

REMARKS OF JAMES RUSSELL WIGGINS

POT AND KETTLE CLUB, SEPTEMBER 3, 1987

The success of the Constitutional convention was described as a "miracle" by many who attended it. Catherine Drinker Bowen so described it in her book: "Miracle at Philadelphia." It is not surprising that the work of the 55 delegates to the convention was then regarded as a miracle. The states, under the Articles of Confederation, seemed unable to collect revenue, regulate commerce, or compel compliance of the states with the confederation government's rules. Only 5 states sent delegates to a meeting at Annapolis in 1786. Congress responded to that meeting's request that it call a convention at Philadelphia the next year, to meet on May 14. It was May 25th before a quorum arrived. Only 12 states sent delegates. The first meeting was held on May 25th. For four months they attacked the problem of writing a new frame of government. Each state had one vote and 7 states were required for a quorum. Sometimes only a handful of men were present. Only 39 finally signed the finished document, in September 1787. It was sent to the states by the Congress and approved in all 13 conventions after bitter fights in many states. Rhode Island, the last state to act, approved it on May 29, 1790.

It was indeed a miracle that an agreed upon document survived this laborious and controversial creation. It would

be an infinitely greater miracle if as satisfactory a governmental frame could be put through the same procedures today. It is extremely doubtful that there are in America today 55 men who are the equal of the 55 who met in Philadelphia in 1787. It is even more doubtful that any document that a convention perfected today could survive congress and 50 state conventions.

One of the first issues that confronted the convention was the adoption of its own rules. They included a provision that the proceedings were to be held in secret and the members were not to disclose what transpired. This lead Thomas Jefferson to exclaim, in a letter to John Adams; "I am sorry the Federal Convention began their deliberations by so abominable a precedent as that of tying up the tongues of their members. Nothing can justify this example but the innocence of their intentions; and ignorance of the value of public discussion."

Subsequent to the adoption of the Constitution and the formation of the new government, Jefferson urged James Madison to publish his notes of the proceedings. They were not published until after his death.

The secrecy which Jefferson so stoutly opposed may have made the progress at Philadelphia possible, for it permitted

the delegates to meet in committee of the whole and without a record, thresh out an issue in unrecorded debate, in which individuals could withdraw from a stated position, return to it, and change their views again, if they wished, without fear of being criticized for inconsistency, or reproached by their colleagues. Some critiques doubt that a constitution could have emerged from open proceedings with recorded votes.

So much for the advantages of secrecy. The disadvantages came later. They came first in the nation-wide debate over adoption. To repair the absence that the constitutional debates could have contributed to discussion, John Jay, Alexander Hamilton, and James Madison collaborated in the publication of the Federalist Papers. Madison was the only one of the three present throughout the convention. Hamilton left on July 8 and did not return until September 18. Jay was busy in Congress with foreign affairs. Another disadvantage of the convention's secrecy affected the interpretation of the Constitution by the United States Supreme Court to this day. The courts frequently examine the legislative history of the acts of Congress to discover the intent and meaning of the law; they cannot examine the legislative history of the Constitution, because it doesn't exist. Madison kept notes throughout but they are mere notes and not a transcript.

So secrecy helped get the Constitution approved by the convention. It made adoption in the state conventions more

difficult. It has complicated the judicial construction of the document ever since.

The 13 states in 1787 not only had enough men to write a constitution -- they had more than enough. Three of the best minds of the age were not present at Philadelphia -- John Adams, who was the American minister in Great Britain; Thomas Jefferson, who was our minister to France; and John Jay who was secretary of foreign affairs for the Confederation Congress then meeting in New York.

(Parenthetically, it must be said that it may have been just as well they weren't there. For example, Jefferson found the failure to limit the term of the president a great error and Adams thought it one of the things that recommended the document to him.)

All historians I have consulted agree that James Madison made a contribution to the convention exceeding that of any other delegate. He was better prepared by a course of research on governments (aided by books sent from France by Jefferson); he was foremost among the Virginians who laid before the convention the Virginia plan of union which became a sort of agenda for the debates. His constant attention and attendance probably was decisive in steering toward a strong, federalist nation.

George Washington, who endowed the convention with a standing and reputation by his very presence, made another sort of contribution, as president of the convention. He had more political sense and more liberal impulses than many

historians have credited him with. When the Revolutionary Army was retreating across New Jersey and Elias Boudinot was serving as an adjutant, two men were brought in to Boudinot under a charge of spying for the British. They had been informed on by American spies in the British Army. Boudinot wished them executed. He laid the documents before General Washington. Washington said he presumed the men had been confronted by their accusers. Boudinot said that had not been done because their accusers were our spies. Washington told Boudinot to turn them loose and try them when they could confront their accusers. Boudinot had joined the army to protect it from excesses of the military and he withdrew in embarrassment from a lecture on due process. The story helps to explain the enormous reputation of Washington.

