

Chapter 05

Madison - The Constitution, The Bill of Rights and The Snow Job

The fault of the Constitution is that it allows men to evade it

In my play, "The Hanging of George Washington", a concerned President Madison asks his Vice President, and former political nemesis Elbridge Gerry, if he has no hope that the country will continue to be ruled by men with goodness in their hearts. Gerry responds by saying:

"It is not the goodness that I fear, but the promise of better things to come by the relinquishment of certain freedoms. I can never forgive you for what you have brought to us - a wonderful country, but for so short a time. It is our children's children who will live under the yoke of that President who speaks of goodness and betterment for all - but in his heart is not bound by a love of our republican system. We may see some small aspect of this future tyranny today in some of our leaders, but only when the central government has seized a power of which we cannot today dream, will the danger from the office become clear." [1]

It is with deep concern and some bemusement that I listen to the corporate mainstream media beat up on Conservatives, Tea Party people and anyone who advocates frugality and small government. It reminds me of the guys who got beaten up in the Eastern press after the Federal Convention. They were among the men who fought the Revolution and wanted what they fought for - a limited government and a limit on any central authority. They'd had it with a King. It was very much the age of enlightenment, a time when an idea was taking root among political theorists and philosophers - that the individual should by divine right be

released from his bondage and servitude to royalty of any sort. Bondage, slavery and servitude were common throughout the world. Captured peoples were traded as commodities, bought and sold like chattel, and a nation's subjects were no more than tax producers for the rulers.

Early in the 18th Century, the seed of liberty planted by the European intelligencia, made its way to American shores. Those in the American Colonies read and took heed of the works of David Hume and John Locke. And, while they were impressed by the concepts, the new Americans were far from naive, they understood the ways of the world and knew that what was wonderful in theory was not always practical in application, and that there would inevitably be "royalty" of some sort.

They understood the power of wealth, the inheritance of reputation - and the interests of those with the most influence being satisfied at the expense of the average citizen. After the Revolution, creating a certain pragmatic balance was to become a great part of their struggle - to prevent the confluence of government and influence from oppressing either the average citizen or the wealthy. It was both the average citizen and their leaders standing side by side that had made the Revolution possible. With the concept of individual liberty came the obligation of individual responsibility, which to them was egalitarian, not only in theory, but in practice. As late as 1809, one of the most distinguished Colonial Americans, Major General Henry Lee 3rd, better known as Harry Light Horse Lee, who later served as a delegate to Congress and Governor of Virginia, and the man selected by the Sixth Congress to write the Eulogy for General Washington, from which comes the quote - "*First in war, first in peace, and first in the hearts of his countrymen*" - and who, after a turn of financial fortune, spent a year in debtor's prison.

The Revolution may have been sparked by farmers in Lexington, Massachusetts, have been supported by a minority of the population, and guided by an even smaller more select group, but among those who supported the Revolution was a

cross section of the population. From the beginning, though, it was this select group of property owners, the slave plantation owners, the wealthy farmers, the merchants, the mercantile class, the lawyers, doctors and the shipping company owners who were the high office holders in all of the states - many of the same people who were representatives at the First and Second Continental Congresses. When the Revolution ended, it was these same people who attended the Federal Convention and eventually served in the new Congress and were the Federal Government's first elected officials, cabinet members and judicial appointees. Still, this select group of men took the intellectual ideas of the Age of Enlightenment and Liberalism and of the Revolution to heart. Liberty and its master - 'responsibility' - were to be shared by all citizens.

When it came to politics, there was a practical limitation as to who could serve. Politics was not a well paying venture in those days. And, while an attendee at one of the Congresses might have been reimbursed for travel and lodging, it was only very few people who had the wherewithal to leave their business or their farm, traveling for days and spending weeks at meetings and conventions or serving in Congress. Even today, although we have a number of average citizens in Congress who can manage on the Congressional salary, politics is still a rich man's game, mostly because of the extent and cost of campaigning. [A]

Back then, there may not have been the terrible cost of political campaigns, but there was time away from home that made the difference in one's ability to serve. While the small farmers may have been able to accommodate the time to participate in local town meetings, as they usually did; attendance at a distant meeting was extremely difficult. It was not just wealth alone that served as a criteria for attendance at national meetings. With wealth came education. A good education was costly, even in those days. The few universities that there were, required attendance far from home, and among the colonials, higher education was not common. While the average upstate New York farmer may have been able to read and understand the arguments for and against an issue as printed in

the newspapers of the day, producing those arguments took a skill and knowledge that today is still considered formidable. It was the more wealthy and the more educated, that could attend the meetings and share their thoughts that decided the fate of the nation.

