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ANOTHER NEW YORK STATE CONSTITUTIONAL CONVENTION

ROBERT MOSES †

I

FIRST a few words here about the labors and battles of our constitutional Founding Fathers, federal and state. Although the thirteen Colonies united in war to resist the King of Britain, they steadfastly continued their efforts to establish separate governments. Even before the Declaration of Independence, impetus to the drafting of separate constitutions was given by the Second Continental Congress when in May of 1776 it advised each of the Colonies to adopt such form of "government as should best conduce to the happiness and safety of the several colonies in particular and America in general."¹ As a result, New York adopted a constitution in 1777, ten years before the Federal Constitutional Convention of 1787 produced its masterpiece of fundamental federal law.

In New York the task of drafting a constitution was delegated to "the Convention of the Representatives of the State of New York,"² a body which, unlike future constitutional conventions, was engaged in the actual business of running the government of the state. Harried by the exigencies of war, this early "Convention" was forced to change its location five times and seldom had more than a third of its members in attendance. But through the tireless efforts of a small committee headed by that great statesman and jurist, John Jay, a draft of New York's first Constitution

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¹ Quoted in DOUGHERTY, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK 46 (2d ed. 1915).

² 1 LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 487 (1905).

was finally hammered out and was adopted, with minor alterations, by the New York Representatives at a meeting held at Kingston on April 20, 1777. The vote was 32 to 1 although the roster of representatives totaled 107.³

It is of interest to note that New York's first Constitution was never submitted to a vote of the people. But this document fashioned by dedicated craftsmen in the midst of a bloody war and without assurance that it would ever even see the light of day as the framework of the state's future government, did indeed become our first New York Constitution and, to some extent, served as a model for our first Federal Constitution. Much has been written and much more remains to be said by historians and students of government as to why and how our Federal Constitution came into being. I will venture only a few words on this intriguing subject.

II

The Declaration of Independence provided no framework of government but merely expressed the basic principles upon which a just government should rest. The Articles of Confederation of 1777, under which the union of the liberated Colonies struggled for more than twelve years, provided for "a firm league of friendship"⁴ wherein each state retained its sovereignty and independence with a few obscure and generally unenforceable powers delegated to the federal government.

Congress was little more than a meeting of ambassadors from thirteen sovereign states. In theory the laws of Congress were binding upon the states but in fact the states usually disregarded them. Abroad an alarming loss of prestige in our foreign relations developed, and at home there was jealousy and rivalry between the states amounting at times almost to anarchy. It was with a background of such chaotic conditions that the Federal Constitution was drafted.

In 1785 the Congress debated a few constructive alterations to the Articles of Confederation but took no action,

³ See DOUGHERTY, *op. cit. supra* note 1, at 47-49.

⁴ ARTICLES OF CONFEDERATION art. III.

leaving it to the states to proceed. It was then that several of the states, notably Virginia and New York, took the initiative to consider what should be done about the Union, which was rapidly falling apart at the seams. Five states sent commissioners to Annapolis in September, 1786, who agreed that the legislatures of the states should appoint representatives to meet at Philadelphia to develop a Federal Constitution. In February, 1787, Congress approved, and on May 25, 1787, delegates from twelve states convened at Philadelphia, elected George Washington President of the Convention and settled down to the critical work of establishing a federal government which would be able to maintain itself at home and abroad and, at the same time, continue the independence of the component states.

Historians agree that no political assembly in world history ever included a higher proportion of members of high character, intellectual ability, farsighted statesmanship and political sagacity. Who were the fifty-five men who attended this first Convention? And what had been their experience? Thirty-nine of them had already served in the Congress of the Confederation, eight had signed the Declaration of Independence, eight had helped to form their state constitutions, seven had been chief executives of their states, and twenty-one had fought in the Revolutionary War. Thirty-three of the delegates were lawyers, of whom ten had served as state judges.

The posts of honor to which these early delegates were later called confirm their capabilities and their accomplishments at Philadelphia. Two became Presidents of the United States, two became Chief Justices of the United States, and three Associate Justices of the Supreme Court. Three became cabinet members, four were appointed ministers to foreign countries, and six were elected governors of their states.

