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Constitutional Dead Letters

by **Roger Roots**
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Historians of Soviet Russia occasionally note that the communist workers' paradise was originally intended to adhere to a written constitution that expressly guaranteed freedoms such as speech, press and assembly. In practice, however, none of the

freedoms guaranteed in the Soviet constitution were recognized in the country's legal system, and millions of dissenters and suspected dissenters were imprisoned or killed for disagreeing with the commissars of the state.

The United States Constitution, by contrast, is thought to be in **good standing**. Yet there are numerous provisions of the U.S. Constitution that are never enforced. These provisions, analogous to "dead letters" in the U.S. Postal System, are either totally ignored by federal judges or given such a narrow construction that they might as well not exist. As columnist and curmudgeon Joseph Sobran **has written**, the Supreme Court has, in essence, exercised a "line-item veto" over the document, totally ignoring provisions that interfere with the justices' national



vision or social objectives.

When the Supreme Court switched to discretionary *certiorari* in 1925 (thus allowing the court to pick and choose its own docket), the Court paved the way for a highly selective treatment of the Constitution. While some constitutional provisions (e.g., the First Amendment and the Fourth Amendment) are routinely accorded Supreme Court consideration, many others are almost completely ignored.

It can hardly be a coincidence that all of the dead letters happen to place limitations on the scope and power of government. In contrast, the few provisions of the Constitution *granting* powers to government have been interpreted expansively. The clause giving Congress power to regulate interstate commerce, for example, has been interpreted by the courts to allow Congress to *imprison* people for acts that can be linked to either commerce or interstate activities only by a tenuous *series of conceptual inferences*.

There are even provisions which were included in the Constitution to limit government but which have now been interpreted to *empower* government. The Takings Clause, which states that no person shall be deprived of property "without due process of law; nor shall private property be taken for public use, without just compensation," was recently construed by the Supreme Court to give government at all levels near *carte blanche* power over all property. In a 2005 decision entitled *Kelo v. City of New London*, the Court reinterpreted the phrase "for public use" to mean for whatever use any government desires – including private use.

Similarly, the Fifth Amendment Grand Jury clause was placed in the Constitution in order to limit government but has now been interpreted in a way that *empowers government*. As the criminal law grew more complicated during the 1800s, courts began allowing public prosecutors to appear and discuss cases before grand juries (a practice strictly forbidden at the time of the Founding). This became embedded in grand jury practice by the 1900s. Today's Federal Rules of Criminal Procedure state that prosecutors may be present before grand juries at all times and prohibit grand jurors from issuing independent presentments.

There is nothing new about this insidious trend. The *Necessary and Proper* clause was originally intended to bind Congress to legislating only in ways that were "necessary" to carry out the few limited powers the national government had been granted. By the early nineteenth

century, however, the Supreme Court had already interpreted "necessary and proper" to mean only "proper" – in the eyes of the government. As Jefferson observed, "[t]he natural progress of things is for liberty to yield and government to gain ground."

Courts have increasingly subjected all rights mentioned in the Constitution to balancing tests, meaning that rights have become mere interests to be balanced against the (always pressing) interests of government. Thus, it is asserted that "no rights are absolute" and that courts may deny the application of a right where "the Government's regulatory interest in community safety

. . . outweigh[s] an individual's **liberty interest**." However, the Supreme Court has abandoned any pretense of balancing tests with regard to governmental *powers* (such as those found in the Tax Clause or the Spending Clause), for which the Constitution's provisions are described as **plenary**.

Some rights enshrined in the Constitution are rendered dead by the lack of any remedy to enforce them. For example, in 1974, the Supreme Court held that no taxpayer ever has standing to challenge the **secret budget of the CIA** (which clearly violates Article 1's requirement that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law; and a regular Statement and Account . . . of all public Money shall be published").

Finally, there are newly invented "maxims" of law that have crept into modern jurisprudence by means of pronouncements that they are long-recognized. One such so-called maxim originated with Justice Stone's "Footnote Four" in the 1938 case of *United States v. Carolene Products Company*. Justice Stone proclaimed that most congressional enactments are "presumed constitutional" and will be struck down only if they blatantly contradict explicit constitutional protections. Stone's "presumption of validity" has been cited in dozens if not hundreds of appellate decisions to turn away constitutional challenges.

