KEYNOTE ADDRESS

Symposium on Federal and State Methods of Repressing Political Activism, February 21, 1987*

WILLIAM KUNSTLER**

I want to read something about the Constitution that comes from two different publications saying exactly the same thing. While we're going to be talking about the Federal Constitution as a great document with high-sounding phrases, two men, a continent apart, writing almost at the same time, have discussed its origins. One is E.L. Doctorow in *The Nation*, in an article entitled, "A Citizen Reads the Constitution;"[1] the other is a relatively unknown but marvelous writer by the name of John Sanford, 82 1/2 years old and living in Santa Barbara, California, who went to this university under his real name of Julian Shapiro and who is a critic of all of the excesses of America.

In describing the people who created the Constitution in a book called *The Color of the Air*, Sanford writes the following:

> There were fifty-six signers, (and these were some of the same people who signed 'The Declaration' as well) all of them Gents: fourteen lawyers (among them a part-time moneylender), thirteen jurists (one a musician, a writer of airy and dainty songs), eleven merchants (i.e. smugglers), eight farmers (two being Tidewater rubes by the name of Lee), four physicians, a pair of soldiers, an ironmonger, a publisher, a politician, and the President of Princeton. The Mob did not sign. The sailmakers, the cartwrights and the glassblowers, the grooms, the tapsters, the drovers and drayman—none such signed. The barbers, the fiddlers, the Wandering Jews, the horse-copers, the hatters and glovers, and those that stomped the high road with or without their scarlet letters—none of these signed, none made a mark. Only Gents wrote their John Hancocks, not cheap Jacks, not swabs or sweeps or keepers of an ordinary, not joiners or tinkers or catchers of rats at a penny a pound. That kind had lives, of course, but no fortunes, and therefore no sacred honor. The nobodies thus were missing—the mercer, the chandler, the hanger-on, the muff. To the City of Brotherly Love, no rough fellow, no greenhorn went, none but the Gents.[2]

---

* Hosted by the NYU *Review of Law & Social Change.*

** Vice-president and volunteer staff attorney at the Center for Constitutional Rights; B.A., 1941, Yale University; LL.B., 1948, Columbia University.

1. Doctorow, *A Citizen Reads the Constitution*, THE NATION, Feb. 21, 1987, at 208.
2. J. SANFORD, THE COLOR OF THE AIR 86 (1985).

Mr. Doctorow, in his analysis of the Constitution, says the following:

> And I reflect now in conclusion, that this is what brought the people into the streets in Philadelphia 200 years ago. Those wheelwrights and coach builders and ribbon and fringe weavers. The idea, the belief, the faith that America was unprecedented. I like to think in this year of bicentennial celebration that the prevailing image will be of those plain people, taking to the streets. Those people with only their wits and their skills to lead them through their lives. Forming their processions, the wheelwrights and ribbon makers, the railroad porters and coalminers, the garment workers, the steel workers, the automobile workers, the telephone operators, the air traffic controllers, the farmworkers, the computer programmers, and, one hopes, the printers, stationers, and booksellers too.[3]

You see how alike these are, and I'm sure that those two men do not know each other and were writing independently of each other, yet say much the same thing. That the Constitution may have been created by Gents but was meant, or should be meant, for all of those non-gents, the Mob, as Mr. Sanford calls them, who are in the streets or should be in the streets. That's a preface, I think, to any discussion about the rise and fall of the American Constitution. I guess we all realize that it was framed by Gents; it was filled with compromises that were palatable to some of the Gents, such as making Blacks 3/5 of Whites and so on, and yet it should be the Constitution of those who didn't meet in Philadelphia, who didn't hold the reins of government eventually, who weren't the power brokers, but the millwrights and the telephone operators and all the rest about whom Mssrs. Doctorow and Sanford are talking. With that as a backdrop, I would like to get to what I prepared because I thought that this occasion was more than worthy of putting something down on paper and not the delivery of glib, off-the-cuff remarks. I call it the rise and fall of the American Constitution.