Many people must have been surprised this spring when Robert Allen Rutland, one of America's foremost historians of the Revolutionary period, declared in a bicentennial ceremony in Boston, that the delegate who was second only to Madison in the convention was Oliver Ellsworth. It would be remarkable if Ellsworth's name would mean anything to most citizens today. Madison's notes disclose that Ellsworth's interjections in the convention debates were almost as extensive as Madison's or those of Morris, or Pinckney, or other foremost figures. He influenced the style of the meeting by getting all resolutions worded to refer to the United States

instead of "the national government." He was chairman of the five man committee that perfected the first rough draft of the constitution based on the resolutions approved. He was the chief author of the article on the judiciary. He joined in Connecticut's effort to solve the deadlock over voting by the plan to have the people elect the House by proportionate representation and the states name two senators apiece. He led the fight to get Connecticut's convention to approve the constitution. He became one of Connecticut's first senators under the new government. He was the principal author of the Judiciary Act, the very first resolution to come before the new Senate and he led the floor fight to get it adopted. It was signed into law on September 22, 1789. He was named Chief Justice in 1796. Near the close of the Adams administration he was sent to France where he negotiated a treaty with Napoleon almost as important as the Jay Treaty with England. His name was given to the town of Ellsworth on February 26, 1800, by Act of the Massachusetts House.

Another major figure of the convention, not much heard of, was Gouverneur Morris, whose appearances on the floor and in Madison's notes were among the most numerous of all the delegates. He also chaired the committee which made the final draft of the constitution, contributing a fine rhetorical grace by his elegant style of writing.

The fight to get the Constitution approved by the state conventions was a bitter one and in many states a close one.

The meeting at Philadelphia, generally speaking, was a gentlemanly affair, but the fight over adoption had some rough and tumble debates. In Pennsylvania, the anti-federalists boycotted the state adopting convention and the sergeant at arms had to physically drag two members into the assembly to make a quorum.

In Virginia, Richard Henry Lee bluntly said that there were defects in the draft before the convention. He said to adopt a bad government for fear of anarchy was like saying "we must kill ourselves for fear of dying."

The Federalist Papers, by Madison, Hamilton and Jay were attacked by Letters from the Federal Farmer, attributed to Richard Henry Lee, probably mistakenly.

Oliver Ellsworth, under the pseudonym of The Landholder attacked George Mason for advocating in the convention the ending of slave imports, attributing his position to the fact that he had 300 slaves and probably would profit by breeding them for sale in South Carolina and Georgia. Ellsworth attacked Elbridge Gerry for opposing the draft constitution because he had paper money that the new government was not committed to redeeming. When Luther Martin defended Gerry Ellsworth said Martin had opposed the popular election of representatives. Martin wrote a ten thousand word retort to Ellsworth. Ellsworth attacked the foes of adoption as men who have lucrative state offices, tories, debtors,

believers in paper money. The anti-federalists attacked proponents as office holders, bankers, lawyers, and members of the Cincinnatti bent on establishing a monarchy.

The debate in the Virginia convention produced a challenge to a duel when Patrick Henry insinuated that Edmund Randolph had changed his views because of a bribe. Randolph retorted that the insinuation was warranted by no principle of decency, nor compatible with the least shadow of friendship. If friendship must fall - he said - "let it fall, like Lucifer, never to rise again." Henry's seconds called on Randolph that night to arrange the duel. Friends intervened and the quarrel was settled without a duel. Virginia finally approved 89 to 79.

Massachusetts finally approved by 187 to 168 but only after Sam Adams had proposed a string of amendments including a bill of rights. Governor Hancock swung the tide by rising from a sick bed to appear before the convention in favor of the Constitution.

Maine delegates were conspicuous in their opposition. Delegate Barrell of Maine said he wished the Constitution

had not been hurried on "like the driving of Jehu" and gave in detail eight anti-federalist reasons against it. He wished the convention to adjourn so he could go home and present the arguments to his constituents. Widgery of Maine also opposed it. There was already a separtist movement in Maine and some of them evidently felt the adoption of the Constitution would obstruct that.

