

3.31.2003

The Constitution in Crisis

John Brigham, UMass, Amherst

Remarks prepared for a conference on constitutional orders in Baltimore organized by Mark Graber, April 4-5, 2003.¹

Abstract

This paper begins with the idea of a constitutional crisis. It proposes that, given what we know of constitutions and constitutional change that we think in terms of the transformations that take place and specifically that we see the American war in Iraq as a struggle to remake the Constitution. I discuss the sides in the conflict, some strategic and tactical issues and in conclusion I try to draw some hope from this endeavor.

An earlier version of these remarks was prepared for a Peace Convocation on the War in Iraq, March 25, 2003 at the University of Massachusetts, Amherst.

1. The Idea of Constitutional Crisis

a. The Notion of a Crisis

My colleagues in political science and law are fascinated with the notion of constitutional crisis. This, in summary, usually involves the perception that the constitutional system as a whole or in significant part is in jeopardy of falling apart.

These intellectuals were buzzing about the election in November of 2000 (See Law and Courts list). The perceived crisis then was thought to have emerged because a President had not been chosen by the time the election coverage was to conclude on election night. Or, so it seemed to me. In fact the President would not be chosen until over a month later.

During that period the “what if” and “how about that” commentary was intense. There were questions about whether something like this had ever happened before (it had) and what it would mean in the 21st Century (it turns out quite a lot).

Then, when the Supreme Court settled the issue in relatively predictable constitutional style, there was a continued buzz and rush to comment on what had happened.² I too was interested and my constitutional law class appreciated the events as an indication that our subject was relevant. I didn’t wonder about all this attention until the following fall when the neighborhood in NYC where my son had been living was blown up.

These people with whom I am professionally identified were much quieter after the World Trade Center and the Pentagon were attacked. There wasn’t much about terrorism on the various lists that I subscribe to or, I suspect, at least initially in the

¹ For the gathering in Baltimore, I had begun to write on the internet, focusing on the resistance of librarians to Congressional regulation. I have put that aside for the moment. In the spirit of the times I am tempted not to return to it until this constitutional crisis is resolved, but I might not be able to do that.

² See Howard Gillman.

3.31.2003

constitutional law curriculum.³ And, my colleagues have not had much to say about the American war in Iraq.

The odd thing to me was that in the confusion over the election in 2000, America never seemed to be in a crisis of constitutional proportions. The issues to be decided, which ballots to count and how to count them, though momentous, were within rather than outside the parameters of the constitutional system. Indeed, it was the operation of the slightly odd Electoral College system that set the parameters of the core controversies.

But, a crisis does appear to have been brewing since September of 2001. And, the notion of crisis and the notion of Constitution have been on my mind during the opening days of the second Bush war in Iraq. Maybe it is an indication of the seriousness of this crisis that we don't speak about it much.

b. Constitutional Orders

Many of us have argued that the Constitution is too important to be left to the courts, particularly the current Supreme Court. This group is familiar with Mark Tushnet's proposition, in *Taking the Constitution Away from the Courts*,⁴ that there are other places to look for constitutional meaning. My argument in *The Cult of the Court*⁵ was that the academy had become sycophants and lost the ability to think about constitutional interpretation without first thinking about the Supreme Court.

I am influenced by notions of constitutional change articulated by Mark Tushnet and by the book *Neglected Policies: Constitutional Law and Legal Commentary as Civic Education* by Ira Strauber. In Strauber's Introduction he states that "... teachers and critics (primarily journalists and academics outside law school)" are "devoted to a complex group of intellectual and political ideas" which he calls "the ideology of involvement" and "intellectual jurisprudence".⁶ Though his treatment is more sophisticated, I will summarize the argument here as treating many of us as being too devoted to "lawyerly methods and legal, political, and moral abstractions as they are ordinarily deployed in doctrinal analysis, jurisprudence, and legal philosophy."⁷ His approach "calls for commentary that mixes and merges these methods and abstractions with commonplace contingent and/or circumstantial social-fact, social-scientific, and consequentialist considerations."⁸ This he characterizes in terms of a "willingness to be situated 'on the outside looking in' on the law."⁹ From my vantage point in the academy teaching hundreds of undergraduates a year, thousands in my lifetime, most of whom will not go to law school or argue before the Supreme Court, in a period when the Supreme Court is far from the most interesting place to look for the meaning of the Constitution, I find Strauber's position, really useful.

