U.S. CONSTITUTION COMMENTS

[I made extensive use of the Collier's Encyclopedia, 1963, when assembling this.]

1. Basic Structure of the Constitution

In 1796 Justice William Paterson stated that, "It is the form of government delimited by the mighty hand of the people, in which certain first principles of fundamental laws are established". In 1875 Justice Samuel Miller said, "The theory of our government, national and state, is opposed to the deposit of unlimited power anywhere". We now would take issue with the word "unlimited", it now being absolutely banned even from our conversations. In the Federalist Paper No.51 James Madison, the "originator" of the U.S. Constitution, said that, " In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself". The Constitution both grants and limits power (power being the force of law backed by enforcement capability). Articles I, II and III of the Constitution entrust powers in the agencies of the Congress, the President and the Judiciary respectively. Sections 9 and 10 of the First Article restrain national powers and state powers respectively. However the Constitution provides no definition of either powers or limitations. Therein lies a fertile field for "endless" controversy. The Constitution expressly forbids Congress from passing "ex post facto" laws (retroactively making what was legal now illegal: if I legally built a house on a given tract of land the government could not later say that that house was illegally built) and "bills of attainder" (denying convicted felons of certain civil rights such as the donation of inheritance). The Congress may not tax exports from states and, except in serious emergencies, suspend the "writ of habeas corpus" (being held illegally by the government). The Bill of Rights contains a list of things the national government is prohibited from doing. The state governments are similarly proscribed from acts as defined in Article I, Section 10. They may not enact "ex post facto" laws, coin money, emit bills of credit, or enter into any alliances or treaties with foreign states. To put restraints on the government the Constitution set in place the separation of powers between the Congress, the President and the Judiciary as well as the concept of federalism (separation of national and state governments where the national overarched state governments. The Constitution contains the

"due process" clause (the Fifth (part of the Bill of Rights) and Fourteenth Amendments provide in part that no person shall "ne deprived of life, liberty, or property without the due process of law" (including trial by jury)). The framers included the process of judicial review in implementing the separation of powers of the three branches of government and to imbue the concept of restraint. These provisions are not explicitly spelled out thus ensuring a great deal of "conversation". There is a certain blending and mingling of powers of the three branches that at times becomes highly technical but in general Congress makes laws, the President administers them and the judiciary adjudicates the actions of both. The president can thwart the Congress by his veto of bills but this in turn can be overridden by a majority of Congress. [It should be said that the above is not "cut and dried" but rather has technical "addendums".] While the President can make high level appointments the Congress must give its "advice and consent". Federalism, the other concept of the separation of powers, is a system whereby there are two independent governments that govern the same peoples but in which the national government has the higher authority and where what is not delegated to the national government is left to the state governments. That is, the national government has certain enumerated powers, all else being reserved to the state governments. Thus Federalism, like separation of powers and checks and balances of the three branches are devised to require the government to control itself. [This is a marvelous concept for us as individuals: control ourselves.] The Judiciary stands as a bulwark in defense of individual rights. Alexander Hamilton wrote in the Federalist Papers No. 22 that "The want of a a judiciary power was the circumstance which crowned the defects of the Articles of Confederation" (the precursor to the Constitution). The Founding Fathers, being mindful of the power of the majority to trammel individual rights, established "free government" in which all were open to participate in the governmental process (this was not specifically specified but was implied——how I'm not clear).

2. Judicial Review

Alexander Hamilton said in the Federalist Papers No.78, that "it is the duty of the Court to declare all acts contrary to the manifest tenor of the Constitution void". Continuing, specific limitations on legislative power could be perceived in no other way "than through the medium of courts of justice". The courts must ascertain the meaning of the law, whether contained in the Constitution or in a legislative act. Hamilton said that if there were a difference between the meaning of the Constitution and the meaning of a legislative act, the former should always take precedence. He further stipulated that judicial review does not imply the superiority of the Court over the Congress. He presumed that the Constitution represented the will of the people and that therefore the Constitution was supreme over the legislative statutes (the prevailing attitude of this day also). Hamilton considered that the Constitution was the will of the people while statutes were the will of their agents, the legislators, and that the former always held precedence over the latter. This the Courts were bound to acknowledge and to which they were to defer. He did profess that the conflict between the Constitution and the statute must be clearly in favor of the Constitution's specific clause and thus the conflict of the powers of the Court and Congress. Chief Justice Marshall, perhaps the preeminent judge, spelled out Hamilton's thoughts by saying, " It is emphatically the province and duty of the judicial department to say what the law is". Marshall inaugurated , as Oliver Wendell Holmes put it, "a new body of jurisprudence by which guiding principles are raised above the reach of statute and state, a nd judges are entrusted with a solemn and hitherto unheard of authority and duty". We study the Constitution but do so only as it is read by the Supreme Court.