The responsibility to guard liberty did not rise from nor depend upon universal suffrage. The people that decided the direction and fate of the nation were landholding yeomen, a group considered to have a stake in the country. The exclusion of bonded Whites, enslaved Blacks, women and non-landed citizens reflected the limits placed on full citizenship in most of the world in the 1700's. But, for those that voted and had a direct say in the fate of the country, it was, from the beginning, not just their fortunes alone that were entwined with the success of the country, but their lives as well. When the 56 signers of the Declaration declared to "*mutually pledge to each other our Lives, our Fortunes, and our Sacred Honor,*" they truly understood the risks. A number of them served in the Military during the Revolution. Many of them, who were not in the military, still suffered terribly, never fully recovering from their losses. Several were killed. Many of the Post Revolutionary leaders including those at the Federal Convention also fought in the War. Many land owning farmers, who were considered to have a stake in the country, served in either the Army or in the Militia.

Today, that system of a ruling elite cognoscenti may appear limited and 'unjust' - but back then it was a time when republican government was rare, and never before attempted in such an expansive country as the United States. If one looked to any corner of the world in the 1700's, people were ruled by sovereigns, regardless of what they were called. If one looked to Europe, with few exceptions, monarchy was the order of the day. If one looked around the entirety of the world, serfdom, slavery and indentured servitude were also the order of the day. In most countries, from the Far East to the Middle East, women were less than second class citizens. By whatever contemporary standards we use to judge Revolutionary America, it's founding was a brilliantly accomplished first step.

From a broader and more understanding perspective, not a perspective based on a pejorative revisionist history belittling early America - the Revolution was magnificent. Whatever else it did, it put to paper a structured government wherein power emanates from the people to their leaders, not from a royal authority whose dictates all must follow. That we have now allowed the Federal system to be corrupted is more than partially the fault of the founders. It was the transition from The United States of America in Congress Assembled under the Articles of Confederation to The United States of America under the Constitution that the seeds for the growth of the Federal monster were sewn.

It was not a debatable question that America's central authority required additional strength to keep the Confederation secure and in tact. But, few of those who favored strengthening the Confederation considered the creation of a wholly new more consolidated government of the extent that was hidden between the Articles, Sections, and Clauses of the Constitution. Americans had just fought to rid themselves of a consolidated authority, and those who fought the Revolution wanted no part of the yoke they had just thrown off.

There were also among those patriots who had fought the Revolution, those most concerned with creating a stable business environment. In their minds, trade and banking were as important as liberty, and it was their point of view that prosperity would guarantee liberty. Trade was, after all, a main motivator for the calling of the Federal Convention. They advocated the proposition that a select group with direct import to the money matters of a powerful government would be no threat to liberty, as they would be constrained by the framework of the proposed Constitution.

Among those who came to be labeled Anti-Federalists, were those who wanted as little centralization as possible and no national debt; those whose main concern was Liberty - that Liberty would be the seed from which all else would grow. It was

Hamilton versus Jefferson, the banking interest versus the agrarian interest - but really those who wanted more central authority with a strong executive, even a central bank like the ones in Europe, and those who wanted to maintain a confederated authority with individual state and personal responsibility over money matters, and no central bank.

The angry fight that came to the fore in 2016, the uprising against the size and authority of the Federal Government, the anger at a recalcitrant Congress refusing to reign in an abusive executive who seemed to have had a private deal with the Senators and Representatives that allowed him to run up an unsustainable national debt, the anger at a President with a penchant for stirring up hatred among the citizenry, who blatantly dismissed our republican form of government, saying he would fundamentally change America, subjugating the individual's rights to government mandates forged in the name of the public good - is the same fight waged during and after the Federal Convention. Big government is nothing new. National debt is nothing new. Overreaching central authority is nothing new. Control of the public debate by the voices of those with influence is nothing new. Reticence to rise up against an oppressive force is nothing new.

