

2012

September Eleventh, a Citizen's Response (Continued Further)

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SEPTEMBER ELEVENTH, A CITIZEN'S RESPONSE
(CONTINUED FURTHER)

George Anastaplo[†]

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Prologue

There are collected here seven sets of remarks, prepared by me from 2009-2012, which can illuminate issues posed since the September 11, 2001 attacks in New York City and Washington, D.C. This is my fourth such collection, with two quite long collections in the *Oklahoma City University Law Review* and now two much shorter collections in the *Loyola University Chicago International Law Review*.¹

It is inevitable that there should be some duplications among these remarks. Each statement was prepared for a particular audience to which some things might have to be said which had already been said by me elsewhere.

Particularly noteworthy in this 2012 collection is an adaptation for these pages of the Tenth Anniversary remarks, “Lessons of an Instructive Decade,” prepared in September 2011 for the *Chicago Daily Law Bulletin*.² It had been a decade that came to be dominated by the folly of our 2003 Iraqi Intervention.

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¹ George Anastaplo, *September Eleventh, The ABC’s of a Citizen’s Responses*, 29 OKLA. CITY L. REV. 135 (2004); George Anastaplo, *September Eleventh, A Citizen’s Responses (Continued Further)*, 35 OKLA. CITY L. REV. 625 (2010); George Anastaplo, *September 11th, A Citizen’s Responses (Continued)*, LOY. U. CHI. INT’L L. REV. 135 (2006-2007).

² See SELECTED WRITINGS BY AND ABOUT GEORGE ANASTAPLO, www.anastaplo.wordpress.com (last visited Apr. 17, 2012) [hereinafter WORDPRESS CITE]. The three essays entitled *Lessons from an Instructive Decade* can be located by selecting the September 2011 archives on the right hand side of the page. These essays were also published in the *Chicago Daily Law Bulletin* on September 9, 12, and 13,

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The bizarre character of that Intervention can be illuminated by this reminder of earlier dealings by the United States with the Saddam Hussein regime in Iraq.

By 1982, Iran was beginning [in its war with Iraq] to gain some success on the battlefields, and the United States and her allies began to intervene on behalf of Iraq, providing it with chemical and biological weapons and protecting Iraqi oil tankers.³

This 2012 collection begins with remarks which remind us of “the gun culture” to which we have become accustomed in the United States. The gun-related casualties to which we have become accustomed far surpass annually those suffered from the September Eleventh attacks.

This 2012 collection ends with remarks bearing on our dealings across decades with the current Chinese tyranny. We can be reminded here of humanitarian principles that it is prudent to insist upon in troubled times.

Publication of this 2012 collection has been facilitated by the development of its footnotes by the editors of this journal.

I. The Second Amendment – Then and Now, Here and There – November 2, 2009⁴

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.

- The Second Amendment

It should be instructive (as well as reassuring) to be reminded, from time to time, of how bills of rights were regarded by the Framers of the Constitution of 1787 and their most thoughtful champions. The absence of a bill of rights in the original Constitution disturbed some citizens during the Ratification Campaign of 1787-1788. Attempts were made to reassure such critics with reminders that the principal guarantees they were demanding were already generally recognized for and by the People of the United States, whether or not reaffirmed in any new document.

The constitutional assumptions drawn on by such assurances are reflected in the language of the Ninth Amendment (the next-to-last article provided thereafter in the Bill of Rights of 1791): “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

2011 with the following titles: *Local Professor Examines the Historical Record, Making Sense of the Current State of Affairs, and Efficiency of Political Institutions*, respectively.

³ ATLAS OF WORLD HISTORY 296 (Kate Santon and Liz McKay eds., Paragon Publ'g 2005).

⁴ These remarks were prepared by the author for his Constitutional Law Seminar at the Loyola University Chicago School of Law on November 2, 2009, in the course of an examination of *District of Columbia v. Heller*, 544 U.S. 570 (2008). In addition, he has discussed the Second Amendment at greater length in two of his books. See GEORGE ANASTAPLO, *THE AMERICAN MORALIST: ON LAW, ETHICS, AND GOVERNMENT* 367 (Ohio Univ. Press 1992); see also GEORGE ANASTAPLO, *THE AMENDMENT TO THE CONSTITUTION: A COMMENTARY* 59 (Johns Hopkins Univ. Press 1995). For further reading, see George Anastaplo, “‘McCarthyism,’ the Cold War, and Their Aftermath,” 43 S.D. L. REV 103, 128 (1998); GEORGE ANASTAPLO, *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT* 820 (Southern Methodist Univ. Press, 1971; Lexington Books, 2005).

Such constitutional assumptions had been evident as well in the Declaration of Independence of 1776, where longstanding guarantees and rights were repeatedly drawn on in condemning what the English Government of the day had been doing to their North American Colonies. But however misguided, if not even tyrannical, the English Government might have seemed at times, it was evident that various fundamental rights of the People (rights recognized over centuries) were firmly grounded in the history and political character of the English-speaking peoples. Thus, Americans could acknowledge, once the passions of war had subsided, that their "cousins" in England were generally as free, politically and legally, as they themselves were in North America.

It can be instructive, therefore, to notice any deviations in American constitutional doctrine today from the current English understanding of comparable matters. One obvious departure is with respect to inherited privileges, but even here the English are steadily moving closer to the American orientation, as may be seen in what has happened during the past century to their House of Lords. Another departure can be noticed with respect to established religious prerogatives, something recognized in the First Amendment restriction upon "an establishment of religion."

Otherwise, the English reading of longstanding constitutional privileges is generally like ours. The most truly troubling exception may be with respect to the Second Amendment assurance about "the right of the people to keep and bear Arms" – troubling *not* because of the language of that provision, but rather because of how it has come to be misread by some among us. After all, there *had* been in England, well before 1776, suspicions about any faction (usually grounded in religious principles) sometimes being more privileged than others with respect to the right to possess weapons. (This injustice is noticed in the English Bill of Rights of 1689.) But the ancestral "right of [all] the people to keep and bear Arms" has never been understood to have in England the remarkable scope now claimed for it in the United States. That is, whatever may now be felt by *some* among us about such a privilege in the United States, it is hardly traditional among the English-speaking peoples that it should be completely independent of anything like the substantial supervision once provided by a "well regulated Militia."

American visitors do recognize that they move in England among a people who are generally as free as their own. English domestic problems tend to be similar to ours, even with respect to race relations. The deference still paid there to royalty and to the nobility *can* seem foreign to American tastes, but it does not tend to be generally regarded by us as corrupting everyday life. Besides, even more dramatic deference may sometimes be observed in the United States – as in the almost obsessive interest in whoever happens to be either the President or the celebrity of the moment.

However all this may be, the American visitor to England simply does not encounter there the amount of, and the determined campaigns for, unregulated private gun ownership that we have had to become accustomed to in the United States. Nor is there, of course, the horrendous murder rate that we are also accustomed to, a rate that undermines both security and freedom.

Social conditions and chance historical developments may help account for such differences. But English friends of the United States are hardly likely to regard as either prudent or persuasive the curious insistence that we hear among us (even from distinguished jurists) that the right of citizens to possess, mostly on their own terms, a wide variety of dangerous weapons is grounded in and guaranteed by whatever ancient right the English-speaking peoples may properly have "to keep and bear Arms."

II. What Should We Be Afraid Of? – April 26, 2010⁵

i.

The liveliest discussion in my law school seminars this semester was in response to my Letter to the Editor of April 18, 2010 inspired by a front-page *New York Times* article of April 16, 2010⁶ stating:

Why has there not been any serious public criticism of the determined impropriety of having completely nude women and men (standing a yard apart), shamelessly facing each other in a doorway, between whom visitors must squeeze in order to enter a popular exhibition these days in the Museum of Modern Art in New York City? Is not gross impropriety evident both on the part of those who mount (as well as provide) such a display and on the part of those who attend this two-month-long exhibit in large numbers? Do not such ugly indulgences testify to an ominous decadence among our most privileged fellow-citizens, a deterioration that corrupts everyone involved, recklessly undermining thereby the moral foundations of our republican institutions?

The number of seminar members moved to speak was unprecedented, with no one venturing an opinion *in support* of the position taken in my letter. Perhaps a few may have been intimidated to remain silent by the vigor and persistence of my critics.

