EXHIBIT 15

DRAFT (1)

Reflections on Our Constitution

By Joe Giarratano

> "Government cannot stand not to be in control, and the minions of government—judges—still do the decision making. Thus I am subject to the passions and weaknesses of those who may be lackeys to tyranny or fearful of their own lives or possessions or status, even when, especially when (as today) tyranny is masked as participatory liberal capitalism. I would prefer to make my arguments to that-other, even more democratic legal institutions. . .a jury of my peers." - Wythe Holt, Professor of Law

Preface

Recently, during a talk given at a law school, U.S. Supreme Court Justice Antonin Scalia commented that those who contend that the Constitution is a living, breathing document are wrong. Justice Scalia, who refers to himself as an "originalist", went on to state, "the Constitution is not an organism. It is a legal document", he added further, that until about 50 years ago, more judges and legal scholars shared his belief that what the Constitution means "is what it was understood to mean when it was adopted." The learned Justice also complained that confirmation hearings for appointees to the highest court amount to "one issue after another on what the Bill of Rights ought to be."

The reflections that follow are not necessarily original, i.e., they are as old as the very Constitution Justice Scalia speaks of; and, they are presented—not so much to rebut the Justice—as an effort to get a new generation engaged in one of the most practical and important philosophical activities of our time: i.e., to think about what a just society and just government ought to be.

Constitutional rule places heavy burdens upon us. It may well be the most demanding form of government and, in the absence of high degrees of foresight and responsibility in both the citizen and public servant constitutional democracy tends to degenerate. As citizens, indeed, as a free people, we must remain ever vigilant of the reality that the greatest menace to our Liberty is an uninformed and inert populace. A far wiser person than I once noted "a population of sheep, in time, will surely beget a government of wolves": a notion and sentiment often expressed by those who participated in the ratification debates surrounding the adoption of our Constitution. Continued and informed acquaintance with the philosophical underpinnings of our Constitution and, the essential ideals it symbolizes, is the obligation of all. As soon as 'We the people', thinking of the affairs of State, say "They do not concern me", it is time to conclude that the State is in decline.

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"Every man by nature has a right to everything he needs."
--Rousseau

"All the members of human society stand in need of each others assistance. Society may subsist, though not in the most comfortable state, without beneficence; but the prevalence of injustice must utterly destroy it."
-Adam Smith

Generally speaking I would agree with Justice Scalia: our Constitution is a "legal document". It is the written document that was drafted at Philadelphia in 1787, along with the amendments that have since been added. As a 'legal document" it is remarkable and extraordinary, because it succinctly reflects an ingenious balancing act between competitive political forces and philosophies; and more over, it was designed to prevent just the sort of concentration of unrepresented authority that culminated in our Revolution, and break away from British rule. Nonetheless, as a "legal document" it was not understood as, nor was it intended to be—at least not by those who drafted and ratified it—static in meaning. In the words of Chief Justice John Marshall (upon whom, posthumously, our country has conferred the title, "The Great Chief justice") they, i.e. The Framers, envisioned that our Constitution should "endure for ages to come and consequently be adapted to various crises in human affairs." Chief Justice John Marshall presided over the High Court during a period when the dominance of the Constitutional document prevailed, i.e., a period when the tradition concerning the original establishment of the "legal document", as Justice Scalia refers to it, was still fresh in the minds of the people and, indeed, a time when many of those who drafted the document were still active in the politics of the day: it was a time when. in the person and office of the Chief Justice, the intention of the Framers enjoyed a renewed vigor. 1 do not mean to imply that John Marshall, like Antonin Scalia, did not have views of his own to advance. I only mean to intimate that the theories which the former Chief Justice advanced in support of his preferences were, in fact, frequently verifiable as theories held by those very human beings who framed our Constitution. Yet, sadly, as time has passed the Constitutional text and, the philosophies that underscored it, has faded farther into the background, and the testimony of "The Federalist'. Marshall's essential book of precedents, is rarely, if ever, cited.

To reference our Constitution as merely a "legal document", i.e., as little more than a deed of contract, does a serious disservice to those who gave birth to that document. Indeed, a contract, if we conceive it broadly enough, may prove to be a beckoning hand to progress rather than a dead hand on political development; But without an understanding of the philosoplical thought that under-girds our Constitution, our deed of political association becomes a little more than a dead letter instrument. Even a cursory review of our Constitutional heritage will underscore the belief our Founders had in the principles of Natural Law. Nor do 1 believe that we, in our day. should not ignore the service that the doctrine of contract and, the theory of Natural Law behind it, has rendered to the cause of liberty and to the general cause of political ptogress. Its fruits may not prove its truths, but we would do well to remember them.

But I get ahead of myself. I suspect that those who, like Justice Scalia, view our Constitution as a mere * legal document" would earn the ire of Thomas Paine; and the warning he gave when he opened his small book "The Rights of Man", by denouncing Edmund Burke for seeking to lay the dead hand of 1689 on the living present of 1791, and for saying as it were to the Convention Parliament and its antique notion of contract, "0 Parliament, live forever."