³ We simply may be a deliberate group when it comes to commenting on war. The recent discussion of the course by Brett E. Marston (www.oswego.edu/~marston/300/index.html) on the Law and Courts List does indicate a willingness to take on these issues.

⁴ Princeton University Press, 1999.

⁵ Temple University Press, 1987.

⁶ Strauber, p. 1.

⁷ Strauber, p. 2.

⁸ Id.

⁹ Id.

This position, called skepticism, is related to the framework offered by Mark Tushnet in his forthcoming book *The New Constitutional Order*. Tushnet characterizes institutions and principles in public life as constitutional when they provide “the structure within which ordinary political contention occurs”.¹⁰ A constitutional order is one that has a “reasonably stable set of institution” and “principles that guide those decisions.”¹¹

c. What is a/the Constitution?

This work on constitutional orders takes us beyond the conventional wisdom on the nature of the American Constitution. It holds that our Constitution is not static, that it is not outside of politics, nor can it hold people back and make them do the right thing. The Constitution exists in political struggle and political activity determines what it will be.¹² The lesson to be drawn from the literature on constitutional interpretation and the transformation of constitutional orders is that a Constitution is always in flux.

The text that “our forefathers” wrote in Philadelphia got changed when the first Congress met. They added important details like the Bill of Rights. Four score and seven years later they made it a national Bill of Rights. And, the changes continued through the 20th Century and now into the 21st.

Scholars of constitutional orders bring that flux to constitutional thought. My proposition is that we can even do more with it. Since Sept. 11 there have been extraordinary changes in the Constitution and since the fall of 2002, Americans have been engaged in a sometimes violent and always monumental struggle to remake the Constitution. In March of 2003, with the armed mass destruction in Iraq, the struggle has gotten more intense.

2. The War to Remake the Constitution

a. Having it backwards

I began this inquiry by thinking about what the Constitution had to say about the war in Iraq.¹³ I quickly became frustrated. The Constitution says Congress declares war. Americans are at war, but our legislators didn’t really declare it. We are used to looking the judges for insight but the judges have been relatively silent.

There are classic constitutional issues. The issue of respect for dissent is a vital one. The press is supposed to be free but there are disturbing developments in that area.¹⁴ The Constitution does not seem to have been telling us very important things about the war. It is not a place one can “go” to get a better understanding of the conflict.

Then I realized I had it backwards. The issue worth addressing was not, “What does the Constitution say about the war?” But, “What does the war have to say about the Constitution?” This, and the foregoing discussion of constitutional order, is what leads me to believe that there is a crisis.

¹⁰ Tushnet, p. 1.

¹¹ Id.

¹² John Brigham, *The Constitution of Interests: Beyond a Politics of Rights* (New York: NYU Press, 1996).

¹³ If “this inquiry” were to refer to the “ticket of admission” then I began it by thinking about regulation of the internet but that line of research fell by the wayside when the cruise missiles were launched.

¹⁴ Often they look like the public relations arm of the military, and in cases like the firing of *SF Chronicle* reporter in the first week of the war for getting arrested in an anti-war demonstration, press freedom seems challenged.

3.31.2003

b. Other struggles over new constitutional orders

Wars tend to mask the politics of constitutional orders. They tend to cloud perception of what is at stake.

During the Civil War a free labor vision masked the trampling of the Constitution for those who dissented and the spoils of war created a national framework that allowed the industrial revolution.

During the 2nd World War, racial hysteria led to extraordinary violations of the rights of Americans on the West Coast if you were Japanese. Yet, the war is said to have produced the racial vision that launched the Civil Rights Movement.

During the Cold War, the threat of communism and the specter of nuclear annihilation was the basis for an erosion of basic human rights driven by a hysterical middle class conformity.

The first Gulf War seems benign by comparison¹⁵ but it produced Timothy McVeigh, who was responsible for the largest terrorist attack before Sept. 11, and thousands of other casualties in the United States and Iraq.