Such critics tend to ignore, when they do not even disparage, concerns about communal decadence and its consequences. The moral deterioration which was once routinely guarded against can now be dismissed as inconsequential. Public opinion and institutions are no longer looked to as guardians of our morals.

Deference to an unavoidable range in tastes may be seen in that arrangement at the Museum of Modern Art which permitted the prudish and others of like temperament to enter this exhibit through a more conventional doorway. Also, underage visitors, no matter what their temperament or desires, were not permitted to use the nudity-enhanced doorway available to "grown-ups." This may have been, at least in part, out of deference to municipal ordinances grounded in what

⁵ Remarks prepared for the author's Constitutional Law Seminar at Loyola University Chicago School of Law in the Spring of 2010.

⁶ Claudia LaRocco, *At MoMA Show, Some Forget You Should Not Touch the Art*, N.Y. TIMES, Apr. 15, 2010, http://www.nytimes.com/2010/04/16/arts/design/16public.html?_r=1&scp=1&sq=at%20MoMa&st=cse.

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more "liberated" observers might regard as old-fashioned superstitions about corruption of the young.

ii.

The law students who were emphatic in their criticisms of my letter are themselves restrained, at least around the law school, in their language and dress. They defer thereby to the inherent limitations of the elders in the profession that they hope to join. One even suspects that few, if any, of such students would consider their careers advanced by publicized service in the enhanced doorway of the Museum of Modern Art exhibit that has been called to our attention.

However, all this may be, most, if not virtually all, of these students came down firmly against the approach evident in my Letter to the Editor. They are quite apprehensive about the "repression" that might be opened up if my approach should be considered legitimate. Besides, it can be asked, what harm is really done if women and men with beautiful bodies are permitted to display themselves in the flesh, alongside works of art in which such bodies have long been depicted?

The law school discussion drawn on here occurred within a week of the virtually unanimous decision by the United States Supreme Court in *United States v. Stevens*⁷, the decision which seemed to find questionable, if not even unconstitutional (on First Amendment grounds), a statute which "criminalize[d] the commercial creation, sale or possession of certain depictions of animal cruelty."⁸ This ruling seems to be part of a development which has significantly expanded the original political-discourse orientation in the First Amendment of "freedom of speech [and] of the press" to include an ever-broadening "freedom of expression." It seems to be assumed, that is, that the community has neither a duty nor a right (nor, indeed, any need) to shape the opinions of its citizens with a view to the common good.

iii.

The sentiments voiced by the typical law student today seem to reflect the kind of permissiveness generally exhibited by the more ambitious youngsters of talent among us. On the other hand, people such as these do seem willing (if not even eager) to put up with all kinds of restrictions for the sake of "homeland security." This has been a decade-long development since the atrocities of September Eleventh.

The resources, spiritual as well as financial, devoted to *this* enterprise have been tremendous. And they have been substantially unchallenged even by the otherwise freethinking young. Considerable physical harm is seen to be threatened – and vigorous measures may be (indeed, it can be insisted, *should* be) maintained to protect us.

⁷ *United States v. Stevens*, 130 S.Ct. 1577 (2009).

⁸ *Id.* at 1579.

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The danger to life and limb is much exaggerated, especially when compared to many other physical dangers among us against which we do not routinely employ the resources now devoted to Homeland Security. On the other hand, the danger to the human soul of sustained fearfulness is not generally taken into account. We can see here another form of the lack of concern for moral deterioration evident in the ever-growing tolerance of "an ominous decadence among our most privileged fellow-citizens."

iv.

After all, moral deterioration can be suspected when the most powerful nation in the known history of the human race conducts itself so apprehensively. This has led to the many precautions in our everyday life that we have become accustomed to. These are equivalent, in spirit, to the concern once felt with respect to the Satanic (as during frantic campaigns for decades at a time against witchcraft).

This has led, as well, to remarkably extravagant military campaigns abroad. Such extravagance has not been good for the reputation of the United States worldwide. Thus, there has been recently seen in Iraq the kind of folly exhibited decades ago by us in Vietnam.

Even our more plausible Afghan intervention has suffered from a failure to anticipate the limitations of any such enterprise that went beyond immediately punishing dreadful misconduct. We can be reminded here of the warning given to the Athenians when they contemplated their fateful expedition to Sicily during the Peloponnesian War. They were told, Thucydides reports, "It is senseless to assault people whom you can't hold on to after you conquer them, while failure would leave you worse off than before you attacked."⁹

v.

It can seem, therefore, that the American people, and especially the young, can sometimes be excessively fearful about physical threats to their well being and insufficiently fearful about moral (if not even spiritual) threats. Indeed, the moral threats are generally *not* seen as threats at all. They may even be seen by some as providing much-needed spice to what would otherwise be humdrum lives.

These failings – whether in excess or in deficiency – may assure us, curiously enough, about the soundness of the American regime. That is, we are confident we can *continue* to govern ourselves fairly well despite critical shortcomings in key perceptions. A momentum that reaches back across centuries continues to keep us fairly steady, despite intermittent indulgences in collective silliness of one kind or another.

Perhaps that momentum is reinforced by the steady infusion into our system across decades of millions of immigrants. Do not such immigrants tend to be old-fashioned in their respect for moral standards? Thus, it might be instructive to determine what kind of families supply both the current shameless exhibition-

⁹ THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR, BOOK VI, 9-14.

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ists at the Museum of Modern Art and the hordes of privileged fellow-citizens who recklessly patronize them.

vi.

I have noticed the fearfulness of those, especially among the young, who warn against the repressiveness inherent in any collective effort to develop and maintain moral standards. I have also noticed the fearfulness, in the community at large, about the threats of "terrorism." Do I not, however, exhibit still another form of fearfulness when I develop the criticisms *I* have been making?

Still, are there not more noble as well as less noble forms of fearfulness? The guidance here of Socrates can be instructive. Certainly, he has taught us, one should be fearful lest one not do the best of which one is capable.

That is not likely to be realized, however, if one does not recognize what the conditions are for developing and maintaining the best of which a community is capable. Both debilitating self-indulgence and paralyzing fearfulness should be recognized and avoided. A self-indulgent people, upon being attacked, can even be shocked into recognizing their mortality, thereby making themselves unbecomingly fearful.

vii.

One consequence of any steady deterioration in public character (as well as in the character of individual citizens) is that we can become unduly susceptible to chance events. The workings of chance here can extend to how such events are regarded. It can be difficult to exaggerate the influence of the ever-growing and largely undisciplined electronic media.

One consequence of this profligacy is that one can be encouraged in one's appetites and errors by having ready access to others of like "mind." Such access can appear to be liberating, but only to those who do not recognize how much discipline may be needed to develop and sustain a human being who is self-knowing and self-controlling. It remains to be seen, for example, whether any of the electronic mass media can provide the reliability particular publishers have been known to exhibit.

What is already evident (it should be emphasized) is that the wide variety of electronic venues can mean, in effect, that all tastes and inclinations find what may appear to be sufficient support. Thus, one is repeatedly reinforced in any peculiar tendencies one chances to have rather than being steadily challenged in a salutary manner. This means, in effect, that anything goes – somewhere!

viii.

Authoritative instruction remains invaluable. Thus, Socrates was sincere in his insistence that he welcomed – indeed, sought for – informed correction. Any such correction thereby received can be gratefully remembered.

I remember, for example, a fleeting (but most instructive) episode at our Southern Illinois high school, a few weeks after the Japanese surprise attack on

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Pearl Harbor, when a film was shown to us in our high school gym, a film that included pictures of Japanese envoys in Washington. The boos from the student body moved our principal to stop the film, turn on the lights, and then lecture us that this was *not* the way to behave. This was, seven decades ago, a salutary intervention, reminding us of old-fashioned standards of propriety, even in time of war.

What happens when a sound liberty disintegrates into innovative licentiousness that is either “artistic” or “principled” in its protestations? This may be seen, perhaps, in the “hooligan art” current in those Eastern European countries that had been corrupted by a half-century of Stalinist repressiveness. A determined recourse to First Principles may be needed for a sound rejuvenation of human souls in accordance with the standards and the aspirations of a proper regime.

ix.

I return to a much more recent episode, that of the responses by both law students and the general public to the “bold” Museum of Modern Art exhibit. It *is* striking, if not even disturbing, that there has not been a public outcry in response – or, at least, none that has come to my attention. What, it can well be wondered, might move students to recognize the appropriate reach here of venerable rules of propriety?

