1986

Address Address

Philip B. Kurland

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By Philip B. Kurland
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The Wednesday luncheon session
honoring new life members
and members elected
within the previous five years
convened in the East and State Rooms
of The Mayflower, Washington, D C ,
on May 14, 1986,
and was called to order at 12 45 p m by
President Roswell B Perkins

PRESIDENT ROSWELL B. PERKINS: The spokesman for the class of 1961 is Professor Philip Kurland of the University of Chicago. Phil is a bona fide real Brooklyner. He was born there in 1921 and brought up there and cheered for the Dodgers as loudly as anyone else. In fact, he tells me that he has departed from the baseball scene ever since he lost the Dodgers. That was a sad event in the lives of many people, we're sorry it happened to you, Phil.

He went to the University of Pennsylvania, got his A.B. in 1942, and then went year round at the Harvard Law School during the war years and was President of the Harvard Law Review and graduated in 1944. After graduation he clerked in the Second Circuit for Judge Jerome Frank; this was followed by a year of clerking for Felix Frankfurter, ending up in 1946 with a brief stop at the Justice Department, where he worked on a very famous mine workers' injunction case. He then went back to New York and formed a small law firm, Kurland and Wolfson, and after three years of practice was enticed by Northwestern Law School to come out and go on the faculty, which he did.

He was there three years and then went to the University of Chicago on the faculty of the law school, became a full Professor two years later, and so since 1953 he's been in Chicago, since 1956 in the capacity of full Professor.

Over the years Phil has had many posts of honor. One that he recalls with great joy was working as a consultant on the subcommittee on separation of powers on the U. S. Judiciary Committee under the chairmanship of Sam Ervin.

In 1960 he conceived of and created a publication, with which I'm sure many of you are familiar, namely, the *Supreme Court Review*, consisting of a collection of commentaries on the work of the court published by the University of Chicago, edited by him. He now shares the editing with our Council member Dean Casper and Dennis Huchinson, and it's been a highly successful and important publication.

He's a fellow of the Academy of Arts and Sciences and the recipient of honorary doctor of laws degrees from Notre Dame in 1977 and the University of Detroit in 1982.

The field in which he teaches is Constitutional Law and the Supreme Court; he teaches these not only at the law school but also to the undergraduates at the University of Chicago and he's much in demand for lectures with the bicentennial year.

Phil, we're deeply honored to have you come to Washington to speak on behalf of the life members, and as you rise, I present you with a certificate attesting to your loyalty to this organization. The other members of your class of '61, I regret to say, have to pick theirs up at the desk, but they are waiting for you and they are all signed and in your respective names, so, Phil, thank you very much and congratulations. Professor Kurland. *(Applause)*

PROFESSOR PHILIP B. KURLAND: To those of you whom I purport to represent, I apologize. I am grateful to President Perkins both for what he has said and for what he has not said.

It was a year ago last January that I was honored by the American Bar Foundation for my legal publications. I was sure then, as I am now, that it was the quantity rather than the quality of my bibliography that qualified me for that honor.

In accepting the award, I suggested that the law has been plagued with an overabundance of writing, whether in the form of law review articles, casebooks, textbooks, briefs, judicial opinions, and even "Tentative Drafts" from the American Law Institute.

The creed of our profession seems to be never to use one word where one hundred will suffice. I suggested to the Bar Foundation that their next writing award be given to that person who encompassed an idea in the smallest possible num-

ber of words — the equivalent of E equals MC^2 — or better yet, be given to him or her who abstained from writing at all.

The ubiquitous ALI must have been present at the occasion of my earlier remarks. For today I am being honored by this opportunity for access to an ALI podium — although or because — I have been a member for twenty-five years and have never uttered a syllable — orally or in writing — in its deliberations or publications. *(Laughter)*

In this regard perhaps I am untypical of a large part of our membership. Nevertheless, I accept this honor, not only for myself, but for all those similarly situated. I do not wish to imply, however, that anyone other than myself is responsible for any discourtesy or astringency my words may fail to conceal.

When President Perkins called me to accept this honor, his instructions were pellucid. "Your remarks," he said, "need be neither substantive nor witty. The only requirement is that they be short." *(Laughter)*

On hearing this, it was as if a veil had been removed from my eyes. Now I had the key to understanding the speeches of all those who had occupied the lecterns of the ALI for the past quarter century. Indeed, I had the feeling that Mr. Perkins' admonition may also have been the guide issued to the Reporters by the council for all these years, however little it may have been followed by them.

Let me quickly explain that it is not as easy as it may seem to speak, even for a short time, and to abjure all wit and substance, that is, to engage in what my mentor Thomas Reed Powell disdained as "mere recitativo."