War has produced the most dramatic constitutional change...and it hasn't come from judges.

c. The War in Iraq as a war over the Constitution

The current war in Iraq is a front in the war over what the Constitution will be or what it will mean. Rather than thinking about Saddam Hussein and motivations or justifications coming from the Bush Administration, we should look at the conflict as being over the meaning of the Constitution.

Clearly the war is also about oil and strategic issues. It may even be about Saddam Hussein. But these are not my areas of expertise. I know about constitutions and I know that this war is a key element in a conservative constitutional agenda.

Since Sept 11 -- the war against immigrants, the war against Afghanistan, and the war in Iraq -- are fronts in the war over the Constitution. Or, as some scholars of the Constitution would say today, these are wars over the nature of "the new constitutional order".

3. The Sides in the War over the Constitution

a. George Bush's America

On one side of this war is George W. Bush's America. It has big armies, executioners and an Office of "Homeland Security" (but a very insecure homeland). It is the America that had its Twin Towers and Wall Street, the FBI and the air defense command. It is an America that took a big hit on Sept. 11.¹⁶ Here are some of the specifics in the Bush vision of the Constitution.

¹⁵ Before the Gulf War Greg Levey covered himself with gasoline on the Amherst Common and lit a match. The story can be found at: http://wmass.indymedia.org/newswire/display_printable/187/index.php

¹⁶ When I presented this argument to the Peace Convocation at UMass one question asked about specifics and I hadn't given them. I did mean to focus on the nature of the American Constitution and one's political stance regarding the war in Iraq. But I appreciated the question. It is important to delineate what aspects of the Constitution have already been altered since September 11 that I see as essentially contested in the war.

Speech...the key variable in modern free speech doctrine is the public perception of danger. The intensification of the perceived danger to Americans since Bush took office has been extraordinary, especially in comparison to the recent, post Cold War, past.

Detention...from John Walker Lindh, the American Taliban, to Jose Padilla, the dirty bomb suspect to the thousands of unknowns detained and the combatants at Guantamamo Bay, America has expanded its incarceration proclivities dramatically since September 11.

War... The first American “Gulf War” lasted five days and it was at least ostensibly about the invasion of Kuwait. The Bush Administration wants this war to reassert American power in the Middle East.¹⁷

Civic Obligation...The pressure to rally around the President in a time of war is immense. Even in foreign policy there is marked support that adheres to the Commander in Chief. In many little ways the pressure intensifies in wartime.

Place of the United Nations...The first Gulf War linked the interests of the United States to international interests and an international organization. Conservatives in America have long chafed at the authority of the United Nations.

Equality...One of the main consequences of the War on Terror is that “the homeland” is described as being threatened by alien elements in our midst. With almost no attention to Timothy McVeigh terrorism the deprivations associated with the War are disproportionately borne by immigrants.

This side in the war has already mobilized many ordinary Americans in the name of the flag and nationality. Its vision of the Constitution surely amounts to a “new Constitutional order”.

b. The Other America

Years ago a socialist by the name of Michael Harrington using data from an economist by the name of Robert Lampman referred to the poor in America as “the other America”. Today in thinking about the war over the Constitution I’m inclined to think in terms of this “other America”.¹⁸ Here are some of those same considerations from the other side.

Speech...If danger is the key, are people safer now, do they feel a danger? Clearly a danger has been created and now with the war, there is little doubt that America

¹⁷ If you look at a map the carved out section that is Kuwait looks suspiciously like Panama and other convenient creations of American foreign policy.

¹⁸ Greil Marcus described “an old weird America” as a folky, idiosyncratic collection in his book *The Old, Weird America: Bob Dylan’s Basement Tapes* which was originally published as *The Invisible Republic*.

3.31.2003

is in danger. One of the questions is simply how close we are to it. Another has to do with the challenges in focusing on the realities.

Detention...Law professor Alan Dershowitz writes in the Boston Review about the fact that post Sept. 11 the deprivations of civil liberties have been focused on persons readily described as “other”. He argues that this is not good policy while at the same time suggesting that it can be effective to limit dissent.

