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A CONTEMPORARY FEDERALIST PAPER

As we approach the bi-centennial celebration of our Federal Constitution, one of the astonishing things about it is its freshness, its contemporary relevance, in every age. New meanings are discovered in its great general principles in concrete new circumstances.

In 1777, even as they fought the British, the thirteen colonies entered into a compact styled "Articles of Confederation and Perpetual Union." The delegates determined that each state would retain its sovereignty, freedom and independence, and every power, jurisdiction and right which was not expressly dedicated to the United States. In form, the Articles were remarkably like the Charter of the United Nations and possessed most of the weaknesses of that document.

Having won their independence from England in 1781, the American colonies faced a new question of paramount importance: Would this be politically one nation or would it not.

That the American Revolution and the American people produced a governmental system adequate to check the very forces they unleashed was the miracle of an age in which many other nations, the French, the Russians, the Germans, the Italians, in their respective revolutionary turns would become so unrestrained as to lose contact with sanity.

The Americans might have suffered a similar fate had they followed the lead of some demagogues who were available but there were giants in the earth in those days and they spoke in the name of the nation and the people followed them.

The Federal Convention, called in 1787 to alter and amend the Articles of Confederation, boldly created a federal government which

would have authority and power to regulate federal affairs, leaving local affairs to the states. It was no longer a league, it was a government.

It is difficult to imagine a group assembled to revise the U. N. Charter, even in these days of instant communication, so boldly addressing our international problems.

The framers of the U. S. Constitution of 1787 were educated, highly literate, and widely read men who were intimately acquainted with the centuries of struggle between tyranny and freedom, a struggle which had been going on in Europe and more lately in America. The long record of oppression and suppression formed a backdrop as the leaders proceeded in secrecy to build the government of the United States on the sovereignty of the people and their rights as citizens of a republic.

As originally drafted, the Constitution had no Bill of Rights, because the convention delegates at Philadelphia felt that individual rights were in no danger and would be protected by the states, most of which had already adopted Bills of Rights.

Despite the numerous state Bills of Rights, the absence of a Bill of Rights in the federal document became the strongest obstruction to the ratification of the Constitution and under the influence of his friend, Thomas Jefferson, and yielding to the general demand, James Madison became the principal author of the first ten amendments which constitute the federal Bill of Rights.

The most basic law protecting freedom of speech and the press in America is to be found in the first amendment added to the Constitution, a recognition of its profound importance.

There are three guarantees of personal liberties in the First Amendment: Congress shall make no law (1) respecting an establishment of religion or prohibiting the free exercise thereof; (2) abridging the freedom of speech or of the press; or (3) abridging the right of the people peaceably to assemble and to petition the government for a redress of grievance.

A basically new approach to the crime of seditious libel was made by the authors of the First Amendment. Even after the victory over censorship in England in 1695, the people continued to regard their rulers as their superiors who must not be censured directly in newspapers and pamphlets but only through petitions to elected parliamentary representatives. Now came Madison and his associates who regarded governmental authorities as servants of the people. As stated by Madison, "If we advert to the nature of republican government, we shall find the censorial power is in the people over government, and not in the government over the people." In effect, sedition ceased to be a crime under the broad prohibitions of the First Amendment, though breaches of the peace which destroyed or endangered life, limb, or property, were still punishable by law.

To understand the motivations and strong emotional involvement of the framers of the Constitution, with its appended Bill of Rights, one must retrace a series of events in English and colonial American history. The First Amendment's prohibition against interference with free speech and free press was a direct consequence of centuries of bitter experience living under extremely repressive English law controlling speech and press. The authority of government was long regarded as supreme, irresistible

and absolute. Prior to the English revolution of 1688, unqualified sovereignty had been exercised by the Crown; subsequently, the same power was vested in parliamentary authority. Any criticism of the government was considered not only objectionable but dangerous heresy which must be ruthlessly suppressed. That entire concept was rejected by the First Amendment.

