

De Constitutionis Natura: After Seventy Years

This essay is an attempt to revise an article I wrote for *Social Science*'s April 1948 issue, entitled "De Constitutionis Natura, a play on the Roman poet Lucretius' 'De Rerum Natura.'"

The article was as pretentious as the title, promising to explain America's fortunate history through the agency of its Constitution. My judgment grew out of an experience in the Philippine island of Samar in August 1945. I had an opportunity then to look into the city hall where the constitution of the puppet Philippine government installed by the conquering Japanese, hung on a prominent wall. It remained there despite the return with General MacArthur of the Philippines liberated government.

At the time I was a cryptographer in the Signal Corps with the U.S. Eighth Army on the island of Leyte. As a veteran of the invasion of that island in October 1944, I was given interesting assignments. Among them was a two-week visit to a Filipino unit on the neighboring island of Samar to ensure that it was not compromising the primitive cryptographic equipment supplied by the U.S. Army. It was an agreeable mission given the relatively few Japanese soldiers holed up in the hills surrounding the capital city of Calbayog. The presence of armed former guerrillas seemed to have bothered the citizens more than a potential Japanese raid. In this setting I had ample time to wander around the city before settling on the city hall.

There to my surprise was what seemed to be a replication of the U.S. Constitution. It has all the trappings of the American model, arguably influenced by President Jose Laurel's experience as a student at Yale in the 1920s. The same three articles that inform the U.S. Constitution were central to the document—the Executive, Legislature, and Judiciary. The order, however, was rearranged. The Executive was listed first as Article II, which realistically reflected the balance of power in the government. It stated that the President, with the

concurrence of two-thirds of all the members of the National Assembly, shall have the power to make war and make peace. The legislature was not only an inferior branch of government but was unicameral without the checks of a bicameral Congress. Nor was there any provision for the impeachment of the President in the 1943 Philippine Constitution.

The basic elements in the U.S. Constitution were the many checks on the powers of any one branch. These were absent from the Philippine Constitution. The importance of competing interests to keep the executive from gaining excessive power was expressed eloquently by James Madison in Federalist No. 10, and one of eighty-five essays written by Alexander Hamilton, Madison, and John Jay in 1788 and 1789 in several New York newspapers to persuade New York voters to ratify the proposed Constitution. These essays were published as the *Federalist Papers*. The separation of powers was a fundament shared by all the authors, particularly Hamilton in Federalist No. 66, in which he envisioned the House of Representatives limiting the power of the more conservative Senate. As Madison in Federalist No. 51 vividly observed, “if men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed. And in the next place oblige it to control itself.”

There were not the concerns of the Philippine Constitution of 1943. It was obvious that the Japanese wanted a President strong enough to dominate a potentially uncooperative legislature but still under the control of their military in wartime. The Philippine Constitution of 1943 was a mask for Japanese military control of the country. Similarly, as I had pointed out in 1948, the Soviet Constitution of 1936 was a travesty of a constitution, a cynical bow to liberal values without any intention of fulfilling its promises. It included a bicameral legislature as well

as guarantees of freedom of speech, of the press, and of assembly. It also included reference to the Communist Party whose dominance negated all the promised freedoms. The two chambers did not provide any check on each other or on the executive branch. The Communist Party made the protections of the Soviet constitution a farce, as the Japanese Army did with the Philippine constitution seven years later. A case certainly can be made for my assertions seventy years ago.

Yet, two generations later it was equally obvious to me that the essay was too simplistic in its confident contrast between the unenlightened world and the American experience. Among the missing pieces was the role of Jose Laurel as the puppet president of a country under Japanese occupation in World War II. He held the office from October 14, 1943—six days before the U.S. invasion of Leyte till August 17, 1945— less than a month before Japan's surrender. On the day of the Leyte invasion, Laurel's foreign minister signed a Philippine-Japanese Treaty of Alliance. This sequence of events suggests an intimate connection with Japan.

His selection as president in Tokyo seemed to have been prefigured by his close relationship with Japanese officials before the war. He had been awarded an honorary doctorate from the University of Tokyo and one of his sons studied at the Imperial Japanese Army Academy in Tokyo. Under Japanese pressure, the Philippine National Assembly selected Laurel to serve as President when the constitution was proclaimed. He subsequently attended the Greater East Asia Conference, an international summit in Tokyo on November 5-6, 1943, to celebrate liberation of the area from American colonialism. This collaboration culminated in Laurel's government declaring on September 23, 1944 the existence of a state of war between the Philippines and the United States. By that time, however, Laurel had recognized the full significance of Japan's brutal occupation. Japan's liberation of French, British, Dutch, and

American colonies was replaced by a Japanese equivalent. Japan lost an opportunity to give meaning to an East Asian community of nations aligned against the West.