As many scholars have pointed out, this "presumption of constitutionality" was enunciated nowhere in the many letters and speeches that punctuated ratification debates in the late 1700s. In fact, Founding-era voices more than occasionally expressed the opposite opinion. A widely-distributed editorial by Alexander White, a member of the First U.S. Congress from Virginia, proclaimed (in opposition to proposals for a bill of rights) that "In America it is the governors not the governed that must produce their Bills of Rights: unless they can

shew the charters under which they act, the people will not yield obedience." Moreover, the *Carolene Products* presumption of validity can be said to overrule the plain text of the Ninth Amendment ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people") as well as the Tenth Amendment ("The powers not delegated to the United States by the Constitution . . . are reserved to the States . . . or to the people").

A list of other recently invented "maxims" would include (1) Justice Robert H. Jackson's proclamation in 1949 that the Constitution is not a "suicide pact" (i.e., it should never be interpreted to mean the government is not always in control), and (2) the doctrine of "harmless error" (invented in 1967 in *Chapman v. California*) by which an appellate court may concede a constitutional violation but uphold a criminal conviction by proclaiming that the defendant would have been convicted even if the Constitution had been followed. There are also insidious doctrines such as "sovereign immunity" (which allows government agents to escape liability for illegal acts – on the ground that they are with the government) and the "state secrets" doctrine (which deprives citizens of any redress by the assertion that proof of a constitutional violation would expose intelligence sources or methods), which are found nowhere in the text or the original understanding of the Constitution.

Of course, liberty dies incrementally, and the leviathanic government we see today took generations to bring about. It has been largely forgotten that the prohibition of intrastate liquor sales in the early twentieth century required a constitutional amendment (the Eighteenth) because policymakers and judges recognized that Congress had no constitutional authority to regulate intrastate sales of any commodity. The Supreme Court even wrote in a 1932 decision that "sales of [] forbidden drugs *qua* sales" was "a matter entirely beyond the authority of Congress." The recent *Gonzales v. Raich* decision (upholding federal drugs laws as trumping California's medical marijuana protections) highlights the fact that recent generations of Supreme Court justices have amended the Constitution without formal process.

A list of constitutional dead letters follows below. I honestly don't know what weight to give some of the Bush Administration's "unitary executive" practices such as its warrantless domestic eavesdropping and treatment of detainees at Guantanamo Bay, which amount to complete abdications of the procedural rights laid out in the 4th, 5th, 6th

and 8th Amendments. (If such matters are considered, it becomes arguable that the *entirety* of the Bill of Rights is a dead letter even if some of the rights are partially recognized for some people.) The list enumerated below, to paraphrase the dead-lettered Ninth Amendment, should not be considered all-inclusive, and there are, no doubt, other dead-lettered constitutional provisions I have neglected to identify.

- **The House origination clause, Art. 1, § 7**, requiring that all "Bills for raising Revenue shall originate in the House of Representatives," has been rendered a dead letter by neglect. As Congressman Ron Paul has pointed out, the 2008 bank bailout bill with all its tax implications was deliberately introduced in the Senate after House members rejected it – a plain violation of this clause. Similar practices have gone on for many years.
- **The congressional declaration of war clause, Art. 1, § 8**. No "war" in the constitutional sense has been declared since 1941, although the executive branch has engaged in numerous undeclared wars and military escapades around the globe.
- **The public accounting clause Art. 1, § 10**: As already discussed, the secret budget of the CIA is in plain conflict with Article I of the Constitution ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time").
- **The Legal Tender Clause, Art. 1, § 10**, prohibiting states from making "any Thing but gold and silver Coin a Tender in Payment of Debts." The application of the Federal Reserve Act and many other statutes and executive orders are in plain violation of this clause. State and Federal governments demand and provide payment in paper currencies that are unbacked by any precious metals.
- **The prohibition against bills of attainder, Art. 1, §10** – which was supposed to ensure that no one could ever be punished by the legislature – has been addressed only four times by the Supreme Court. Congress regularly enacts new laws placing extrajudicial punishments on various groups (felons, convicted sex offenders, disfavored corporations such as Wal-Mart, and even entire industries (e.g., "Big Tobacco")).