When Hamilton, Madison and Jay penned the Federalist Papers, they were cautious to frame the greed, arrogance and selfishness inherent in man in such a way as to demonstrate how those forces would be countered and contained by the structure of the proposed Federal System, by the separation of powers and the ability of the Congress to impeach Federal officials at will. But, what they avoided in their discussion was the basic question raised by the Anti-Federalists - the question originally posed by a Roman satirist many years earlier to guarantee the chastity of a wife – but, just as well may be asked to guarantee the sanctity of government, “*Who will guard the guardians?*” [2] We are asked on a daily basis to hand over our wallets, the fruits of our endeavors and our self-authority to faceless bureaucrats backed by armed enforcers demanding our submission.

In 1786, the country, as a whole, was suffering from the effects of the long and costly Revolution, and several states were burdened with debt incurred during the war. In the early period after the Revolution, there were several rebellions. They were in many ways justified, and reflected an authentic discontent with Congressional and state monetary policies, as well as demonstrating a weakness in the general government's ability to suppress the rebellions. It was the prolonged events of Shay's Rebellion, lasting from August 1786 until February 1787, that was most responsible for a sentiment to strengthen the general government. Adding to the sentiment for greater central authority were the Indian attacks on the frontiers, threats to commerce by the Barbary Corsairs, and lingering threats from the British. The issue that most highlighted a fault with the existing union, were the trade restrictions and tariffs between states, each of which, as independent governments had complete autonomy over trade. The states turned to these tariffs as a means to protect their businesses and generate funds to pay down their debt. In 1786, only several years after the end of the revolution, a desire to eliminate the protectionist trade barriers that each state had put in place, moved James Madison to ask the Congress to hold a convention at Annapolis to explore changes to the Articles of Confederation that had bound the country together under the Second Continental Congress since 1777.

The meeting at Annapolis was poorly attended, and Alexander Hamilton, a commissioner from New York, strongly supported the call for a second meeting in Philadelphia the following year; a Federal Convention to modify the Articles so as to strengthen the powers of the Congress. It was in 1787, in Philadelphia, at Independence Hall, where the Declaration of Independence had been drafted only eleven years earlier, that the devil did his handiwork.

Those in attendance were said to have complained that the Philadelphia summer of 1787 was extremely warm, and the windows were closed at Independence Hall to keep the flies out. In fact 1787 was a relatively cool summer, and the windows were closed to keep hoi polloi outside from hearing what was going on inside. Had

it been known that the Confederation was being shredded, there most probably would have been riots in the streets. It was Patrick Henry who said he smelled a rat, but stayed back in Virginia tending to the matters of his state that allowed his fellow countryman, diminutive James Madison, to pull off the first coup in American history - a complete change of the American government.

While the dirty work was done during a Philadelphia summer, the snow job was done after the convention. Those who wanted a smaller government were countered by those who wanted a more consolidated government - one with much more power. That the men at Philadelphia did a wonderful job in scripting a document that was magnificent on paper cannot be denied; that they had configured and compromised and connived to bring together opposing regional factions also cannot be denied.

In its quest for a stronger government, several compromises were made, and several issues were awkwardly addressed - slavery being one of them. Had the document remained a compact, there would have been no Civil War in 1861, but, merely dissolution of the Union into two parts. But, by 1861 more Northern states had been created, and Lincoln had the Constitution and a sizable army under his command; and he wanted to preserve the Union - doing so at a terrible cost. While the cost in lives was great, the Civil War cost the country the work of the Revolution. The Federal Government did not initiate its war to free the slaves. It became the cause célèbre with the issuance of the Emancipation Proclamation, the most far reaching of all Presidential executive orders. Ultimately, freedom for many was paid for with an eventual decline in freedom for all. The United States of America were after the Civil War one large consolidated country with a very strong central government demonstrating the lengths to which it would go to impose its will on the states and the people who disagreed with it. What was wrought asunder in bloodshed in 1861, had its tempestuous beginning in 1787 at the Federal Convention .

