

Our Elusive Constitution

by

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On a hot day in July 1974, members of President Nixon's personal legal team descended on the National Archives Building in Washington, DC, in a last ditch effort to save the President from impeachment.

They wanted to read the U.S. Constitution. Not just any copy from a law book or copies that can be found in any high school civics book, they wanted to see THE ORIGINAL, the four-page handwritten version kept in a bomb-proof Diebold safe housed in a thick subterranean concrete vault, said to be able to survive a nuclear attack on the nation's capital.

Just what they were looking for was never made public. Perhaps they were looking for a comma, or a dash, or some word that was in the Original version that had been missed by all the editions that have been printed since 1787 that would offer a new way of interpreting this fundamental document and might help get President Nixon out of his terrible situation. They were searching for some elusive meaning that wasn't there.

The very idea of the President's men trekking to the shrine of the Constitution in search of meaning has always resonated with me. These four little pages, and some that have been added over the past two centuries, including the amendments known as the Bill of Rights, are this nation's touchstone for our civil order and for how we conduct our system of government.

The Constitution is written in straightforward language. Yet for its entire history the Constitution has been subjected to various interpretations that make up the story of this nation's quest to understand its founding document.

It is a never ending story that has filled countless volumes of histories, law books and journals, commentaries, editorials, court decisions, scholarly works, and hundreds of biographies of the Framers of the Constitution. In 226 years we have never completely reached a consensus on what that plain language means. It remains elusive, still just out of our grasp.

As I began to write this talk, a number of current constitutional issues swirled around in my head. They are all taken from today's news stories in all the media from newspapers to blogs and tweets. The stories are promulgated by the left and by the right, by Republicans and Democrats, progressives and Tea Party folks, in a rather remarkable tower of confusion and concern about what all these issues mean to the survival of our Republic.

The Supreme Court overturned a portion of the Voting Rights Act of 1965, appalling many who had struggled so long to guarantee voting rights to African Americans, and we saw that same high court overturn the Defense of Marriage Act of 1996, thus allowing same-sex marriages to resume in California and other states.

DOMA originally was pushed by conservatives with the intention of declaring marriage to be an institution between a man and a woman. Republicans and Democrats both supported DOMA in large numbers less than 20 years ago, and now it has been thrown out, declared unconstitutional by a conservative Supreme Court.

As I was finishing the first draft of this talk, Supreme Court Justice Ruth Bader Ginsberg presided at a wedding between two men.

As the nation commemorated the 50th anniversary of the 1963 March on Washington, that commemoration took on new urgency as it seemed the high court had knocked all the teeth out of the Voting Rights Act. No sooner was the ink dry on the court's decision in the Voting Rights Act case before several states rushed forward with legislation that would further restrict African Americans and others from voting. Some of these laws are on the books. Others are being challenged in the court.

As part of the commemoration of the '63 March, *Time* magazine's cover of August 26, 2013, featured Martin Luther King, Jr. as a "Founding Father," which I thought was a perfectly fitting tribute and it raised in my mind the intriguing question of whom else besides the Founders of 1787 that we could call Founders.

Other issues in my constitutional stew include President Obama's response to the use of chemical warfare in the Syrian civil war. The President said he was ready to engage in limited military action in Syria because it was against international law to use such an indiscriminate weapon of mass destruction.

Then the President said he would delay any action in order to seek Congressional approval in a potential constitutional confrontation between the Executive Branch and Congress.

Mixed with this breaking news about our intentions in Syria was the usual punditry and journalistic speculation about what Congress would do when it returned from its long recess to address the looming problem of extending the debt limit of the United States or possibly defaulting on the faith and credit of the nation.

The media were speculating on when this country might see again a regular appropriations bill pass both houses of Congress for the next fiscal year beginning in October. In the meantime, the Sequester, one of worst examples of a congressional appropriation process of any recent Congress, continues unabated. Unless it is repealed or revised, the Sequester will be in effect until the year 2022, each year arbitrarily cutting parts of the budget by percentages without a serious review of what is or is not wasteful spending.

