THE BILL OF RIGHTS AND THE CONSTITUTION

AN ADDRESS BY ASSOCIATE JUSTICE JOHN M. HARLAN OF THE SUPREME COURT OF THE UNITED STATES, AT THE DEDICATION OF THE BILL OF RIGHTS ROOM, U. S. SUBTREASURY BUILDING, NEW YORK CITY, ON AUGUST 9, 1964. * * * * * * * * *

• Late on the afternoon of Sunday, August 9, when most of the world had its eyes on a crisis in Cyprus, Mr. Justice John M. Harlan made a speech in New York City. His address was not long. In the press of the news, it went almost unnoticed. Yet in the few minutes that he spoke, dedicating an historic room to the Bill of Rights, he put together a statement of profound wisdom on the nature of our liberties, the structure of our government, and the need for judicial restraint. The Virginia Commission on Constitutional Government counts it a privilege to reprint his address here.

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We stand on hallowed ground. It was at this spot—the site of Federal Hall which served as the first Capitol of our Nation—that among other things George Washington in 1789 was inaugurated as the first President of the United States, that the first Congress and Cabinet met, and that the Supreme Court of the United States was organized. And at this place, a little more than 175 years ago, occurred the event that brings us here today—the adoption by Congress of the first ten Amendments to the Constitution of the United States, which upon ratification by the States became known as the Bill of Rights.

These exercises dedicate the Bill of Rights Room which will be a part of the memorial museum established by the National Parks Service of the Department of Interior in this United States Subtreasury building; that building succeeded Federal Hall and is also historic on its own account. The Room will house an important collection of materials having to do with the origins of the Bill of Rights. The project is under the sponsorship of the American Bar Association and has been made possible by the financial contributions of many individual lawyers throughout the United States. It marks another milestone in the continuing efforts of the American Bar Association to make our legal heritage a living force in the concerns of the American people. I am honored by the Association's invitation to play a part in these ceremonies.

We should surely begin by recalling the specific provisions of the Bill of Rights. They speak with such eloquent simplicity and clarity as to defy paraphrasing, and their words should be read in full.

AMENDMENT I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT II

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

AMENDMENT III

"No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

AMENDMENT VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

AMENDMENT VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT IX

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

AMENDMENT X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

While these Amendments symbolize the respect for the individual that is the cornerstone of American political concepts, it would be a grave mistake to regard them as the full measure of the bulwarks of our free society. Except for the first three Amendments they are largely procedural protections against particular kinds of arbitrary governmental action and touch the activities of relatively few people; standing alone they do not account for the broad spectrum of freedoms which the people of this Country enjoy. They were indeed not a part of the original handiwork of the Framers of the Constitution.

The men who wrote the Constitution recognized, with unmatched political wisdom, that true liberty can rise no higher or be made more secure than the spirit of a people to achieve and maintain it. Their prime concern was to devise a form of government for the new Nation under which such a spirit might thrive and find the fullest opportunity for expression. The Amendments comprising the Bill of Rights followed only after the structure of government had been established by the Constitution proper. They resulted not so much from what the Framers considered to be new ideological imperatives as from fears among the States that the national government might seek to tamper with individual rights already largely assured under the laws of the various States. The movement for a Bill of Rights was given added impetus by the passage of the Northwest Ordinance under which the Federal Government was to administer the western territories, all claims to sovereignty over which had been relinquished by the States. That instrument, passed by the Continental Congress sitting at Federal Hall in New York at the same time as the Constitutional Convention was meeting in Philadelphia, contained what amounted to a formal Bill of Rights of its own.

For the most part the Rights assured by these first ten Amendments against federal invasion were simply those enjoyed by Englishmen under the institutions of the mother country, having their origins in the provisions of Magna Carta, that famed fountainhead of individual liberty. There were, however, two notable extensions of those rights: freedom of religion and freedom of speech and press, the former stemming from what had been growing colonial practice, and the latter being spurred by the prosecution and acquittal of John Peter Zenger for seditious libel, which had taken place in New York in 1735.

In short, as the debates at the Constitutional Convention and the terms of the Constitution itself both reveal, the Framers proceeded on a premise which many years later Judge Learned Hand was to state in the following words: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court even can do much to help it." They staked their faith that liberty would prosper in the new Nation not primarily upon declarations of individual rights but upon the kind of government the Union was to have. And they determined that in a government of divided powers lay the best promise for realizing the free society it was their object to achieve.

The matter had a double aspect: *first*, the division of governmental authority between the States and the central government; *second*, the distribution of power within the federal establishment itself. The former, doubtless born not so much of political principle as out of the necessity for achieving a more perfect Union than had proved possible under the Articles of Confederation, was solved by making the authority of the Federal Government supreme within the sphere of powers expressly or impliedly delegated to it and reserving to the States all other powers—a reservation which subsequently found express protection in the Bill of Rights through the provisions of the Tenth Amendment. The second aspect of the governmental structure was solved, purely as a matter of political theory, by distributing the totality of federal power among the Legislative, Executive, and Judicial branches of the Government, each having defined functions. Thus eventuated the two great constitutional doctrines of Federalism—often inaccurately referred to as the doctrine of States' Rights—and Separation of Powers.

These doctrines lie at the root of our constitutional system. It is manifest that no view of the Bill of Rights or interpretation of any of its provisions which fails to take due account of them can be considered constitutionally sound. The same is true of the Due Process,

Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment, which, since their adoption following the Civil War, have afforded federal protecton against limitation by state action of various basic individual rights. It is an accurate generalization to say that the effect of these two doctrines in combination is to put within the range of federal cognizance only those matters, whether or not denominated civil rights, for which a source of federal executive, legislative, or judicial competence can fairly be found in the Constitution or its Amendments. There is no such thing in our constitutional jurisprudence as a doctrine of civil rights at large, standing independent of other constitutional limitations or giving rise to rights born only out of the personal predilections of judges as to what is good. And it should further be observed that our federalism not only tolerates, but encourages, differences between federal and state protection of individual rights, so long as the differing policies alike are founded in reason and do not run afoul of dictates of fundamental fairness.

It does not derogate from steadfastness to the concept of developing constitutionalism in the field of civil rights—even as we must solve by orderly constitutional processes alone the great question of racial equality before the law—to insist upon *principled* constitutionalism which does not proceed by eroding the true fundamentals of Federalism and the Separation of Powers. To assert the contrary is in effect to urge that the Bill of Rights and cognate Amendments to the Constitution be extended so as to become the masters, not the servants, of the principles of government that have served the cause of free society in this Country so well.

We cannot take these things for granted in an age when the validity of established processes of our system is increasingly being called into question. No higher duty rests upon lawyers—by their training made "ready to aid in the shaping and application of those wise restraints that make men free"*—than to maintain unimpaired the firm foundations on which ordered liberty in this land has been built. The memorial we dedicate today will serve as a continuing reminder of that obligation.

*The quoted language is that used by Harvard University in the conferring of law degrees.

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