Still, it is hardly surprising that General McArthur ordered his arrest for collaborating with the Japanese. In 1946, Laurel was charged with 132 counts of treason. It was surprising, however, that he was never brought to trial. President Manuel Roxas granted a general amnesty in 1948, removing any taint of treason. In fact, Laurel ran for president the following year. He lost that election but appeared to suffer no penalty from his role in World War II. He was elected to the Senate in 1951, but declined to run again for president in 1953. Instead, he campaigned for the charismatic Ramon Magsaysay, the pro-American, anti-Communist leader who subsequently appointed Laurel to head a successful trade mission to the United States. It was his last foray into public life. He did not seek re-election to the Senate in 1957, and died in 1959 with a sense that his membership in the Senate had fully restored his reputation as a hero of Filipino nationalism.

Given the course of his career, it was unlikely that his reputation required restoration. Laurel never considered himself an agent of the Japanese. Rather, it was the opposite. Japan, at least initially, with its promise of a Greater East Asia community of nations appeared to serve Philippine's interest in removing the nation from the yoke of American imperialism. Memory of what Filipino leaders considered America's betrayal at the end of the Spanish-American war loomed large as a key factor in his judgment of the United States. Laurel was a product of nationalist tradition that opposed Spanish suzerainty and was not prepared to accept an American substitute, no matter how benign its intentions. Arguably, his year at Yale involved slights that confirmed his distrust of Americans.

Laurel's father had been an official in the government of Emilio Aguinaldo, the president of the First Philippine Republic of 1898. It is no coincidence that Aguinaldo welcomed the Japanese invasion in 1941. Even more than Laurel, Aguinaldo had won the loyalty of his nation by his leadership, first against Spain and then the United States in the wake of the Spanish-American War. His surrender to the superior force of the American army in 1901 did not signify a loss of confidence on the part of the Filipino people or the end of his bitterness against the new colonial authorities. While he abided by the terms of his surrender, his nationalist sentiments were never extinguished.

Other leaders made their peace with the United States, particularly as that country took steps to granting independence—to be completed in 1944. Laurel did *so pro forma* until Japan expelled American forces in 1942. As noted, the new governments after 1945 found a place for Laurel, and even for Aguinaldo.

None of this was apparent to me on that August afternoon and it would not have affected my judgment if I had known the details of the Constitution. What struck me then was how meaningless this document was in influencing the lives of the citizens. I then advised my potential readers that democracy under a federal system would fail without the experience of an Anglo-Saxon-tradition-self-government that would protect the sanctity of the rights of the individual.

Today I question the generalizations I made in the afterglow of America's success in defeating Nazi Germany and Imperial Japan in 1945. The Philippine Republic after World War II did produce a viable constitution despite the obvious lack of historical experience. It had promulgated one in 1935, and currently lives under a constitution ratified in 1987. The 1935 Constitution was a product of American tutelage, the culmination of a long gestation that began

as early as 1902, when the U.S. Congress enacted the Philippine Organic Act that vested legislative power in a bicameral, included a bill of rights, and two Filipino commissioners to represent the Philippines in the U.S. House of Representatives. Fourteen years later, Congress explicitly claimed that the purpose of the United States had always been to end its sovereignty over the Philippines and to recognize its independence as soon as a stable government could be established. This was accomplished through the Tydings-McDuffie Act of 1934 that drafted mechanisms for the establishment of a constitution. World War II intervened to postpone the implementation of the 1935 Constitution until after the war.

There is no question that initially the Spanish-American War of 1898 and the subsequent acquisition of the Philippines were in accord with American aspirations, expressed by Alfred Thayer Mahan, of competing with European imperial powers for control of Asian territories and markets. Nevertheless, this conquest did not replicate European exploitation of this region. Counter pressures for disengagement with the Philippines based on America's tradition of self-government led to offering Filipinos a version of autonomy the United States had granted to its northwest territories in the early Republic. Still, it is worth noting that had Congress and the American public not been disillusioned with the putative economic benefits of the relationship support for anti-imperialist acts might not have taken place.

The Constitution of 1935 was based on the American model. Only the impact of war prevented it from coming into effect in 1944. With the end of World War II, the promise of independence was met. The contrast between the painful European termination of colonial occupation in the 1950s and 1960s was striking.

