

# INTERPRETING A CONSTITUTION OR A CHARTER — “ORIGINAL INTENT”, STRICT OR LIBERAL CONSTRUCTION, AND OTHER APPROACHES

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The United States and Canada are both great examples of democratic government, both succeeding to the democracy which was so painfully established in Great Britain in the seventeenth and eighteenth centuries, and, in this country, to the liberty developed in France. The transition was not altogether easy for either the United States or Canada.

As Arthur Goodhart once pointed out, it was Abraham Lincoln in his Philadelphia Address who said “that the Declaration of Independence had given hope to all the world . . . that all should have an equal chance”.<sup>1</sup> Yet freedom does not mean that anyone may do whatever he pleases without regard to the interests of others. The ultimate task, in the words used in conferring law degrees at Harvard University, is to seek “those wise restraints which make men free”.

For this purpose, both countries have established popularly elected legislatures to formulate the laws. As a bulwark behind the legislation my country, and now yours, have established a Constitution and a Charter designed to restrict the unlimited power of the legislature. When this road is followed many problems are presented to the courts.

With us, it was established early by our Supreme Court in *Marbury v. Madison*<sup>2</sup> that it was the duty of the Court to interpret and apply the Constitution. This result was supported in part by the Supremacy Clause in our Constitution which provides that:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .<sup>3</sup>

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<sup>1</sup> A.L. Goodhart, *Lincoln and the Law* (1964) 50 A.B.A.J. 433 at 434.

<sup>2</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>3</sup> *U.S. Const.*, art. VI.

You have a similar provision in section 52 of the *Canadian Charter of Rights and Freedoms* which, as you well know, reads as follows:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.<sup>4</sup>

Thus, the structure is clear, but difficulties immediately appear. The constitutional provisions must be construed. They are not wholly clear. We have learned over the years that problems of construing the Constitution of the United States, and applying its terms to current facts, are often difficult and frequently controversial. As I understand the situation, you are already finding similar difficulties in the application and construction of your newly adopted *Charter*.

These difficulties are usually matters for discussion by judges in their decisions and by legal scholars in their books and articles.<sup>5</sup> Recently, they have been widely considered and discussed by the general public. In the United States this occurred in connection with the nomination of Judge Bork to be an Associate Justice of the Supreme Court. Under our Constitution this required confirmation by the Senate, now a popularly elected body. The hearings on the nomination before the Judiciary Committee of the Senate were widely televised and I understand that there was much interest in them in Canada.

In my student days a much talked about book was *THE MEANING OF MEANING*, by Ogden and Richards, first published in 1923.<sup>6</sup> It was a few years later that Judge Jerome Frank referred to the "one-word one-meaning fallacy" which, he said, "would compel the conclusion that a clothes horse is an animal of the equine species, and would make it impossible to speak of 'drinking a toast' ".<sup>7</sup> For better or for worse, words are very slippery articles. All lawyers know that they take their meaning not only from ordinary usage, but also from the circumstances in which they are used and the purpose which they are intended to carry out. Very early in our history Chief Justice Marshall wrote "we must never forget, that it is *a constitution* we are expounding",<sup>8</sup> which "constitution", he

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<sup>4</sup> *Canadian Charter of Rights and Freedoms*, s. 52, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15 [hereinafter *Charter*].

<sup>5</sup> A few of the many references include A. Cox, *THE COURT AND THE CONSTITUTION* (Boston: Houghton Mifflin, 1987); R.N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution'* (1987) 72 *IOWA L. REV.* 1177; C. Mathius, *Ordered Liberty: The Original Intent of the Constitution* (1987) 47 *MD. L. REV.* 174; P. Brest, *The Misconceived Quest for the Original Understanding* (1980) 60 *B.U.L. REV.* 204; H.J. Powell, *The Original Understanding of the Original Intent* (1985) 98 *HARV. L. REV.* 885.

<sup>6</sup> C.K. Ogden & I.A. Richards, *THE MEANING OF MEANING*, 10th ed. (London: Routledge & Keagan Paul Ltd., 1969).

