



IS THERE A CONSTITUTION IN (THE) HOUSE?

David G. Leitch

WHEN I WAS INVITED to speak here today, I noticed immediately the significance of today's date – September 17. I'm sure all of you know what happened on this date 221 years ago, but let's start with a little survey. I'll give you a hint; it involves the U.S. Constitution. In fact, many refer to it as Constitution Day. But what exactly happened on Constitution Day?

Let's make it multiple choice. I'll offer three options and then we'll vote:

- A. The Constitution was ratified by the last state necessary for its adoption and therefore became effective on this date;
- B. The men who gathered at the Constitutional Convention in Philadelphia signed the proposed Constitution's seven articles on this date; or
- C. The convention designed to draft a document to replace the Articles of Confederation convened on this date.

David Leitch is Group Vice President & General Counsel, Ford Motor Company. This article is based on remarks delivered at the Argyle Executive Forum's 2008 Corporate Counsel Leadership Forum on September 17, 2008 in Chicago, Illinois.

The correct answer is B. On this date, 221 years ago, the visionaries often referred to as our Founding Fathers affixed their signatures to the proposed Constitution of the United States. And yes, it contained only seven articles – it did not yet include the Bill of Rights.

It's an event whose significance has often been forgotten amid the other important holidays and celebrations in our Nation, but in recent years Congress has designated today "Constitution Day and Citizenship Day," and has in fact ordered that "[e]ach educational institution that receives Federal funds ... shall hold an educational program on the United States Constitution on September 17 ... for the students served by the educational institution."¹ As if to demonstrate the vitality of the Constitution's First Amendment, some wags have declared that Constitution Day is itself unconstitutional.²

Be that as it may, I think it's only fitting that, as corporate counsel, we spend a few moments on this occasion reflecting on the significance of our Constitution and its continuing impact on us and on the companies we represent. Forgive me if this brief overview is old news to many of you – you are to be commended – but I believe all of us will benefit from a short discussion of the document that resulted from what John Adams called "the greatest single effort of national deliberation that the world has ever seen."³

I will divide my remarks into three parts. First, I'll offer a brief background on the events leading up to September 17, 1787. Second, I will provide some examples of how the *structural* provisions of the Constitution are still relevant, and subject to debate, today – in a way that has real consequences for your practice. And third, I will provide some examples of how the *substantive* provisions of the Constitution provide protection not just for individuals but also for companies, in ways that continue to develop and be interpreted by the courts.

¹ Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 111, 118 Stat. 2809, 3344-45 (2004).

² Kent Greenfield, *Unconstitutional Constitution Day*, www.acsblog.org/bill-of-rights-unconstitutional-constitution-day.html (Sept. 15, 2005).

³ John Adams, *A Defense of the Constitutions of the Government of the United States of America*, in 4 WORKS OF JOHN ADAMS 220 (1851).

A Constitution In (The) House

I

First, some background. The delegates that gathered at the Constitutional Convention in Philadelphia beginning in May of 1787 were compelled to do so by the general failure of the tepid Articles of Confederation under which the new country had operated for the previous six years. Some have described the Articles as a “league of friendship” which provided for no national authority. Each state had the power to collect its own taxes, issue currency, and provide for its own militia.

As Jefferson put it in his autobiography:

The fundamental defect of the Confederation was that Congress was not authorized to act immediately on the people, & by its own officers. Their power was only requisitory, and these requisitions were addressed to the several legislatures, to be by them carried into execution, without other coercion than the moral principle of duty. This allowed in fact a negative to every legislature, on every measure proposed by Congress; a negative so frequently exercised in practice as to benumb the action of the federal government, and to render it inefficient in its general objects⁴

It was “the incompetence of their first compact,” as Jefferson put it, that led the people to support a constitutional convention that would “peaceably meet and agree on such a constitution as ‘would ensure peace, justice, liberty, the common defence & general welfare.’”⁵ By the time thirty-nine men signed the Constitution on September 17, 1787 after a long summer of debate and compromise, they had forged a compact that was both fixed and flexible enough to survive and adapt for the centuries that followed. As historian Michael Beschloss has observed: “The Framers gave us a document durable and flexible enough to take us from the agrarian land of the 18th century, of the musket, the axe and the plow – to the country

⁴ Thomas Jefferson, *Autobiography 1743-1790*, http://avalon.law.yale.edu/19th_century/jeffauto.asp.

