Reflections on The Supreme Law of the Land

By John W. Oliver

My title is borrowed from the Sixth Article of the Constitution of the United States, which states in no uncertain terms that:

"This Constitution, and the Laws of the United States which shall be made Pursuance thereof: . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding."

I have been exposed to constitutions, to the law, to courts, to lawyers and to judges all my life. I am a graduate of the Law School of this University, as was my father and his father before him.

And yet, as I now endeavor to discharge the duties of a federal judge, I find that I reflect more and not less upon the question stated best by Judge Learned Hand in his now famous Spirit of Liberty address made during the critical hot war year of 1944.

Judge Hand said: "I often wonder whether we do not rest our hopes too much on constitutions, upon laws, and upon courts." He was speaking of those who would seek liberty under law and he concluded that hopes based solely on constitutions, laws and courts were indeed false hopes.

Judge Hand believed very deeply that "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 can ever do much to help it. While it lies there it needs no constitution, no law, no court to save it."

Learned Hand, of course, was not advocating the idea that we need no constitution, no laws, and no courts to preserve the liberties established by the Constitution, its Bill of Rights, and its other amendments; particularly those written in the blood of our Revolutionary and of our Civil Wars.

Any reflection on the Supreme Law of the Land therefore requires a particularized inquiry into the broader question of what it is that Americans must add to our constitutions, to our laws, and to our courts in order that our very complicated system of government under law will continue to serve us in the future at least as well as it has in the past.

Speaking for myself, I believe that the American record of government under laws rather than men has been, for the largest part, an exemplary record.

Of course, we have moved with painfully slow and

Federal Judge Oliver is pictured at left at Arts and Science Week banquet (see page 7) where he delivered this address, slightly condensed here. Photo by George W. Gardner.

with quite undeliberate speed in particular areas, but I am personally convinced that our total experience has taught us, if we wish to learn, what it is that has afforded the base upon which the reasonable operation of constitutions, laws and courts has rested. And, as I reflect upon it, we shall survive our present constitutional crisis if, but only if, we come to understand how very rare and essential is that which we add to make stable our system of liberty under constitutions and laws.

When de Tocqueville examined Democracy in America, in the very early days of our experiment, he became as convinced as did Judge Hand that "the best possible laws cannot maintain a constitution in spite of the customs of a country." His expressed definition of "customs" included the "habits, opinions, usages and beliefs" of a people.

De Tocqueville also suggested that "the importance of customs is a common truth to which study and experience incessantly direct our attention."

In fact, so firmly did he believe that the maintenance of constitutions and laws depends upon the habits, opinions, usages and beliefs of a people, he insisted that "if I have heretofore failed in making the reader feel the important influence of the practical experience, the habits, the opinions, in short, the customs of the Americans upon the maintenance of their institutions, I failed in the principal object of my work."

BEFORE WE EXPLORE THE HABITS AND OPINIONS, or, to use de Tocqueville's word, the "customs" that are necessary for the support of the Constitution and laws of the United States, we must first examine briefly the instrument that we declared one hundred and seventy-six years ago to be the Supreme Law of the Land. A hint as to the complexity of the task that Americans then undertook will be found in the preamble to the Constitution.

Without fanfare, that preamble declares that "WE, THE PEOPLE" do "Ordain and establish this CONSTITUTION for the United States of America," all in order to accomplish a number of particular purposes. The first thing we must note is that those declared purposes are incapable of an absolute or precise definition. They do not state any principle of law at all; they expressed, as both Jefferson and Lincoln noted, the best hopes of mankind.

It is one thing to state that the Constitution was established "in Order to form a more perfect Union": it is quite another thing to make a determination of the practical political fact as to exactly what constitutes a more perfect union. And before one even reaches the question of whether a union is perfect, he must first determine what is a union.

The declaration of the general purpose of union is easy. The sorting and selection of different ideas as to how that purpose is to be accomplished, however, is most difficult. The latter problem has produced the classic and continuing disagreement about states rights versus federal power that erupted once into open and violent war and has cloaked many of the political battles that have been fought both before and after those tragic days.

The preamble declares next that the Constitution was established to "establish justice." But what is justice? Again we must note that it is one thing to be able to agree, as did the Convention of 1787, that Article III of the Constitution should provide that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and "that the Judges . . . shall hold their offices during good Behaviour . . . ." but it is infinitely more difficult to reach any sort of an agreement that the courts thus established and the particular judges appointed to serve have in fact administered justice in any particular case.

I find, in fact, that some of my friends are quite satisfied to make their minds up about a particular decision of the Supreme Court, for example, before and even without ever reading the particular opinion about which they complain. And, if I were to be completely candid, I suspect that some of my friends have already made up their minds about cases that the Supreme Court has not even yet decided.