<sup>7</sup> J. Frank, *COURTS ON TRIAL* (New York: Atheneum, 1969) at 299.

<sup>8</sup> *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). Emphasis in original.

added, is "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs".<sup>9</sup> This theme was carried forward by Woodrow Wilson when he wrote "the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age".<sup>10</sup>

There are problems with this approach, particularly in a democratic society and especially with constitutional provisions, for which it is difficult to correct an inappropriate construction. If a Constitution is to be adapted, and if its spirit is "the spirit of the age", who is to make that adaptation and what standards or oracles shall be used?

In approaching this problem we must remember that, as Mr. Justice Holmes wrote, "[a] word is not a crystal, transparent and unchanged. . ." <sup>11</sup> and, in Professor Thayer's words, that we do not live in "that lawyers' Paradise where all words have a fixed precisely ascertained meaning."<sup>12</sup> Indeed, it was more than two centuries ago that Lord Mansfield wrote that "[m]ost of the disputes in the world arise from words".<sup>13</sup> This is particularly true when the constitutional provision is phrased in words of considerable generality. Constitutional interpretation is different from the construction of a statute, or of a contract or of a will — but not entirely different. Ascertaining the meaning of a term or a clause is judges' work, and it cannot be shirked merely because the task is intellectually difficult or because the consequences of the decision will be serious.

Many years ago, my one-time colleague Professor Zechariah Chafee wrote a very interesting article entitled *The Disorderly Conduct of Words*.<sup>14</sup> In this article, Professor Chafee gave a number of examples of situations where a word can appropriately have a meaning quite different from its common usage. This brings to mind a New York lower court decision involving a municipal ordinance which, by imposing criminal sanctions, limited the use of the West Side Highway in New York City to "pleasure vehicles". A New York policeman, performing his duty as he saw it, gave a ticket to the driver of a hearse on the highway. The hearse was part of a funeral procession. The New York court discharged the defendant, holding that in this situation, the hearse was a "pleasure vehicle". Thus, in a sense, the word was turned around. But is it not clear that this was the right decision?

<sup>9</sup> *Ibid.* at 415. See also G.E. White, *THE MARSHALL COURT AND CULTURAL CHANGE*. 1815-35 (New York: Macmillan, 1988) at 114-19, 125-27. (This is also volumes III and IV of the *HISTORY OF THE SUPREME COURT OF THE UNITED STATES*, under the Oliver Wendell Holmes Devise).

<sup>10</sup> W. Wilson, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (New York: Columbia University Press, 1908) at 69.

<sup>11</sup> *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

<sup>12</sup> J.B. Thayer, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* (New York: Rothmaman-Kelley 1969) at 428-29.

<sup>13</sup> *Morgan v. Jones* (1772), Lofft 160 at 176, 98 E.R. 587 at 596 (K.B.).

<sup>14</sup> Z. Chafee, *The Disorderly Conduct of Words* (1941) 41 COLUM. L. REV. 382.

There are several approaches to the problem in constitutional cases. One which has been strongly supported by the Attorney General of the United States, Edwin Meese III, is known as the rule of "original intent".<sup>15</sup> Our Constitution, including the Civil War Amendments, is so old that it is extremely difficult to discover the original intent, except in a general way; often, on the facts before the courts it is simply non-existent. As Professor Archibald Cox has said: "Did the Framers intend to forbid electronic eavesdropping? If you ask that literally, the answer is 'no, of course not.' They never heard of such a thing. How could they have intended to forbid it."<sup>16</sup> You will have many similar problems in the days to come under section 7 of your *Charter* and I doubt that many of them can be resolved on the basis of "original intent", except in a very general sense.

Closely related to the idea of "original intent" is the rule of "literal construction". This rule is often clear and helpful, such as in construing the provision in the United States Constitution that the President must be at least thirty-five years old — but what about the further provision that he must be a "natural born Citizen"? Consider a child born abroad with both of his parents being citizens of the United States, or a child born abroad with one parent a citizen? We have never resolved this problem.