⁵ *Id.*

we know today, of the Internet and the human genome and a thousand different cultures living together in one nation like a glittering mosaic.”⁶

How did they accomplish this remarkable act? They did so through two different types of provisions – *structural* provisions and *substantive* provisions. The initial genius of the Constitution was in its structural provisions, the seven articles that establish the three branches of government, their authorities, the checks and balances of each against the other, the role of the states, the process for amending the charter, and – importantly – the Constitution and laws of the United States as the supreme law of the land.

The most significant and revolutionary of the Constitution’s structural provisions was the separation of powers and the attendant system of checks and balances. As Madison observed in *Federalist No. 47*: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.” To address this fundamental concern, the Founders established a bi-cameral legislature of enumerated powers, a strong executive, a system of law-making that required assent of both branches except when a super-majority of the houses of Congress overrode a presidential veto, shared appointment power to executive positions, and an independent judiciary with life tenure and pay protection.

The substantive provisions of the Constitution came later. Many viewed the failure of the initial charter to include a Bill of Rights as a fatal flaw; others viewed it as unnecessary. In the end, of course, the former view won out. As Jefferson put it, “A bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inferences.”⁷

⁶ Michael Beschloss, *Remarks at the Ceremony to Unveil Page Two of the U.S. Constitution in its New Encasement*, www.archives.gov/about/speeches/09-15-00-b.html (Sept. 15, 2000).

⁷ Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 483 (1983).

A Constitution In (The) House

It was not until June of 1789 that Madison first proposed the twelve amendments of the Bill of Rights in the House of Representatives; ten of these amendments became part of the charter in 1791, when ratified by Virginia. An 11th of the original twelve – the Congressional Pay Amendment – was the originally proposed Second Amendment and became the 27th Amendment in 1992. But we don't have time for that story.⁸

The Bill of Rights, of course, contains the broad guarantees to citizens against infringements by the government of the rights of free speech, religion, the press, and assembly, and secures (as we have recently been reminded) gun rights, due process, criminal procedure rights, civil jury rights, and protections against unreasonable searches and seizures and cruel and unusual punishments. The first ten amendments have been supplemented throughout the years to provide for the abolition of slavery and to expand voting rights and equal protection guarantees.

At this point, one might well ask, "So what? Why are you giving an audience of corporate counsel a high school civics lesson on the Constitution?" Well, in addition to the historical significance of the day and the document, I hope to demonstrate the current relevance of the provisions penned in the late 18th century to our lives as corporate counsel today.

II

So, in the second part of my remarks, let me mention very real controversies continuing to this day over the application of the Constitution's structural provisions. One might well think that the meaning and application of the provisions establishing the basic structure of our government would be well-settled by now – and frankly of little relevance to corporate counsel dealing with actual substantive issues arising not only under the Constitution but also under a myriad of local, state, and national laws and regulations. But given the dramatic expansion of government in the last century,

⁸ See Congressional Pay Amendment (Op. U.S. DOJ Off. Legal Counsel) (Nov. 2, 1992), www.usdoj.gov/olc/congress.17.htm.

as well as the creativity of Congress in designing new structures to address new problems, it is incumbent on us as corporate counsel to ensure that when government acts in a way that affects our clients, it does so in a manner that is constitutionally legitimate.

Three current examples establish beyond doubt that the structural provisions of the Constitution remain very much in play.