2A. Hudicial Review of State Actions

The Supreme Court has spent much more of its efforts and time adjudicating state laws as they concern the Constitution as opposed to

those as enacted by the Congress. Only sixty-nine acts of Congress fell under judicial review between 1889 and 1937, thirteen of these occurring within the crucial period of June 1934-1936. Since 1937 then the Court's review of actions by Congress have been minimal.

2B. Restraints On Judicial Review

Justice Frankfurter stated that "holding democracy in judicial tutelage is not the most promising way to foster disciplined responsibility in a people". From time to time the Court has invoked certain cautionary considerations to keep the power of judicial review bounds: one who relies on the invalidity of a statute has the burden of proving its invalidity; if this burden is not sustained the Court will presume the statute is constitutional. The Court does not, should not, pass on the expediency or efficacy or wisdom of legislation. The Court can not question the Congress' motives nor will it involve itself in political issues except in so far as it relates to the content of the Constitution. In all of this the Constitution, in its desire to maintain the separation of powers of the three branches of the government, strongly implies that the Court shall not delve into the prerogatives of Congress by legislating in the name of interpreting the relationship of statute to Constitution. While the judges are not enveloped in a "Constitutional wrapper" and they do have political thoughts as would anyone whose life is concerned with government, the true merit of a judge is found, among other things, in how well that judge eschews the political scene no matter how devoted to the natural interest in social issues. They, after all, are selected for the rest of their lives. Their purpose in life is to interpret the statutes in terms of conforming to the letter of the Constitution (not an easy job). Without ignoring the social issues, their strictures are to "ring" the legislative statutes against the Constitution, and not, by their interpretations, 'legislate from the bench". The recourse of those who would change the social fabric is through our elected representatives (in conformance with the representative form of government of this country). True, there are changes in the social, political and economic scene but modifications in there areas are not the domain of the Court except in a tangential way (as reflected in their decisions). [This brings to the fore the function of the President and how the President can effect change in the Constitutional environment.] The Court's domain is the legality of the statutes, not their possible "stupidity" (which is under the aegis of the legislature——— AND the people who elect them as their representatives).

In sum, the Court should have no agenda except that of justice under the rule of law (as it rests in the first instance under the aegis of the Constitution).

3. Separation of Powers

3A. Commingling of Powers

The system of checks and balances between the three branches of government not only permits but requires the commingling of powers. The legislature may exercise the executive power of pardon and also provide minute detail to the rules of procedure to be followed by by the Courts. Congress has the power to control the issuance of injunctions by federal courts and to restrict the courts' power to punish for disobedience. While the courts may not legislate, their decisions may in fact have that effect (but again, courts may not rule in a legislative way). Within limits, the courts may exercise the legislative power of appointments. Congress may confer on courts the authority to suspend sentences. The Presidents control over foreign relations is such that the advising and consenting to treaties and the declaration of war has recently come under more control by the President. Congress in turn does control the allocation of funds as a counter to this power of the President. The administration has the power of adjudication in disputes of the rights of patent holders. The Tax Court of the administrative branch

makes judicial decisions about the tax code. Within the executive branch the Federal Trade Commission and the Interstate Commerce Commission make both legislative and judicial decisions. The courts have recognized that the details of administering laws of Congress require that the executive branch must make decisions when administering those laws in such a way that they undertake judicial functions. The legislature allows the executive to fill in the details of a statute by enumerating regulations to carry out that law of Congress. During war, the Congress has delegated aspects of power not condoned during peacetime. Of necessity in this increasingly complex society there are and will be conflicts between competing interests in all three branches. Politics is a profession that has no easy or well-defined answers.

