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"A NATION WAS BROUGHT INTO BEING"

Constitution Day Address

By

HONORABLE HOMER CUMMINGS
a. a.]
THE ATTORNEY GENERAL OF THE UNITED STATES

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Members and Friends of the Kiwanis Club of Washington:

One hundred and forty-nine years ago, in the City of Philadelphia, there was formulated and submitted to the States for ratification a document embodying the fundamental law under which this Republic is governed. The Convention that had toiled through the summer of 1787 was composed of ardent patriots and far-seeing statesmen. Its deliberations were presided over by the immortal Washington. How fitting and appropriate that the Commander-in-chief who had successfully brought the country through the vicissitudes of the Revolutionary struggle, should crown his achievements by leadership in the framing of the Constitution and the establishment of a popular form of Government that has endured to the present day!

Madison, in his Diary of the Debates in the Convention, records that at the closing session, while the members were signing the Constitution, Benjamin Franklin, pointing to a painting of the sun behind the President's chair observed that, "Painters have found it difficult to distinguish in their art a rising from a setting sun", but, now, said he, "I have the happiness to know that it is a rising and not a setting Sun."

The treaty of peace with Great Britain, that had terminated the Revolutionary War, was succeeded by eleven years of domestic turmoil, which the historian John Fiske has aptly termed the "Critical Period". The Articles of Confederation of the thirteen original States had proved an inglorious failure. Local rivalries rendered any unified action in the common interest all but impossible. Public affairs fell into disorder. The achievements of the Revolutionary War were rapidly being frittered away by the ineptitudes of an unorganized peace.

Gradually the demand for a vigorous central Government took form. An enlightened leadership gave purpose to the common wish and resulted in the call of the Constitutional Convention, whose labors brought forth America. The purpose of the framers of the Constitution was to establish a virile Federal Government that would serve the insistent needs of a growing people; and that purpose they achieved. In the stirring phrase of Mr. Justice Brewer, "By the Constitution a nation was brought into being."

Since that time our country has grown and prospered. The American philosophy of government, embodied in concrete form in the Constitution has made this development feasible. It has enabled the Republic to endure amidst the kaleidoscopic changes that have taken place in other parts of the world during the past one hundred and forty-seven years.

It would be erroneous, however, to assume that our people have reached a final solution of all their domestic difficulties, or that the Constitution sets forth the criteria that will resolve every doubt. As civilization has advanced and modern conditions have displaced the practices of earlier days, innumerable questions have arisen presenting aspects of great difficulty.

As was to be expected in a relatively short document, the Constitution did not attempt to lay down a detailed chart of government. For the most part it dealt, as Thayer in his Legal Essays observed, "in brief and general terms, in phrases which are the language of statesmen." Naturally, therefore, as specific questions arose involving personal or property rights and the relative powers of the States and the Federal Government, resort was had to the Courts which, in turn, by interpreting and developing the language of

the Constitution, disposed of the controversies as they were presented. There has thus grown up a large body of Constitutional law which has filled thousands of pages in our reports of adjudicated cases and in innumerable treatises of law.

Constitutional law is, therefore, a history of controversy and a record of differences of opinion. As its development has gone forward differing schools of interpretation have come in sharp conflict with one another. This, I take it, is not to be deplored. It is not a symptom of disease; it is, rather, a proof of health. It is the evidence of life and growth; and America is a vital and growing nation.

Mr. Chief Justice Hughes, in an address delivered at a recent meeting of the American Law Institute in Washington, made the following statement:

"Of course, it is to be expected that there will be differences of opinion. How amazing it is that, in the midst of controversies on every conceivable subject, one should expect unanimity of opinion upon difficult legal questions! In the highest ranges of thought, in theology, philosophy and science, we find differences of view on the part of the most distinguished experts, -- theologians, philosophers and scientists. The history of scholarship is a record of disagreements. And when we deal with questions relating to principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty."

Indeed, shifting national needs and maturing national ideals have, at times, resulted in reversals of court decisions involving important

Constitutional questions. In other instances there have been substantial modifications of doctrines laid down with great solemnity in earlier cases, thereafter found to have been too narrow or too exclusive. Ofttimes these changes have resulted in vehement protests from those who felt that the foundations of the Government were giving way. For instance, when the famous Dartmouth College case was limited by the subsequent decision in the Charles River Bridge case, Mr. Justice Story took occasion to remark that "the old constitutional doctrines are fast fading away and a change has come over the public mind from which I augur little good." Daniel Webster, speaking of the same decision, declared that "It has completely overturned a clear provision of the Constitution." He went even further and said "Judge Story thinks the Supreme Court has gone and I think so too, and almost everything else is gone or seems rapidly going." These pessimistic observations were made in 1837; and yet the Government still stands. Indeed, within fifteen years thereafter, Mr. Justice Campbell, speaking of this same decision, was able to say, "No opinion of the Court more fully satisfied the legal judgment of the country, and consequently none has exercised more influence upon its legislation."

In the first Congress that convened under the new Constitution, there was adopted an Act, sponsored by Alexander Hamilton, creating a national bank. It was opposed by able and patriotic men on the ground that the measure was unconstitutional. Later the Supreme Court took a contrary view.

When Thomas Jefferson acquired from France the vast territory known as the Louisiana Purchase, which embraces the major portion of the Mississippi Valley and the adjoining territory, it was asserted that the Constitu-

tion was being torn to tatters.

Some years later, when the westward migration of the population necessitated the building of roads on a large scale, it was proposed that the task should be aided by the Federal Government. Again, those who were unable to look forward and envisage the future expressed fears for the safety of the Constitution. However, the counsel of broad-minded leaders of both parties, such as Henry Clay and John C. Calhoun, prevailed and the Government entered upon the policy then known as "internal improvements."