It was in June of 1788 at the Virginia Ratifying Convention that the two adversaries, James Madison, the Federalist and Patrick Henry, the Anti-Federalist dueled across the aisle looking over "that paper on the table", the proposed Constitution. It was Henry who, years before, transformed a collection of grievances held by thirteen separate colonies into a united struggle for liberty with a speech of magnificent persuasion. At the Virginia Convention he once again defended what he thought most important above all else - liberty. Although much of what he said at the Convention was as insightful and magnificent, and prophetic as what was said at St. Johns Church in 1775, this time he was on the wrong side of history, and like the other Anti-Federalists, what they did in defence of liberty as their country was being stolen, has become footnotes in the story of a grand nation.

"When I rose yesterday to ask a question, I thought the meaning of my interrogation was obvious. The fate of this question and of America may depend on this. Have they said, we, the states? If they had, this would be a confederation. It is otherwise most clearly a consolidated government; we should not have been brought to this alarming transition, from a confederacy to a consolidated government. Here is a resolution as radical as that which separated us from Great Britain.

"Liberty, the greatest of all earthly blessing - give us that precious jewel, and you may take every thing else! But I am fearful I have lived long enough to become an old-fashioned fellow. Perhaps an invincible attachment to the dearest rights of man may, in these refined, enlightened days, be deemed old-fashioned; if so, I am contented to be so.

"Twenty-three years ago was I supposed a traitor to my country? I was then said to be the bane of sedition, because I supported the rights of my country. May I now be thought suspicious when I say our privileges and rights are in danger?

"There are many on the other side, who possibly may have been persuaded to the necessity of these measures, which I conceive to be dangerous to your liberty. Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined.

"The Confederation carried us through a long and dangerous war; - and shall a government which has been thus strong and vigorous, be accused of imbecility, and abandoned for want of energy? Consider what you are about to do before you part with the government. There are many instances of the people losing their liberty by their own carelessness and the ambition of a few.

"Let my beloved Americans guard against that fatal lethargy that has pervaded the universe.

"The honorable gentleman who presides told us that, to prevent abuses in our government, we will assemble in Convention, and punish our servants for abusing the trust reposed in them. O sir, we should have fine times, indeed, if, to punish tyrants, it were only sufficient to assemble the people!" [2]

In 1788, many of those who had been the most outspoken about the need for revolution only a few years earlier, once again raised alarm that liberty was in danger. The Revolution was being co-opted. In 1788 the work of the Revolution was about to be taken from the people by a new central authority. It is the same authority that has now imposed trade deals hurtful to our industry, fostered unopposed illegal immigration across our borders, created unfair and impossible tax codes, established out of control federal agencies, devised overpriced health insurance schemes, handed down regulations from a million faceless bureaucrats, and subjugating the people at large to the dictates from a single central authority -

the totality of which is a loss of American individual liberty. That this is happening today is, of course, attributable to what happened in Philadelphia in 1787. As is said, "*The mills of god grind slowly, yet they grind exceedingly small*". Well, the mills of the gods, however slowly they may have ground before, they most assuredly are speeding up today in depriving us of our liberty.

Once the State Ratifying Conventions started voting, a pattern appeared. Several of the smaller and less populace states voted early and accepted the Constitution. They saw the new Constitution as being positive because their power would not be terribly diminished under the new plan, which allowed them two senators, regardless of their population. Of the first five states to vote only one was contentious - Pennsylvania. It was the third most populace state. The final vote was 46 to 23, and even though the vote was not close, the opposition to the Constitution was strong. Massachusetts was the second most populace state and it voted sixth. When the polling started, the polled vote was 177 for and 178 against. After some of the strongest debates of all the conventions, only the promise of amendments to the Constitution after the government had assembled, shifted the final vote to 187 to 168, a 9 vote margin out of 355 votes. New Hampshire, the ninth state to vote, and the one that would seal passage, and Virginia, the most populace state, started evenly divided for and against. New York was solidly against passage, with a polled vote of 19 for and 46 against. It appeared, though, that passage was now guaranteed, judging by the sentiment in several state that were yet to vote. The question then remained, what amendments were necessary to hold the new Federal monster at bay.