3B. Legislative Investigations

The Power of Congress to conduct investigations ferives immediate;y from "necessary and proper" clause (Article I, Section 8). It is sustainable solely on the basis of the inherent powers of legislature to inform itself for purposes of legislation. This power pf Congress was adjudicated saying that Congress did not possess the "general powers of making of making inquiries into the private affairs of citizens", that this power was solely related to some legislative purpose. The Congress has the power to investigate corruption of government though there are certain restrictions of procedure. There must be a legislative purpose for the investigation and not merely for the purpose of exposing. The questioning must be pertinent to the inquiry. These above mentioned items come under the purview of the courts as a restraint on Congress. Investigations can not be made foe personal aggrandizement or for personal punishment.

4. The President

Our government tends to place a substantial amount of power in the hands of the President and his administration (the executive branch). He derives much of this by being the head of his political party, being extra-constitutional. He exercises the power of pardon, the veto power of statutes, extensive war powers as commander-in-chief of the armed forces and as administrator of a huge body of departments, and has an almost absolute control of foreign relations. The Congress, with certain limitations, can confer on the President its own powers to be used when swift and coordinated action is requited. Finally, the efficient conduct of government, increasingly in the hands of administrative authority, has given rise to the expression "big government" and "government by executive order". While the President has certain leeway as to his executive prerogatives, his administrative officers have no such authority except by legislative grant. Under Article IV, Section 4 the President has the power to furnish military assistance to repress domestic violence upon the call of a state governor or legislature. This also applies if the domestic disorder results in the violation of federal laws. The Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, ... Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper in the President alone, in the courts of law, or in the heads of departments" (Article II, Section 2, Clause 2). Those not appointed according to the provisions of the Constitution are not "officers of the United States". The power of the federal government over the armed forces of the nation is divided between the President and the Congress. The legislature (Congress) has been given the important powers of raising armies and providing a navy (Article I, Section 8, Clause 14); the President, as commander-in-chief of the armed forces (Article II, Section 2, Clause 1), may issue regulations of his own and may take charge of all military operations in times of both peace and war. Article I, Section 9 limits Congress' power to suspend "writ of habeas corpus" to "cases of rebellion or invasion". In foreign affairs the President

is limited by Congress only with great difficulty and on rare occasions. The control of the public purse provides a theoretical check on the President's foreign policy endeavors but in practice it has had limited effect. Treaties must receive two-thirds vote of support by the Senate to be valid. A treaty has two aspects: an engagement with a foreign entity and as federal law. The former may be changed or modified only by the President while the latter may be altered or negated by an act of Congress. Executive agreements by the President with foreign entities has tended to circumvent the treaty process. These agreements have obviated the imposition of Congressional action as concerns these agreements which have the weight of law. Finally, the President is the "manager" of the federal bureaucracy and as such determines its efficiency and efficacy.

5. Federalism

The United States is governed by a federal system in which governmental powers are distributed between central (national) and local (state) authorities. In the nascent confederation of the colonies it was seem that as individual entities they lacked the necessary ability to fend for themselves in a world more developed than they were. Local patriotism gave way to the exigencies of the times and they sought the strength of banding together even as independent sovereignties. Local patriotism necessarily yielded before the proved inability of the confederation (of Colonies) to cope with the problems confronting it. In the Constitutional Convention compromise was achieved between the advocates of a strong central government and supporters of states rights. Federalism also fit into Madison's basic requirement of free government. It reflected his purpose to so contrive "the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper place". The Ninth and Tenth Amendments sought to clarify this distribution of powers between national and state authority but it still is the cause of contentions, to be resolved by the Supreme Court.

5A. Scope of National Authority

Theoretically, the powers of the national government are limited to those delegated to it by the Constitution, expressly or by implication; the powers "not delegated .... nor prohibited by it to the states" are "reserved to the states respectively, or to the people". The national government may choose the means of carrying specifically granted power into effect. Implied powers find verbal basis in Article I, Section 8, Clause 18: the "necessary and proper" clause merely enables the federal (national) government to maintain its supremacy in the limited sphere of its activity. Article VI, Section 2, the keystone of the federal system, stipulates a third dimension of national power. It indicates that if the legitimate powers of the state and nation conflict, that of the national government shall prevail. There are exclusive powers and concurrent powers of national and state governments. An example of an exclusive power is that of the federal government being exclusively the coiner of money (Article I, Section 8, Clause 5).