During the Civil War, the Lincoln administration issued paper money, and, with certain exceptions, made it legal tender for public and private debts. There was a great hue and cry in financial centers; and, later on, the measure was challenged as unconstitutional. The Supreme Court, in the case of Hepburn v. Griswold, took this view of the matter and decided accordingly. Subsequently, however, the famous Legal Tender Cases were heard and the earlier decision was over-ruled. Most modern students of finance will readily admit that if the decision in Hepburn v. Griswold had been allowed to stand, the Government of the United States would have been hopelessly crippled in dealing with the money problems of the people.

Before Theodore Roosevelt succeeded in having placed on the statute books the Meat Inspection Act and the Pure Food and Drugs Act - laws which are now regarded as commonplace, but the enactment of which caused much heart burning and perturbation - he was confronted with vigorous opposition upon constitutional grounds.

A study of the varying decisions with regard to the Anti-Trust statutes is particularly indicative of this same uncertainty, this same shift of view-

point, and this same prediction of inescapable disaster.

When the Congress attempted to assist the dry States by passing the so-called Webb-Kenyon Act to prohibit the transportation of liquor from wet into dry territory, President Taft, on the advice of Attorney General Wickersham, vetoed the bill on the theory that it was unconstitutional. In fact he read the Congress a severe lecture upon the gross impropriety of its conduct. Nevertheless, the Congress, in an obstinate mood, passed the measure over the Presidential veto. When the law came before the Supreme Court, that tribunal, ironically enough, held the statute valid, despite the opinions entertained by my learned predecessor and by President Taft, himself a distinguished jurist and later Chief Justice of the very court that had so emphatically disagreed with him.

The marked differences of opinion which have been made evident in more recent cases are but characteristic of the entire history of Constitutional interpretation. It is not my purpose to comment upon any of these decisions. I am not here concerned with the views therein expressed. I advert to them for the purpose of directing attention to the fact that [learned and patriotic men may honestly take differing views of Constitutional questions when new problems of a perplexing nature are presented.]

All of us, in our views of such questions, like to feel that we are right, and are apt to believe that those who disagree with us are wrong. Perhaps this attitude is a natural consequence of man's insatiable desire for certainty which he seeks to satisfy by convincing himself that he already has certainty within his grasp. This tends to increase the heat, as well as the scope, of the debate. Men are apt to become irritated when they find their own certainties challenged, and to that extent shaken, by the

existence of other and inconsistent certainties on the part of other men. But, as Mr. Justice Holmes admonishes us, "Certainty, generally, is an illusion and repose is not the destiny of man"; and it was George Meredith who, referring to this human frailty, exclaimed:

"Ah, what a dusty answer gets the soul
When hot for certainties in this our life."

The process of Constitutional construction relies for its validity on the relative weight to be given to this or that factor in a chain of inference. As I have said on a previous occasion, one mind will be impressed by the need of centralized power, another by the value of local self-government; one by immediate governmental necessities, another by the danger of governmental abuses; one by the rights of property, another by the claims of human sympathy; one by the sanctity of contracts, another by the requirements of essential justice. The interplay of these conflicting concepts, and the predominance of one or another at different periods of national development, are illustrated throughout the long history of judicial decisions and should serve to convince us that within the great house of the Constitution there are many mansions, and that the questions which are left open within its four corners are frequently susceptible of more than one solution based upon reason.

Running through the history of our Constitutional development is the story of a conflict of view between those who may roughly be described as "strict constructionists" and those who may be regarded as "broad constructionists." It would be a rash person, indeed, who would maintain that members of the bench who adhere to one school of Constitutional interpretation are wiser, more patriotic, or more devoted to the Constitution than

their brethern who entertain contrary opinions. You may belong to the one school or the other without incurring any challenge of your patriotism, your integrity, or your intelligence. These differences of opinion are as natural as the varying temperaments of men.

The law is not a mere body of precedents. It is a living thing, the servant of human need. If it is to perform that function it must accommodate itself to the necessities of a vital and expanding nation. Should we not, in these difficult days, remember what Jefferson said so long ago that "laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."

We have established a Constitution which is supreme over all the acts of Government, legislative, executive, and judicial alike, because it is the highest expression of the popular will. Of necessity, it employs broad language which leaves a wide area for legitimate differences of opinion. Within this arena of discussion all voices must be heard. The Courts may give, and as a rule do give, less weight to what they feel to be temporary currents of opinion, casual pressures for reform, evanescent aspirations or momentary ideals as contrasted with what they may properly regard as the confirmed and enlightened sense of justice developed by the changing life of a vital and growing nation.

The American Constitutional method is a process of adaptation and growth, as well as a means whereby wrongs may be corrected and Governmental measures may be attuned to the essentials of justice, through the orderly

ways of discussion and education. Should we not, therefore, exhibit a greater tolerance of one another's views and realize with increasing gratitude the blessings of a Government under which it is possible for varying opinions so freely to express themselves? This I take it is the American way; and by pursuing the practices of free discussion we shall find our path amid the intricacies of modern life and preserve in its essential integrity the great document that lies at the heart of our Governmental structure.

As long as these processes can go forward, untroubled and unvexed, America is safe. But, from time to time, we are told that subversive suggestions are received from abroad calculated to influence the course of conduct here. I am sure that we all realize the vital importance of keeping the currents of legitimate debate free from defilement from any alien source. We have built up here a structure of freedom that stands like a great rock against the swirling waters of violence and revolution that have engulfed so many lands. This structure we propose to maintain, believing as we do that it is a refuge from intolerance and arbitrary power, a citadel of human rights and liberty.

Many difficult problems confront us. In a growing nation this must inevitably be so; but we propose to solve them within the framework of our existing institutions which it is our dearest purpose to preserve.