The next best thing to saying nothing, however, is to say the same things over again. What follows then falls somewhere between speaking in tongues and speaking in cliches, and I have chosen a topic that especially lends itself to such accomplishment: The Supreme Court of the United States.

The current call for a return to the meaning intended by those who wrote the words of the Constitution is not novel.

The phrase "original meaning" has simply replaced "strict construction" as the rallying cry for those who want a revamping of constitutional law to bring it into closer conformity to their own political philosophy. The "strict constructionists" of twenty years ago meant strict construction, but only some of the time.

For example, I never heard them argue that corporations were not protected by the Due Process Clauses because they were not really "persons." So, too, I doubt that today's "original intent" school would restrict the protections of the Privileges and Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment to blacks for whose sole benefit those provisions were clearly intended by its authors.

Throughout American history, at least since the adoption of the 1787 Constitution, one or both of the political branches of government have often been in fundamental disagreement with the judicial branch over the propriety of the exercise of the power of judicial review.

The frustrations of the first two branches, whose members come and go every two, four, or six years are aggravated by the life tenure awarded to the Justices of the Supreme Court for the very purpose of protecting the judges from the political machinations of the elected branches.

In our 198-year constitutional history, we have had only 103 Justices. The average tenure of office has been about twelve years, but every Court since Marshall's has included one or more twenty-year veterans. Perhaps it should be noted that the language of independence that was chosen — tenure "during good behavior" — would certainly be found by a strict constructionist not to mean unconditional life tenure.

An historian could readily show the phrase was derived from an English statute pursuant to which English judges remained removable by petition of both houses of Parliament, among other devices. But ever since Jefferson tried the impeachment route with Mr. Justice Samuel Chase and failed,

the political branches have been reduced to fulminating against the Court while awaiting the use of the appointment process to cure the evils that it perpetrates.

The behavior of the legislative and executive branches over time in trying to curb the Court may be described as volcanic. These mountains constantly rumble, but break forth in strong attacks only periodically and usually after a case or series of cases triggers the eruption. Then the Court's attackers or detractors self-righteously wrap themselves in the Constitution and seek popular support by taking to the hustings or stating their case through the media.

The formula was stated by Professor Felix Frankfurter in a letter to President Franklin Roosevelt dated 27 December 1938, where he made some suggestions for improvement of the presidential text.

Frankfurter wrote: "Be good enough to consider the suggestions in the light of their aim — to say everything that you have said to educate the laity, and in the words of my great master Holmes, 'calculated to give the brethren pain', but at the same time give the scavenger profession nothing to feed on. I also should suggest that throughout you should appear as the real guardian of the Constitution, adequate to the needs of the nation if only judges would be obedient to the majestic powers of the Constitution."

One advantage of such form of attack on the Court was that generally the enemy did not shoot back. The Justices themselves ordinarily adhered to their implicit vow of silence not to speak about their functions except in the course of rendering opinions So the arguments on their behalf had to be made through surrogates.

John Marshall's defense in *McCulloch v. Maryland* aside, until recent years Justices did not usually reply to the attacks on the Court or its product. Lately, through law school speeches and law review articles, particularly in talks at annual bar meetings, the Justices too have entered the fray, but

they never lacked for apologists and defenders both in the ranks of the press and in academia.

Constitutional construction, like statutory construction, has always invoked both more and less than the words of the text. The intent of the authors, assuming it can be ascertained, has never been the exclusive tool for construction. Certainly the Constitution is the foundation on which constitutional law is built; but constitutional law and the Constitution are not the same.

The very few thousand words that the fundamental document contains are not adequate to resolve the myriad of legal issues calling for a resolution by judicial action. Constitutional law consists not only of the text but of fundamental principles inherent in that document. It includes as well its aspirations for a representative government assuring majority rule while protecting minority rights. Thus, constitutional law consists of constitutional principles and of constitutional precedents, of pressures of the needs for practical answers to practical problems, and, to varying degrees, even of the personal predilections of the possessors of power who sit in the Marble Palace at the very apex of Capitol Hill in this city; they purport to earn their living by the exercise of judgment.

Constitutional law is also politics, in the best sense of the word, when it means establishing the governing legal principles. Alas, at times, constitutional law also means politics in the lowest sense of the word, a partisanship reflecting the interests of what Madison disdained as factions. Constitutional law is a rule of decision; the Constitution is a frame of government.

The basic function of the Supreme Court has been and ought to be the maintenance of the rule of law in our society: The rejection of arbitrariness of governmental action; the prevention of agglomeration of power in any governmental function, area, or institution; the avoidance of the kind of "corruption of the Constitution" that called forth the American Revolution. The constitutional demand for reasoned and

justifiable assertions of authority by government is not to be found in any particular words of the Constitution, but in that rule of law which is a principle immanent in its creation.