The most conspicuous mistake of the Constitutional Convention was probably its omission of a Bill of Rights. This neglect threatened adoption in many of the conventions and was prevented from bringing about its defeat only by the prompt passage of declarations and amendments desiring that suitable amendments be adopted after enactment. Thomas Jefferson, among others, deplored the lack of a Bill of Rights. The reasons given for not including one were interesting. It was argued by Hamilton and others that since the convention was creating a limited government of enumerated powers no bill of rights to prevent it from the trespasses feared was needed -- in other words, the Constitution did not have to

have safeguards against abuses beyond the power of the government created. It seemed logical, but the foes of a bill of rights had to yield and in the First Congress, Madison brought forward a bill of rights that emerged as the first Ten Amendments.

Of these Amendments the one most familiar to most citizens now is Article 1: "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 of the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Altogether, the Bill of Rights laid down restraints upon Congress (and subsequently through the 14th amendment) on the states, to which citizens have had frequent resort in the subsequent 200 years. The State conventions rightly saw that the Bill of Rights was needed.

One other notable failure of the convention was its inability to address satisfactorily the issue of slavery. It outlawed importation of slaves in 1808 but left intact domestic slavery. Perhaps the failure of so firm and opponent as Ellsworth to argue for abolition partly explains it. He thought it necessary to yield in order to get a constitution adopted. The patriots of 1787 were not writing a perfect constitution, they were writing the best that could get adopted.

There are some curious contradictions in the convention debates on slavery. One of the most eloquent advocates of immediately banning imports of slaves was George Mason of Virginia who had 200 slaves. He based his arguments on moral grounds, citing especially the way slavery debased the minds of slave owners. Ellsworth replied that he could not give any evidence on that point because he had never owned a slave and neither had anyone else in Connecticut where slavery had long been abolished and he thought other states as well would abolish it in their own interest. Some southerners taunted the New Englanders with the charge that they were biased by the interest of New England maritime trades in the slave traffic. Another curious contradiction was that the Confederation Congress, sitting in New York, at the same time the Constitutional Convention was meeting in Philadelphia, had adopted the Northwest Ordinance abolishing slavery in the states of Northwest territory.

The failure to deal with slavery in 1787 because it was then a difficult question led to failure to handle the issue later when it became even more difficult by the fact that the cotton gin of Eli Whitney made it more feasible commercially. The convention's failure led straight to the Dredd Scott opinion of Chief Justice Taney and on to the Civil

War. The existence of slavery and the quarrels over admitting free and slave states probably kept the United States from taking Cuba and from expanding into Mexico.

A second failure was the failure to address the issue of sexual equality. (Here again, Ellsworth was no help. He had opposed in Connecticut the ability of females to devise their estates.)

Another failure was, in my opinion, its provisions for the election of the president. The Electoral College has not been a happy device. It brought the country to the brink of political disaster in the Adams administration in the tie vote between Aaron Burr and Thomas Jefferson. It has produced minority presidents. It ought to be revised to permit the direct election of presidents by a simple majority vote.

Another shortcoming was the absence of any thing relating to political parties. The system has varied from year to year and election to election. The primary system which has grown like Topsy is satisfactory by no standard of measurement.

The delegates to the Convention in Philadelphia did not foresee the rise of bureaucracy with the vast delegation of authority to persons not elected to office or responsible to any electorate until the government has accumulated a vast New Class alert to its own interests, secure in its prerogatives and tenure, generally irremovable from office and vested with powers loosely defined. Maybe they could not have dealt with it if they had foreseen it. Their successors have not dealt with it.

The constitution's apportionment of responsibility for the conduct of foreign affairs has not been a success. It has been a source of conflict in one administration after another. It has frustrated the consistent conduct of foreign affairs -- leading such critics as the late Walter Lippman to wonder if it is possible to conduct foreign policy under our system of government.

The defects as to slavery and sexual equality were dealt with by amendment but remain a reproach. The weakness of the system for selecting the president remains. The foreign policy defects persist. The transformation of a democracy into a bureaucracy remains to be addressed.

The United States Constitution, whatever its defects, flaws and weaknesses, still is a more perfect document for the government of this great country in the 20th Century than any we might expect to emerge from any convention called upon to draft another constitution.

The Constitution of 1787 occupies about 12 printed pages in ordinary book type. A document that emerged from a constitution today could hardly make a bow to the special interests that would bombard the convention without extending to several hundred pages. No rational man could hope, no reasonable man predict that a convention would now produce a more workable document. It has been the country's great good fortune to have this constitution through all the

turbulent decades of the past and it will be its good fortune if it can retain it unblemished by the intervention of any popular conventions, in the decades ahead.

The founding fathers met at Philadelphia in 1787 to transform a collection of separate states into a nation, and they succeeded beyond the expectations of any of them. They did indeed accomplish a miracle. An inquiring citizen, asked Ben Franklin what the Convention had given the country. His answer was: "A Republic, if you can keep it."

xxx