by Samuel Francis

Impeachable Offenses

Back in March, Republican Majority Whip Tom DeLay took lunch at the *Washington Times* and started jabbering about how he and his party were going to impeach "activist judges" who handed down improper rulings. I know something about how those luncheons at the *Times* work, so I was not as impressed as some people. First, the guest is taken to the editor-in-chief's office and offered a drink or two. Then at table he is kept talking and prevented from swallowing any solid food, all the while being plied with more potables and lots of questions from the reporters present. By the end of the session, the guest—usually an officeholder and often a congressman or Cabinet member—is lucky if he hasn't threatened to nuke Massachusetts and defund Arlington Cemetery, but the hapless celebrity finds himself and his remarks plastered all over the front page of the next day's edition, while his press aides scurry to explain what he really said and what he really meant.

In Mr. DeLay's case, there was no reason to retract or explain, and indeed his fellow congresspersons in the Stupid Party found his proposals exhilarating. A day or so later, the news was full of stories about how the Republicans were going to take back the Constitution and decorate the public lamp posts with the corpses of judges. "They loved it," spouted the Majority Whip of his colleagues' response to his proposals, "they think I'm a god on this one." The Texas lawmaker then boasted of how he was even drawing up plans for the mass bloodletting to be submitted to the grand inquisitor himself, Speaker Gingrich.

It is always dangerous when Republicans start thinking about the Constitution. If history tells us anything, it shows that from the blatantly illegal passage of the 14th Amendment in 1866 down to Dwight Eisenhower's appointment of Earl Warren and William Brennan to the Supreme Court, the Republican Party has been the major enemy of constitutional government. There have indeed been Republicans who knew something about constitutional law—Senator Robert Taft, for example, as well as Barry Goldwater and my late employer John East—but for the most part, congressional pressures for preserving the integrity of the Constitution have sprouted in Democratic bosoms—notably Southerners like Richard Russell of Georgia, Harry Byrd of West Virginia, Sam Ervin of North Carolina, and James Allen of Alabama, to name but a few. Even the immense damage inflicted on the Constitution by the judges and justices appointed by Woodrow Wilson and Franklin Roosevelt could have been corrected had it not been for the insistence of the Republicans who perpetuated their follies by their own appointments to the bench.

The Reagan and Bush eras proved this rule. By the time President Bush left office in 1993, all but two of the nine justices of the Supreme Court had been appointed by Republican Presidents, and one would have thought that the collective judicial appointments to the federal bench by Nixon, Ford, Reagan, and Bush might have made some difference in the kind of court decisions the Solomons hand down. But the truth is, it made no difference at all. The most controversial, divisive, and damaging court decisions in American history—those of the Warren and Burger courts—were the products of mainly Republican appointments, and without their contributions to jurisprudence, the rest of the country would not have had to endure the effects of forced school desegregation, the legalization of pornography, the destruction of criminal law, and the creation of abortion as a "human right."

Recent Republican ventures into constitutionalism continue this pattern. Ever since the Republicans won a congressional majority in 1994, they have unveiled one ill-considered constitutional amendment after another—the School Prayer Amendment, the Flag Amendment, the Term Limits Amendment, the Human Life Amendment, the Religious Freedom Amendment, and the Balanced Budget Amendment. Almost all of these measures are carelessly drafted, intended more to assuage the pet peeves of their conservative constituencies than to provide clear guidance as to what lawmakers may or may not do, and none of them speaks to the fundamental flaws that the courts have imported into the Constitution over the last half century and more. For all the ballyhoo about the Tenth Amendment and states' rights that Republican gurus have spewed forth in recent years, not a single serious effort has been made to restore real federalism. Not a single serious effort has been made to curb the "imperial presidency" that Taft and Goldwater warned about in the 1950's or that conservative theorists like James Burnham, Willmoore Kendall, and Russell Kirk criticized long before Richard Nixon's experiments in presidential Caesarism excited the envy of Arthur Schlesinger, Jr. Not a single serious effort has been made to reverse the principal Big Lie of 20th-century jurisprudence, the Incorporation Doctrine, under which the courts may strike down virtually any state or local law that displeases them. If there is a single Republican congressman today who understands these principles and even entertains the notion of restoring them, I am unable to tell who he might be, nor do the "theorists" who discourse on constitutionalism in today's conservative circles show much grasp of them either.