The subsequent record of constitutional democracy in the Philippines is mixed. In the 1970s, President Ferdinand Marcos declared martial law in response to a Communist insurgency,

and tried to impose a parliamentary system, with a ceremonial head of state as president but with executive power in the hands of the prime minister—Marcos himself, who was head of government and commander-in-chief of the Armed Forces. He was elected president in 1965 and re-elected in 1969, which should have been his last term. The new constitution allowed him to rule by decree until 1985 when his corrupt regime was forced out by popular pressure with American assistance. Marcos and his family fled into exile in 1986.

The nation recovered its liberties under the widow of assassinated opposition leader Benigno Aquino Jr. A new constitution in 1987 re-established a representative system, with power divided among three separate and independent branches of government. A Bill of Rights guaranteeing fundamental civil and political rights was included in the constitution. After long years of a perverted constitutional system, the Philippines was again on the path that the 1935 Constitution had begun.

The democratic path has never run smooth. Corruption at the highest levels of government stained the record, and rising Islamic belligerence in Mindanao against the Christian majority in the rest of the country were constant challenges. They were accompanied by an anti-American strain that periodically led to withdrawal of an American presence at naval bases. Ambivalence about the American relationship is currently in evidence under the presidency of the eccentric Rodrigo Duterte, former mayor of Davao and the first Mindanaoan to hold the office. He won international condemnation by sponsoring extra-judicial killings of drug users. Facing strong criticism from the United States, he threatened to withdraw the Philippines from the UN and to cultivate close ties with China and Russia. He has jeopardized ties with the United States in the face of the pro-American views of his countrymen. Despite his bluster, Duterte has not sacrificed the American relationship to establish an independent foreign policy.

The Philippines revealed both the promise and the fragility of a constitutional system. The nation survived the long dictatorship of Ferdinand Marcos and resumed its democratic path in 1986. However, corruption persisted, and the current president, Rodrigo Duterte, displays an authoritarian temperament that may be as subversive for the current 1987 Constitution as Marcos was of the 1935 Constitution. Freedom of the press and human rights in general—integral parts of the American conception of constitutional government—are at risk in the Philippines.

Is the United States immune to such abuses? Despite a successful history of 230 years of constitutional government, the United States encountered and surmounted severe challenges. Not least was the critical flaw in the Constitution that violated the basic premise of the Declaration of Independence, in which all men were created equal before the law. A bloody Civil War resolved some but not all of this incoherence. New legislation and Supreme Court decisions in the twentieth century have not yet erased the stain of racism.

American involvement in Puerto Rico and the Philippines at the end of the nineteenth century raised another constitutional issue: how to rationalize the acquisition of territories won in the Spanish-American War with the democratic tradition of admitting new states to the Union as equal with older states. While Puerto Rico is still a territory, its residents are American citizens. Its government has non-voting representation in the U.S. Congress. Had Puerto Ricans asked for independence they would have received it. Such was one way the nation dealt with the uncomfortable problem of colonialism.

The Filipino demagogues—Marcos and Duterte—bring to mind President Nixon's actions in the Watergate scandal that led to his resignation in 1974. It was his behavior in the cover-up of that break-in of the Democratic National Committee's headquarters in Washington's Watergate hotel that led to the President's impeachment. His successor's pardon saved him from

conviction. A generation later, it was the charges of collusion with Russia in the presidential election of 2016 that led to the appointment of a Special Counsel to investigate links between President Donald J. Trump's campaign and Russian efforts to interfere in American domestic affairs. The Nixon threat to America democracy stemmed from a clear abuse of executive power. If the charges against the Trump administration are confirmed, presidential offenses against the Constitution may provide a similar challenge to the future of the American system. The issue of abuse of executive power suggests that the Philippine experience, with threats to its Constitution, with threats to its Constitution that while more menacing to a still fragile constitutional system, may not elude the United States.

America's history shows that the nation can learn from its mistakes without abandoning its values. The same may be said of the Philippines. The Constitutions of both countries remain in place. Their essence rests on the assumption of human fallibility. The checks and balances in these documents may be the reason for the success of the American model. The First Amendment of the U.S. Constitution and the Bill of Rights was unnecessary in the judgment of Hamilton and Madison, two of the authors of the *Federalist Papers*. They disparaged "the nauseous project of amendments." Hamilton claimed that the Constitution already contained provisions that secured those rights. Madison doubted the effectiveness of paper barriers to tyranny, and saw no need for a federal government limited to enumerated powers. Both men believed that the freedoms sought by supporters of a Bill of Rights were embedded in the Constitution. In fact, enumerating a bill of rights could be dangerous; it could lead to the assumption that not all the freedoms would be protected.

Madison and Hamilton were overruled. The U.S. and Philippine Constitutions contained bills of rights. Yet these were not self-enforcing, as their histories recorded. What mattered

more to their survival were the checks and balances in the three branches of government that up to now have prevented one branch from controlling the government.