The first example arises out of the congressional response to the collapse of Enron and Worldcom, the Sarbanes-Oxley Act of 2002.⁹ Among the innovations in that act was the establishment of the Public Company Accounting Oversight Board (the PCAOB – some call it “peekaboo” which only makes sense if F-A-V-R-E is pronounced “Farve”). The five members of the Board are appointed by the SEC, and the Board is empowered to register public accounting firms, establish auditing and ethics standards, conduct inspections and investigations of registered firms, impose sanctions, and set its own budget, which is funded by annual fees.¹⁰

The scope of the Board’s authority combined with the method of appointing its members gave rise to a serious challenge under the Constitution’s Appointments Clause – Article II, Section 2, Clause 2 – which requires that “Officers of the United States” must be appointed by the President with the advice and consent of the Senate except when Congress vests the appointment of inferior officers “in the President alone, in the Courts of Law, or in the Heads of Departments.” It is this clause that has been at the heart of some significant decisions in recent years – for example, the Supreme Court’s decision concerning the constitutionality of the independent counsel statute.¹¹

Allowing officers with significant executive power – those who qualify as principal officers – to be appointed by others deprives the President of the opportunity to control the exercise of executive power through the appointment process and the attendant right of removal, and the framers required that the President retain ap-

⁹ Sarbanes-Oxley Act, 15 U.S.C. §§ 7201-7266 (2002).

¹⁰ See Title I of the Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7211-19.

¹¹ *Morrison v. Olson*, 487 U.S. 654 (1988).

A Constitution In (The) House

pointment authority for principal officers. The question in the PCAOB case, therefore, was whether it was constitutionally proper for Congress to place the power to appoint members of the PCAOB in the SEC – itself an independent agency whose members enjoy some measure of protection from control by the Chief Executive.

In response to a challenge to the method by which the PCAOB members are appointed, and thus to their very authority to act, a divided panel of the U.S. Court of Appeals for the D.C. Circuit recently upheld the structure of the PCAOB, issuing dozens of pages worth of opinions full of citations to the historical record.¹² The members of the Court obviously found the question a close one; even after 221 years on the books, the Appointments Clause and all of the accumulated precedent provided no clear answer to the Court. The case may ultimately be resolved at the en banc or Supreme Court level, but even if this is the end of the challenge, this example clearly demonstrates the importance of paying attention to the structural elements of the Constitution as we examine problems facing our companies.

The Appointments Clause is also at issue in the second example – one that could more directly and immediately affect the bottom line for a great many corporations, because it involves the process for determining the validity of patents.

The Board of Patent Appeals and Interferences within the Patent and Trademark Office is responsible for reviewing adverse decisions of examiners upon applications for patents and for determining priority whenever an applicant claims the same patentable invention which is already claimed by another applicant or patentee. As you can imagine, the decisions of the Board can have significant economic impact on patent owners and applications.

Last year George Washington University Law Professor John Duffy published a blog item¹³ calling into question the validity of the

¹²Free Enterprise Fund v. Public Company Accounting Oversight Board, 537 F.3d 667 (D.C. Cir. 2008).

¹³John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, Patently-O Patent L.J. 21 (2007), www.patentlyo.com/lawjournal/files/Duffy.BPAI.pdf.

means by which members of the Board of Patent Appeals have been appointed since 2000.¹⁴ Specifically, he asserted that their appointment by the Director of the Patent and Trademark Office was invalid under the Appointments Clause because he does not serve as a “Head of Department,” as is permitted under the clause for “inferior officers” when Congress so directs.

Congress and the Administration were concerned enough about Duffy’s argument – and, one assumes, about the constitutional infirmity – that with relative speed they enacted into law a legislative fix to the problem he identified. In August, President Bush signed a bill that places the power to appoint members of the Patent Appeal Board in the Secretary of Commerce.¹⁵ Yet to be determined is the validity of the retroactivity clause contained in that legislation. This example too reminds us of the continuing vitality of structural provisions; we would be wise when monitoring or advocating legislative changes to ensure that Congress establishes a system that will not be called into question years after the fact.