My students were asked, subsequent to our original seminar about this matter, whether the Museum of Modern Art display would seem objectionable to them if the nude pair used in the doorway consisted of a mother and her adult son or of a father and his adult daughter or of a brother and sister. Would such a display, even if “voluntary” on the part both of the performers and of the museum visitors, be objectionable? Almost all of those who spoke on this later occasion did find *these* pairings objectionable.

I was heartened by this abandonment by them of their earlier insistent tolerance of public nudity in the service of artistic expression. Particularly instructive for me was the fact that I had adapted this revised “scenario” from Aristophanes’ *The Clouds*, for it had been an apparent toleration by his “liberated” son of incest which had provoked an elderly Athenian in that comedy to move vigorously against philosophic innovators. Indeed, it was reassuring as well as intriguing to discover, across two and a half millennia, how sound an inspired diagnosis of morality can be.

III. Tucson and a Sense of Proportion – January 18, 2011¹⁰

i.

We are now one-third of the way through our tenth year since the September 11, 2001 “terrorist” attacks in New York City and Washington, D.C. And we are

¹⁰ These remarks were prepared for the author’s Jurisprudence Seminar, Loyola University Chicago School of Law, January 18, 2011.

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now in the first fortnight of the shooting of nineteen people in Tucson, Arizona (on January 8, 2011). Among the nine killed on that occasion were the Chief Judge of the Federal District Court in Arizona and a nine-year-old girl, charmingly interested in politics, who had been born on September 11, 2001.

Robert Burns has suggested that it would be salutary for us to see ourselves as others see us.¹¹ But also useful, I venture to add, is to see others as we see ourselves. This can be particularly instructive as we notice what we often do to others without stopping to think about how we regard such things when done to us.

We have had a score of people gunned down in Tucson, an assault that the President of the United States could immediately identify as “a tragedy for our entire country.” This assault was dramatized, for the public at large, by the critical condition of the Member of Congress who was evidently the initial target of an obviously demented gunman. But we do not generally recognize that comparable body-counts have resulted from *hundreds* of assaults by us and our allies in Afghanistan, Iraq, and Pakistan during the past decade, assaults which have all too often probably included victims as innocent as those gunned down in Tucson ten days ago.

ii.

The assaults that we and our allies have been responsible for in Afghanistan, Iraq, and Pakistan have *not* been conducted by demented agents. Nor can there be an explanation for such violence offered in the terms used (perhaps prematurely) by a distraught Arizona sheriff during that dreadful weekend in Tucson:

When you look at unbalanced people, how they respond to the vitriol that comes out of certain mouths about tearing down the government, the anger, the hatred, the bigotry that goes on in this country is getting to be outrageous. And unfortunately, Arizona, I think, has become sort of the capital. . . . We have become the mecca for prejudice and bigotry.¹²

It is reported that the Congresswoman who had been gunned down had recently expressed similar concerns after “her Tucson office [had been] vandalized” and someone had showed up at an earlier gathering of hers with a weapon:

In an interview after her office was vandalized, she referred to animosity against her by conservatives, including Sarah Palin’s decision to list [her Congressional] seat as one of the top “targets” in midterm elections. “For example, we’re on Sarah Palin’s targeted list, but the thing is that the way she has it depicted has the crosshairs of a gun sight over our [Congressional] district. When people do that, they have to realize that there are consequences to that action.” After the [recent] shooting Palin issued a

¹¹ See Robert Burns, *To a Louse*, *infra* Part VII.

¹² Michael Martinez, *Shooting Throws Spotlight on State of U.S. Political Rhetoric*, CNN U.S., Jan. 10, 2011, <http://www.cnn.com/2011/US/01/09/arizona.shooting.rhetoric/index.html>.

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statement expressing her “sincere condolences” [to the families of all the victims].¹³

It should not be suggested that any respectable politician or political movement in this Country hoped for a Tucson-style massacre. The immediate source for this disaster *was* obviously a madman, who may not have been moved significantly by *any* contemporary “political” discourse. Such insanity is bound to be “available” and largely unsupervised in the modern communities that we have become accustomed to.

However, it *has* been suggested that any madman among us (especially if he is suicidal) can easily wreak havoc because of the weaponry readily available to him, especially in the form of a machine gun-type pistol that can be used to gun down dozens of the unwary before anyone else present (even with a gun) can intervene. Complicating the assessments of this “situation” are the reports that the Congresswoman struck down on this occasion had publicly boasted both that she too had such a pistol and that she knew how to use it. This is the kind of talk we can expect, and that we have to contend with, when there is the remarkable (perhaps even unique in the Western World) “gun culture” that we have long had to become accustomed to in this country.

iii.

The President's remarks, at a Tucson memorial service a few days after the massacre, have been acclaimed across the political spectrum. It is hoped that such remarks can help tone down the “political rhetoric” (or, rather, the anti-political rhetoric) in this Country. People at large seem to be prepared to believe that this will happen.

What has already happened, of some note, was the effort made by several people in that Tucson shopping center to subdue the gunman, especially when he attempted to re-load in order to continue his attack. Even if he had had two such pistols, perhaps he could have been kept from using them. What may be critical in such situations is that the gunman should not be allowed to believe he can “escape” by killing himself.

The responses of potential victims in Tucson were in marked contrast to what had happened, a few years ago, at Virginia Tech and at Northern Illinois University. Those victims were made even more vulnerable by their efforts to escape, which served as a perverse form of cooperation with their attackers. The more courageous (the more aggressive) the would-be victims are in such circumstances, the safer they are likely to be, so much so that some would-be attackers may be deterred if it is expected that they themselves might become “targets” and even prisoners.¹⁴

¹³ Amanda Lee Myers & David Espo, *U.S. Rep. Shot in Head, 6 Killed*, CHI. SUN-TIMES, Jan. 9, 2011, at 2A.

¹⁴ WORDPRESS CITE, *supra* note 2 (the piece is entitled *Tucson and a Sense of Proportion* and can be located by selecting the April 2011 archives on the right side of the page).

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iv.

We can be reminded by all this that an underlying (or pervasive) problem in these matters (in assessing what has happened in Tucson or in our recent combat zones abroad) is with respect to the Sense of Proportion. Two dozen victims in Tucson became a national catastrophe even while hundreds (if not even thousands) of our victims abroad may be barely noticed by the American public. It is such a cavalier attitude on our part, which has led some to argue that our Iraqi Intervention (since 2003) has served as a recruitment campaign for Al Qaeda.

Critical to any assessment of these and like matters is a Sense of Proportion. A Sense of Proportion very much bears on such jurisprudential elements as Prudence and Justice. It can help us *see* and hence to understand what is going on here and abroad.

v.

Particularly challenging for us can be the routine use of drone (that is, unmanned) aircraft to strike targets. Such targets can include innocent people that we really do not want to hurt. All this can seem quite peculiar, to say the least, when the military personnel guiding such weaponry are halfway around the world.

Our responses to the shocking September Eleventh attacks were disproportionate from the outset. I noticed this in my first public remarks thereafter, which were the day after to a law school audience. I questioned, that is, the talk we were already hearing that those attacks were "a second Pearl Harbor."¹⁵

vi.

I have suggested that a reliable grasp of a Sense of Proportion should help us recognize and address questions of justice. These questions do not depend on the legislation of a community. Rather, they are questions that should be considered in developing and assessing such legislation.

Questions of justice bear on the framing of constitutions. Provisions in constitutions for their amendment recognize, in effect, that there exist standards that are somehow superior even to the most venerated constitution. Such standards are drawn on, for example, in the Declaration of Independence.

Respect for enduring standards may be seen as well in the deference paid to international law. The Nuremberg Trials of 1945-1946 provided a dramatic instance of such deference. It can be wondered whether the Soviet judges participating in that Tribunal appreciated what was tacitly being said about their own determinedly oppressive regime.

¹⁵ George Anastaplo, *September Eleventh, The ABC's of a Citizen's Responses*, *supra* note 1.

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vii.

I have also suggested that a reliable grasp of a Sense of Proportion should help us be more prudent than we might otherwise be. Prudence permits one to recognize how critical the element of chance can be in the conduct of human affairs. It has to be provided for, especially when one ventures into unfamiliar territory.

Chance can affect who happens to be targeted and to what effect. Thus, a Congresswoman may be one's primary object as the assailant, while the others one knows nothing about may turn to be the most critical victims. Thus, also, "Al Qaeda" may be our primary object in one military strike after another, but others may be so affected as to become formidable (at least implacable) enemies for a generation, however noble our intentions may have originally been.