The main such theorist, of course, is Robert Bork, who does know a bit about the Constitution and who would like to do something to salvage it. But even Judge Bork flops and flails when it comes to doing the right thing. In his book *The Tempting of America*, written after the defeat of his nomination to the Supreme Court by President Reagan, he dismisses any notion of reversing the Incorporation Doctrine. "The controversy over the legitimacy of incorporation continues to this day," he writes, "although as a matter of judicial practice the issue is settled." In his more recent book, he is equally dismissive of the Second Amendment. "The Supreme Court has consistently ruled that there is no individual right to own a firearm," he writes erroneously. "The Second Amendment was designed to allow states to defend themselves against a possibly tyrannical national government. Now that the federal government has stealth bombers and nuclear weapons, it is hard to imagine what people would need to keep in

the garage to serve that purpose." Even if we grant Judge Bork's military expertise, it does not follow that because the original purpose of an explicit right is obsolete, the right itself no longer exists. The Court ruled in the Miller decision of 1939 that certain weapons, like sawed-off shotguns, were not covered by the Second Amendment because they were not useful in warfare (it was wrong on that too, since sawed-off shotguns have been used in warfare, especially trench warfare), but it has never held that "there is no individual right to own a firearm." Had it done so, there would be no legal firearms in the country today.

Judge Bork's remedy for the courts is simply to abolish judicial independence by allowing Congress to overrule by majority vote any court decision it dislikes. Not only would his proposal not correct constitutional mechanisms, it would effectively exterminate any pretense that the rule of law, independent of the lawmakers, is even what is supposed to govern the country. At least, however, Judge Bork is willing to entertain radical measures, unlike some of his neoconservative critics. Bill Kristol has remarked that what's wrong with Judge Bork is that "he makes it seem that only an extreme measure would do any good." No, what's wrong with Judge Bork is that his particular extreme measure would do no good, not that no extreme measure would do any good.

Given the ignorance, opportunism, and cowardice of congressional Republicans and the uselessness of such mentors as Judge Bork, then, it was hardly surprising that Mr. DeLay's plans for stringing up the judges soon came to naught. Whatever Mr. Gingrich thought about those plans when his lieutenant submitted them, it was left to the Majority Leader of the Senate to disillusion Mr. DeLay that the Republicans were really serious about restoring the Constitution. Only a few days after Mr. DeLay had laid out his grand strategy, Trent Lott let the air out of the impeachment tire. "I don't think there is going to be a plan to look at [impeachment] as a way to express our opinion on their rulings," said the Mississippi senator. Only a judge's committing a crime would interest him and the Senate in impeachment, and the DeLay plan died a quick and quiet death.

Mr. Lott was probably right. In the first place, precisely because most Republicans are not serious about constitutionalism, it was always unlikely the party would proceed with the tribunals Mr. DeLay contemplated. Secondly, impeachment, as anyone who knows a bit about its historical origins and use in British history can tell you, is a dangerous game. Whoever starts it seldom finishes it, and the annals of England are drenched in the blood of ministers who were impeached by the House of Commons simply for their political actions. There is no reason why the Democrats could not use the impeachment sword against those judges and other officeholders they dislike as much as the Republicans can, and my bet is that the Democrats would play the game a bit more skillfully than their rivals. Finally, there is the issue of whether it is really right to impeach judges just because of their rulings. Mr. Lott is correct that the Constitution does not seem to provide for that, saying only that impeachment shall be for "high crimes and misdemeanors," but it can be argued that this language does allow for the impeachment of officials for noncriminal conduct (if, indeed, that is an accurate description of concerted efforts to subvert the Constitution). In any case, without Mr. Lott's support and that of the senatorial myrmidons he commands, there would be no purpose in the House impeaching anyone, so the DeLay scheme seems to have died aborning.