5B. Cooperative Federalism

Under Article IV, Section 4, the United States is under obligation to guarantee to every state a republican form of government. Amendments may be proposed and ratified by the state legislatures; state court judges are bound to observe and apply federal law. Through the years the national and state governments have de facto increased their cooperation as being to their mutual benefit. They are less amenable and amicable when a state's purposes did not coincide with the larger national purpose. Conflict has arisen from two sources: 1) when the states in the pursuit of normal objectives, under their police power, encroached on Congress' power to regulate interstate commerce,; 2) when the federal government

pursued a national policy normally thought to lie within the province of the states. While recognizing the states' right to handle their own internal affairs unhindered, according to their local precepts, the Supreme Court made decisions that also recognized that the country's peoples were inextricably entwined such that the concept of "one for all, all for one" was in the best interests of both national and state welfare (where "welfare" is not a political word). States' rights advocates and a strong national government adherents over the years have worked out amenable compromises that essentially accommodate both sides. As in life, things are not all white or all black, even though people can legitimately stand firm in their core beliefs, giving a little here, taking a little there. The prevailing view would seem to be that things should not change precipitously but rather that they should evolve over time, seeking the most beneficial level. With a diverse content of peoples such as is our country, it of necessity must be so. [However, our heritage from our Founding Fathers is important and even crucial to the our identity. Diverse cultures are fine but can only be salutary within our national heritage (China is China, the U.S. is the U.S.) Pardon my personal interjection.]

6. Regulation of the Economy

The Commerce Clause (Article I, Section 8, Clause 3) was inserted in the Constitution primarily to prevent the several states from impeding and interfering with the freedom of national commerce. Over time this clause has increased in importance in terms of national authority. Since the beginning with Chief Justice Marshall the Courts have ruled in favor of those policies that implement the Federalism construct: those things of a national nature come under the purview of the Congress with the states being granted authority over the rest of the field of commerce, including those areas strictly within the state and not in conflict with the national interests. This is a very fertile area due to the fact that commerce is so heavily involved in national activity and thus of a national concern. Interstate commerce trumps intrastate commerce every time and influences the Court in such conflicts. The purpose of this is to facilitate interstate commerce and prevent one state from dominating another state. There is no "balance of interests" where the national and state interests collide. However, the judiciary takes cognizance of the states' rights to regulate such things as local taxes, inspections, safety rules, weight restrictions and such other local concerns. Of prime importance to the federal aspect of our government is the prevention of local barriers to national commerce. 7.

7. National Taxing and Spending

Under Article I, Section 8 the Congress shall have the power to "lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.....". [This Clause "providing for the general welfare" strikes a chord in many but must be taken as an overarching rather than a specific stipulation.] It would be difficult to fashion more sweeping language. In the exercise of its taxing power, the national government reaches individual citizens and their property and acts directly as though there were no states. Except for the limitations of the voters at the ballot box, Congress is free to set any amount it desires through taxation. [Recall the cry during the Boston Tea Party, pre-Revolution, " no taxation without representation". No democracy could function otherwise.] The only specific limitations on the taxing authority is found in Article I, Section 9 which expressly prohibits the national government from granting a preference to one state's ports over another's, and it forbids a tax on exports (a concession to the southern states). In addition to these expressed limitations the Supreme Court has developed two others through interpretations. The first one is found in the doctrine of reciprocal immunity: the national and state governments cannot tax each other. A second Court decision

prohibited the federal (national) government from certain taxing and spending powers as a way to regulate certain activities traditionally within the states' purview (such as the agricultural production). In short, the general-welfare clause was a grant of power to use public money for any purpose that concerns the general welfare. In 1913 the Sixteenth Amendment was passed: "Congress shall have the power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States and without any regard to census or enumeration". The "due process" clauses of the Fifth and Fourteenth Amendments were not now (since 1949) considered impediments to the national and state governments in dealing with private business and commerce in cases considered to be offensive to the public welfare (labor disputes). [More on "due process" in next section.]