The workings of chance may be seen as well in what the sudden explosion of a madman in Tucson has done to the long-term interests of an Alaskan politician. Thus, the vivid language which may be enjoyed by one's partisans can come back to haunt one. This may be apart from how decent and well-meaning one may really be.

viii.

Perhaps the most important consequence of a Sense of Proportion may be that it can help one understand oneself. *Know oneself*, it should be remembered, was one of the standard commandments associated with the Delphic Oracle. This can be particularly difficult to live up to when one is riding high (especially when one considers oneself invulnerable).

Critical here can be the kind of question that may not be noticed or addressed. Such a question is one that I once had occasion to ask a Greek general who had helped lead (in late 1967) an unsuccessful coup (in the name of his King) against a stifling military dictatorship in his country. The question that had *not* been provided for on that fateful day (which contributed to the permanent exile of an inexperienced but well-meaning monarch) had to do with the contingency plan for the Second Day if things did not go as expected on the First Day.

A Sense of Proportion, I venture to add, should help moderate the claims, rooted in part in a curious sense of vulnerability, about the protection provided for private gun ownership by the Second Amendment. It can be difficult for many of us to grasp how fearful many manly types among us may be. Or is it insensitivity on my part, for example, that has left me without a handgun since I last served as Officer of the Day on my airbase sixty years ago and without any other such weapon since I volunteered to ride "shotgun" (with a rifle) in a truck taking supplies from our air base to our Embassy in Cairo, Egypt, during a riot in that city?

ix.

A proper Sense of Proportion should call into question the security measures insisted upon in this Country since September 2001. Particularly instructive can be the remarkably expensive (and ever more offensive) airport measures relied

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upon. Once airliner cockpits had been adequately secured from forcible entry by passengers, the resources devoted to such security with respect to passengers could be put to much better use elsewhere.

Critical to the assessments that should be made of what is both feared and put up with is a proper recognition of our mortality. An undue fearfulness can be both demeaning and debilitating, however vigorous the protective measures resorted to may seem. One sad consequence can be the corruption of those with whom one is allied, as may be seen in what happened to a talented British Prime Minister during the determined push for our Iraqi Intervention in 2003.

A Sense of Proportion can help shield one from the determined fearfulness that sometimes seizes a community. This need may be seen in the proclamation, by a very learned United States Supreme Court Justice in 1919, of the remarkably mischievous Clear and Present Danger Test. There *was* a danger to be confronted then, but it emanated not from obviously ineffectual agitators against that monumental folly known as the First World War but rather from the authorities who were neither as thoughtful nor as principled as they should have been, crippling thereby a self-governing community for at least a half-century thereafter.

IV. September Eleventh: Lessons of an Instructive Decade – September 11, 2011

Part One: The Past

I began, on September 12, 2001, a series of public observations about our response to the monstrous assaults that took place the day before in New York City, Washington, D.C., and Pennsylvania. The opening days of our decade-long encounter with suicidal terrorists included for me three letters I presumed to send at once to the Federal Bureau of Investigation with suggestions for immediate inquiries by our Government. My series of periodic observations thereafter looked back to Thucydides for inspiration as I recalled what he said about the beginning of the Peloponnesian War: he had recognized at once that this was for his Athens a vital challenge, and he began writing about the war from its outset.

My running commentary, which includes public talks on various subjects and even letters to editors, has by now been published in three installments totaling almost 500 pages.¹⁶ Perhaps all of these, along with subsequent materials, can someday be brought together on a website, if not even in a print volume. A University of Chicago Law School classmate, Ramsey Clark (a former Attorney General of the United States) has agreed to provide a Foreword upon the issuance of such a collection.

Critical throughout this decade has been the question whether an appropriate Sense of Proportion could be maintained in this country both in assessing the damage done to us on September Eleventh and in shaping proper responses thereafter. (Indicative of my overall concern for the lack of a Sense of Proportion,

¹⁶ See George Anastaplo, *September Eleventh, The ABC's of a Citizen's Responses*, *supra* note 1; George Anastaplo, *September Eleventh, A Citizen's Responses (Continued Further)*, *supra* note 1; George Anastaplo, *September 11th, A Citizen's Responses (Continued)*, *supra* note 1.

early on, is the title of my Loyola law school talk of September 12, 2001, "A Second Pearl Harbor? Let's Be Serious"). It was obvious from the outset both that the surviving men responsible for the September Eleventh attacks would have to be detected and punished and that any government that had knowingly permitted them to operate would have to be severely dealt with. Thus, the initial measures taken in Afghanistan (in 2001) seemed inevitable. They could even be understood as an appropriate Police Action, not as an Act of War. It was an Action that was at first quite successful, with the alleged leader of the September Eleventh assaults very much on the run (if not even about to be captured). World opinion seemed generally receptive to this phase of the response by the United States to the shocking September Eleventh assaults. Such an opinion made it more likely that sensible governments and peoples worldwide would be helpful in anticipating any future clandestine attacks on this country.

We then had in Iraq, however, what the student of Thucydides could recognize as a Twenty-first Century relapse into "the Sicilian delusion" that seized Fifth Century Athenians. They had been warned by their Pericles, at the outset of the Peloponnesian War, to restrict themselves to defensive measures, and certainly not to attempt to expand at that time their already considerable empire. But, after Pericles' death, the Athenians were persuaded that there were great things to be done in Sicily (indeed as a major step toward that "universal" empire the Romans were later to achieve). The Sicilian campaign proved a disaster for the Athenians, evidently contributing significantly to their eventual defeat in the Peloponnesian War and to the dismemberment of their empire. It may take decades to figure out why our President, his Vice President, and his Secretary of Defense were so determined to go into Iraq in 2003, effectively abandoning for several years the obvious Mission they had had in Afghanistan. It already seems to be widely accepted both that the abominable Iraqi dictatorship had had nothing to do with the September Eleventh atrocities and that that regime posed no immediate threat to the United States. Critical to judgments about what has been done by our government in Iraq are concerns about a blatant disregard for a Sense of Proportion. Particularly puzzling was the acquiescence of the British Government in what has turned out to be a remarkable act of folly.

It was bad enough that several thousand American lives have been sacrificed to this endeavor, along with a trillion dollars. It remains to be generally recognized how massive the Iraqi losses (perhaps hundreds of thousands of lives) have been at the hands of American power ever since the Persian Gulf War of 1990-1991 (with the decade-long economic sanctions thereafter that were followed eventually by the 2003 Intervention). It should not surprise us that suicidal measures against the United States could be promoted by such treatment. That is, the Iraqi people, for a quarter-century now, may have suffered much more at our hands than they did even from the brutal Saddam Hussein regime.

The follies of our most recent past can remind us of other, perhaps even more serious, follies in our history. Particularly destructive, of course, was that incredible folly, the First World War, which severely damaged the Western World and opened the way to the murderous regimes of Josef Stalin and Adolf Hitler. The "good war" that had to be fought thereafter was preceded by a series of appease-

ments in Europe that may even have taught decent people the wrong lessons (against diplomacy) since the Second World War. A harbinger of our Iraqi folly was what happened in Korea in 1950-1953. A Police Action, authorized by the United Nations, permitted the repulse of the June 1950 North Korean invasion of South Korea. But, unfortunately, our leaders were not satisfied with driving the invaders back across the 38th Parallel. Their push up to the Yalu River virtually invited a Chinese intervention which poisoned relations between the United States and China for a generation thereafter. One consequence of all this is that the United States has maintained a substantial military force in South Korea for six decades. There may be seen, in this escalation of the initial relatively modest 1950 mission, an anticipation of the escalation of the First Gulf War (repelling the August 1990 Iraqi invasion of Kuwait) into the 2003 Intervention that could trap the United States in Iraq for a generation.