Another approach which finds a broader basis for constitutional interpretation, taking into account not only the past but the present, and even the future, can be called "liberal construction". This is an approach which has provoked much controversy in recent years in the United States. It can surely be carried too far, but it cannot readily be written off. What about drug testing, aspects of which are now pending decision before our Supreme Court?

There are serious problems with all of these approaches. This was pointed out by John Chipman Gray. He was referring to statutory interpretation, but the situation is not different with respect to constitutions. He wrote:

[T]he difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.<sup>17</sup>

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<sup>15</sup> E. Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution* (1986) 27 S. TEX. L.J. 455. See also D.C. Moss, *The Policy and Rhetoric of Ed Meese* (1987) 73 A.B.A.J. 64.

<sup>16</sup> A. COX, *Remarks* (1987) 42 REC. OF THE ASS'N OF THE B. OF THE CITY OF NEW YORK 1012.

<sup>17</sup> J.C. Gray, *THE NATURE AND SOURCES OF THE LAW*, 2d ed. (Gloucester, Mass.: Peter Smith, 1972) c. 8 at 173.

Judge Learned Hand made the same point when he wrote:

There is no surer way to misread any document than to read it literally; in every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.<sup>18</sup>

Mr. Justice Holmes also advised us that “[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.”<sup>19</sup> There are innumerable illustrations of the problem. The question arose in connection with the argument in the Pentagon Papers case before our Supreme Court.<sup>20</sup> That case involved the construction and application of the First Amendment to our Constitution, which provides succinctly that:

Congress shall make no law . . . abridging the freedom of speech or of the press. . . .<sup>21</sup>

If we use the literal construction approach, it is hard to see how the First Amendment had anything to do with the above case, which involved equity proceedings by which the Government sought to enjoin the New York Times (and the Washington Post) from printing certain classified materials relating to the Viet Nam War. Congress had made no law on the subject since we have no Official Secrets Act. Indeed, that was one of the weaknesses of the Government’s case. Even if that point is overlooked, it seems reasonably obvious that the words “no law” cannot appropriately be construed with absolute literalism, since there is the law of libel and slander. Congress has made a number of laws restricting speech and the press, for example, in matters of racial discrimination and labour relations. Thus, it is an offense for a newspaper to publish an advertisement for housing which says that the housing is restricted to “whites only”. It is also an offense for an employer to tell his employees that he will fire them if they join a union. Further, there is little doubt about the continuing soundness of Mr. Justice Holmes’ observation that one cannot falsely shout “ ‘fire’ in a theatre” with impunity,<sup>22</sup> or that a newspaper can be prevented from printing the sailing dates of troop ships in wartime.<sup>23</sup>

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<sup>18</sup> *Guiseppe v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944).

<sup>19</sup> *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931).

<sup>20</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>21</sup> *U.S. Const.*, amend. I.

<sup>22</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>23</sup> *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

It would be very hard indeed to demonstrate "original intent" in any of these situations and neither is "literal construction" an invariably sound approach. How should the question be answered? In the Pentagon Papers case the Court divided three ways.

Another illustration of the problem can be shown with our Eighth Amendment, which provides that:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.<sup>24</sup>

You have a counterpart for this in section 12 of your *Charter of Rights and Freedoms*, which, as you know, provides that:

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.<sup>25</sup>

These are words which seem clear and definite, yet, in our experience, they have been filled with problems. In the United States there is virtually no evidence of original intent at the time the provision was adopted in 1791, nearly two hundred years ago. Even if there were, it would be at most the views of two or three members of the Congress which adopted the Bill of Rights, or of the state legislatures which ratified it. Thus, the only evidence of "original intent" would have to come from practices in the states when the Bill of Rights was ratified. That would allow flogging, which was a fairly common practice in those days, and perhaps amputation of a hand or an ear, or branding, though I have made no specific research about the latter points. Whatever the historical facts may be it seems reasonably clear that the present Supreme Court would find such punishments to be forbidden today by the Eighth Amendment. Is that a matter of "liberal construction" or is it merely a carrying out of the basic intent of those who wrote and approved the Amendment?