War...after September 11 commentary from people like Noam Chomsky spoke of the violent character of American foreign policy. The doctrine of preemptive engagement was not part of the lore associated with this policy.¹⁹ When actions are military (or to some extent when they are police actions) the culture and the tenor of the problems have a distinctive manifestation. They are much more male than ordinary life, they have the camaraderie often associated with the locker room and the consequences are dire.

Civic Obligation...The absence of a draft has constitutional dimensions. The national identity with our boys is less substantive than it was during the Vietnam period. The soldiers are, of course, ours in many of the same ways and we can say of them, as Adrien Brody did at the Oscars that we feel close to them. But they are not “us” in the sense that we are likely to go there. Perversely, the relief at having “volunteers” fighting is tempered by the greater ease with which we seem to be able to throw them into battle.

Internationalism (and the Place of the United Nations)...The United States is a remarkably international country and at the same time, perhaps necessarily at the same time, remarkably insular. Just before Sept. 11 Amherst was planning to give non citizens the right to vote in town elections. It seemed odd then at the same time that it made perfect sense.

Equality...one of the first constitutional lessons that I learned was that the protections of due process and equality were applied to persons and not citizens. It is one of those counter intuitive constitutional notions that seems important precisely because it is “in” the Constitution.

On the other side of this war is then an America struggling to preserve its identity in the new constitutional order. This America certainly took a hit on Sept. 11 too. It is the America of the people who were killed in the Twin Towers, the heroes doing their jobs, whether washing windows, delivering pizza or rescuing people from the buildings.

It is also the men and women on flight 93 who shouted “Let’s roll!” and who achieved the only victory on Sept. 11. It is the Muslim and Arab Americans who bear the brunt of the racial divide in this war.

The Constitution is pretty simple...you need to have confidence to read it and discuss it from the perspective that draws from the best of the American tradition.

¹⁹ Susan Faludi, *The New York Times* March 30, 2003.

3.31.2003

c. The allies...

I have not been keeping track of what was initially called the Alliance of the Willing and now is pretty much the UK and the US. I think that it gives a perverse meaning to the notion of an alliance and it is very one sided. I do know that Spain is in it, at least for a time. This is not, I think, a popular move in Spain but one many are not surprised by given the links that the Aznar government has to the former regime of Francisco Franco.

The “other America” has its allies too. This is an America known in Europe and the rift with Europe will trickle down to the American people, but that America is one with friends and admirers in Europe.

It is an America of sometimes wholesome if naïve values, of cowboy heroes and plain food. It is an America that the George Bushes have tried to capture in their America. This is an America that played a major role in creating United Nations while remaining ambivalent about its authority.

In this glance at the global implications of American constitutionalism there is utility in the book *Empire* by Michael Hardt and Antonio Negri. Of course it is European in flavor but more supportive than one might expect about the meaning of American constitutionalism in the world today.

4. Strategic and Tactical Issues:

a. Recapturing Constitutional Authority

One of the problems we have is that we have abrogated authority for constitutional interpretation to the Supreme Court and other legal mandarins.

For a long time we have thought of the Constitution as something the Supreme Court interprets for us. Now we have to realize it's what we constitute.

b. Culture of Fear in the Legislature

What did Congress have to say? On October 10, 2002, the House and Senate of the United States passed the 'Authorization for the Use of Military Force Against Iraq'. It cites the War Powers Resolution as the legal framework for Congress and the President to engage in military action against Iraq. They aren't hopeless but they aren't a source of much hope either.

Since September 11 the Bush Administration has wrapped itself in a cloak of national security. The legislature is populated mostly by practical politicians. One of the few who wasn't, Paul Wellstone, was killed last year. Others are safe in their districts and usually don't get much attention.

There are exceptions, like Charlie Rangel of New York, whose call for a draft is a policy response that reaches to the constitutional level. Dennis Kucinich of Ohio who has filed suits against the war and is now running for President in opposition to the conflict. And John Conyers of Michigan, whose investigations of Richard Perle, of the “Defense Policy Board,” led Perle to resign under the shadow of conflicting interests.²⁰

²⁰ Stephen Labaton and Thom Shanker, “After Disclosures, Pentagon Adviser Quits a Post,” *The New York Times*, March 28, 2003, C1.