For five hundred years before the adoption of the American Constitution, a struggle between tyranny and freedom had been underway in England. The Anglo-Saxon precedents may be dated from the English Treason Statute of 1351, during the reign of Edward III. Parliament persuaded or compelled Edward III to narrow the crime of treason by limiting it to making war on the King, or compassing or imaging his death. But in subsequent centuries, the statute was broken down by judicial interpretation and expanded by new acts of Parliament. Officials in power used the charge of treason to send their adversaries to the scaffold and then lost their own heads when they fell out of favor with the King. Parliament added new treasons to the statutory lists, with no requirement that an overt act be proved. The omission, notes Sir Matthew Hale in his PLEAS OF THE CROWN, "subjected men to the great punishment of treason for their very thoughts." The body of repressive laws continued to build up until the death of Henry VIII, when legislation was enacted wiping out all forms of treason except those contained in the statute of Edward III.

Nevertheless, with or without the sanction of law, the slaughter of dissidents persisted. Catholic Queen Mary killed off the Protestants and Protestant Queen Elizabeth similarly dispatched the Catholics--along with sundry rivals and ex-lovers. The orgy of persecution continued

without diminution during the eighty-five year Stuart epoch and Cromwell's Puritan Revolution.

The significance of the written and printed word was fully recognized by Elizabeth, Cromwell and the Stuarts. From the time William Caxton set up the first printing press in England in 1476, a new force was released in the world, but until Henry VIII's split with the Catholic Church, printed books were predominantly concerned with orthodox religion or were non-controversial in subject matter. Thereafter, the country was flooded with Anabaptist, Presbyterian, Quaker and Papist tracts. As soon as the products of the printing press started to reach the masses, restraints began to be set up. Treason, felony and heresy statutes directed against authors and publishers were enacted in Elizabeth's time and strengthened by a licensing system to control the printers and their presses. Only the government was free to express opinion through the spoken or the printed word.

A blow against censorship and prior restraint was struck by John Milton in 1644, shortly after the first permanent English settlement on the North American continent, in his classic polemic *Areopagetica*, contending against parliamentary censorship and unlicensed printing. The name of the tract was derived from the title of the highest Council in ancient Athens, a democratic society in which openness was treasured at a time when that city reached the zenith of its power.

Milton's stirring defense for liberty went unheeded, and government censorship continued for another fifty years. The licensing Act of 1662, made law after the Restoration, prohibited seditious and heretical books and pamphlets; forbade printing any material unlicensed by the Stationer's Company, a government monopoly; made illegal the importation or selling

of a book without a license, and required that all printing presses be registered with the Stationers' Company. The system did not come to an end until 1694, six years after the "Glorious Revolution" threw out the last of the Stuarts.

Meanwhile, on this side of the Atlantic, the English colonies in America, forced to operate under the laws of the Motherland, were experiencing similar travails. One myth that should be dispelled is the popular belief that freedom of expression was cherished in colonial American society because the evidence provides little comfort for the notion that the colonies hospitably received advocates of obnoxious or detestable ideas on matters that counted. Nor is there reason to believe that rambunctious unorthodoxies suffered only from Puritan bigots and tyrannous royal judges. The American people simply did not understand that freedom of thought and expression means equal freedom for the other fellow, especially the one with hated ideas.

Colonial America was marked by great diversity of opinion on religion, politics and other matters but violent conflicts were avoided for the most part by the separation of groups with varying points of view. Colonial America was a diverse open society dotted with closed enclaves and one could generally settle in with his co-believers in safety and comfort and exercise the right of oppression. Thus, Unitarians avoided Anglican or Puritan communities; Puritans stayed away from the Anglican colonies; Quakers and Anabaptists confined their activities principally to Pennsylvania and Rhode Island; and Catholics were concentrated in Maryland. The Atheists met with toleration nowhere.

Strangely, again contrary to tradition, most severe suppression of freedom of expression came not from royal judges or governors appointed by the Crown, but from the popularly elected assemblies. During the eighteenth century especially, the law of seditious libel was enforced in America chiefly by the provincial legislatures. The assemblies, considering themselves immune from criticism, issued warrants of arrest for, interrogated, fined and imprisoned, anyone accused of libelling its members, or the body as a whole, by written, printed or spoken words.

None of the colonies was an exception. The first assembly to meet on American soil, the Virginia House of Burgesses, decided that a Captain Henry Spellman was guilty of "treasonable words" and stripped him of his rank. The prevailing attitude in the Old Dominion was expressed by Governor William Berkeley's famous remark, "I thank God, there are no free schools nor printing, and I hope we shall not have these hundred years; for learning has brought disobedience, and heresy, and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both."