More than a century ago, Karl Marx, in assessing the 18th of Brumaire Constitution of Louis Napoleon, observed that, while its parchment was filled with glowing hyperbole about human rights and liberties, it would only be meaningful if it were applied across the board and without reserve to all French citizens, a consummation never to be realized, certainly during the emperor's reign.[4] The same can be said, of course, about its American equivalent, whose bicentennial is being celebrated this very year. Paradoxically, the man who heads the festivities is Warren E. Burger, during whose tenure as Chief Justice more was done by the Supreme Court's anti-libertarian majority to destroy the essence of this marvelous instrument of human freedom than in nearly any other previous era.

On every level, the edifice erected after so much debate in Philadelphia in

3. Doctorow, *supra* note 1, at 217.

4. *See* K. MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE (1852).

1787 is crumbling into the dust of reactionism. The Bill of Rights, easily the most important element of the Constitution, and without which the latter could never have been approved by a majority of the the original thirteen states, has been virtually destroyed by a judicial scalpel that has excised all of its most significant portions. One by one, these safeguards, erected against official tyranny, have fallen under the weight of interpretations stripping them of any contemporary meaning.

Today, the Attorney General of the United States, a clone of his creator, insists that, in interpreting the Constitution, we must return to what he terms the "original intentions" of its framers. What he really means is that we must retrogress to the early part of the 19th century when the federal Bill of Rights was held not to be binding on the states. In other words, the doctrine of states' rights, the foundation supporting much of the legal justification for segregation, interposition, child labor, and anti-unionism, to name but a few of our national horrors, must be given precedence over any federally created rights. The suggestion from the likes of an Edwin Meese, that we backtrack a century and a half to pre-Civil War America, to restore what he considers a purer form of constitutionalism, is as assinine as it is dangerous.

While we're still on the subject of Meesetification, how about his contention that we no longer need the celebrated Miranda warnings because, in his opinion, most criminal suspects are guilty, and thus not mere suspects entitled to be enlightened as to their custodial rights. With this hypothesis, he sweeps aside the century-old Anglo-American concept of presumption of innocence in favor of that of the continental model of guilty until proven to the contrary. In addition, he has urged the Supreme Court to relegate the presumption to the level of a simple rule regarding the burden of proof rather than a constitutional principle, a proposition the Rehnquist Court might well soon adopt.

The Bill of Rights amendments directly affecting criminal trials are four in number: the fourth, prohibiting unreasonable searches and seizures, the fifth, guaranteeing due process of law and the privilege against self-incrimination, the sixth, insuring trial by jury and the assistance of counsel, and the eighth, prohibiting Draconian punishments and providing for reasonable bail in most cases. Each one has been systematically and significantly weakened in recent years either by court decisions or by legislative fiat.

The "good faith" exception to the exclusionary rule, for example, has virtually neutralized the fourth amendment as a bar to the admission of illegally seized evidence. The grant of limited immunity has all but destroyed the fifth's privilege against self-incrimination, unless of course you're Lt. Col. Oliver North or Vice Admiral John Poindexter. Judicially sanctioned prosecutorial misconduct has made a tragic mockery of its stricture against denials of due process.

The growing refusal of both state and federal courts to appoint counsel of choice to indigent offenders has often forced the latter to accept lawyers selected by the sovereignty involved or to proceed pro se. The most dramatic

example of this tendency is now taking place in the Boston prosecution of eight revolutionaries for seditious conspiracy where attorneys who had represented the defendants in other trials, involving virtually the same evidence and who are implicitly trusted by them, have been denied appointment under the appropriate provisions of the Criminal Justice Act. Instead, a bevy of local practitioners, most of whom were former federal prosecutors without any previous relationship with the defendants, were named to represent them over their vehement objections.[5]