Many decades later another eminent and learned Constitutional scholar summed up the sentiments of John Marshall, who himself merely echoed the Framers of the Constitution on this point, in this statement:

"The proper point of view from which to approach the task of interpreting the Constitution is that of regarding it as a living statute, palpitating with the purpose of the hour reenacted with every waking breath of the American people, whose primitive right to determine their institutions is the sole claim to validity as a law and as the matrix of laws under our system." This contemporary scholar, E.S. Corwin, also commented that "as a document, the Constitution came from its Framers, and its elaboration was an event of the greatest historical interest, but as law the Constitution comes from and derives all its force from the people of the United States of this day and hour." The Framers. Chief Justice John Marshall, and Professor Corwin were all echoing an idea that had been expressed in the Seventeenth Century by another learned and eminent jurist, Lord Halifax, who articulated the sentiment quite succinctly:

•'A Constitution cannot make itself; somebody made it, not at once but at several times. It is alterable; and by that draweth nearer Perfection; and without suiting itself to differing Times and Circumstances, it could not live. Its Life is prolonged by changing seasonably the several Parts of it at several times." Each one of those thinkers, i.e., philosophers, is passing on the same core message to us in the present. Here is how 1 see it. This is what the world of human experience means to me. Here are the errors I've detected in the thinking of those who came before me. This is my best understanding. Take it and carry on from there/

Under normal circumstances and, as Justice Scalia and others intimate, such change should come by way of the formal amending process through the will of the people, and the passage of laws through the legislature as our Constitution makes provision for. Yet, nevertheless, our appointed judges have an abiding mandate to protect the liberties and freedoms of individuals from encroachment by government commission and/or omission. The lessons of history, both ancient and contemporary, attest to the fact that times arise when there is a necessity for judges—in accord with their Constitutional mandate—to step back and by process of comparison and contrast to reflect on what was, what is. and what is becoming. As Justice Miller noted in 1875, "It must be conceded that there are.. .rights in every free government beyond the control of state. There are limitations on [governmental] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." And, as observed several decades later by Justice Cardozo, the due process clause of the 14th Amendment may proscribe a certain State procedure, not because the proscription was spelled out in one of the first eight amendments, but because the procedure "offends some principle of justice so rooted in the tradition and conscience of our people as to be

ranked as fimdamental." because certain proscriptions were "implicit in the concept of ordered liberty."

To blithely state, as Justice Scalia does that what the Constitution means "is what it was understood to mean when it was adopted", and simply let the matter rest there is offensive to any human being capable of thinking for themselves. The proper historical inquiry is one which seeks to determine what history teaches are the traditions from which our National Constitutional jurisprudence developed as well as the traditions from which it broke. That tradition is a living tradition and is not slavishly devoted to the fidelity of the past. A point that James Madison succinctly made when promoting the ungratified Constitution:

"The glory of the people of America is that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestion of their own good sense, the knowledge of their own situation, and the lessons of their own experience."

The Framers of our Constitution never intended that the philosophy of law should become so fixed and archaic which all the other sciences may go forward in the discovery of truth and utilize it whenever it is found. It is simply misguided to attempt to shackle our minds to a civilization as it existed over 200 years ago, and it was not the intention of the Framers of our Constitution that we should do so. Justice Scalia and those of like mind fail to grasp or; simply lose sight of, the reality that the human spirit does not conform to the neat models of formulae within which scientifically minded theorists seek to contain it: but is, on the contrary, distinguished by the great diversity of forms it manifests in the context of different societies and cultures.

Justice Scalia also bemoans that confirmation hearings for appointees to the highest court amount to "one issue after another on what the Bill of Rights ought to be." Given the indisputable historical record it is quite clear that those who won our independence—though they had their points of contention with each other—agreed on core, i.e., fundamental principles, such as their belief that the final end of the State was to make us free to develop our fadillties; that in its government deliberative forces should prevail over the arbitrary; they valued liberty both as an end and as a means; they believed, as a self-evident truth, that human beings were endowed with inalienable natural rights; they believed liberty to be the secret of happiness and courage to be the secret of liberty, to touch on just a few of the essential basics. That being a given it is odd that a Justice. sitting on the Highest Court of our land, would be perturbed by our concern or, the concern of those we elect to represent us, about what the "Bill of Rights ought to be" when "We the people" are deciding who to entrust with the authority to guard our rights.

One of the salient aspects that we, as citizens, must remain ever cognizant of in our contemporary debates concerning our Constitution is the fact that our personal rights lay at the very foundation of our culture; they are the ultimate justification we give for having a government in the first instance and the absolute limit of government interference. It is also important for us to recall that initially our Constitutions original structuring of our government did not, in the minds of the Colonists or the Framers, satisfactorily address one of the central concerns of the Revolution, i.e., the protection of individual rights from both State and Federal government. That oversight engendered much heated debate—to the degree that ratification was seriously jeopardized—and the