Gridlock reigns in Congress with little or no legislative progress being made on any front other than the naming of post offices and 41 votes in the House to repeal the Affordable Healthcare Act known to friend and foe alike as Obamacare. And as frosting on this whirligig of constitutional issues, some far out members of Congress are calling for the President's impeachment, but just for what—other than the fact that they don't like the president—is not clear.

There is a movement of sorts going on right now to DEFUND OBAMACARE. Some members of Congress, thankfully only a handful, have proposed Defunding various programs they don't like. I would ask them how they think Defunding would work.

How do you Defund legislation that has passed both houses of Congress, been signed by the President, and declared to be constitutional by the Supreme Court? Defunding programs you don't like that have already become law might sound like a good idea, but it certainly isn't in the Constitution or in any law on the books. Repealing The Affordable Health Care Act would be the only constitutional way to defund it.

Well, perhaps we will see in just a few weeks if those in Congress who don't like Obamacare and some that don't like the whole federal budget, or do not like the idea of extending the nation's debt ceiling will try to DEFUND the whole government by shutting it down. Now that indeed would be an amazing constitutional crisis. Stay Tuned.

Such is the state of our constitutional union as I speak to you today.

In 1983, I was appointed Historian of the U. S. House of Representatives by House Speaker Tip O'Neill. I was hired to develop a seven year plan to commemorate the 200th anniversary of the Constitution, the 200th anniversary of Congress, and the 200th anniversary of the Bill of Rights.

My education on how elusive the Constitution could be was just beginning.

Suddenly I was thrust into the interior world of the U.S. House of Representatives without any prior training or experience for such an assignment. I wondered then how I even got the job. I knew the House wanted a professional historian to head the office, but you would think they could find someone who had some idea of what the institution was like besides what I learned in textbooks.

It was years before I finally understood the simple fact that everyone who works there or serves as an elected representative of the people comes to the place as a babe in the woods. The true measure is what you make of your time there.

As I was coming out of my first meeting with the House leaders in Speaker Tip O'Neill's private office, I encountered the chairman of the House Rules committee, 83-year old Claude Pepper of Florida. Chairman Pepper reached out his hand to shake mine, and then he clutched my hand in both of his and held onto me.

He congratulated me on my appointment. He said he was sorry he had missed the meeting in the Speakers office but he had been detained. He then looked me straight in the eye, still holding onto my hand and said: "I have two questions for you if you don't mind." I said of course I didn't mind. His first question was: "Do you believe in the Constitution of the United States?" "Yes, sir, I do," I replied.

Then he pulled me ever closer to him, cocked his head, and said: "You're not a communist are you?" "NO SIR I AM NOT!" I replied. He let go of my hand and smiled and said "I think you will do just fine."

What an entrance exam! It took a while for it to sink in. When he asked me if I was a communist he was making a joke about himself. Claude Pepper was in the U.S. Senate when Franklin Roosevelt was president.

He was a big supporter of FDR and the New Deal including that radical and controversial thing called Social Security. Pepper lost his seat in the Senate in 1950, when I was just nine years old, in one of the dirtiest campaigns of his time. His opponent called him RED Pepper. He was smeared as a communist because he supported social security, government funding for cancer research, and equal pay for women. He was too radical for Florida voters in 1950, when the nation was in the midst of an anti-communist frenzy led by Senator Joe McCarthy of Wisconsin.

In 1963, Pepper came back to Congress. This time he was elected to the House of Representatives where he served until his death in 1989. He was just one of the truly great Americans that I had the pleasure of meeting during my tenure as House Historian.

Today the House of Representatives and the Senate according to all polls have the lowest rating of public approval since pollsters began keeping records. Less than 10% of the nation gives Congress a positive approval rating. What the polls don't say is that Congress has rarely had a positive approval rating.

In 1927, Republican House Speaker Nicholas Longworth, who was a popular Speaker, lamented the fact that Congress got terrible press and even worse condemnation from the public. He said he looked into history and saw that Congress was not popular when Henry Clay was Speaker; it was not popular when Lincoln served in Congress, and he said he learned to live with criticism and move on.

When Congress reached its bicentennial year in 1989 I was planning and writing the script for a joyous day of speeches and commemorations in the House chamber, while the House Speaker Jim Wright of Texas, who succeeded Tip O'Neill, was just months away from resigning his office.