In *Trop v. Dulles*<sup>26</sup> the Court held invalid a statute which deprived a person of citizenship for the offense of desertion in wartime. It stated that the meaning of the constitutional provision must be drawn "from the evolving standards of decency that mark the progress of a maturing society". On the other hand, it has been held that mandatory life sentences in drug cases are not invalid.<sup>27</sup> The Supreme Court has also held that the Amendment applies only to criminal punishments so that it does not bar corporal punishment upon school children for disciplinary purposes.<sup>28</sup>

The greatest controversy has arisen with respect to capital punishment which you have largely resolved by legislative action (though I

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<sup>24</sup> U.S. Const., amend. VIII.

<sup>25</sup> *Charter*, s. 12.

<sup>26</sup> 356 U.S. 86, 100-01 (1958).

<sup>27</sup> *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978). *Cert. denied*, 439 U.S. 1091 (1979).

<sup>28</sup> *Ingraham v. Wright*, 430 U.S. 651 (1977).

understand that the penalty is still prescribed for two offences under the *National Defence Act*<sup>29</sup> (espionage in section 68 and mutiny with violence in section 69). In the United States, where criminal law is largely allocated to the states, the Supreme Court has not held that capital punishment violates the Eighth Amendment in all cases, although it has imposed a number of procedural requirements designed to ensure the fairness of the determination that capital punishment should be imposed. The Court has held that the Eighth Amendment forbids the imposition of capital punishment in cases which do not involve the deliberate taking of human life. Thus, it has held that capital punishment may not be imposed for the crime of rape.<sup>30</sup> In cases of felony murder the Court has held that the capital penalty may be imposed only on a person who understood that killing would be, or might be, a consequence of the basic crime.<sup>31</sup>

For many years, Justices Brennan and Marshall have steadfastly held to the view that the death penalty is, under all circumstances, a cruel and unusual punishment which is prohibited by the Eighth Amendment. Mr. Justice Brennan, in his Holmes Lecture delivered at the Harvard Law School on the occasion of the 350th Anniversary of Harvard University,<sup>32</sup> has expressed this view with characteristic feeling. Reaching this result requires not only the "evolving Constitution" approach, but it also involves disregarding the fact that capital crimes were explicitly referred to in the Bill of Rights itself.<sup>33</sup> The same argument could, of course, be made with respect to the decision that the death penalty may not be imposed as a punishment for rape.<sup>34</sup> The Court said in the *Coker* case that a "punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to the acceptable goals of punishment . . . or (2) is grossly out of proportion to the severity of the crime".<sup>35</sup>

The problem of the approach which should be taken by the courts in construing and applying constitutional provisions has long been a subject of intense discussion in the United States. It readily produces deep feelings and strong talk. It was Thomas Jefferson who wrote more than a hundred and fifty years ago:

The judiciary of the United States is a subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric.<sup>36</sup>

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<sup>29</sup> R.S.C. 1970, c. N-4.

<sup>30</sup> *Coker v. Georgia*, 433 U.S. 584 (1977).

<sup>31</sup> *Lockett v. Ohio*, 438 U.S. 586 (1978).

<sup>32</sup> W.J. Brennan, *Constitutional Adjudication and the Death Penalty: A View from the Court* (1986) 100 HARV. L. REV. 313.

<sup>33</sup> The Fifth Amendment to the United States Constitution provides that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

<sup>34</sup> *Supra*, note 30.

<sup>35</sup> *Ibid.* at 592.

<sup>36</sup> Letter from Thomas Jefferson to Thomas Ritchie, December 25, 1820.

During the last thirty-five years there has been, in the words of Professor Cox, an "extraordinary increase in constitutional litigation in the United States".<sup>37</sup> These constitutional decisions raise deep feelings and sometimes evoke strong comment, not only because of the immediate importance of the subject matter, but also because of their virtual finality.