With this tradition and history, Madison created new concepts which Abraham Lincoln described at Gettysburg nearly eighty years later as "Government of, by and for the people." It was a concept of government differing not in degree but in a fundamental idea. And, like the shot at Concord, it was heard around the world. The concept struck terror then to the hearts of people in authority as it does yet.

Our Revolution, which was a political one, was as shattering to the rulers of other nations as was the economic revolution in Russia in our century. Moreover, our revolution has proved to be far more enduring as we witness the fading and failures of the Communist doctrines which for several decades exerted tremendous influence around the globe.

Though we share a common legal system and many institutions, even our British cousins cannot accept our revolutionary concept of the free flow of information. They have an Official Secrets Act which takes the position that the government owns information and ideas, a question that went to our Supreme Court in the Pentagon Papers case.

The British attitude is distinctly different from the American tradition. Newspapers, for example, are not permitted to comment on criminal cases before trial and an Official Secrets Act imposes severe penalties upon those who disclose classified information.

An interesting example of this Act demonstrates the proprietary attitude of that government toward information. As you may recall, the Argentine Cruiser General Belgrano was sunk off the Falkland Islands by British torpedo planes on May 2, 1982, with the loss of hundreds of Argentine lives. This was reported as a great victory by the British government but a government employee disclosed to a member of Parliament that the cruiser was torpedoed many hours after it had departed from the battle area and was returning to its home port. The government of Mrs. Thatcher, infuriated by the disclosure, did not deny its accuracy but charged Clive Ponting of a criminal offense, that of giving Parliament a government paper. The case did not involve the press but it provoked



broad criticism of the extremely constraining "Official Secrets Act" and a jury acquitted Mr. Ponting, reflecting a sense that the right to conceal information about national affairs should not be total and arbitrary.

Nearly a generation ago, a leading American historian, Bruce Catton, restated a basic truth:

"The greatest of all American traditions is the simple tradition of freedom. From our earliest days as a people, this tradition has provided us with a faith to live by. It has shaped what Americans have done and what they have dreamed. If any one word tells what America really is, it is the one word -- freedom . . . . The secret of the American tradition is freedom -- freedom unabridged and unadulterated, freedom that applies to everybody in the land at all times and places, freedom for those with whom we disagree as well as for those with whom we do agree."

Power is always gradually stealing away from the many to the few, because the few are more vigilant and consistent, Samuel Johnson warned in the "Adventurer"; and every generation since 1790, indeed nearly every decade, has redefined and reinterpreted the First Amendment. Though the language is clear that "Congress shall make no law... abridging the freedom of speech, or of the press," Congress, the Courts and executive powers have repeatedly done, or attempted to do, exactly that.

Despite dissents by Supreme Court Justices such as Hugo Black and William O. Douglas, our governmental system has determined that obscenity

is not entitled to constitutional protection, and the concept of "commercial speech" was invented to enable the government to regulate advertising. By now, this limitation seems to include anything written on a commercial subject.

The surge of First Amendment cases now before various federal courts and regulatory agencies suggests a disquieting pattern. It shows the federal government pressing, increasingly aggressively, into areas that until now have been well beyond its constitutional limits. Federal judges are becoming increasingly receptive to these incursions and willing to subject the freedom of expression to routine commercial regulations.

The Securities and Exchange Commission is now pursuing several cases in which it hopes to establish its power to regulate the financial press. It is trying to assert a power and responsibility to set standards of moral character for those permitted to publish in financial fields. It claims authority to oversee what goes into financial publications. This is known as "prior restraint" which until very recently has been held to be flatly unconstitutional under American law.

The C.I.A.'s attack on the American Broadcasting Company is even more startling. In a news broadcast, ABC had suggested that the CIA tried to arrange the murder of a Honolulu financial figure. The CIA denied it vehemently, and, after a long delay, ABC acknowledged on the air that its source could provide no supporting evidence. But the CIA proceeded to file a complaint with the Federal Communications Commission demanding that the FCC investigate and take the results into account when ABC's license comes up for renewal.

