

The K.F. Stone Weekly

(Formerly "Beating the Bushes")



February 14, 2016

CONSTITUTIONAL CPR

Shortly before last night's Republican presidential debate in South Carolina, word came that Supreme Court Justice Antonin Scalia had unexpectedly passed away at age 79. Without question, the conservative icon's death added a dramatic dimension to the evening, and quite literally, separated the men from the boys. Prior to debate - and even



prior to President Obama's official statement on Scalia's untimely demise - Senator Majority Leader Mitch McConnell [declared](#): "*The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President.*" Shortly thereafter, President Obama referring to Scalia as ". . . a larger than life presence on the bench," [announced](#) "*I plan to fulfill my constitutional responsibilities to nominate a successor in due time.*"

Not too surprisingly, all 6 Republican presidential hopefuls agreed with Senator McConnell that being a "lame duck," President Obama should leave the seat vacant, thus putting this crucial nomination into the next president's hands. [The discussion on this issue](#) - which occupied the first 20 minutes of the debate - brought forth some fascinating "facts":

- When asked by moderator John Dickerson "*What does the Constitution say about whose duty it is here to act in this kind of a situation?*" Dr. Ben Carson - who recently published [a book](#) on the Constitution - unbelievably responded "*Well, the current*"

Constitution actually doesn't address that particular situation . . ." (Later on in the debate, Dr. Carson clarified his statement: *"It wasn't phrased as who gets to nominate Supreme Court appointees. Of course that's the president. So I know that there are some left-wing media who would try to make hay on that."*)

- It should also be noted that in his closing statement, the good doctor - unbelievably - quoted Josef Stalin: *"If you want to bring America down, you have to undermine three things: our spiritual life, our patriotism and our morality."* Besides causing millions of people to wonder at the utter inaptness of an arch conservative citing a Communist dictator, Carson was just plain wrong; Stalin never said it. [Politifact](#) rated his assertion "Pants on Fire."
- Florida Senator Marco Rubio exaggerated, when he said that *"It has been over 80 years since a lame-duck president appointed a Supreme Court justice."* (Technically, of course, presidents don't "appoint" a justice to the Supreme Court. They nominate someone who is then confirmed by the U.S. Senate. But there's also the problem of whether Obama should be considered a lame duck or not. Some would say Obama isn't a lame duck until after Election Day in November when his successor is chosen. Others might say all second-term presidents are lame ducks because they know they won't serve again. Ronald Reagan's last Supreme Court nominee - Anthony Kennedy - was approved by the Senate when "The Gipper" was in the last year of *his* second term; the year was 1988 - certainly not "over 80 years ago.")
- In stressing how crucial the 2016 election is from the standpoint of who the next Supreme Court Justice will be, Rubio stated: *". . . we need to put people on the bench that understand that the Constitution is not a living and breathing document. It is to be interpreted as originally meant."* (Emphasis added.)

Of course what Rubio was telegraphing to Republican voters from Maine to California is that he's a "strict constructionist" - one who is against "activist judges" and believes in the inerrant perfection of the Constitution of the United States as originally written back in the late 18th century. (It should be noted that "judicial activism is a relative concept; if one is a conservative, it's liberal judges who are the activists; if one is a liberal, it's the conservative jurists who wear that thorny crown.)

A strict constructionist approach to the U.S. Constitution is akin to being a literalist when it comes to Holy Writ. It also presumes, in both cases, that one can know precisely what the Founders - or almighty God - had in mind at the time of the creation. The *tanakh* - the Hebrew Bible or "Old Testament" can easily be published in a single volume. However, to amass a reasonable collection of the literally tens of dozens of commentaries and discussions on that single volume requires a minimum of ten board feet of shelf space. For you see, the Bible is a "living and breathing document." To read the words and take them literally without benefit of commentary is to fossilize a phenomenal document; to suck out its very life. It is also an act of utter *chutzpah* - of shameless audacity or impudence. Who am I to say precisely what God meant when

Co* (meaning "he/she") commanded, as an example, that "*we are not to do any manner of work*" on the Sabbath Day? Commentaries and centuries of case law certainly help make the words come alive; they perform CPR, thus insuring that the law shall neither stultify nor fossilize.



The same goes for the Constitution and civil law. Those like Messrs. Cruz, Rubio, Kasich, Carson, Bush and Trump, who firmly believe that the Constitution "is not a living and breathing document", are likewise seeking to fossilize a phenomenal document - and likewise getting caught up in an act of utter *chutzpah*. Were they to have their way, the Constitution would be beyond CPR for the next generation.

Who is to say precisely what James Madison had in mind, when he wrote the Second Amendment: *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.* Did he have in mind AK47s, Uzis, and the unfettered right to carry weapons on to school grounds, into churches and the floor of the Florida Legislature (as is currently being contemplated)? Or perhaps something far more benign? Then too, according to an "original intent" point of view, since the Constitution says nothing about climate change, any law seeking to bring it under control is . . . you guessed it, *unconstitutional*. To those who believe the document is both living and breathing, the words "life, liberty and the pursuit of happiness" can be interpreted and understood to cover global warming and climate change.

If we are to read the Constitution literally - without benefit of commentary or case law - does that mean that there is one totally objective, inerrant way to understand its dictates? Or, is it, in the words of President Dwight Eisenhower (among others) that "*The Constitution means what the Supreme Court says it means?*"



Not too long ago, [Judge Richard Posner](#), the most oft-cited legal scholar of our generation, shocked many academics attending a constitutional law conference when he said that when he decides cases, he does not care what people in the late eighteenth century thought about today's legal issues or even what the constitutional text says about those problems. He remarked that following the Constitution does not mean adhering to its text but instead respecting Supreme Court interpretations of that text. Constitutional law as made by judges, Judge Posner emphasized, is much more about creating rules that make sense today than interpreting an old and often obsolete

document. (Those wishing to get the full flavor of Judge Posner's approach to constitutional law can check out the most recent [*Harvard Law Review Forum*](#).)

To my mind, the most egregious example of the strict constructionist is the Supreme Court's 5-4 decision in the 2010 case *Citizens United v. Federal Election Commission* in which it ruled that corporations and unions have the same political speech rights as individuals under the First Amendment. It found no compelling government interest for prohibiting corporations and unions from using their general treasury funds to make election-related independent expenditures. This ruling has directly led to the massive infusion of anonymous money into the nation's political campaigns.

With the death of Justice Scalia, the 2016 presidential election becomes even more critical than it was a mere 36 hours ago. It is most likely that anyone President Obama nominates will be kept off the court, the Republicans scared to death about tipping the court to a 5-4 liberal majority. A Democratic victory is thus essential if the next justice on the court is to be one who believes with every fiber of his or her being that the Constitution is a living, breathing document. Otherwise, no amount of CPR will ever revive it. And you had better believe that none of the Republicans know or care about resuscitation.

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