3.31.2003

War changes the context...To the extent that we are constituted as a people we are identified with the soldiers much as disinterested Muslims are identified with those who ran planes into the WTC.

c. Cultural Biases

Americans are insular and naïve. We are a diverse society with a culture that can be extraordinarily one dimensional. We identify with a slow witted cowboy.²¹ And we associate what he does with what we are doing.

The dominant American culture gets nervous, cringes as they would say in Australia, around the French. It is almost as if they think they are so smart, and they have so many fancy restaurants. And, Americans associate their restaurants with what their government is doing.²²

For all the information about warfare that Americans are willing or must acquire to even follow the conflict in Iraq, they seem unwilling to calculate outcomes²³ or even assess the implications of watching for who they are. We are people who will, sometimes, tell children that violent video games can make them aggressive but believe that a steady diet of “A Nation at War” can make the world a safer place.²⁴

People can look to the Constitution and the Supreme Court to understand how different speech has been in wartime. There are great cases²⁵ and doctrines, like “clear and present danger” that seem relevant. But the constitutional protections seem greatest when most Americans don’t sense a danger.

So, the Dixie Chicks and Michael Moore are problematic.

d. Timing the campaigns

The experience of the first Bush is worth considering. After a much less costly and brutal war with far greater support and sounder bases for justification, the first Bush faced a backlash at the conclusion of the war. One of the lessons seems to have been that the war needs to go on further into the primary season. In this sense the failures of the war effort thus far may be good for the Bush Constitution.

This seems to be a more intense conflict at all levels. A well publicized fragging in the first few days of the war. There is widespread discussion of it going badly and reporters being disciplined for reporting against the administration position.²⁶

²¹ This was initially because he came from a good family. Then it was because he was a good guy. Now it’s because he is the President.

²² Eric Asimov, “New York Restaurants Now Cope With a War, Too,” *The New York Times*, March 26, 2003, Dining In (D) 1.

²³ Except, perhaps, for the simple calculation of carnage that may lead us to figure the struggle is not worth the effort.

²⁴ I can’t help but think about Timothy McVeigh’s experience in the last Iraq war as relevant in this context but it is not talked about much and of course he is not around.

²⁵ One hears about *Tinker v. Des Moines* a lot and I’m teaching *Schenck v. US* at the moment.

²⁶ Jon Arnett let go by NBC on March 31, 2003.

5. Conclusion

a. The Constitution doesn't offer much protection if...

If you think of the Constitution as a piece of paper given meaning by lawyers and judges, it doesn't offer much protection against a President who goes to war for ill conceived, partisan or even personal reasons. The tragedy of a situation like this is that acts of war have a status that tends to bend or even trump constitutional principles.

In the United States, from September of 2001, the economy has steadily declined and the social and economic infrastructure from roads to education has been crumbling while the promise of security and the appeal of world domination have kept the critics at bay and conservatives in control of the government.

If, instead, of thinking about the wars being waged as being directed at security or justified as wars of liberation, one thinks of them as about how we are constituted as a people, at least conceptually the situation is not quite so bleak.

b. A message of hope?

There is not much hope if the Bush Administration wins its war in Iraq or even the war against terror as the administration has defined it. Well, there are the benefits of fighting along side the British, like the possibility of acquiring English.

But, ultimately the hope is in the culture, in the people of America. It is in their expression of being constituted in a way other than the way they are led. There are millions of allies in the world. And, there are the pressing realities of history, economics and critical thinking.

In the end the outcome will be determined by how we chose to be constituted. Michael Moore said that because the Bush Administration had the Pope and the Dixie Chicks against it, its time was limited. To some extent that might be true, but the Pope is not voting and the Dixie Chicks are dissembling.

Change requires distinguishing the administration, the government that sends troops to fight in Iraq, maybe even the government of "Homeland Security," from the legitimate government of the United States.

It is a little like associating French government policy with French wine, cheese or restaurants, but in reverse. In my world they play the Dixie Chicks more now and serve French wine where they wouldn't have, though maybe that is because it's cheaper. Engaging in politics at a constitutional level asks a lot and only makes sense because the costs are so high.

In the end, victorious or not, standing apart from the government while it is waging war, just like waging one, is a life altering experience.