8. Rights of Individuals

"Due process", found in the Constitution including the Fifth and Fourteenth Amendments, stipulates that certain things cannot be done by the governments without the due process of the law, such as trial by jury. [The problem with the law is, how can a law be written which is both succinct and "all-inclusive " at the same time? There are so many iterations of "unique" situations that one law does in no way fit them all. Yet this shall be the challenge of the legislators and the imperative of the courts. One of the beauties of science is that one law fits a multitude of situations: Newton's Law of "force equals mass times acceleration" can be applied with equal force (pardon the pun) to any number of applications. Not so the legislative law: the courts are assigned the task of unraveling the meaning of a law in the context of the unique details of the conflict. In fact, unlike science, there is no one right answer to satisfy all parties. Who among us has the wisdom to fairly and rightly adjudicate all our conflicts with their multitudes of ramifications ? These are points to ponder.] The decisions of the courts over the years have molded and remolded our personal, individual rights in an ever increasing complex society. To follow this history is beyond the ken of this Constitutional summary. It will be said that there are references to "due process" (redress of wrongs by jury consideration) and "equal protection under the law" (everyone has their day in court). These two clauses refer to the individual in relation to the government, national and state. The individual rights in such cases have evolved over time and have relied in large measure on the interpretation of the historic set of rights enumerated in the Bill of Rights, that set of amendments ratified shortly after the ratification of the Constitution. Besides statutory enactments, judicial decisions and custom, the first ten amendments of which the first eight are the Bill of Rights, were proposed by Congress in 1789 in order to assure both the people and the states that their rights would be protected against encroachment by the federal government. Several of the amendments follow: I. (Freedom of Religion, of Speech and of the Press) Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. IV. (Security, Unwarrantable Search and Seizure) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. V. (Rights of Accused in Criminal Proceedings) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment or of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy lide or limb; nor 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; nor shall private property nor shall private

property be taken for public use without just compensation. VI. (Right to Speedy Trial, Witnesses, etc.) In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense, VII. (Trial by Jury in Civil Cases) In suits at civil law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall otherwise be re-examined in any Court of the United States, that according to the rules of the common law. VIII. (Bails, Fines, Punishments) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. IX. (Reservation of the Rights of the People) The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. X. (Power Reserved to States or People) The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. The preceding are rights provided to the people, and states, by the reading of the Constitution. These rights are being interpreted and reinterpreted by both the Courts and the Congress and so is a "work-in-progress". Presumably and hopefully these rights will be accommodated to the changing times even in light of the "strict constructionists". However, it's nevertheless necessary to "stay tuned".

9. Toward Positive Responsibility

Americans have become so accustomed to judicial review that they take it for granted. Whenever the government enters a new domain there are questions as to the constitutionality of this action. Since the 1930's many have wondered wether a government so contrived can survive in an age that calls for power to deal with domestic problems of an ever-increasingly complex society and the power to cope with ever more complex international issues. These pressures may help explain why, during the 1930's, the principle of constitutional limitations has been under siege. Nevertheless, Americans are still accustomed to think in terms of the constitutionality of governmental actions rather than of its wisdom. Again, it's a contest between those who feel the Constitution should be liberally defined to reflect the changing times and those who feel that the strict letter of the Constitution should be followed even as society becomes more complex. The former group is not uncomfortable with the counts de facto legislating from the bench while the latter group vigorously rejects this concept. One thing should be clear: the spirit of the Constitution rejects the concept of a "legislative" court: the laws must conform to the Constitution, not the other way around. In addition, keep firmly in mind that the Court is elected for life while legislators can be voted out periodically. [The Second Amendment ("A well regulated Militia, being necessary to the security of the State, the right of the people to keep and bear Arms, shall not be infringed") has been the epicenter of a controversy over the right to bear machine-guns. There were no machine-guns on December 15, 1791. The concept in 1791 was that every man should be a part of the State militia. Are our citizens now expected to do the same? No. Do they now need hand-guns for protection? Possibly. However, do they need machine-guns for protection? No, because we have the service of the police, and we have a National Guard. Is there then a justification to bear machine-guns? Only in one's wildest day-dreams. However, is there danger of monstrous mischief (hellish behavior)? Unfortunately even civilized countries have monsters. So then, the Constitution says we may bear "arms" (single-loading flint-locks). To be a smart-aleck, would we say an atomic "device" is an "arm"? Would we then stick to the letter of the law? Hardly. I have yet to hear even a glimmer of a sensible, valid justification for allowing machine-guns (except the vapid one that "if they take away my machine-