In another proceeding, a federal grand jury in Philadelphia sub-

poenaed the notes and papers of an author named Antoni Gronowicz, who wrote a book about Pope John Paul II.

In January, 1984, at the request of the Justice Department's tax division, the U. S. Court of Appeals for the 10th circuit temporarily ordered West Publishing Company, a private law publishing firm, to delay publication of an opinion which included severe criticism of three tax division lawyers by the presiding judge.

For years, the CIA has required as a condition of original employment that persons hired by it agree to a lifetime prepublication review by that agency of their writings, to insure that no classified material is revealed. Frank Snepp 3rd, a former CIA analyst of North Vietnamese political affairs, wrote a book "Decent Interval" about his experiences in Viet-Nam. He caused the book to be published without first submitting it to the CIA for review. The Supreme Court held 6 - 3 that Snepp had breached his agreement by even using unclassified information, and required that Snepp turn over all of his earnings from his book to the government.

Recognizing that the constitutional difficulties inherent in adoption of any law to restrict the freedom of the press, the Administration saw an opening to control information by the device of contracts. In July, 1981, President Reagan ordered all government officials who have access to secret intelligence to sign a one-page form agreeing not to disclose secret information without receiving their agency's approval. Those who refused would be denied access. In 1983, the Administration sought to strengthen the agreement with a more detailed form under National Security Decision Directive 84, requiring all officials with access to sensitive information to agree to "preclear" their writings with their successors so long as they

lived, even after they left government service.

The effect of the directive is this: Those people most knowledgeable about subjects of overriding national concern will be least able to comment without the approval of those they may wish to criticize. Mondale could not comment on government policy nor a Kissinger on foreign affairs without prior approval.

It is true that public indignation induced the Administration to announce that it would not implement Executive Order 84, and some members of Congress thought the matter had been put to rest. Congress later learned that the Administration intended to continue asking employees to sign the original agreement.

Responding to Congressional requests, the General Accounting Office investigated that report and found 164,000 federal employees have signed agreements barring them for life from writing or speaking on intelligence-related issues without receiving clearance from the government. The signatories include employees from the Defense Department, State Department, Treasury, NASA, Interior and others.

The trend is toward secrecy in government, and a significant case in point is now before the federal courts. Samuel Loring Morrison, the 40-year old grandson of the late historian, Samuel Eliot Morrison, was a civilian employed by the Navy with a top-secret security clearance. He worked, also, with the Navy's consent, as United States editor of Jane's Fighting Ships, a military publication affiliated with Jane's Defense Weekly. In late February, he was charged with theft of government property and espionage for sending to Jane's for publication three U.S. satellite photographs of a Soviet aircraft carrier under construction. The government argues

that he violated the Espionage Act of 1917, even if he acted without subversive intent. Morrison is accused of violating the Espionage Act because foreign agents read Jane's publications. The federal prosecutor argues that the publication of the pictures could provide foreign agents with information about American intelligence-gathering methods and American targeting priorities.

The only previous effort to use such laws in this way was the indictment of Daniel Ellsberg and Anthony Russo for unauthorized disclosure of the Pentagon Papers, the Defense Department study of the Vietnam War. That case was dismissed by the U. S. Supreme Court because of government misconduct but the composition of this Supreme Court is different from that of the Pentagon Papers era.

Congress has repeatedly refused to pass a general law making leaks a criminal offense. Instead, it has taken careful aim and outlawed in strict terms only disclosures of a particularly dangerous kind -- on nuclear data, for example, and communications such as that gleaned from electronic eavesdropping.

It was confirmed March 19th by the White House that the CIA sent it legislation making it a crime for government employees to disclose "any classified information." And the bill was being considered within the Administration. Less than 10 days later, the Administration disclosed that it had decided to drop the proposal which had been sponsored by William J. Casey, the Director of the Central Intelligence Agency.

As if these CIA challenges to freedom of the press were not adequate, recent libel actions have suggested the law of libel may become a significant tool to inhibit press criticism of public figures. In the cases of General William Westmoreland against CBS, and Ariel Sharon against TIME MAGAZINE, enormous sums were demanded in private tort actions in-

stituted by the generals against the broadcasting system and the publication.