We need not reflect at any length upon the declared objections of insuring "domestic tranquility," of providing "for the common defense," and of promotion of "the general Welfare." Certainly in regard to those relative declarations we can understand that agreement is easy only in regard to the statement of the objective. We must also understand that the very nature of those objectives prompts radically different viewpoints as to the means that should be put into political operation to attain them.

So violently do uninformed people quarrel that I do not know whether to believe or disbelieve another friend of mine who once told me that he had been called a Communist because he had called his adversary's attention to the fact that one of the declared purposes for which the Constitution of the United States was established was to promote the general welfare. To the minds of some, execution of the declared purpose of promotion of the general welfare is to be equated to the promotion of Sin. And who is not against that?

The final declared purpose to "secure the Blessings of Liberty to ourselves and our Posterity" is even more complicated than the other declared objectives because certain definitive declarations of individual liberty were spelled out in the Bill of Rights. But even there, we must school ourselves to think in relative rather than absolute terms.

Some of the rights guaranteed in the first ten amendments, of course, do not present much of a problem. But others present quite the same difficulty we have noted as being inherent in the declaration of, as distinguished from, the means to be used, to attain the broad objectives stated in the Preamble to the Constitution.

For example, and to state first the areas of the

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Bill of Rights that are relatively free of complication, we can readily understand that the range of real or even potential disagreement must be limited as to whether a particular defendant received a "speedy and public trial." Or, for probably an even better example, from the same Sixth Amendment, no one can present much of an argument about whether a particular defendant was or was not tried in the "district wherein the crime shall have been committed," or whether or not he was in fact "confronted with the witnesses against him."

No one can really argue very long or very loud about whether or not a particular defendant was so tried. He either was, or he wasn't. If the method of determining the facts was fair, most people would say that justice was done.

But let us look a moment at the First Amendment. What is the "establishment of religion"? What is an "abridgement" of the "freedom of speech, or of the press"? The initial reaction to and the vast amount of preliminary uninformed comment that followed particular recent Supreme Court decisions involving these First Amendment questions that were necessarily ruled in the public school prayer decisions and in the obscenity cases illustrates how violent can be the disagreement that is aroused by a specific application of one of the broad historical concepts incorporated into the First Amendment.

Much the same thing must be said about the Fourth Amendment's right to be secure "against unreasonable searches and seizures." Have you not overheard conversations that include the following: "Are you for or against wire tapping? If against—do you also oppose Mother, Home, and J. Edgar Hoover? Oh, so you are really in favor of Crime? What are you afraid of then? Are you afraid that someone will find out whether you have quit beating your wife? So much for but one of the problems involved in the application of the Fourth Amendment.

There also seems to be a quite large area of apparent misunderstanding about whether the Fifth Amendment to the Constitution or whether some of the present members of the Supreme Court appointed by President Eisenhower, particularly the Chief Justice, established as a part of the Supreme Law of the Land the principle that "no person . . . . 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."

Apart from the quite technical problem of what is meant by the language "in a criminal case," is it not apparent that what one person may think is "due process of law" might not find ready acceptance by many of his fellow citizens?

Without discussion of the Eighth Amendment's prohibition against "excessive" bail or even mentioning other relative standards of expression that may be cited in the Bill of Rights and other parts of the Constitution, is it not also clear that the Founding Fathers did not bequeath to us an instrument that is easy to apply or to administer?

How then have Americans been able to make it work? What has been our secret? What "customs" have been added to our Constitution, to our laws, and to our courts that have supplied the mortar that has held the stones together? What have we learned, often by the hardest of ways, are the consequences of any radical departure from our "experience," from our "habits," and from our "opinions," to use de Tocqueville's full definition of the word "customs"?

And finally, must not each of us personally, inquire whether any duty rests upon each of us to join, as Thomas Jefferson once urged George Wythe to join "a crusade against ignorance" so that there may be a general "diffusion of knowledge among the people" in regard to the difficulties that are inherent in the determination of and in the operation of the Supreme Law of the Land.

Mr. Jefferson said that he believed that only widely diffused liberal education could afford a "sure foundation . . . for the preservation of freedom and happiness." Is Mr. Jefferson's conviction valid today? And if it is, what sort of a job are we doing to make that dream come true?

We must, I think, seek our answers by a critical examination of the principles that the Founding Fathers assumed would be accepted and acted upon by the governed as they wrote our Constitution and as they provided for courts to administer the laws written for the then new United States of America.