His was the latest scandal that had befallen the House. There would be subsequent scandals in the House Post Office involving officers and members and in the Sergeant at Arms Office, where the "House Bank," as it was called, regularly allowed members to overdraw their accounts.

Speaker Wright had been accused of House ethics violations related to book royalties and other issues. A relatively new House member from Georgia, Newt Gingrich, was making a name for himself by attacking the House as a den of sin and corruption.

Where was the Constitution in all of this mess? It was there all along but rather elusive and very much lost in the daily headlines of scandal and growing partisan bitterness.

While I worked on my celebratory script of upbeat speeches about the survival of our Constitution for two centuries I hoped to demonstrate that Congress and the Federal Government was, as James Madison said: the greatest reflection on human nature. Yet scandals and partisanship were on the rise all around me.

I wanted to celebrate the better angels of our elected representatives while some of them were acting very much like fallen angels.

The corruption of the House was in part due to the fact that one party, the Democrats, had held power for 40 years. But it was true that for more than 200 years the House and the Senate had found ways to isolate and limit the effects of personal scandals and even institutional failures.

What was new in the 1980s and into the 1990s was a growing hard-edged partisanship that took every transgression of rules and laws, whether real or imagined, and turned them to short-term political advantage for one party or the other. Members of opposite parties who had traditionally functioned as political adversaries by day and drinking buddies in the evening were becoming full-time enemies.

In the midst of this mess, it took a poet to clarify things for me again and to remind Congress of its important role under our Constitution.

The big event I was planning, complete with the U.S. Army band and the House chamber decorated with bunting, featured the unveiling of House and Senate commemorative postage stamps by the Postmaster General, the unveiling of commemorative coins by the Secretary of the Treasury, a keynote speech by the distinguished historian David McCullough, the presenting of the colors by the joint Armed Services color guard accompanied by the 3rd Infantry fife and drum corps—the whole nine yards.

But something was missing. I wanted another element. Back in 1959 for the 150th anniversary of the birth of Abraham Lincoln, the great poet and Lincoln biographer Carl Sandburg came to the House Chamber to talk about Lincoln. I wanted a poet to speak.

The Poet Laureate of the United States at the time was Howard Nemerov of Washington University in St. Louis. He had been a fighter pilot who flew 100 missions during World War II. He got into the war early on by volunteering for the Royal Air Force before switching to the Army Air Force. He stayed a pilot throughout the war.

There were still a lot of veterans of World War II in the House then, including some of the leaders like Senator Bob Dole and House Republican Leader Bob Michael, both decorated veterans, and the Speaker Jim Wright, a bombardier in B-24 Liberators in the Pacific, for which he received the Distinguished Flying Cross.

I called Nemerov at his home in St. Louis, told him who I was and that I would like him to write a special poem for Congress on its 200th anniversary. Not only that; I wanted him come to Washington and deliver the poem before a joint meeting of Congress in a nationally televised broadcast. And he had to make up his mind and write the poem in six weeks. He said he would think it over get back to me.

The next day he called to say he would do it.

I had worked on the script for this event for months. The timing was critical. The House leaders did not want the ceremony to drag on. I was told to keep it to an hour and 45 minutes. I timed the speeches I had written over and over again. I knew precisely what everyone was going to say EXCEPT the Poet Laureate. I had given him no direction as to topic or content and no time limit. Given all the scandals swirling around Congress at the time, I had no idea if he would say harsh things about Congress or not.

The time came for the 79-year old Poet Laureate to reveal his creation. I stood next the podium near the House Parliamentarian where I could watch Nemerov and also look out at the members and guests and the packed galleries. Nemerov's legs shook. He seemed a bit wobbly. But he clutched the lectern with both hands and read his poem.

This is what he said to Congress that day:

To the Congress of the United States Entering Its Third Century,
With Preface

Because reverence has never been America's thing, this verse in your honor will not begin "O thou." But the great respect our country has to give may you all continue to deserve and have.

Here at the fulcrum of us all,
The feather of truth against the soul
Is weighed, and had better be found to balance
Lest our enterprise collapse in silence.

For here the million varying wills
Get melted down, and hammered out
Until the movie's reduced to stills
That tell us what the law's about.