Of course, if the Republicans really were serious about restoring the Constitution or controlling a judiciary that has escaped all bonds of law and rationality, they would not have to resort to measures as drastic or as disturbing to Bill Kristol as impeachment or even amendment. Article II, section two of the Constitution gives Congress authority to regulate the appellate jurisdiction of the Supreme Court, and the Court itself has acknowledged this authority in the 1868 ruling Ex parte McCardle. All the majority of the Congress has to do is enact a law (or several) stating that the Court shall have no jurisdiction in whatever kinds of cases the majority doesn't want it to have jurisdiction over: abortion, sexual morality, national security, burning the flag, obscenity, or even any case arising from a state or local law. With one stroke, the Congress could wipe out the Incorporation Doctrine and effectively restore the Constitution to life.

That the Republicans do not seriously (or even unseriously) propose that, rather than tinker with silly amendments that will never pass anyway or mutter idle threats to impeach judges that can't be fulfilled, ought to tell us something not only about the Republicans but the nature of law itself. "Law follows power," wrote Kevin Phillips some years ago, and while he is hardly the only person to make that observation, he puts it as succinctly as it can be put. Human law is a fiction agreed upon, and the laws that govern human communities are always merely reflections of the elites in power and their interests and values. The alteration of the Constitution from a document ruling a decentralized republic of self-governing citizens into one authorizing the construction of a centralized, bureaucratic leviathan is an integral part of what James Burnham called the managerial revolution, the historical process by which law is replaced by administrative decree, federalism is replaced by executive autocracy, and a limited government replaced by an unlimited state. The distortion of the Constitution, in other words, is not merely the product of a handful of ignoramuses who have warmed their hindquarters on the benches of the courts but of a complex and protracted displacement of one ruling class by another. Because the revolution in this country happened to take place "within the form," as Garet Garrett called it, it was necessary to adapt the Constitution and existing political institutions to the needs of the revolution and the new elites that it brought to power, rather than simply junk it and start over.

The new managerial elites needed the centralization, uniformity, and power that the courts readily gave them and which the old Constitution did not allow them to have, and the Republican Party, at least as much as its rival, was eager and willing to help them out. It should not, therefore, be too surprising that Republican blather about restoring the old Constitution, the old federalism, and the old Republic is not to be taken seriously or that whenever some harmless drudge like Mr. DeLay has one drink too many and starts babbling about getting serious, his superiors in the party at once explain to a patient press and public that they have no intention of doing what he suggests. In the effort to restore life to the Constitution, as in so many similar efforts, Americans who are serious will have to look beyond the Republican Party and the leviathan that the party has helped create.

Letter From Inner Israel

by Jacob Neusner

Continental Judaism, R.I.P.

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Religions may explode in human history—Christianity conquering Rome in scarcely 300 years, Islam the Mediterranean basin in scarcely a century. But they die only here and there, only now and then, and renew themselves in times and circumstances none can predict. God has a good sense of humor and a still better understanding of ourselves than we can hope to have. Spending last Purim (March 22) in Prague gave me good reason to think about what happens when a religion dies, as Judaism has died or is dying, not for demographic but for religious reasons, in Prague and in most of continental Europe, including all of Scandinavia, Germany, Italy, Spain, the Low Countries—everywhere except for Britain and France.