gun they'll next take away my hand-gun". No, we're not that ignorant. Personally, I'd like to have every "arm" in civilian hands banished, but that will not happen because even in an affluent society such as ours there are the "bad guys" out there. (When I was about 10 years old I looked in my father's bureau and saw a hand-gun. I never gave it another thought.) In sum, let's use our God-given

intelligence when considering things of such importance. I would warrant that the police have strong views about the proliferation of "arms" and they are our "thin blue line" between us and the "bad guys". There can be some "bad apples" but gosh, let's give them a break in a world where there are those with absolutely mo conscience. So, how does a judge interpret the word "arms"? Is he legislating from the bench if he defines it as hand-gun? I think not, and I'm partial to looking to the Constitution as an essentially immutable standard of conduct. Tamper with it only at the very edges and then with trepidation. Machines have to have strict standards and I'm partial to machines. The question is, "does the law conform to the Constitution, our standard, and if not, why not"?]

9A. Erosion of Constitutional Limitations

There are three prime delimiting principles provided by the Constitution: separation of powers between the three branches of government, the federal system (national and state) and the due process of law. Since 1937 these three delimiters have been slowly eroded. In addition, there is no specific elements in the Constitution that proclaiming the separation of powers of the three branches. Those separate powers are only implied by the structure and organization of the Constitution. Hoever, it does not preclude blending of powers. However, in the modern are the executive , by virtue of its size, tends to be the dominate branch of the government (in addition to which must be added the state governments). In its daily operations the executive branch reaches into the daily lives of everyone in a manner that leaves even the legislative branch of secondary (but important) significance. [There are those who are pleased when the legislators do nothing, at all. There are also those who would have the legislators rescind many laws that no longer pertain.] When the government seized the steel mills (during a strike) in 1952 without statutory authorization Justice Black stated, "In the framework of our Constitution the President's power to see that the laws are faithfully executed refutes the idea that he is to be a law-maker". Justice Black's rejection of the claim of inherent power in the President to deal with this emergency as he pleases was rooted in the doctrine of the separation of powers. The public perception probably is that the President "runs" the country, and in large measure this is true in his capacity as the head of a very large executive organization, i.e., all the large governmental departments that seem to pervade our lives. However, the Constitution endeavors, by its structure, to maintain the balance of powers through the court system and the legislative bodies. [We are a large and complex society that necessarily requires a large and complex government. The Framers of our Constitution did so in a largely agricultural and small - sized country. That they could derive a form of government that could "grow" with the increasing weight of an increasing population of increasing complexity is remarkable. That that Constitution also respects the inalienable rights of the individual members of that society at the same time is what makes the Constitution so remarkable. Without those (responsible) rights the word "democracy" would be a sham. To support these rights it's absolutely essential that a citizen have accessibility to the courts, that the courts rely on the merits of a case , and that the courts impose complete impartiality, the "sine qua non" of jurisprudence. As stated on the frieze over the entrance of the Supreme Court, "Equal Justice Under Law".] Against an impressive background of unprecedented executive aggrandizement in the last half of the 20th Century, and with the concept of self-restraint still fresh, the Court interposed its authority, making it quite clear that presidential action is not immune to judicial

review (to enforce the separation of powers). This was exemplified when Justice Douglas said about Truman's 1952 seizure of the steel mills, "the most important one in our history concerning separation of powers between the President and Congress, and the role of the Court in enforcing the separation". The separation of powers is also found in the relationship between the national and state governments, particularly in the area of interstate commerce: anything transported between states comes under the purview of the federal government: the Congress has the power to regulate interstate commerce not only of tangible goods but also of those intangibles such as services or intellectual property, etc. Even the minimum wage law was held to be in the domain of the federal government because of the commerce clause. [As time progressed and the society became more complex and economically interrelated, the federal part of federalism has ascended while the states bring up the rear (which does not mean that they do not have substantial powers. It only means that the citizen has more and more government with which to contend. There's a constant push and pull between the "nanny" government and the laissez-faire proponents. The common wisdom seems to be that both will be with us in the foreseeable future, with the hope that conditions improve to the point of favoring the latter.]