The third example I will mention involves the very basic structural relationship between state and federal law embodied in the Supremacy Clause – which makes the Constitution and laws of the United States the Supreme Law of the Land.¹⁶ This division of authority, which is second nature today, was a sea change at the time the Constitution was adopted, and of course the relationship between states and the federal government has been the source of vociferous debate and conflict throughout our history.

One of the more significant effects of the Supremacy Clause lies in the doctrine of federal preemption. That doctrine is very much at issue in many of the most financially significant issues facing many of our companies.

In the auto industry, for example, California and a dozen other states claim the right to impose standards for emission of green-

¹⁴ See Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, §§ 4717, 4731, 113 Stat. 1501, 1501A-580-81 (1999).

¹⁵ Public Law No. 110-313.

¹⁶ U.S. CONST. art. VI, cl. 2.

A Constitution In (The) House

house gases that can only be met by increasing fuel economy.¹⁷ Their regulations fly in the face of a congressional prohibition on states adopting regulations “relating to” fuel economy – which are the subject of federal law in the form of Corporate Average Fuel Economy standards.¹⁸ The outcome of pending litigation on this issue could very well determine both the future of particular companies and the availability of a wide range of products consumers want and value – such as trucks and SUVs.

The vitality of preemption issues is further demonstrated by the fact that the Supreme Court has two preemption cases on its relatively thin docket for the Term that begins in October 2008. The first involves state efforts to impose liability on tobacco companies on the basis that FTC-approved labeling of certain cigarettes as “light” is deceptive.¹⁹ At issue in the second case is whether the prescription drug labeling requirements imposed on manufacturers by the FDA preempt state law product liability claims premised on the theory that different labeling content was necessary to make drugs reasonably safe for use.²⁰

Obviously, this is just a brief mention of some very significant current issues arising under the structural Constitution. But even this brief survey clearly demonstrates that the provisions signed in Philadelphia 221 years ago today continue to present open issues the resolution of which can and does have very real practical effect. We would be wise as corporate counsel to be familiar with and keep a careful eye on issues such as those arising under the Appointments

¹⁷ See generally *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007), *appeal pending*, Nos. 07-4342, -4360 (2d Cir. 2008).

¹⁸ The Clean Air Act § 209, 42 U.S.C. § 7543(a) (2006) (“No State or any political subdivision thereof shall adopt or attempt to enforce any standard *relating to* the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.”) (emphasis added).

¹⁹ *Good v. Altria Group, Inc.*, 501 F.3d 29 (1st Cir. 2007), *cert. granted*, 128 S.Ct. 1119 (2008).

²⁰ *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006), *cert. granted*, 128 S.Ct. 1118 (2008).

and Supremacy Clauses – not to mention other structural limitations such as enumerated powers and Article III standing.

III

I suspect you're all more attuned to the substantive limitations that are spelled out in the Bill of Rights, and have had occasion to deal with free speech, civil jury, and due process issues in your practice. But just to round out the picture, I will touch on a current issue grounded in the substantive provisions of the Constitution that is all too real for many of us – punitive damages.

Before I do so, however, I might pause to mention that we should not blithely assume the right of corporations to enjoy constitutional protections is universally accepted. On the contrary, we should all be aware of a movement by some to deny corporations any constitutional protections.

For example, in June 2004, the Berkeley California City Council expressed support for amendments to the California state and U.S. constitutions declaring that corporations are not granted the protections or rights of natural persons and that expenditure of corporate money is not constitutionally protected free speech.²¹ Of course, if Berkeley's views on issues were a bellwether, I suppose the USSR would have unilaterally dismantled when Berkeley declared itself a nuclear free zone. Nevertheless, we shouldn't take the right of our clients to enjoy constitutional protections completely for granted.

Among those protections is the right to due process of law, and it is in the Due Process Clause that the Supreme Court in recent years has grounded a developing limitation on punitive damage awards – which were largely unknown at the time the Constitution was adopted.