From that point on, each convention attached suggested amendments to the Constitution as the basis for their positive vote. New Hampshire Virginia and New York, which had been opposed to the plan, made 12, 20 and 31 proposals respectively, before voting in favor. The vote in New Hampshire ended with a ten vote difference, Virginia with ten and New York, a mere three votes. In spite of passage, there was a lack of unanimity. Rhode Island, the next to the smallest

state in population, which had not sent delegates to the Federal Convention, did not vote until May of 1790. The Constitution passed by two votes out of 66 votes cast, and 21 amendments being proposed.

The irony in the voting was that Massachusetts, the center of Shay's Rebellion, was among the states most opposed to the new stronger Constitution, a document specifically constructed to better deal with insurrections like the very one they had just experienced. Massachusetts had the most number of delegates in convention and the smallest percentage of victory than any other state. It would appear that the state where it had all begun in 1775, was still home to a Revolutionary spirit in 1788.

Ultimately, in spite of very small margins of victory in the larger states, with each state having one vote, the Constitution passed. The issue at the state conventions came down to accepting the paper as written and amending it later by adding a Bill of Rights or rejecting it and sending it back to a second Convention for changes. Some felt the country was between a rock and a hard place, so to speak. It was surmised that if the Constitution were rejected there would be no second Convention, and quite possibly the Confederation itself might dissolve. Many were fearful of chancing a rejection of the proposal. Those who wanted to send it back to a new Convention and have the disturbing elements of the document re-examined and adding a Bill of Rights within the body of the text made forceful arguments, but the die was cast. The several Ratifying Conventions that voted later, even though the Constitution had the nine states for passage, only voted in favor because of the promise of a Bill of Rights to be added.

Ultimately many of the doubters accepted the idea that whatever deficiencies existed in the form of the Constitution, a proper and forceful Bill of Rights would protect them from usurpations of authority from an out of control central government. What was not protected against is what we have today, an unresponsive Congress and an out of control executive controlling a massive

bureaucracy, headed by officials who are so daring as to claim Fifth Amendment protection while testifying before Congress - and seemingly a Congress unwilling to do anything about it. Is it just a sign of the times that what only mobsters seemed to do, "pleading the Fifth" in Congressional hearings - is now done by public officials? Or is it that the bureaucracy has become a mob with a shadow gangster at its head? Maybe some day we'll apply the duck test to our government and see what it really is.

When the Constitution left Philadelphia, it was considered dead in the water, with little chance of passing. It was a radical change that many people saw as threatening their liberty. It was only the promise of a Bill of Rights that allowed the proposed Constitution to be ratified. The Bill of Rights was never intended to give the states or the citizens any rights they didn't already have. The prevalent fear was that the new Constitution would interfere with the liberties they had just secured. Today, we are incorrect when we say we have Constitutional rights. We have Constitutionally protected rights. A very big difference, considering that the Revolution was fought to bring into being that very concept - the divine rights of man being superior to any claimed divine right of a monarch or any government.

The Bill of Rights was to be a shield against the potential power of the new much stronger central government. The Constitution was approved on the strength of a promise that a Bill of Rights would be passed in the first session of the new Congress. Ironically, the idea of a Bill of Rights was opposed by Alexander Hamilton and the man who was chosen to edit the numerous proposals to be included in the Bill of Rights, James Madison. Both of them argued that the Constitution was framed in such a way that a Bill of Rights was unnecessary, and even potentially dangerous, possibly limiting the people's rights to those that would be enumerated, and none more.