The Court's deficiency is largely to be seen in its persistent and recurrent failure to apply the demands to itself that it purports to apply to other branches of government. It is a failure to recognize that its principal role is a judicial one, that is, the resolution of a particular case or controversy on the basis of the facts adduced. It is supposed to decide cases on the basis of pre-existing law where possible, resorting to lawmaking only out of necessity, that is, where there are not existing rules or where the existing rules are patently and demonstrably redundant. It is not supposed to be a legislature establishing general rules of behavior for the people of this nation. Even less is it supposed to be issuing a new Decalogue or another Sermon on the Mount. It is supposed to be a judicial body determining, according to law, whether A is to prevail over B, or vice versa, in a particular litigation. And in resolving that controversy, it is supposed to state cogent reasons for its conclusions. Those reasons may, indeed, be based on constitutional principles or text, on precedents, even on pragmatic considerations and personal predilections. Those reasons ought to be stated in its opinion, not only cogently, but fully and openly and honestly.

The Court ought not to be a huckster of causes or a "great communicator." When it fails in its capacity to persuade rather than to command — the distinction is drawn by Mr. Justice Brandeis — it fails its commitments to the maintenance of the rules of law which is its central constitutional obligation. And the remedy is not for it to shift from espousing one set of political creeds in order to embrace another, to shill for one political platform rather than a second or a third one.

Perhaps these remarks are the maunderings of one academic lawyer which can be of no interest to the real world of law and government. Certainly, they seem to have no appeal to most of my academic colleagues who, like the Justices of the

Supreme Court and the Attorney General, have seen "the Truth" and are prepared to share it or impose it on those not equally blessed. But I think that I ask for very little when I ask that the Court confine itself to its function and say only what it means and mean only what it says. Nor do I suggest that such behavior is easy of accomplishment. I do think that it would prove a better endeavor than chasing the will-o'-the wisp of "original intention" as the Attorney General would have us do, or than becoming the transmitter of the public will, as Mr. Justice Brennan has publicly suggested.

For my two propositions about the inadequacy of the arguments from original intention and the common will, I would invoke the highest authority in my own pantheon of judicial gods and one whose voice should ring with particular resonance in the domain of the American Law Institute, Judge Learned Hand.

Of history as a guide to constitutional meaning, he said many things. I offer some of his words to you now, asking that you take particular care to notice that he did not deem history irrelevant, simply inadequate.

Thus he once wrote: "American constitutions not only distribute powers of government, but they assume to lay down general principles to insure the just exercise of those powers. This is the contribution to political science of which we are proud, and especially of a judiciary of vestal unapproachability which shall always tend the Sacred Flame of Justice. Here history is only a feeble light, for these rubrics were meant to answer future problems unimagined and unmanageable. Nothing which by the utmost liberality can be called interpretation describes the process by which they must be applied. Indeed, if law be a command for specific conduct, they are not law at all; they are cautionary warnings against the intemperance of faction and the first approaches of despotism."

Again the good judge warned us, as far back as 1929, of the error of "the notion that constitutional law is an expression of a common will which immanently pervades and broods

over a society, and is something higher and more authoritarian than what would be found in any accredited source."

"I think it can be demonstrated," he said, "that there's nothing of the kind, if by common will we mean the assent of men and women alive today. It was not made in that way originally; no general recension has been accepted by any generation."

In 1935, he added that the Founders did not mean by the common will "what any individual, whether or not he be a judge, should think right and proper. They might have made the judge the mouthpiece of the common will, finding it out by his contacts with people generally; but then he would have been a ruler, like the Judges of Israel."

Hence, the lesson is if there were such a thing as a Rousseauan "general will" there is no reason to believe that its terms and conditions are peculiarly discernible by the nine Justices of the Supreme Court, or a majority of them.

Neither "original intent" nor "strict construction" nor judicial instinct for discovery of the "common will" is an adequate key to constitutional construction. Judicial review essentially invokes a process of reasoned deliberation and explication, equally free of idcology and cant, and, to invoke Judge hand just once more:

"Of course, you must have impartiality. What do I mean by impartiality? I mean you mustn't introduee yourself, your own preconceived notions about what is right. You must try, as far as you can, it is impossible to human beings to do so absolutely, hut just so far as you can, not to interject your own personal interests, even your own preconceived assumptions and beliefs."

I've come to the end of my diatribe. Of the three prescriptions for my talk laid down by President Perkins, I submit that I have fulfilled two: affording neither substance nor wit. If I've overstayed my time, I apologize both to him and to you. Thank you. *(Applause)*

PRESIDENT PERKINS: Thank you so much, Phil. I don't remember writing those suggestions or injunctions for the framework of your talk, but if I did I will use them again because they produced a honey.

So, thank you very much, and your voice is needed in the Institute, so please let us not be so reticent in the next twenty-five years.