²¹ *Berkeley Becomes Latest U.S. Municipality to Oppose Corporate Constitutional "Rights"*, www.reclaimdemocracy.org/personhood/berkeley_resolution.html (June 16, 2004); *see also* Recommendation of City of Berkeley Peace and Justice Commission to Honorable Mayor and Members of the City Council, www.ci.berkeley.ca.us/citycouncil/2004citycouncil/packet/061504/2004-06-15%20Item%2027a.pdf (June 15, 2004).

A Constitution In (The) House

In the past two decades, the Supreme Court has issued half-a-dozen decisions slowly pulling back on the authority of the state and federal courts to award massive punitive damages awards in product liability and other cases where outsize awards have become more and more common but in unpredictable ways.²²

The most recent example took place under the Court's admiralty jurisdiction, in a case arising out of the Exxon Valdez disaster.²³ In an opinion by Justice Souter issued in June, the Court reduced the \$2.5 billion punitive damages award against Exxon to an amount equal to the compensatory damages at issue in the case — just over \$500 million. Although the Court was sitting as a common law court and was not applying constitutional principles, it is hard to see how its views on the unpredictability and limitations on punitive damages will not work their way into future opinions under the Due Process Clause.

The Court has another punitive damages case before it this Term. In a very real sense, the case involves not just the substantive issue of punitive damages but also the structural relationship between state and federal courts. The case is *Williams v. Philip Morris USA*,²⁴ and if that sounds familiar to you, it's because the case was at the Court two Terms ago.²⁵ When it last considered the case, the Court held explicitly that a jury may not punish a defendant through a punitive damages award for harm caused to individuals not before the Court. On remand, however, the Oregon Supreme Court simply reinstated the earlier punitive damages award on the ground that state procedural rules required its affirmance.²⁶

²² See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

²³ *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008).

²⁴ *Williams v. Philip Morris Inc.*, 176 P.3d 1255 (Or. 2008), *cert. granted*, 128 S.Ct. 2904 (2008).

²⁵ *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

²⁶ *Williams v. Philip Morris Inc.*, 176 P.3d 1255 (Or. 2008).

In a somewhat unusual move, the U.S. Supreme Court again granted certiorari in this case – one suspects because it was none too keen about what it perceived to be the flouting of its mandate by the state court. This Term, then, will not only see further development of the law of punitive damages, but also guidance from the Supreme Court about the scope of its mandates vis-à-vis state courts. This should be an interesting case to watch.



The Constitution of the United States is said by many to be “a living Constitution,” by which they may mean something more akin to a “growing Constitution” – one that adapts and changes in meaning to reflect modern mores and “the evolving standards of decency that mark the progress of a maturing society.”²⁷ Others, perhaps most notably Justice Scalia, have argued that this sort of “living Constitution” is bad for democracy because it puts too much power in the hands of judges. Justice Scalia has famously said that he’d prefer a dead Constitution to that notion of a living Constitution.²⁸

To my mind, it’s unfortunate that a serious debate over constitutional interpretation has discredited the notion of a living constitution by identifying it with one side of that debate, for in my judgment we should all be able to celebrate the continuing *vitality* of our Constitution. Whether it’s a growing and evolving document or one that remains more static in its application, it is clearly very much alive, and has the enduring ability to order our government and protect our liberties. On Constitution Day 2008, that’s something we can all celebrate.

²⁷ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

²⁸ See *Scalia Vigorously Defends a ‘Dead’ Constitution*, All Things Considered (April 28, 2008), *portions of interview at* www.npr.org/templates/story/story.php?storyId=90011526 (“If you somehow adopt a philosophy that the Constitution itself is not static, but rather, it morphs from age to age to say whatever it ought to say – which is probably whatever the people would want it to say – you’ve eliminated the whole purpose of a constitution. And that’s essentially what the ‘living constitution’ leaves you with. ... Go back to the good, old dead Constitution.”).