Then there was, in this catalogue of Interventionist follies, the decade-long effort we made in Vietnam, somehow having been induced to try to clean up the mess left by the French as a Colonial Power. Some fifty-thousand American lives were lost there, and many more Vietnamese. Much was heard then about "falling dominoes" and about a need to head off an imperialistic China. I have recently noticed reports, however, not only of hundreds of millions of dollars having already been invested by American corporations in Vietnam but even of a tacit alliance between the United States and a "Marxist" Vietnam against a threatening China.¹⁷

Then, of course, there was the overall Cold War with the Soviet Union, a formidable nuclear-armed adversary. I have recently had occasion to be reminded of the passions of the Cold War upon reviewing the correspondence I had in 1952-1953, as a naïve graduate student, with a distinguished philosophy professor, a passionate Cold Warrior. That correspondence is now available, in its entirety, in a posting of August 2011.¹⁸ Indeed, one can wonder, considering the extraordinary passions exhibited on that occasion six decades ago by a quite intelligent scholar, how we avoided an all-out shooting war with Communist Russia. However that may have been, people were very much surprised by the "sudden" collapse of the Soviet Union in 1990-1991. But anyone who ever visited the Soviet Union and noticed how primitive its civilian economy was – as we could see in 1960 (as part of a nine-month family camping trip across Europe) – one could wonder how that regime could survive as long as it did. Perhaps the fragile Soviet dictatorship could somehow be sustained as long as it was in part because of American fearfulness and hostility.

Here, as elsewhere, a Sense of Proportion on our part was lacking, that Sense which can also be assigned the old-fashioned name of Prudence.

¹⁷ See e.g., John Ruwitch, *Coke to Invest \$200 Million in Vietnam*, REUTERS, Sept. 4, 2009, <http://www.reuters.com/article/2009/09/04/us-cocacola-interview-idUSTRE5831X920090904>.

¹⁸ WORDPRESS CITE, *supra* note 10 (this piece is entitled *An Instructive Encounter with Professor Sidney Hook of New York City* and can be located by selecting the August 2011 archives on the right side of the page). Sidney Hook was Chairman of the Department of Philosophy, New York University.

Part Two: The Present

The Present depends, in large part, upon recollections of the Past as well as expectations (including fears) with respect to the Future. Recollections of my career at the bar, culminating in a remarkable Dissenting Opinion by Justice Hugo L. Black¹⁹, could be drawn on in my *Chicago Daily Law Bulletin* article of April 25, 2011 (on the fiftieth anniversary of that decision).²⁰ How are we situated today? Signs of undue fearfulness can be disturbing. Among these signs are the massive armaments that we still insist upon. It is said that half of all expenditures worldwide for military purposes has long been by the United States. What sense does all this make, especially when there are far better uses to which much of such enormous funds could be put both at home and abroad?

Not only should such continuing endeavors as those in Korea be questioned, but our NATO commitments as well. Has there ever been any scaling down of our military prowess that reflects the collapse of the substantial Soviet threat? It is said as well that there has been, since September 2001, a doubling of the United States' defense budget. What sense *does* the fearfulness implicit here make on the part of the most powerful country, militarily, in the known history of the human race?

But this is only material wastefulness, however grand the scale. What is even more troubling is the determined fearfulness exhibited in our much-publicized campaigns against "Terrorism." This may be seen most dramatically perhaps in how civil aviation passengers are routinely treated – and, even more revealing, in how we all put up with what is thereby done to us.

Once airliner cockpits were secured against forcible entry by hostile passengers, the threat of another World Trade Center-style assault was eliminated – and would be known by would-be assailants to be virtually impossible. Airport security, then, is designed "merely" to protect individual airliners from destructive sabotage. But there still remain all too many ways, of course, to bring down individual airliners – and, terrible as that may be, it is hardly of the scope of what happened in September 2001.

Here, as elsewhere, there is the question of how our vast resources can best be used. It is not hard to imagine how tens of thousands, perhaps even hundreds of thousands, of lives could have been saved during the past decade with half of the resources devoted to airport security alone. The most effective use of resources (in anticipating, for example, the current equivalent of "a suitcase dirty-bomb") still depends upon effective police work and in the imaginative use of Intelligence resources. And it very much helps here, we again notice, to have the good will of peoples and governments around the world, something that is much more likely if we are generally perceived to be both decent and sensible.

However "counterproductive" various defense measures may be, the most troubling aspect of our security measures lies in what they reveal about, and do

¹⁹ *In re George Anastaplo*, 366 U.S. 82, 97 (1961) (Black, J., dissenting).

²⁰ George Anastaplo, *Echoes from a Resounding Silence*, CHICAGO DAILY LAW BULLETIN, April 25, 2011.

to, the American character. Indeed, there may even be something demeaning about a determined program of public announcements that insist, again and again (for years now), "If you see something, say something." What is generally seen (and heard) is a "something" which consists of a steady promotion, in effect, of fearfulness – and much *should* be said about that!

Particularly revealing here have been the occasional rampages conducted by lone gunmen who assault peaceful gatherings. The dreadful Virginia Tech and Northern Illinois University episodes readily come to mind. Such gunmen tend to be suicidal – so they cannot be deterred by threats of punishment, at least in this life. What is more likely to discourage them (besides a proper upbringing) is the fear that the people they target will not turn into scurrying targets desperate to avoid being shot. If it should be suspected that such assemblages will not act as they have heretofore, but rather will go after (and take alive) even an armed assailant (throwing at him whatever is at hand – chairs, clothing, backpacks, bottles, laptops, etc.), the dynamics of "the situation" would be radically changed.

What the marauding gunman typically counts on is a radical individualism, which has each potential victim looking out only for himself. The spirit that needs to be encouraged here (by school administrators, for example) is that evidently exhibited in a targeted airliner over Pennsylvania on September 11, 2011. Indeed, there must already be assemblies that a murderous gunman knows better than to attack, such as a locker-room full of football players.

However sensible we are in discouraging unbecoming fearfulness among ourselves, there do remain problems associated with the ventures we already find ourselves entangled by. What more should we reasonably expect to accomplish hereafter in Afghanistan? What lessons can be learned from the experiences there of Alexander the Great, the British, and the Russians? Even before Osama bin Laden was hunted down and executed, we could have plausibly argued that we had already accomplished our primary (if not even our only legitimate) purpose in Afghanistan. Other peoples and their governments *had* been warned thereby about what would happen to them in turn if the United States should be criminally attacked again as a result of operations that are permitted to be developed elsewhere.

Then there is Iraq – with all kinds of challenges related to the status of the Kurds, the maneuvers of the Iranians, and the legitimate interests of the Israelis, to say nothing of an incipient civil war. All of these challenges might seem to be, not improperly, addressed (but not really settled) by establishing in an autonomous (if not even in an independent) Kurdistan a permanent American military base. I can wonder what one's military service on such a base would be like, recalling my experience in the 1940's as an Air Corps flying officer at my last base overseas (Dhahran, Saudi Arabia). I can even wonder, for example, whether our personnel at any Kurdish base would have food of the quality we enjoyed at Dhahran, where we benefitted from the culinary skills of Italian prisoners-of-war. However that may be, would a Kurdish enterprise on our part be a "perpetually" entangling Korea all over again?

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A survey of our present situation should at least notice the economic circumstances of our day (if not of our decade). Will Rogers could say of the Great Depression that it would be the first time that a nation went to the poor house in an automobile. Today, the counterpart to that automobile may be sophisticated (constantly "improved") electronic devices that put us instantly in touch with "everybody" everywhere – and with no one, really, anywhere? That is, has an electronically-promoted globalization had the effect of making it difficult (and, for many, perhaps even impossible) to form any vital community upon which one can rely? Is an isolating kind of Individualism thereby encouraged?

What a thoughtless Individualism can mean, in practice, is indicated by the caustic responses to a recent tax-increase proposed by one of our most prominent billionaires published by him in the *New York Times* where he ventured to confess that the "super-rich" really paid a significantly smaller proportion of their income in taxes than the typical middle-class taxpayer.²¹ This argument was reinforced, a week later, by the "Doonesbury" comic strip which played with an unbelievable report that "the 400 richest families in America now hold as much wealth as the bottom 50% of the country combined."²²

Whatever the merits of these and like debates, we *have* seen, during the past decade, financial adventurers willing to put others (including the community at large) at great risks while they have personally managed to survive in quite comfortable circumstances, which they can desperately protect thereafter from efforts by any community to require them to share more of the common burdens. And that, it should be suggested, may not really seem to be right.

Part Three: The Future

One way or another, we will get past Afghanistan and Iraq, Iran and North Korea. But there *are* better and worse ways of proceeding. The better ways are more likely to be available if our political institutions are reasonably efficient.

An illusion we have long had is about the efficacy of the Presidency. That office, because of its high visibility, does seem to be particularly powerful. But at times it can be very much dependent on the whims of public opinion, whims often dictated by chance circumstances.