10. Preferred Freedoms And Judicial Self-Restraint

Starting in 1937 the Supreme Court justices were faced with the necessity of probing the philosophy of the limits of judicial self-restraint. Having adopted self-restraint as to commercial regulations, in the face of audacious presidential assault (such as the President Truman's seizure of the steel mills), would the same narrow concept of judicial power apply to enactments that infringe upon free speech, thought and religion? [In recent times the power of the president to wage war has come under scrutiny. The Constitutional power of the Congress to withhold monies from the executive branch is a blunt method when the military action is essentially localized: what ability does Congress have to withhold funds for a specific military action? This dual power of the President and Congress concerning the initiation of military action is a difficult one when the concept of an immediate emergency is considered. The area of resolution could perhaps be delimited by separating defensive military as opposed to offensive, preemptive actions. It would seem clear that a preemptive military action would require a sound Congressional participation in accordance with the Constitution (which debate might in effect cause the action to be unnecessary: the adversary rethinks its position———-but "saber-rattling" is akin to gamesmanship, a repugnant form of international diplomacy that is not useful in the 21st Century. This is a most important issue about which books have been written and is mentioned here only because it is so important: this book documents an aspect of one of those most important results of such deliberations.] The fact of the matter is that all three branches are responsible for restraining themselves even as they undertake to fulfill their duties under the Constitution. "Power-grabs" most often come off as an example of a "holier than thou" attitude (if not outright self-aggrandizement). [We dislike the phrase "power corrupts and absolute power corrupts absolutely.] In 1937 the Courts tended to take a hands-off attitude when the Executive was involved in the administration of the economic and commercial success of the economy. This did not apply when things such as civil rights as found in the Bill of Rights Amendments were under consideration.. The Courts were not prone to tolerate infringement of these elements of the Constitution. This was spotlighted when the Warren Court in 1954 unanimously ruled against segregation in public schools. The Warren Court took the liberal view in cases concerning the Bill of Rights, saying that all such cases should be examined with special diligence and that "the Judiciary has the duty of implementing the constitutional safeguards that protect individual rights". The Courts purpose is to "ring" the legislative statutes (federal and state) against the precepts of the Constitution, without at the same time writing their own

"legislation" by their interpretations. This is a fundamental complaint of those who rightly desire a well-established separation of powers. It is said that the Warren Court has achieved libertarian objectives largely by statutory interpretation. In its repudiation of the "separate but equal" doctrine it stirred up strong feeling both pro and con. While now a settled issue it was once a very divisive and contentious one in which the Court was accused of legislating fro the bench. Wartime brings about all kinds of controversies as to the legitimate powers of the executive as concerns the privacy of the citizens due to executive imperatives to prosecute the war or their legislative proposals to accommodate the executive. Integral to this is whether the condition of war could be established. War can be considered an emergency and in conditions of an emergency the government can impose itself on civil liberties and rights. Thus war makes itself felt in this region also. The condition of war is far too serious to be dealt with as a political gambit. That would be a "federal offense of gigantic proportions. It's that age-old conundrum of balancing the security of the nation as against the civil liberties of the populace. It would seem that the Constitution was written in such a way as to cry out for interpretation which in turn assures a steady dependence on the courts. In this way the admirable simplicity of the wording of the Constitution presents opportunities for responsible disagreements in this modern day and age. The function of the concept of checks and balances assures that if the "ship of state" heels over too much one way it will be self-righting by virtue of one of the three branches. The problem seems to be to protect individuals and minorities without thereby destroying capacity in the majority from governing. One of the qualities of a democracy is that the majority is not always so; the majority and minority may alternate periodically and the minority never loses its standing as legitimate and deserving of proper consideration. Defense of the rights of the minorities becomes not the antithesis of majority rule but its very foundation. It thus becomes necessary to preserve equal access in the political process to both majority as well as the minority. This is the essence of a democracy. An act of judgement in a court based on intellectual reason can have a moral force far exceeding that of the purse or the sword. Thus the Court's worth consists not only in its restraining power but also in its making available ideals and values that might not otherwise be made available. These standards must not be silenced lest we as a people sink into an abyss difficult from which to extricate ourselves. In the final analysis, it would seem that what all branches of the government require for a felicitous (apt and well-run) outcome is an impeccable sense of conscience (with the admonition, "Let your conscience be your guide"). How could one ask for more? (besides knowledge and intelligence, obtained from the thrill of learning).