Who killed continental Judaism? Hitler did much of the work, Stalin finished the job (with—among many others—his willing Jewish-communist collaborators). Judaism flourishes in many forms and in many places, but one of the enduring legacies of Nazism and communism is the utter death of Judaism in most of continental Europe. Apart from France and Britain—the one community rebuilt after the Algerian conflict by French-speaking, highly educated, Jews from Algeria, Tunisia, and Morocco; the other untouched by Hitler or Stalin—no Jewish community in continental Europe preserves and practices Judaism in a manner appropriate to that religion's teachings. Having lectured under university and Jewish auspices from Madrid to Helsinki, Rome to Stockholm, Utrecht and Antwerp to Prague, and everywhere in between, I know whereof I speak.

What makes me wonder whether the religion, Judaism, finds practitioners in the lands occupied by the Germans in World War II and especially in the lands ruined by the Russians afterward? Take three norms of the faith. First comes hospitality to strangers, which the Talmud values in the tradition of Abraham and the angels. Second comes study of the Torah, which according to the tractate of the Mishnah called "the Fathers" man is created to do. Third comes prayer and respect for the act of prayer: in many synagogues "know before whom you stand" is written above the ark containing the Torah-scrolls.

The ferocious inhospitality of continental European synagogues (again: except the British and the French, and in some places, Stockholm and Berlin for instance) is famous in the Jewish world. Everybody knows the story. It is not the necessity of armed guards to protect the worshipers from Arab bullets and bombs, but the incapacity of local Jews even to greet new faces in attendance. Continental European Jews serve large helpings of cold shoulder. Whether in Frankfurt or in Berlin or Prague or Madrid or Helsinki, neither clergy nor laity greets strangers in any way, except with scowls and turned backs.

What about Torah study? Not marked by learning or interest, continental Jewry is wholly unable to participate in the study of the sacred books, exhibiting a complete indifference to the academic presentation of these books for a world of cultured people. One cannot point to a single intellectually distinguished rabbi in all of continental Europe (with the repeated exceptions), and most of the scholarship on Judaism that is published comes from Gentiles. Europe is populated by Chief Rabbis, not one of whom (outside of Britain or France) enjoys moral authority or even pretends to the dignity of learning. All of them impress by their ferocious condemnation of everyone beyond their range of vision and uncomprehending rejection of any idea they did not invent, of which, in fact, there is none.

I state very simply that the rabbinate of continental Europe is the first large rabbinate in the history of Judaism that utterly lacks learning, except perhaps in the technicalities of worship and the slaughter of chickens. As for hospitality, I know from personal experience: when I attended the World Congress of Families organized by The Rockford Institute in Prague last March, and my wife and I wanted to attend the Purim worship at the principal synagogue there, we were turned away at the door; foreigners are not wanted. We could not perform our religious obligation of hearing the scroll of Esther read: we were Americans and therefore excluded. We could go to the second floor, in the same community center, where an American Conservative rabbi explained the scroll of Esther but was not allowed by the local rabbi (a convert to Judaism) to read it from start to finish. This would not fulfill our religious duty.

But the conduct of people at worship speaks eloquently about the state of their faith in prayer, and it suffices to say, from the evidence of how they behaved, that they believe nothing. Some examples: in Madrid, on a Sabbath morning, when my family attended the public proclamation of the Torah-lection for the Sabbath, people surrounding the lectern engaged in conversations throughout the scriptural lesson, except for those engaged in reading the morning papers. In Abo, Finland, the week after Passover some years back, the Orthodox synagogue there decided not to take the sacred scrolls out of the ark and read them, the responsible person being too tired to bother to learn the passage; but it is principally to hear the Torah declaimed that one bears the obligation of attending public worship at all. Everything else is a detail. In Prague on the festival of Purim, people attending the public reading of the scroll of Esther simply walked out in the middle of the reading, leaving not in ones and twos but in fives and tens, exiting from a small room the only way they could, which was to walk within three feet of the rabbi as he read from the scroll. So far as I could tell, they were not even embarrassed.

There is not a single Orthodox, Reform, or Conservative synagogue in the State of Israel where such conduct would