Then there is the United States Supreme Court, which exercises, sometimes irresponsibly, a power never intended for it by the Framers of the Constitution – the power routinely to subject Acts of Congress to constitutional scrutiny. Reservations that a few of us still have about the propriety of the Judicial Review of Acts of Congress now seem to have the aura of a Lost Cause. A recent dramatic instance of judicial usurpation was seen in what the Supreme Court did in December 2000, presuming as it did to insist on exercising the power assigned by

²¹ Warren E. Buffet, Op-Ed, *Stop Coddling the Super-Rich*, N.Y. TIMES, Aug. 14, 2011, <http://www.nytimes.com/2011/08/15/opinion/stop-coddling-the-super-rich.html>.

²² Doonesbury Comic Strip of August 21, 2011 by Gary Trudeau, *available at* <http://www.gocomics.com/doonesbury/2011/08/21>.

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the Constitution to the House of Representatives for determining who the President of the United States should be.²³

The President (however selected) will continue to be subject to the gusts of public opinion. And the Supreme Court will continue in its presumptuous usurpations, even as it insists upon abdicating its intended office as the most significant judicial shaper of the common law of the country.²⁴ But it can be hoped that Congress may be helped to be more effective than it seems to be these days. Illustrative of its failure to assert itself as it should, for the good of the country, is how Congressional declarations of war have come to be dispensed with since December 1941.

Also illustrative here is what has recently come to be allowed in the Senate of the United States with *not* the use but rather with the *threat* of the Filibuster that only a 60% super-majority can overcome. The regular majority is thereby frequently impended (or so it can seem) from exercising the power constitutionally available to it, power necessary for the good of the country that should be, and should appear to be, available.

What we know is "super-majorities" were indeed provided for in specified circumstances in the Constitution. Otherwise, it was expected, the Senate majority would usually rule, just as electoral majorities do (for example) in selecting who the Members of the Senate from any particular State are to be. (The authority of the majority of a proper assembly is even insisted on, in 1215, in Chapter 61 of the Magna Carta.) It would be a notable service to responsible legislating, and hence to the Country at Large, if a Point of Order should now be raised in the United States Senate, insisting upon the right (and, really, the duty) of the majority to rule in ordinary circumstances – a Point of Order which the Vice President (as President of the Senate) would then confirm. It can be hoped that the Supreme Court would not subvert thereafter what the Senate had done in thus contributing to the enactment of any contested statute by "a mere majority."

Of course, a responsible Senate would not cut off debate before the issues relating to any measure before it had been thoroughly considered. It can even permit old-fashioned filibustering to be indulged in, but the way "Filibuster" has come to be employed in recent decades has had the effect of discouraging genuine debate. Those who invoke the current Filibuster rule do not do so in order to air their positions, but rather (in effect) to discourage (if not even to suppress) any serious discussion of issues. A self-respecting legislative body, sensitive to the spirit as well as to the letter of the Constitution, would not permit its prerogatives to be abused as they have been by the current practice with respect to nominal filibusters. Competent lawyers, properly familiar with our constitutional heritage, should be able to develop these and like points in the ways needed for effective and responsible governance.

It is somewhat reassuring these days that our decade-long "terrorism" crisis has not led to that crippling curtailment of our vital freedom of speech that we

²³ Bush v. Gore, 531 U.S. 98 (2000).

²⁴ Compare *Eric Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) with *Swift v. Tyson*, 41 U.S. 1 (1842).

had to endure during much of the Cold War. But our freedom of speech guarantee was intended to be put to far better use than the Supreme Court seems to recognize. The Court has, in the name of freedom of speech, insisted on dubious rulings about video-games regulations, campaign-financing laws, etc. A harbinger of how "freedom of speech" was to be vulgarized could be seen in *Cohen v. California* (1971).²⁵

A healthy reading of the First Amendment depends on the recognition of the grounding of the traditional "freedom of speech" guarantee in the substantial assurance, given centuries ago, to participants in parliamentary discussions. It is such an assurance which makes it more likely that a community's issues will be properly discussed. And it is an assurance that is reinforced (as seen in John Milton's *Areopagitica*) by the protection available against prior restraints, or official censorship, of publications.

Among the issues to be discussed, again and again, is whether our resources, spiritual as well as material, are being properly used. Those resources include the venerable writ of *habeas corpus*, which has seemed at times, during the past decade, to be cavalierly dealt with by both courts and executive officers. The underlying issue here is as to what is indeed terrible and how a responsible community should deal with it. What, we must wonder again and again, is truly fearful – and how can it best be identified and responded to? Such an inquiry should expose, for example, the limitations of the 2001 PATRIOT Act as well as our covert (and deeply demeaning) reliance on torture.

I have been privileged, during the past decade, to develop two sets of serial publications in addition to, and bearing upon, the September Eleventh materials that I have been producing. One set has been devoted to a projected ten-volume compilation of "constitutional sonnets." The first three of these volumes have been published by the University Press of Kentucky.²⁶ The fourth volume is to be published later this year by Lexington Books.²⁷ And a fifth volume, *Reflections on Religion, the Divine, and the Constitution* is now being prepared for publication by Lexington Books.

A second set of serial publications draws on my thirteen encounters, in 2000-2001, with a thoughtful veteran of Nazi concentration camps, camps that were one of the monumentally awful consequences of our monstrous First World War folly.²⁸ Four of these conversations have already been provided as appendices to various things I have published during the past decade.²⁹ It is to be hoped, of

²⁵ *Cohen v. California*, 430 U.S. 15 (1971).

²⁶ GEORGE ANASTAPLO, *REFLECTIONS ON CONSTITUTIONAL LAW* (U. Ky. Press 2006); GEORGE ANASTAPLO, *REFLECTIONS ON FREEDOM OF SPEECH AND THE FIRST AMENDMENT* (U. Ky. Press 2007); GEORGE ANASTAPLO, *REFLECTIONS ON LIFE, DEATH, AND THE CONSTITUTION* (U. Ky. Press 2009).

²⁷ GEORGE ANASTAPLO, *REFLECTIONS ON SLAVERY AND THE CONSTITUTION* (forthcoming 2012, Lexington Books).

²⁸ WORDPRESS CITE, *supra* note 2 (the piece is entitled *Simply Unbelievable: Conversations with a Holocaust Survivor*, and can be located by selecting the July 2012 archives on the right hand side of the page).

²⁹ George Anastaplo, *Why the Jews?*, 35 S. ILL. U. L. J. 401 (2010-11); GEORGE ANASTAPLO, *REFLECTIONS ON LIFE, DEATH, AND THE CONSTITUTION* 251 (2009); GEORGE ANASTAPLO, *THE CHRISTIAN HERITAGE: PROBLEMS AND PROSPECTS* 257 (2010); George Anastaplo, *Abraham Lincoln, Lawyers, and*

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course, that all of these conversations, after having been placed here and there [D.V] during the next few years, can be collected someday in one volume.

My *Reflections* series, following upon treatises that I have published since 1971 on the Constitution, explores facets of the constitutionalism that is at the foundation of my offerings (here and elsewhere) with respect to our often-questionable responses as a community to the dreadful September Eleventh challenge. My *Simply Unbelievable* Holocaust series can remind us of the horrible things that human beings are capable both of inflicting on others and of somehow enduring. It may be hoped, of course, that we can, on reflecting upon such matters, discern and cherish what is truly appropriate for us to feel and to think – and hence to know and to do – both as citizens and human beings.

V. September Eleventh and The Greek Tragedies – September 12, 2011³⁰

i.

A spectacular victory by Greeks over an invading army of the Superpower of the day is recalled in Aeschylus' *Persians*. All of this play's action on stage is in the court of the Persian King. The magnitude of the victory is reflected in the fact that the despair thereafter among the mighty Persians extends to the dead.

Should the Athenian audience have seen in the *Persians* what was to be avoided in and for themselves? Alexander the Great can be seen as a "Greek" intensification of the mere ambitious Persian potentates. Indeed, it can be wondered whether Alexander even provided a model of imperialism for the more ambitious Romans – and it can also be wondered, in turn, what imperial adventures (whether Alexander's or the Romans') did for both the integrity and the influence of traditional Greek culture.

It can be wondered as well what the spread of Greek culture (especially through its language) did to the transformation of Judaism into what we know as Christianity. It can also be wondered what the effect of all that has been on Judaism ever since. In short, both the allure and the pitfalls of cosmopolitanism may be anticipated by the Persian experience in and with Greece, that experience recalled so dramatically by Aeschylus.

ii.