The eighth amendment insists that excessive bail shall not be required, nor cruel or unusual punishments inflicted. Yet we now have a preventive detention statute on the federal level with many states expected to follow suit if the law passes Supreme Court muster, as it almost certainly will given the present line-up of that Court.[6] In addition to the restoration of the death penalty as the myopic panacea for serious crimes of violence, we are now building prisons devoted to the physical and psychological torture of their inmates. Accordingly, in Marion, Illinois we have a federal penal institution with a behavior modification program that would put the Marquis de Sade to shame, and, as many of you know, there is one for women as well in Lexington, Kentucky. In addition, the lengths of criminal sentences have increased drastically to the point where, in many cases, terms of double and triple the normal lifetimes of their subjects are routinely imposed.

One more area needs elaboration. Despite the imposing frieze containing the words "Equal Justice Under Law" that greets the eye as one ascends the steps of the Supreme Court, the promise of that inscription remains, as Marx put it, "The acme of a cruel mythology." Justice may well be highly equal for the favored few of our national community, but it is systematically withheld from our seasonal and perennial pariahs. We have created outlaw classes — Native Americans, Blacks, communists, socialists, revolutionaries, Puerto Rican nationalists, providers of sanctuaries from South and Central American death squads, women, pacifists, anti-nuclear protesters, gays, and prisoners — to name but two handfuls for whom justice is so often denied or perverted. For these, there is no real Constitution and they must fend with the sure knowledge that, in the courtrooms, in the penitentiaries, in the streets, and in their homes, they will be maltreated with the heavy hand of official arrogance and cruelty. Just as the original Constitution could split human beings into fifths, so it can be read by its latter day diviners as authorizing the legal lynching of those who dare to demand that it live up to its most sacred of guarantees, promises its detractors and destroyers are in the unholy process of withdrawing from the marketplace of human rights.

5. The defendants' refusal to proceed unless they were represented by their counsel of choice eventually forced the court to permit them to do so, but only after a storm of public protest. *See* United States v. Levasseur, et. al., Criminal No. 86-180 MC (D. Mass. filed May 28, 1986).

6. Unfortunately, this prophecy proved to be true. *See* United States v. Salerno, 107 S. Ct. 2095 (1987).

In short, we are watching the deliberate dismemberment of the most significant aspects of what some of its drafters once referred to as "the great charter of our liberties." Case by case, statute by statute, we are squeezing the breath out of a document that's second only to Magna Carta in importance and was thought to perpetuate basic concepts of human freedom and render them forever secure against the depredation of king and commoner alike. If this symposium does nothing more than warn that the handwriting on the wall is becoming clearer, day by mournful day, then it will more than have served its purpose. If it succeeds in generating shock waves that can translate themselves into terms clearly and unmistakably understood by a sizeable segment of our fellow citizens across the land, it will have exceeded the wildest hopes of its resourceful conveners. While I hope for the latter, I will willingly settle for the former.

In closing, I would like to read the words of G.K. Chesterton in his poem about King Alfred, on the eve of the ill-fated battle of Athelny with the Danes, when the Saxon monarch, who was to be overwhelmingly defeated the next day, was supposedly visited by the Virgin Mary. Incidentally, these words, which have as much meaning today as when they were first written, constituted the only editorial published by the *London Times* after the evacuation of French and British soldiers from Dunkirk in 1941. They appeared in a small section of the editorial page and there was nothing printed on any other part of that page. Chesterton wrote as follows:

> I tell you naught for your comfort,
> Yea, naught for your desire,
> Save that the sky grows darker yet
> And the sea rises ever higher.
> Night shall be thrice night over you
> And heaven an iron cope.
> Do you have joy without cause
> And faith without hope.[7]

Now let's get on with our work. Thank you.

7. G. K. CHESTERTON, *The Vision of the King*, in THE COLLECTED POEMS OF G. K. CHESTERTON 217 (1932).