As much as Hamilton, Madison and Jay were trying to elucidate the positive aspects of the new creation, they were as much trying to convince the citizens that

the Constitution was not in need of revision, and should be passed as it was crafted. The Federalists feared that if the Constitution were sent back to a second Convention, it would not survive. Sadly, some of the most valuable political writings of all time, the handbook to the Constitution, The Federalist Papers, is in its collected form a duplicitous work. It intentionally presented only the positive aspects of the Constitution, and glossed over with disdain against critics who dared to point out its very real weaknesses. If there is a sin to be accounted for by James Madison, it is that he was complicit in trying to sell a product he knew was deficient. Fortunately, even though the Anti-Federalists lost the war over the Constitution, they won its biggest battle - extracting a promise for a Bill of Rights. Considering how battered our liberty is today, it is painful to imagine what rights we would have remaining were there no Bill of Rights attached to the Constitution during the First Congress.

In their masterful P.R. work, the authors of The Federalist Papers laid out how wonderfully the government would be run, by wonderful men, supported by wonderful enlightened informed citizens. They either didn't care or didn't realize that we could eventually have a Speaker of the House of Representatives say that we must first pass a 2,800 page bill to see what's inside of it. I can though say that the Federalists were crafty. They were arrogant enough to promote a fancy scheme wrapped in wishful thinking, and like today's modern progressives, they ignored the reality of the frailties and corruption of men close to the seat of power, regardless of how men may portray themselves when seeking power. No corrupt leader has ever attained power by telling his future subjects that he is corrupt and will do whatever he can to help himself, and his cronies at the expense of his subjects. Even leaders like Mao Tse Tung, who was responsible for the murder of millions, told those he had not yet killed that whatever he was doing he was doing for their good. The much revered Federalist Papers do not explain how the Federal Government will work, but how it could work - the could being a dependency upon the altruism of men.

While it is the words of the Federalists that are remembered, it is the words of the Anti-federalists like Richard Henry Lee, Patrick Henry, Elbridge Gerry, and George Mason, among others, that have come to be proven true.

Here are some words from the Anti-Federalist tract *The Federal Farmer* in describing the proposed City in the District of Columbia, the wellspring of our laws.

-

"The difficulties and dangers I have supposed will result from so large a federal city, and federal districts, from the extension of the federal judicial powers, &c. are not, I conceive, merely possible, but probable. I think, pernicious political consequences will follow from them, and from the federal city especially, for very obvious reasons, a few of which I will mention.

..... We are not to suppose all our people are attached to free government, and the principles of the common law, but that many thousands of them will prefer a city governed, not on republican principles -This city, and the government of it, must indubitably take their tone from the characters of the men, who from the nature of its situation and institution, must collect there. This city will not be established for productive labour, for mercantile, or mechanic industry; but for the residence of government, its officers and attendants. If hereafter it should ever become a place of trade and industry, in the early periods of its existence, when its laws and government must receive their fixed tone, it must be a mere court, with its appendages, the executive, congress, the law courts, gentlemen of fortune and pleasure, with all the officers, attendants, suitors, expectants and dependants on the whole, however brilliant and honourable this collection may be, if we expect it will have any sincere attachments to simple and frugal republicanism, to that liberty and mild government,

which is dear to the laborious part of a free people, we most assuredly deceive ourselves. This early collection will draw to it men from all parts of the country, of a like political description: we see them looking towards the place already.

Such a city, or town, containing a hundred square miles, must soon be the great, the visible, and dazzling centre, the mistress of fashions, and the fountain of politics. There may be a free or shackled press in this city, and the streams which may issue from it may overflow the country, and they will be poisonous or pure, as the fountain may be corrupt or not. But not to dwell on a subject that must give pain to the virtuous friends of freedom, I will only add, can a free and enlightened people create a common head so extensive, so prone to corruption and slavery, as this city probably will be, when they have it in their power to form one pure and chaste, frugal and republican." [3]

Citations

1 - From "The Hanging of George Washington", an un-mounted play by Joel Goodman, copyright 2015.

2 - Juvenal, Satire 6.346–348, 1st Century AD, Oracula Sibyllina (c.150 BC-300 AD), Friedrich, Freiherr von Logau (1604–1655), translation by Henry Wadsworth Longfellow

2 - Monday, June 9, 1788, Virginia Convention, Patrick Henry

3 – The Federal Farmer XVIII, 25 January 1788

A - The cost of campaigning is discussed in a later Chapter of "*Solutions for a Naked Country*".