Conflict's endemic in the mind:
Your job's to hear it in the wind

And compass it in opposites,
And bring the antagonists by your wits

To being one, and that the law
Thenceforth, until you change your minds
Against and with the shifting winds
That this is and that way blow the straw.

So it's a republic, as Franklin said,
If you can keep it; and we did
Thus far, and hope to keep our quarrel
Funny and just, though with this moral:---

Praise without end for the go-ahead zeal
Of whoever it was invented the wheel;
But never a word for the poor soul's sake
That thought ahead, and invented the brake.

There were a few seconds of absolute silence after Nemerov finished. He started to leave the podium in silence. It was almost as if politicians in a political chamber did not know how to respond to a poet. But then the place opened up to cheers, applause, and appreciative laughter.

Nemerov sat down next to David McCullough, and later David told me that Nemerov said two words to him. "It worked."

Historians and political scientists don't usually turn to poets for political insights or inspiration. I think we should do it more often. If government is the greatest of all reflections on human nature, as Madison said, then maybe our government officials need a larger dose of the humanities as part of their tool kit for being governors. And I would throw into that tool kit a big block of ethics, morality, and a concern not just for today but for our posterity.

The Constitution was front and center in Nemerov's marvelous poem. It was not at all elusive, even though the word Constitution does not appear anywhere in the poem.

What the poet expressed was a deep understanding of the Constitution.

He also knew something so many members of Congress fail to see. Our whole government, our Constitution, our Republic, could collapse in silence unless we make it work through compromise.

The opening sentence bowled me over. "Here at the fulcrum of us all." When was the last time you thought of Congress as the fulcrum of our national life? The fulcrum of us all. A fulcrum is a balancing point, a defining point, a center of things. This is what the Framers of the Constitution expected Congress to be.

The poet described how fragile the process is. As a young fighter pilot, he saw how easy it was to destroy nations and political systems with weapons. And he saw too how nations could be destroyed by the lack of political will and by powerful blinding ideologies.

He said “the feather of truth against the soul is weighed and had better be found to balance lest our enterprise collapse in silence.

What could be more elusive than “the feather of truth?” What is the truth?

We don’t always know but we better keep trying to find it. And in Congress, with two warring parties claiming to hold the truth, we had better be able to find something that works even if it isn’t the elusive Absolute Truth.

What is the soul?—Another elusive thing, but without what we call a soul there is no nation or no civilization.

The poet said Congress is the place where all of our wills get hammered out until we arrive at a law. This hammering out is called compromise—the art of politics. It is called problem solving. Only in a dictatorship does one party get its own way all the time.

Conflict, the poet said, is an essential part of governing, not something we can do without. Or wish it would go away. But we have to compass our conflicts in opposites. We have to frame our arguments and look for solutions. America’s genius had been its pragmatic, problem-solving approach to government.

Nemerov’s whimsical ending stanza is perfect. It is a signature of his poetry that he often deals with serious subjects but tempers that with humor or a sense of irony.

Congress has this dual function of promoting change, of boldly going into the future with the zeal of whoever invented the wheel, but there are times when the role of Congress is to put on the brakes. Sometimes a “Do Nothing” Congress is just what the people want.

But the question then becomes, how long can Congress fail to compromise, how long can the brakes be applied, before the House and Senate lose their ability to play out the constitutional role of being governing partners with the president?

I think it would be very hard to find anyone today who would think of Congress as our national fulcrum. But it should be. Congress is the branch closest to the people. It has all the powers it ever had under the Constitution to play the central role of policy making and governing. Yet for the last 60 years more and more power has gravitated to the Executive branch.

We have come to think of presidents as the one person who can fulfill a national agenda and the one person who can lead.

Congress has all but abdicated its power to declare war. Americans have died in foreign wars without a declaration of war. Congress has turned over enormous power to presidents, especially since 9/11 when Congress gave to President George W. Bush and subsequently to President

Barack Obama the power to wage war against not only other nations, but against organizations and even individuals.

Senator Robert Byrd, one of 23 Senators who voted against going to war in Iraq, wrote in his book *Losing America* “The awesome power to commit this nation to war must be taken back from the hands of a single individual—the president of the United States—and returned to the people’s representatives in Congress as the framers intended. No president must ever again be granted such license with our troops and our treasure.”