The first principle that those Americans accepted was the quite new, but quite fundamental, idea that the vote of a majority shall establish policy until another majority votes to change it. The vote, of course, was to be a vote by representatives of the people. It was not at all contemplated that there would be a national referendum on anything except the election of the representatives to whom the duty and responsibility of deciding was delegated. And it was contemplated that those representatives would vote so that questions would be decided.

As we reflect upon it, it is clear that the leaving of matters of importance to a vote of representatives was indeed a risky business unless those represented were whole-heartedly in accord with the idea that no better system exists under which decisions may be made.

Certainly the fact that 51 people out of 100 vote "yes" on any particular proposition is not very convincing evidence to the 49 that voted "no" that they were actually wrong when they voted "no." And are we not familiar with the fact that in many countries, a 51-49 vote, whether it is a vote for a representative of the people or whether it is a vote by elected representatives, would not be accepted, even temporarily? In this country, however, apart from a few elections that are contested in a court, Americans

have a truly remarkable historical record of accepting the results of close votes and close elections.

How has this come about? Upon what does it truly rest?

I think de Tocqueville's analysis is still the best expression with which I am familiar. He suggested that "in America the citizens who form the minority associate together in order, first, to show their numerical strength and so to diminish the moral power of the majority; and, secondly, to stimulate competition and thus to discover those arguments that are most fitted to act upon the majority; for they always entertain hopes of drawing over the majority to their own side, and then controlling the supreme power in their name."

Would any American familiar with our history and the best of our "customs" dream that a 51-49 vote was a signal for revolution? Certainly not.

The American tradition confirms that practically all of the 49 who voted "no" would believe in their very hearts that each was in sole possession of at least three, if not more, arguments that were capable of converting at least two of the "yes" votes into the "no" column—thus changing the vote from a 51 to 49 vote, to a 49 to 51 vote in favor of the former minority position.

The phenomena of this acceptance of the political method of counting noses was so unusual in the world of de Tocqueville's time that he felt compelled to comment on it in detail.

He first pointed out that: "Our [*i.e.*, French] inexperience with liberty leads us to regard the liberty of association only as a right to attack the government." De Tocqueville contrasted the basic differences between the purposes of political association in America and those then existing in early 19th Century Europe.

In regard to the purposes of such associations in Europe, he suggested that "the principal aim of these [European] associations is to act and not to debate; to fight rather than to convince," which meant to de Tocqueville that Europeans were "naturally led to adopt an organization which is not civic and peaceable, but partakes of the habits and maxims of military life." He continued that "they also centralize the direction of their forces as much as possible and entrust the power of the whole party to a small number of leaders."

De Tocqueville was describing a 19th Century European association and not any particular modern organization in the United States that might advertise itself as being the sole possessor of 100% Americanism when he added that "the members of those associations respond to a watchword, like soldiers on duty . . . they at once abjure the exercise of their own judgment and free will, and the tyrannical control that these societies exercise is far more insupportable than the authority possessed over society by the government which they attack."

When our community, or our state, or our nation gives approval by its silence to the aims and practices of such associations, then our community, our state, and our nation is in real danger. When we excuse our silence by rationalizing our failure to speak out we must pay the price of an abandonment of the first great unwritten custom that makes our system work. Our silence must mean that we are willing to say that it is not our business that the preachments of hate of well financed political organizations that are not willing to debate in order to convince is not a basic threat to our very existence as an open society. It must mean that we are content to let tyrannically organized minorities force action, to advocate violence, and to attempt to control the very policies of our government without ever bothering to have their dictated policies put to the traditionally accepted test of a majority vote. So much for the principle of majority rule.

The second established principle that underlies our system, I suggest, has a more complicated history than the principle that accepts majority rule. As background, let us remember that one of the questions left open by the Constitutional Convention of 1787 was the question of who was to have the final say as to what the Constitution means. How and who was to definitively and finally decide all the knotty questions concerning what is meant by "interstate commerce," by "due process of law," and all of the other questions of relative degree of which we took note a moment ago?

I need not detail the technical history of the development of the doctrine of judicial supremacy as first announced by Chief Justice John Marshall, nor of its earlier acceptance as a principle that has guided us for most of our national life. I think, in spite of the vast range of scholarship that has been devoted to the growth of the doctrine of judicial supremacy, that the best explanation for the practical political necessity of accepting the idea that the Constitution is what the Supreme Court says it is, was that expressed by Jefferson before he began his lifelong fight with John Marshall.

On May 29, 1792, Jefferson, in his letter to George Hammond, recognized that the Supreme Court must serve "as the last means of correcting the errors of others, and whose decrees are, therefore, subject to no further revisal." This, Mr. Jefferson suggested, was "one of those inconveniences flowing from the imperfections of our faculties, to which every society must submit; because there must be somewhere a last resort, wherein contestations may end."