- **The Contract Clause, Art. 1, § 10**, prohibiting states from impairing contractual obligations. Long dead and buried. Today the federal courts uphold wage, work, production, pricing, licensing and advertising regulations of every manner, irrespective of the Contract Clause.
- **The Second Amendment right to bear arms.** Despite the recent *Heller* decision (which issued a "landmark" ruling that the Amendment protects an individual right), there are still thousands of felons and other persons in federal prison for the mere possession of firearms. No defendant has ever been released from prison or cleared of gun charges in federal court on account of judges recognizing the right to bear arms. The gist of the *Heller* decision is that the Amendment protects a "reasonable" right to bear government-approved arms so long as you are government-approved. Of course, such a limited and conditional reading of the Second Amendment renders it a dead letter. The leaders of the American Revolution were themselves accused (and some convicted) felons, and several were notorious criminals (e.g., John Hancock, an accused tax evader and smuggler; John Paul Jones, a twice-indicted murderer who adopted his name as an alias to avoid arrest).
- **The Fifth Amendment Grand Jury clause.** While federal grand juries do still exist, they are now wholly subject to the control of federal prosecutors – the very persons the Clause was intended to limit. The grand juries known to the Framers were civilian institutions that acted independently of prosecutors, could investigate prosecutors, and could indict prosecutors. Today, prosecutors dispense all evidence, witnesses and testimony to the grand jurors, who then retire to a deliberation room to vote on whether to approve the prosecutors' wishes. (A "no" vote will just mean that the prosecutors will coerce another grand jury to vote on the same case.)
- **The Fifth Amendment Double Jeopardy clause.** Today, the federal government commonly charges defendants who have been previously charged with essentially the same offense in state court (and vice versa). This usually happens after an acquittal or a "light" sentence in the first prosecution. Because Congress has federalized almost every state crime over the past four decades (something the Founders could never have imagined), federal and state prosecutors are able to get two bites at the apple despite the double jeopardy clause.

- **The Sixth Amendment right to jury trial in criminal cases.**
My inclusion of this one may puzzle some readers, because thousands of jury trials take place in American courtrooms annually. But the right to jury trial has been stripped for the vast majority of criminal prosecutions. Supreme Court rulings beginning in the late 1800s confined this right to cases of "serious" rather than "petty" crimes (i.e., punishable by less than six months' imprisonment). This distinction exists nowhere in constitutional text, which explicitly guarantees a jury trial "[i]n *all* criminal prosecutions " and for "*all* crimes." The change has allowed government to impose its will on the populace with far greater efficiency. Justices Black and Douglas **observed in a 1970** concurrence that their colleagues on the Supreme Court had effectively amended the Constitution by applying a balancing test and that "[t]hose who wrote and adopted our Constitution and Bill of Rights engaged in all the balancing necessary. They decided that the value of a jury trial far outweighed its costs for " all crimes" and "[i]n all criminal prosecutions."
- Of course, plea bargains have replaced jury trials in most "serious" cases, allowing government to prosecute and imprison a far higher proportion of the American population than the Framers could have anticipated. And even where defendants take their charges to trial, they are tried before emasculated juries that are ordered to follow the judges' interpretations of the Constitution and the laws. The Founders would have condemned this wholesale takeover of juries by modern judges.
- **The Sixth Amendment vicinage clause** (requiring an "impartial jury of the State and district wherein the crime shall have been committed"). In practice today, most federal court proceedings have been centralized into the largest urban areas of each federal court district, leaving rural defendants in many cases to face trials before urban juries drawn from jury districts that do not include the scene(s) of the alleged offense(s).
- **The Seventh Amendment right to jury trial in civil cases** where the amount in controversy exceeds twenty dollars (\$20). The eternal drive of government officials at every level to collect petty duties, traffic and parking tickets, fees and other tributes has necessitated that they circumvent the plain language of the Seventh Amendment. Today the Seventh Amendment is one of three articles in the Bill of Rights not incorporated into state

court practice by the Fourteenth Amendment. Even in federal courts, the civil remedies mandated by the Seventh Amendment are painted into an extremely narrow corner.

- **The Ninth Amendment protection of other "rights retained by the people."** As already discussed, this important provision, insisted upon by the Anti-Federalists in 1791, has been dead-lettered by a combination of judicial doctrines, maxims and sophistries that in essence leave the people with few or no reserved rights.
- **The Tenth Amendment.** At the heart of the Supreme Court's dead letter file is the abandonment of federalism in order to create a centralized regime run from Washington. Under the Founders' intent, of course, each state was to retain its own sovereignty while the federal government was to act as the states' mutual delegate in matters of foreign and interstate affairs. The absence of this rule in the pre-amendment Constitution precipitated massive resistance across the colonies. Yet today the federal courts regard the Tenth Amendment as a quaint "truism" – a mere statement that the States get to keep whatever jurisdiction is not overtaken by the federal government.
- **The Fourteenth Amendment Privileges and Immunities clause,** which was intended to require states to recognize legal rights recognized by the federal government and other states, was mostly dead-lettered in 1873 in *The Slaughterhouse Cases*, in which the Supreme Court held the provision applied primarily to freed slaves. In recent decades, courts have looked to the Fourteenth Amendment Due Process clause to replace the dead-lettered Privileges and Immunities clause.
- **The Twenty-Seventh Amendment,** which requires that "No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened," has been rendered a dead letter by means of the Supreme Court's "standing" jurisprudence.

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