent defendants accused of serious felonies did not violate the Constitution. Twenty-one years later the unfairness of that denial was recognized by a unanimous Court in *Gideon v. Wainwright*.[10]

In the *Gobitis*[11] flag salute case, the Court, by an eight to one ma-

6. 71 U.S. (4 Wall.) 2, 120-21 (1866).
7. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).
8. 163 U.S. 537 (1896).
9. 316 U.S. 455 (1942).
10. 372 U.S. 355 (1963).
11. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

jority, rejected the good faith religious objection of Jehovah's Witnesses' schoolchildren and upheld their expulsion from school for refusing to affirm what they did not believe. The reversal of this decision three years later hardly undid the injustice of the prior decision for the parties involved.

A particularly egregious example of an unfortunate ruling is the Court's decision that allowed Louisiana to proceed with a second electrocution of a convicted felon after the first attempt had failed because the flow of electricity to the electric chair, while searing, was not fatal. If the second electrocution was not cruel and unusual in a constitutional sense, it is difficult to conceive of a case which is. And recently, the Court in a five to four decision, affirmed a life sentence, under a Texas recidivist statute, imposed on a defendant who committed three non-violent crimes involving the misappropriation of a total of $229.11. We are approaching the twenty-first century and not living in Dickens' time. This decision is an outrageous violation of the constitutional ban on cruel and unusual punishment.

I have thus far pointed out instances where the Executive or Congress has acted unconstitutionally and cases where the Supreme Court temporarily has failed in its responsibilities as the ultimate protector of fundamental individual rights. The case of *Korematsu v. United States*[12] is an illustration of executive action without congressional sanction sustained by the Supreme Court which, in my opinion, constituted an horrendous violation of constitutional rights.

By President Roosevelt's Executive Order[13] at the beginning of World War II, the government removed 110,000 persons of Japanese ancestry—70,000 of whom were American citizens—from their homes in California, Oregon, and Washington and imprisoned them in camps in the Rocky Mountain states. Despite a record devoid of any showing of a compelling governmental need for the removal, or any known instances of American-born Japanese aiding the enemy, the Supreme Court bowed to the passions of the time and found the relocation constitutional.

The people, too, our history records, have from time to time failed to heed the warning of Thomas Paine that "those who expect to reap the blessings of freedom must . . . undergo the fatigue of supporting it." There are far too many instances where they have either acclaimed or acquiesced in unconstitutional actions abridging fundamental rights

12. 323 U.S. 214 (1944).
13. Exec. Order No. 9102, 3 C.F.R. 1123 (1938-43).

and liberties. The popular support of Senator Joseph McCarthy and his trampling on the constitutional rights of citizens is a contemporary example. Indeed, substantial segments of the population have often voiced strong disapproval of actions of the Executive, Congress, or Supreme Court that are protective of constitutional rights and liberties. In fact, it was only a few years ago that public opinion polls disclosed that a majority of the American people favored a serious curtailment of many of the basic freedoms guaranteed by our Bill of Rights—the great charter of our liberties.

If thus far I have emphasized our failures to keep the constitutional faith, it is because of the overriding importance of keeping it. The record would be incomplete and totally distorted, however, were I not to make clear at this point that, despite these transgressions, on the whole our constitutional faith has been kept.

Presidents from the very beginning of the Republic have accepted decisions of the Supreme Court totally repugnant to their own conceptions of the Constitution, thereby ensuring that we are a government of laws and not of men.

Congress has railed against unpopular decisions of the Supreme Court, but, with rare exceptions, has not interfered with its role as a "palladium of liberty."

As I have already pointed out, the Supreme Court itself, notably during the Warren era, overruled many prior decisions restrictive of the rights of Americans to liberty and equality and, indeed, courageously enlarged these rights.

And the people, to their great credit, have stood by the Constitution and not tampered with it to any significant degree. The Bill of Rights has never been repealed—it remains the great protector of our liberties.

True, the Constitution has been amended 16 times since the passage of the Bill of Rights, but most of these amendments are designed to improve the functioning of government and the electoral process, and the few that deal with citizens' rights enlarge, rather than contract them.

It is, I think, right to repeat that, in the constitutional totality, the lamp of liberty may have been dimmed in our country on occasion, but it has never been extinguished.

And, it is an interesting speculation that, in the days to come, the lamp of constitutional faith may burn more brightly than ever before in our history. This renewal of faith in the primacy of individual liberty is

due, in my opinion, to public reaction to Watergate and related matters.

It was not very long ago that not only the public, but even some misguided judicial and scholarly critics, proposed to alter the fundamental balance between the power of government and the autonomy of the individual as established in the Bill of Rights. A rising rate of crime spawned an outcry that permissive Supreme Court decisions had handcuffed the police and overprotected the criminal at the expense of public safety. These attacks centered on the rights and privileges afforded by the fourth, fifth, and sixth amendments. Critics asserted that if these rights were limited there would be more convictions, and more convictions would mean less crime. The nexus between the protection of individual rights and a rising crime rate has never been established. It is easy to point to a suspected criminal and characterize his rights as self-imposed restraints that the law-abiding members of society have adopted only out of an exaggerated sense of fair play. Murderers and thieves are seen as "taking advantage" of constitutional protections that the average citizen rarely has cause to exercise.

Perhaps nothing but the wrenching national agony of Watergate could bring home the realization that the constitutional rights which have been so criticized are rights essential for all citizens and not merely safeguards for criminals. The break-in of the Democratic offices at Watergate, the burglarizing of the office of Dr. Ellsberg's psychiatrist, the illegal wiretappings, the obstruction of justice by those in the highest authority, and the subversion of the political process have demonstrated most vividly that the Bill of Rights is needed to protect the average citizen from governmental excesses. The Bill of Rights protects all of us and the timeless wisdom embodied in its protections has been revealed again to a public badly in need of enduring principles by which to chart the future.

Current public opinion polls indicate that, as a result of Watergate, sizable majorities of the American people now support measures which would more strongly protect individual citizens from illegal wiretappings, electronic surveillance, other invasions of the rights of privacy, and official misconduct. The same polls document a substantial increase in public concern for protection of citizens' fundamental rights and liberties compared with polls of the recent past. It would appear that the people increasingly realize that free speech, a free press, and the vigilant protection of personal privacy are potent weapons against governmental lawbreaking or overreaching.

In response to Watergate, the people once again are seeking refuge

in the principles of the Constitution. No steadier guide could be found by which the nation should chart its future course. As a nation, we have risked our all on faith in the Constitution, as Judge Learned Hand once reminded us. The Constitution will not fail us; let us not fail it.