Fortunately for us, most Americans, throughout most of our history, have recognized and acted upon the principle that the Supreme Court is the "last resort, wherein contestations must end." That acceptance has meant that the Supreme Law of the Land has been a political fact rather than a fancy. But it is important that we understand that just as the rejection of the principle of majority rule, the rejection of the principle that accepts the finality of a decision of the Supreme Court leaves only anarchy as an alter-

native. In the latter instance, it is clear that any profession that we may make that we are governed by law rather than by men becomes a hollow mockery. We delude ourselves if we do not recognize that we face another of a long series of constitutional crises today. The toleration of shrill cries that the Chief Justice should be impeached are but symptomatic of a more fundamental unrest.

WHAT I HAVE HAD TO SAY THUS FAR was in draft form before tragedy again struck our Nation on November 22, 1963, in Dallas. I had also prepared in outline form a section that would discuss in some detail the 13th, 14th and 15th Amendments to our Constitution adopted after the Civil War. In those amendments slavery was abolished, all citizens, regardless of race, color, or previous condition of servitude, were guaranteed the privileges and immunities of all other citizens and their right to vote was constitutionally recognized. I am confident that all of us have reflected fully on the problems posed by those amendments in the days that have followed the death of President Kennedy.

It is sufficient that we recognize that our failure to solve what Myrdal, twenty years ago, called our American Dilemma, has created another constitutional crisis that poses once again the basic question of whether we as a people intend to support or to reject the Constitution of the United States as the Supreme Law of the Land. The violence of Little Rock, of Oxford, of Birmingham, and the attitudes and opinions expressed in almost any town or city in which we live—North, South, East or West force recognition that the problems of liberty and freedom for all Americans must be faced; that the pattern of postponement is no longer viable in the world in which we live.

In the last sentence of the draft that was written before the assassination, I wrote that "our failure to recognize that this is the basic question in this most recent of our long series of constitutional crises can lead only to unforeseen but wholly predictable consequences."

By that sentence I wanted to bring home a brooding sense of the potential disaster that I have felt for some time as I have looked across our land and have seen the rampant growth of a type of thought and of organization that de Tocqueville saw, not in America, but in the Europe of his day; the type of thought and organization that seeks not to debate but to act; the type dedicated to fight rather than to convince; the type that views the precious liberty of association only as a right to attack all government by any means, fair or foul; and the type that centralizes the direction of their forces in unelected leaders who are followed like soldiers on duty and who demand and receive tyrannical response to their uncomplicated watchwords.

Such a pattern seemed to me to reject the basic principles upon which the operation of our constitution, and courts, and our laws, in the final analysis, depend.

I am not at all satisfied that what I have tried to say carries with it the power of conviction and the sense of urgency that I believe is involved.

Particularly after Dallas, are we not forced to ask ourselves, as a people, when and where did we somehow begin to act, or, by our silence, to tolerate the idea that liberty under law can somehow be preserved by constitutions and by courts alone.

Must we not also ask ourselves whether we have lost sight of what Mr. Jefferson called an essential principle of government in his great First Inaugural? He insisted that our system would not work unless there was a full "diffusion of information, and the arraignment of all abuses at the bar of public reason."

How well have those of us who profess to believe in equal and exact justice and the principle of majority rule discharged our duty of diffusion of information so that all abuses of our paradoxically tough yet delicate system be arraigned at the bar of public reason?

How effectively have students and graduates of our School of Journalism, for example, learned that they must report and must explain to all the people how the pattern of current attacks upon the Supreme Court fits in the perspective of the history of similar fanatical attacks on that court and on the Constitution from John Marshall's time to our own?

Have our lawyers and our judges, students and products of our Law School, all of whom bear a specialized duty in regard to teaching the public concerning matters of our Constitution and our laws, made clear that the Constitution is what the Supreme Court of the United States says it is and that there is no practical alternative to an acceptance of that doctrine except anarchy?

Do the students and graduates of the College of the Arts and Science truly learn the necessity for the maintenance of open minds and of tolerance for other people's ideas within the framework of liberty and law? Do those students and graduates take those convictions back to the communities in which they choose to live?

And more important, do all of us, whatever may be our place in the community, use what this University has taught us in order that we diffuse the necessary information to the public at large in order that this system of ours will operate and endure?

In brief, what customs, habits, and opinions do we as individuals foster?

We can only ask questions here tonight; we cannot answer them. But let us not forget that the future insists that the questions raised by these reflections must be answered and acted upon.

What answers will we give? And, more important, what will each of us do to see that history does not record that our professions of faith, though said in the language of the angels, become but sounding brass and tinkling cymbals because of our failure to practice what we preach.

What, my friends, will the answers be?