Two Greek *poleis* are particularly important in the plays we have from the three great tragedians. That is, stories about the Thebans and the Argives are particularly noteworthy. Thebes is associated from its very inception with quite

the Civil War: Bicentennial Explorations, 35 OKLA. CITY U. L. REV. 85 (2010). A fifth conversation is to be included in GEORGE ANASTAPLO, REFLECTIONS ON SLAVERY AND THE CONSTITUTION (2012). These conversations have been transcribed by Adam Reinherz, an alumnus of Loyola University Chicago School of Law.

³⁰ Remarks prepared by the author for his Seminar on the Greek Playwrights, The Basic Program of Liberal Education for Adults, The University of Chicago, September 12, 2011.

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ferocious actions and Argos with the celebrated leadership ("once upon a time") of the Greek world.

Should the United States be likened to either of these communities? Ferocity may be seen in how the native tribes of North America were treated for centuries and in how nuclear weapons could be used by us in August 1945 (as well as relentless annihilation bombing earlier). Then, of course, there is the alternative model provided by a cultured Athens.

The Athens of the tragedians *tended* to be more conciliatory than their Thebes or their Argos. It was to Athens that both Oedipus (of Thebes) and Orestes (of Argos) could go for divine redemption. And it was in Athens, of course, that the tragedies could be developed that attempted to come to terms with a millennium of Greek experience.

iii.

We have been provided, for a decade now, numerous dramatizations of the September Eleventh assaults and of American responses to them. Politicians have contributed to these efforts. One can be reminded here of the complaint made by Aeschylus in Aristophanes' *Frogs*, that Euripides used his art to arouse and appeal to the baser elements in his community.

Can the same kind of complaint be made about how the September Eleventh challenge has generally been addressed among us? Has an unseemly fearfulness been promoted by such indulgences as the determined refrain, "If you see something, say something"? Is there here even a perverse longing for "something" to be seen, something that would legitimate the massive mobilization of resources that has been insisted on for a decade?

Related to this exploitation of fearfulness is the unleashing of violent responses against a despicable regime (that of Saddam Hussein in Iraq) that was never shown to have permitted, as another despicable regime (that of the Taliban in Afghanistan) evidently did permit, preparations for the September Eleventh assaults. The relative immunity of the United States in its campaigns against the targets settled upon is epitomized these days by our reliance upon air strikes by drones. The concerns that began to dominate public discourse in this country by the time the drones came to be employed significantly were not, however, concerns about casualties ("ours" as well as "theirs") but rather concerns about budgetary deficits for the United States.

iv.

How should the promotion of apprehensiveness (whether about casualties or about deficits) be regarded? Is the natural precariousness of human life thus recognized? But are there not better and worse ways of doing this?

An inevitable apprehensiveness is very much in evidence in the Greek tragedies. But it should be recalled how Aristotle understood (perhaps even *chose* to understand) what the tragedians (naturally?) did. They somehow or other came to promote a *catharsis* of pity and fear in the Athenian audience.

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Such a *catharsis* is not a complete elimination of pity and fear. Although an excess of pity and fear is not healthy, their complete elimination would tend to subvert the truly human. That is, both a proper compassion and a necessary prudence would thereby be discouraged, if not even made impossible.

v.

What should be made of the tragedians, as well as of those politicians who are inclined towards the tragic? Do they instinctively strive thereby for the meaningful? And is that more likely to seem to be offered by the warlike?

Compare Aristophanes, the greatest of the comic playwrights of antiquity. He, more than any of the prominent tragedians of his day, evidently yearned for peace. This yearning did not keep him from being a patriotic Athenian.

The difference here between Aristophanes and the tragedians is dramatized by how Dionysus can be portrayed. The ferocious god of Euripides' *Bacchae* cannot be readily recognized in the apprehensive Dionysus of Aristophanes' *Frogs*. A taming of the tragedians' Heracles may also be seen in that play.

vi.

We have become accustomed to hearing the terms "tragic" and "tragedy" misused. Calamities can thus be routinely characterized. But *the tragic* tends to be more meaningful than the calamitous.

Consider even the calamities for which human beings, and not nature, are responsible. For example, did the perpetrators of the September Eleventh atrocities *know* what they were doing? Did they, for example, anticipate what the long-term consequences of their assaults would be for their "people"?

The men who *planned* these atrocities at the highest level were anything but personally suicidal. Their canniness in concealing themselves for a decade thereafter should make observers wonder about what they truly thought of those who had been induced by them to sacrifice themselves for the Cause in September 2001. We can be reminded of the would-be leaders among us today who, in their youth, avoided combat duty in a war for which they were willing to have less privileged young men conscripted.

vii.

The role of chance in the "success" of the September Eleventh assaults was much greater than is generally recognized. It should have been apparent at once to the American public (or at least to its leaders) how much of a "fluke" that "success" was. We can be troubled, in turn, when we reflect upon how much our sometimes-feverish responses have been determined by chance considerations.

In the properly constructed tragedy, however, chance does not play a major role. Characters who do speak of chance being at work among them may not understand what is happening. On the other hand, may we not wonder whether even the givers of oracles truly understand what was happening, and especially why?

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Does the conquest of chance by the tragedian, especially when Fate is made much of, tend to promote piety? Still, it can also be wondered whether it is not a matter of chance what form piety will take? Thus, for example, is it a matter of chance who among us have been raised up to believe in predestination?

viii.

We return to Agamemnon for what his career can suggest about who or what is truly in charge of any life. We can be reminded here by the limits that even the heroic and the most "successful" face. After all, a conquering commander can be pitilessly slaughtered upon his return home.

Earlier, of course, his daughter had been butchered on an altar by her desperate father. And later, his wife is butchered by her son. In both instances, divinities are said to require these sacrifices.

We can be reminded by such stories of the limits to which the heroic must conform even when they seem most in control. Both Apollo and Athena must get "involved" before the problems confronted in Aeschylus' *Oresteia* can seem to have a proper resolution, at least for the time being. Are we meant to wonder whether even Apollo and Athena (to say nothing of Zeus Himself) are ultimately free agents?

ix.

The *Oedipus Tyrannos* of Sophocles can remind us, in turn, of how difficult it may be to determine who does what and why. Thus, it should be wondered, who is really responsible for the killing of Laius? Of course, the playwright must respect, one way or another, the story he inherits and the expectations of the audience as to the awful guilt of Oedipus with respect to his father as well as with respect to his mother.

Even so, Sophocles does leave "technically" open, in the play, the question of what did happen at Laius' fatal crossroads – and why. Does not the playwright even suggest thereby that it must remain a question about who is truly responsible for what in such matters? Thus, what "everyone" comes to believe by the end of this play (as to the killer of Laius) may not suffice for anyone who seeks a full understanding of "the situation."

Similar challenges can confront an inquiry into how our decade-long September Eleventh campaign is to be thought about. Do we truly understand why the perpetrators of this atrocity acted as they did? And, perhaps even more important, do we understand why we have responded as we have not only abroad but, perhaps even more important, also at home?

VI. Tone-Deafness and Constitutional Melodies – October 21, 2011³¹

O wad some Pow'r the giftie gie us
To see oursel's as ithers see us!
It wad frae monie a blunder free us,
An' foolish notion. . .

- Robert Burns, *To a Louse*

i.

Constitutionalism, an established system for a decent rule of law, can presuppose an understanding of how things are done and why. Such an understanding can even make it seem that the prescribed way of “doing things” – “*our way*” – is instinctive.

One can be reminded of distinctive features of the United States Constitution of 1787, with its grounding in the Declaration of Independence of 1776, by comparing it with the Confederate Constitution of 1861. The many similarities of these two instruments make their differences here and there quite dramatic. One obvious consequence of the changes deliberately made in 1861 is to remind us of the extent to which slavery had been no more than reluctantly tolerated, certainly not endorsed, by the 1787 Convention in Philadelphia.

Less obvious, but perhaps even more significant in our present circumstances, is what the changes made in 1861 by the Confederates in Montgomery tacitly recognized about the nationalizing tendencies in the 1787 instrument. Those 1861 changes can usefully be understood (and especially by us today) to have recognized as well the power (if not also the duty) of the Government of the United States to “promote the general Welfare.”

ii.