For many years law was regarded as "a sacred mystery"<sup>38</sup> and, in Blackstone's words, judges were the "living oracles" of the law.<sup>39</sup> Jeremy Bentham began the process of dissolving the mystery. This process was actively pursued throughout the nineteenth century and with the influence of utilitarianism, social Darwinism, pragmatism and many other refinements of thought in the present century. As Judge Posner said: "It seems that every generation must refight the battle between realism and conceptualism."<sup>40</sup> He continued with his observation that many of the constitutional questions which come before the courts in the United States today "require . . . political choices".<sup>41</sup>

This does not make such questions inappropriate for judicial action, nor is there anything undemocratic about the process which allocates such decisions to judges. Our Constitution and your *Charter* were adopted by democratic processes and have, through the two supremacy clauses, and otherwise, determined that, in some matters, the scope of legislative action should be restricted, and have allocated that determination to the courts. As Professor Cox said in his recently published book entitled *THE COURT AND THE CONSTITUTION*:

The very purpose of written constitutions containing Bills of Rights and guaranteeing judicial independence was to put some rights beyond the reach of government policy, even beyond the power of a majority of the people.<sup>42</sup>

Two years ago Anthony M. Kennedy, then a judge of the United States Court of Appeals for the Ninth Circuit, spoke before the Canadian Institute for Advanced Legal Studies, at Stanford University in California. His address was entitled *Unenumerated Rights and the Dictates of Judicial Restraint*<sup>43</sup> and is pertinent to his recently assumed position as Associate Justice of the Supreme Court of the United States, as well as to this

<sup>37</sup> Cox, *supra*, note 16 at 1008.

<sup>38</sup> R.A. Posner, Book Review (1985) 53 GEO. WASH. L. REV. 870 at 871-72.

<sup>39</sup> Sir. W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, vol. 1, 17th ed. (London: Taylor, 1830) at 69. *But see Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 866 (1834) (Marshall C.J.: "Courts are the mere instruments of the law, and can will nothing.").

<sup>40</sup> Posner, *supra*, note 38 at 873.

<sup>41</sup> *Ibid.*

<sup>42</sup> Cox, *supra*, note 5 at 372. *See also* E.V. Rostow, *The Democratic Character of Judicial Review* (1952) 66 HARV. L. REV. 193.

<sup>43</sup> A.M. Kennedy, *Unenumerated Rights and the Dictates of Judicial Restraint* (Address to the Canadian Institute for Advanced Legal Studies, July, 1986) [unpublished].

speech. Judge Kennedy said, at the opening of his address, that “[o]ne cannot talk of unenumerated constitutional rights under the United States Constitution without addressing the question whether the judiciary has the authority to announce them”. He went on to discuss the limitations on judicial power, of which he said the most important was “the overarching principle that the Constitution is a written text, itself a law”. After discussing the many factors involved in reaching constitutional decisions, he said: “The unrestrained exercise of judicial authority ought to be recognized for what it is: the raw exercise of political power. If in fact that is the basis of our decisions, then there is no principled justification for our insulation from the political process.” His conclusion is informative and persuasive:

Finally, I am unconcerned that there is a zone of ambiguity, even one of tension, between the courts and the political branches over the appropriate bounds of governmental power. Uncertainty is itself a restraint on the political branch, causing it to act with deliberation and with conscious reference to constitutional principles. I recognize, too, that saying the constitutional text must be our principle reference is in a sense simply to restate the question what the text means. But uncertainty over precise standards of interpretation does not justify failing in the attempt to construct them, and still less does it justify flagrant departures.<sup>44</sup>

These problems are already appearing in Canadian judgments. I think, for example, of a passage from a judgment of Chief Justice Dickson, where he said:

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for the individual the full benefit of the *Charter's* protection.<sup>45</sup>

What, then, should be the approach? What rule of construction should be followed in constitutional cases? Should it be original intention, literal construction, strict construction or liberal construction? I submit that this is a question — hard as it may be for the judges — which cannot be answered since it should be all of these things. All relevant factors should be, and must be, taken into account. This has been well put by Professor Cox in a recent statement, where he says:

There are two extreme possibilities. One is that we mean the specific applications of the Constitution and nothing more than the Framers con-

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<sup>44</sup> *Ibid.*

<sup>45</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344, 18 D.L.R. (4th) 321.

sciously thought of and particularly intended. The other is that we mean something underlying those conscious thoughts — some deeper principles, policies, purposes — something you can search out and apply to new and unforeseen occasions.<sup>46</sup>