We are discovering new revelations daily of secret documents that describe the vast network of intelligence gathering that has grown up to protect us from future terrorist attacks. Just weeks ago, details about the extent of this intelligence network emerged and we learned that it costs more than \$50 billion a year.

We have learned that data collection of emails and other electronic communications of American citizens has gone on for a number of years in the name of keeping us safe from international terrorists.

This raises serious questions about privacy issues guaranteed in the Constitution. How much of our privacy are we willing to give up to feel a bit safer from potential terrorist attacks?

We are no longer living in the world in which the Constitution was drafted. The document may be the same but this nation and the world are not the same. The Fourth Amendment guarantees the people to be secure in their “persons, houses, papers, and effects, against unreasonable searches and seizures....” The Founders would, I presume, consider email to be “papers.” And if my computer is in my home, does this mean that neither the government nor anybody else can seize or search my electronic “effects?”

The most recent Supreme Court decision regarding our political campaigns, *Citizens United*, expands the idea that money is free speech and the flood gates have been opened to even more money than ever in our political campaigns.

I am less worried about the actual dollars spent in our elections than I am in what happens to government when our presidents and our members of Congress have to spend most of their time fund raising instead of governing. This is the real tragedy of *Citizens United*.

Money also fuels our hyper-partisanship. We are divided into warring camps and both parties use the same marketing techniques to get us to give money. They try to frighten us to death that if we don’t give today, the other side is going to destroy America. Every day both parties send out millions of messages designed to demonize the other party in order to get us to cough up a donation.

Is there any wonder why we are at each other’s political throats all the time?

The Constitution is not perfect. It never was. Some of its compromises made it possible to create a modern republic like the world has never seen. The compromises made the United States possible. Yes some of those compromises regarding slavery led to bloody civil war and the loss of 750, 000 American lives. The echoes of that war are still deeply embedded in our politics and our culture.

The Constitution is not a thing to be worshipped as having been inspired by God, as much as it is a document made by human beings with all the human strengths and frailties our species has always had.

In this regard we are no different, no better or no worse, than the men who launched our government and gave us a means to build a just nation that provides for our common defense, our domestic tranquility, and our general welfare.

I reject the notion that the elusive answers to our constitutional questions lie only in the so-called “original intent” of the Founders, because they didn’t have all the answers then any more than we have all the answers today.

They knew how fragile and elusive the very concept of government can be. I have learned from sources as diverse as the Bible and the Federalist essays that humans are not perfect.

The men who gave us our Constitution deserve our study, our respect, and our critical eye. They will always be a touchstone and a source of strength as long as the Republic endures.

But each generation of Americans must step up to the plate and become Founders in a variety of ways for our own time and for a future the Founders could not possibly have envisioned, or our enterprise, as the poet said, will collapse in silence.

Ours is still an experiment in self-governance. We cannot blindly harken back to 1787 to learn how to make this country work. We need to be as inventive as the Revolutionary generation was in their time but we also need to be inventive for our time and for the future we are creating for the generations that will come after us. We must build on the shoulders of giants but not expect them to carry us forever.

I honor what past generations have done in war and peace to keep this republic alive. But I will conclude by asking you two questions: First: Is America’s greatness in the past and are the generations alive now less likely to achieve greatness than was true of our forbearers?

And the second question, which I have already mentioned: Who are our Founders today? Who are the men and women who will make this Constitution endure for another two centuries? Two hundred and twenty-six years ago the Founders invented a new kind of government. That government does not need to be re-invented—it needs to be continued by men and women of good will who can put nation before party, that can put the common good before hardened ideology.

The Founders of 1787 created and established a new kind of government that demonstrated how humans could be freed from past restraints on human freedom.

The Founders of the 21st century and beyond have an even greater challenge. We the People of the 21st Century must use government and all other resources of the private sector to create a new political, economic, social, moral, and ethical framework that gives us the freedom to think beyond the immediate concerns we all have, and to think pragmatically and globally about what we need to do to save Planet Earth from changes that threaten not just our Constitution, but the nature of life on Earth.

When you look around and can't find this new kind of Founder, then pick up the challenge yourself. Your country and this planet are depending on you.

Thank you.