I have undertaken, during the past decade, three “projects” which can remind us of the dreadful things that can happen, at least in the modern world, when the constitutional proprieties are not respected. A particularly horrible instance of this, of course, is what happened in the European Holocaust of 1933-1945, something illustrated in the course of a dozen conversations I recorded in the Year 2000 with a Lithuanian Jew, a gifted mathematician (conversations which I have been publishing *seriatim*).³²

My second project has been to provide a running commentary, since 2001, upon our responses to the dreadful September Eleventh assaults. Some five hundred pages have thus far found their way into print in law review collections. It can be instructive to remind oneself, years later, of how one regarded challenges as they appeared from time to time.

³¹ These remarks were prepared for the Second Annual Constitutional Law Colloquium, Loyola University Chicago School of Law, October 21, 2011.

³² See *supra* note 29.

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There has also been developed, since 2005, a projected ten-volume series of what I have called "constitutional sonnets." One can, upon subjecting oneself to such a discipline, be reminded both of the constitutional treasures always available for discovery and of one's inevitable limitations as a truly innovative discoverer.

iii.

Tone-deafness with respect to the constitutional proprieties may be encountered in the running commentaries that journalists are permitted by their editors (and by the public) to publish about the evidence presented in the political corruption trials they cover. Thus, there have been routinely provided, in the local press, interpretations of trial evidence that is presented by journalists as revealing, say, the sort of shady practices typical of Illinois politics, interpretations (devastating for defendants) that almost certainly come to the attention of the not-sequestered juries.

iv.

Tone-deafness with respect to the rules of war may be encountered in our resort to drone-missile strikes against villainous men distant from any traditionally-recognized battleground. It could even be believed, without any resulting public protest, that the alleged leader of the September Eleventh assaults had been sentenced to be executed at once whenever encountered (even if he *could* be taken alive). And such a dreadful sentence could be carried out, it seems, with our President, Vice President, and Secretary of State watching "in real time" (halfway around the world) with evident approval.

v.

Tone-deafness with respect to the solemnity of death – a deafness exhibited in monstrous extremes among the Nazis – may be encountered in the passionate political protests that have been indulged in here and there, deliberately disturbing military funerals in this country. The United States Supreme Court, with a dubious invocation of the First Amendment, has exhibited itself here to be as peculiarly "principled" as our more permissive newspaper editors, recalling in effect the 1971 juvenile ruling by the United States Supreme Court in *Cohen v. California*.³³

vi.

We should be thankful that summary executions of notorious villains were not routinely relied upon at the end of the Second World War. The 1945-1946 trial at Nuremberg of the surviving Nazi leaders was a remarkable and quite instructive tribute to the rule of law, even if the principal judges on that occasion included a representative of the Stalinist regime (and even if the executions carried

³³ *Cohen v. California*, 430 U.S. 15 (1971).

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out thereafter released the executed from decades in which to contemplate their awful deeds).

Our increasing use of drone-missiles, far from any conventional battlefield, to kill men evidently identified (but not necessarily publicly) by someone in our government as both wicked and dangerous, should be deeply troubling. It can be wondered whether we truly hear what we are saying when we attempt to justify such measures (however careful we may try to be to limit the evidently inevitable "collateral damage"). We can be reminded here of the determined obliteration bombing of cities we resorted to during the Second World War, a practice (I confess in passing) I never heard any of us (as officers in the Army Air Corps) express any reservations about.

Our current triumphalist acceptance of these drone attacks comes at a time when we ourselves can become quite indignant about reports that the Iranian government has attempted to have killed in this country the Saudi Arabian ambassador to the United States. This is the same government in Teheran, by the way, that seems to have been the principal beneficiary in the Middle East of our determined Iraqi Intervention in 2003.

vii.

We have long been dubious about the efforts routinely made by regimes that employ assassination squads to eliminate "enemies" abroad. Both the Nazis and the Stalinists were believed to have done this, with the 1940 butchery of Leon Trotsky in Mexico as a particularly gruesome example.

It can be a matter of chance, of course, what one learns both about the deadly doings of one's government and about the assessments made by one's fellow citizens of such doings. Thus, one may not be in a position to hear all that might be said in defense of a particular decision. Even so, one can venture to voice one's opinions about such matters in the hope that other equally conscientious citizens will correct the opinions one has presumed to offer.

One also hopes, of course, that one's fellow citizens will make proper use of what is sensible in what one says from time to time. In this way, one properly collaborates with one's critics in composing a glorious constitutional symphony that truly promotes the general welfare.

VII. China and the United States: Who Should Learn What From Whom? – February 18, 2012³⁴

i.

The Communiqué issued in Shanghai, in February 1972 at the conclusion of President Richard M. Nixon's astonishing visit to China is instructive, reinforced as it is by the transcripts of the extended conversations engaged in on that occasion at the highest levels of the Chinese and American governments of that day.

³⁴ These remarks were prepared for a Chinese Reunification luncheon in Chicago, Illinois on February 18, 2012.

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Particularly instructive for us was Mr. Nixon's performance on that occasion, an occasion being celebrated here in Chicago today on its fortieth anniversary.

ii.

We can be challenged to wonder about the tolerance shown then by the Chinese leaders for a projected involvement by the United States in the affairs of Taiwan, even to the extent of continuing to provide military as well as economic aid to the Taiwanese authorities. The Chinese seemed only to require for the time being what they did get with respect to this matter, an American recognition that Taiwan is to be recognized by everyone as forever a part of China.

iii.

The Chinese participants in that 1972 conference seem to have been moved to accept (at least for the time being) this remarkable arrangement with respect to American-Taiwanese military arrangements by two critical interests – the desire to advance their country's interests in the world economy and a growing concern to protect China from what they considered ominous military movements along its northern border by the Russians. What the United States was doing (or was not doing) then in Indochina (and especially in Vietnam) seemed of secondary interest in February 1972, at least for the Chinese.

iv.

There can be for an American reader, previously unfamiliar with these 1972 documents, a feature that is both instructive and sobering – and that is how astute, and even statesmanlike, President Nixon can appear during the hours of conversation recorded here. It can be chastening for all of us to be reminded of perhaps inherent human limitations that could lead a gifted politician to allow himself to be mired down thereafter (and thus to be politically destroyed) by something as trivial (and yet as suicidal) as the Watergate Cover-up.

v.

Also sobering is the apparent willingness of American officials, eager to advance their obviously important foreign policy goals, to ignore, if not even to sacrifice, the legitimate concerns of the Tibetans and others about the Western-territories maneuvers of the Chinese regime (concerns of which we have been reminded recently by a series of distressing fiery suicides). Even more sobering, of course, is the pervasive tyranny to which hundreds of millions of Mainland Chinese have been subjected for decades, something that it would be unnatural to expect the Taiwanese Chinese to look forward to sharing. Should it not be expected that Chinese living elsewhere, subject to far more relaxed regimes such as in the United States, would not want to see a substantial extension of such tyranny to peoples (such as on Taiwan) accustomed to a much freer way of life?

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vi.

The follies of Mao Tse-tung (Mao Zedong) and his successors have been matched somewhat by the misadventures of American governments in recent decades. Particularly destructive was the unbelievably shortsighted drive up to the Yalu River by American forces understandably responding to the North Korean aggression in South Korea in 1950, a drive, which in turn provoked an extravagant response from China, that severely distorted American-Chinese relations for a generation.

vii.

Then, a half-century later (after what should have been an instructive debacle in Vietnam) there was the American drive (in 2003) into Iraq, as a result of which (it has been estimated) perhaps as many as 100,000 innocent Iraqis have died. It remains to be seen, of course, how that long-troubled people will conduct themselves (on their own) during the next decade.

viii.

Our Iraqi follies have been perhaps our most dubious response to the criminal September Eleventh assaults that took four thousand American lives. Also dubious have been many of the security measures resorted to in a misconceived "War on Terror," measures which include highly questionable executions worldwide (by drones and otherwise) of persons unilaterally condemned by us as appropriate targets.

ix.

It can be hoped that American follies may be curbed with the aid of reminders of the salutary guidance provided by Magna Carta, the Declaration of Independence, and the Constitution. It can also be hoped [a hope reinforced, for me, by your willingness (as Reunificationists) to hear me out] – it can be hoped that Chinese follies can in turn be curbed with the aid of reminders of the salutary guidance provided the world by the humane legacies of Confucianism, Taoism, and Buddhism.