The answer to the problem of construction of constitutional provisions seems to me to be clear, though often far from easy. The judge must take into account anything and everything that is relevant, giving each factor the weight to which he concludes it is entitled. He must consider the actual language of the constitutional provision. He must consider the original intent if sure and reliable evidence of such can be found. He must also consider original intent in its broader aspect, that is, the underlying intent — what did the persons who framed and approved this constitutional provision contemplate would be accomplished by what they were doing? In this sense, putting an electronic bug on the walls of a bedroom was intended to be barred just as much as hiding under the bed and listening to the conversation. He must recognize that there can be broad or liberal construction. And on the basis of all of these factors he must make the choice. This is indeed the task of judgment. For a long time we liked to think this task was purely scientific, entirely controlled by logic, something natural and easy for the well-trained legal mind. We now know it is not that easy. There is the necessity of choice which cannot be escaped. It should, in my view, be consciously kept as narrow as possible, but this is part of the art of judging.

I close these inconclusive remarks with an observation that is far more clear. Since our Constitution and your *Charter* are very important in our respective schemes of government, the selection of judges in our countries must always be regarded as a matter of fundamental importance. The choice should not be political in the usual partisan sense, but it is appropriate to take into account not only the candidate's background and basic ability, but also his outlook and approach to problems of human relationships and governmental power. This was clearly evidenced in the recent controversy in the United States with respect to the confirmation of Judge Bork. That episode has been denounced by some persons as a political vendetta, and charges have been made that the Senate Judiciary Committee and the Senate proceeded on purely partisan motives. I think that is quite wrong, although there were some unfortunate excesses in the public discussions.

Our Constitution provides that appointments to the Supreme Court shall be made by the President "by and with the advice and consent of the Senate". The Senate's consent is the step through which the democratic (with a small "d") voice can be heard, and I believe that it was heard, and properly heard, in this case. I can foresee future discussions of similar import in your House of Commons. If the courts are to have such powers, and I believe that they do have, should have, and indeed

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<sup>46</sup> Cox, *supra*, note 16 at 1012.

must have, then the selection of the persons exercising them is one of the basic choices to be made in a democratic society.

This question has been carefully discussed in a book by Professor Laurence H. Tribe of the Harvard Law School, published in 1985, and entitled *GOD SAVE THIS HONORABLE COURT*.<sup>47</sup> The subtitle of the book is significant here. It is *HOW THE CHOICE OF JUSTICES CAN CHANGE OUR LIVES*. The author says in his Preface: "People need to understand. . . why those who interpret and enforce the Constitution simply cannot avoid choosing among competing social and political visions, and why it is that those choices will reflect *our* values . . . only if we peer closely enough, and probe deeply enough, into the outlook"<sup>48</sup> of the President's nominees. Professor Tribe, in his concluding chapter, says that "some constitutional landmarks are so crucial to our sense of what America is all about that their dismantling should be considered off-limits, and candidates who would be at all likely to repeal them should therefore be considered unfit".<sup>49</sup> This was, of course, what Professor Tribe had in mind when he appeared before the Senate Judiciary Committee in opposition to the nomination of Judge Bork. I think that most people in the United States agree with that author's statement that "[p]icking judges is too important to be left to any President unless the Senate . . . plays and active and thoughtful part — something we have seen it do through much of our history".<sup>50</sup>

With the adoption of your *Charter*, Canadian law has clearly started down a new path. We in the United States will be very interested in following your developments and in learning what your experiences will be. We can be sure that there will be controversy, sometimes intense, and that the road will not be smooth. It will not always be easy for judges and lawyers and the people to adjust to the pressures which are inherent in some of the issues which will surely arise. I have confidence in your successful handling of these problems in this great country.

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<sup>47</sup> L.H. Tribe, *GOD SAVE THIS HONORABLE COURT* (New York: Mentor, 1986) [originally published in (New York: Random House, 1985), references are to the Mentor edition].

<sup>48</sup> *Ibid.* at ix.

<sup>49</sup> *Ibid.* at 113.

<sup>50</sup> *Ibid.* at 170.