outcome was that Congress proposed and, the various states approved, a Bill of Rights. It is of central importance to keep in mind that the debate was not about whether or not we, as human beings, were possessed of inalienable natural rights; but, whether or not it was necessary to amend a Bill of Rights to the Constitution to secure those rights. Some of the Framers were of the mind that the procedural safeguards contained in the original Constitution implicitly protected against encroachments upon individual rights, and other Framers did not. That an individual is in possession of natural rights apart from the positive enactments of law was never in dispute. Nor can it be disputed today when one considers that central minds of the Framers, whether leading figures like Madison, Jefferson, Wilson and Mason, or lesser figures like Williams, Spaight or Ingersoll, was a tempered version of the oldest liberty—oriented political philosophies: i,e, the school of natural law and natural rights. The Framers conception of natural rights or, as we refer to them today, human rights, held that certain rights were inalienable; that they were beyond the powers of the government and could not be surrendered to it, despite even a written constitution to the contrary. The staunch federalist, Alexander Hamilton (who opposed the adoption of a Bill of Rights as unnecessary) stated the belief clearly:

'The Sacred Rights of Mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself, and can never be erased or obscured by mortal power."

The intent of the original 10 amendments to our completed Constitution was to articulate and guarantee some of the most obvious natural rights that had been alluded to in our Declaration of Independence: with the Ninth Amendment designed to reflect the incompleteness of that original enumeration. To understand the conception of the rights held by the Framers, to understand our Bill of Rights and, indeed, to understand our Constitution, we must have some basic understanding of the political theory that underscored our Revolution. ft was the political theory expounded by such philosophers as Thomas Hobbes, Jean-Jacques Rousseau, and John Locke that penetrated into the American Colonies, and passed through men such as Samuel Adams and Thomas Jefferson into our Declaration of Independence. For the first time in history the "rights of man", not the rulers, were laid as the foundation of a nation. The unique and profound achievement of our Declaration is that, at its very heart, it gave timeless symbolization in words to a philosophy of human rights and self-government.

The political philosophy that underscored our Revolution and. gave shape to our Nation, found its root in the metaphor of the social contract; and the Natural Law principles that buttressed that philosophy. The theory of a social contract, which by the 18th Century, came to dominate and, do all but define, social and political philosophy. The metaphor of the social contract and the state of nature remains, even today, at the very center of our debates about what constitutes a just, civilized society. Our Declaration is perhaps the single most famous example of the social contract theory in practical politics. For the first time and. in no uncertain terms, a group of people proclaimed loudly "that governments are instituted among men, deriving their just powers from the consent of the governed"; and, further, they audaciously declared that when a government fails to perform its duties, "it is the right of the people to alter or abolish" and, more so, even '"their duty to throw off such a government, and to provide new guards for their future security "

Our Declaration is also one of the clearest and, best known, statements concerning natural rights; and clearly echoes the Lockean theme in reference to Natural Laws and natural rights. The Founders of our nation understood and observed a distinction between "natural" and "civil" (i.e . positive) rights; and they considered both forms to be "essential to secure the liberty of the people." A lesser-known source, though hardly less important or less valid. in reference to our natural rights is encapsulated wit hin the Ninth amendment to our Constitution. Our Ninth amendment contains an implicit reflection to our natural rights by stating, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Legal positivists, i.e.. those who deny that there exists any necessary connection between the law and morality, tend to deny the existence of natural law/rights7 They view the Ninth amendment as an unfortunate glitch in our Constitution because it appears to be a direct affirmation of natural rights. When the amendment was adopted, those other rights retained by the people were those natural rights referred to in the second paragraph of our Declaration, and those that could be deduced there-from through rational, reasoned, reflection. Natural rights are inherent in human nature and are, therefore, inalienable and belong to every human being without exception.

Religious dogma aside, Natural Law, at its core, simply posits that there is a moral logic built into us: a logic that reasonable people can grasp through disciplined reflection on the dynamics of human action. The sounder versions of natural law theory, e.g., Plato, Aristotle and Aquinas, consider morality "natural" precisely because reasonable. That such a moral logic exists, i.e., that it is available to all human beings through rational reflection, and that it can be intelligibly and, cogently, argued in the public forum is, I believe, a matter of common sense. The exponents of natural/human rights can and, do, cogently posit that the existence of natural rights derives from the distinction between needs and wants or stated another way, between natural and acquired desires. Since human needs are the needs inherent in human nature, natural rights are rights to that which human beings need in order to live a morally good human life in a relative state of well -being. Well-being is normally understood to be both a condition of the good life and what the good life achieves.

Those who signed our Declaration and drafted our Constitution, actually understood, defended, and vindicated human rights to the greatest extent that they had ever been recognized up to that time. However, they did not fully conceive of human rights as we understand them today. Nor can we fully predict what human rights of the future may be in light of the development and progress of the human race. In the past, humanity has advanced owing in part to its tendency to reflect on its own condition. The Spirit that gave life to our Declaration, the Spirit that sustains our Constitution, the Spirit that allows us to flourish in our liberty and freedoms cannot thrive without impassioned and, informed, engagement on the part of the individual in the conflicts of the day.

Yes, "Governments cannot stand to not be in control, and the minions of government—judges—still do the decision making", as Professor Holt notes. But, ultimately, it is the will of the people that determines the meaning of the Constitution from one generation to the next. . . provided that we remain vigilant.