The landmark case of New York Times against Sullivan, decided by the U. S. Supreme Court under Earl Warren 20 years ago established that to recover from a newspaper, a public official seeking damages for libel must prove that the falsehood had been issued with actual knowledge that it was false, or in reckless disregard of whether it was false or not. The Court's stated goal was to protect the First Amendment's freedom of speech and press from the effects of large damage awards in libel cases.

Since the Burger Court has yet to find for the press in a libel case, recent questions from the bench by Justice William Rehnquist have suggested that struggle over the rules of libel may be about to enter a new and more fiery stage. Why, he asked recently, should the law be any different whether a person is damaged by a libelous statement or a defective train? The law makes few distinctions between libel and other torts and thus, should not a person injured by the publication of a falsehood be able to sue for damages on much the same basis as one injured by a runaway train?

Justice Rehnquist's question of the nature of the damage brought to my mind a cryptic aphorism remembered from childhood. "Sticks and stones may break my bones, but names will never hurt me." This appears to distinguish between physical injuries and hurts of a less tangible sort. Thinking the jingle might have come <sup>from</sup> McGuffey's Readers or Mother Goose, I thought it might be instructive to see why such a distinction was made. Investigation revealed the saying of far more ancient origin. It appears in Ecclesiasticus, the apocryphal book called "The Wisdom of Jews" the son of Sira (or Sirach), sometimes shortened to Ben Sira in Hebrew, which was compiled in Egypt at least as early as the second century before Christ.

Having led you into this wasteland and having no clear route by which to extricate you, I will express my concern that these basic freedoms of the First Amendment are at risk to a degree not before encountered in any of our lifetimes. In the preparation of this paper, I have found great assistance in a collection of articles compiled under the sponsorship of the American Library Assn. entitled "The First Freedom Today."

Now, I should like to conclude with two quotations, a poem by W. H. Auden and a portion of a letter by Abraham Lincoln.

THE UNKNOWN CITIZEN\*

(To JS/07/M/378 This Marble Monument Is Erected by the State)

He was found by the Bureau of Statistics to be  
One against whom there was no official complaint,  
And all the reports on his conduct agree  
That, in the modern sense of an old-fashioned word, he was a  
saint,  
For in everything he did he served the Greater Community.  
Except for the War till the day he retired  
He worked in a factory and never got fired,  
But satisfied his employers, Fudge Motors Inc.  
Yet he wasn't a scab or odd in his views,  
For his Union reports that he paid his dues,  
(Our report on his Union shows it was sound)  
And our Social Psychology workers found  
That he was popular with his mates and liked a drink.  
The Press are convinced that he bought a paper every day  
And that his reactions to advertisements were normal in every  
way.  
Policies taken out in his name prove that he was fully insured,  
And his Health-card shows he was once in hospital but left it  
cured.  
Both Producers Research and High-Grade Living declare  
He was fully sensible to the advantages of the Installment Plan  
And had everything necessary to the Modern Man,  
A phonograph, a radio, a car and a fridge.  
Our researchers into Public Opinion are content  
That he held the proper opinions for the time of year;  
When there was peace, he was for peace; when there was war,  
he went.  
He was married and added five children to the population,  
Which our Eugenist says was the right number for a parent of  
his generation,  
And our teachers report that he never interfered with their  
education.  
Was he free? Was he happy? The question is absurd:  
Had anything been wrong, we should certainly have heard.

W. H. Auden

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My final quotation is from Abraham Lincoln, who was a supreme realist, a shrewd and calculating individual, and yet a man possessed of a "passionate moral intensity and conviction." Here is an excerpt from his private correspondence:

"What constitutes the bulwark of our own liberty and independence? It is not our frowning battlements, our bristling sea coast, the guns of our war steamers, or the strength of our gallant and disciplined army. There are not our reliance against a resumption of tyranny in our fair land. All of them may be turned against our liberties without making stronger or weaker for the struggle.

"Our reliance is on the love of liberty which God has planted in our bosoms. Our defense is in the preservation of a spirit which prizes liberty as the heritage of all men in all lands, everywhere. Destroy this spirit and you have planted the seeds of despotism around your own doors . . . . Accustomed to trample on the rights of those around you, you have lost the genius of your own independence, and become the fit subjects of the first cunning tyrant who rises amongst you."