Ten men stand out as chiefly responsible for the form which the Federal Constitution finally took—Madison and Randolph of Virginia, the great Benjamin Franklin, Gouverneur Morris and James Wilson of Pennsylvania, Rufus King of Massachusetts, Rutledge of South Carolina, Ellsworth and Sherman of Connecticut and Charles Pinckney, a

twenty-nine year old lawyer from South Carolina. New York's brilliant Alexander Hamilton, who had helped Madison bring the Convention about, rendered his greatest service not at the Convention in Philadelphia, but later in persuading his own state, and probably some of the other reluctant states, to ratify the Constitution through his writings in *The Federalist*. During the Revolution, General Washington called Hamilton "the pen of our army." It has been said that after the Convention his facile pen and eloquence did more to overcome the bitter opposition to ratification than all the other papers and speeches combined. And later as Secretary of the Treasury, he vindicated his theories of a strong national government. In the words of Daniel Webster: "He touched the dead corpse of Public Credit, and it sprung upon its feet."⁵

III

The Founding Fathers of New York State recognized a need of periodic constitutional revision. They therefore provided that every twenty years a proposal for a Convention should be submitted at a general election for their decision. The last Convention was in 1938. In November of this year the people will vote on a proposal for another Convention so that, in the event of its adoption, delegates can be elected in 1958 for a Convention in 1959.

A program of public education is essential to insure understanding of the importance of the Convention proposal, remembering that of the last three proposals, that is in 1914, 1916 and 1936, two barely squeaked through and one was defeated because of lack of educational groundwork.

In 1914 there were 153,322 votes cast for a Constitutional Convention and 151,969 against, at an election when the vote for Governor was 1,313,355. Obviously most of the voters didn't bother with constitutional matters. In 1916 it was 506,503 for and 658,269 against, when 1,538,250 voted for Governor. In 1936 it was 1,413,604 affirmative and 1,190,275 negative when 5,690,093 voted for Governor. There is noth-

⁵ BARTLETT, FAMILIAR QUOTATIONS 444 (13th ed. 1955).

ing in this record to show lively general public interest when so small a majority of those who went to the polls actually took the trouble to record their opinion on the need of constitutional revision.

This warning of voter apathy led to the adoption of Chapter 814 of the Laws of 1956, which created the fifteen member temporary Commission to prepare data for the Convention. The Act provides that the Commission shall submit interim reports to the Governor and the Legislature not later than March 1, 1957, and from time to time thereafter until March 1, 1959, provided, however, that if the voters decide against the Convention the Commission shall terminate on February 1, 1958. The Act carried an appropriation of \$75,000 for the Commission's expenses. Here is a list of appointees:

By Governor Harriman:

- Abraham Beame of New York, Budget Director of New York City;
- Francis Bergan of Albany, Justice of the Supreme Court, Appellate Division, Third Department;
- Adolf A. Berle of New York, lawyer, former Assistant Secretary of State and Ambassador to Brazil;
- William J. O'Shea of New York, lawyer, Member of the City Board of Education, former President of the New York County Lawyers Association;
- Charles Poletti of New York, Member of the State Power Authority, former Lieutenant Governor and Governor.

By Senator Mahoney:

- Nelson Rockefeller of New York, former U.S. Under Secretary of Health, Education and Welfare;
- T. Norman Hurd of Ithaca, Member of the Board of Regents and former Director of the Division of the Budget;
- Reid S. Moule of Buffalo, lawyer, Chairman of the Council of the Buffalo State College for Teachers;
- Alfred L. Rose of New York City, attorney and former President of Mt. Sinai Hospital;
- Professor Charles Ray Wilson of Hamilton, head of the History Department of Colgate University.

By Speaker Heck:

Assemblyman Joseph F. Carlino of Long Beach, Majority Leader of the Assembly;

Charles H. Tuttle of New York, lawyer and Chairman of the Metropolitan Rapid Transit Commission and Member of the Board of Higher Education of New York City;

Donald Mead, Mayor of Syracuse and former Assemblyman;

Reuben A. Lazarus of New York, attorney and Consultant on Municipal Affairs of the Assembly;

Assemblyman Sidney H. Asch of the Bronx, Professor of Law at New York Law School.

Professor Wilson was appointed by Senator Mahoney upon the recommendation of the late Senator Francis J. Mahoney, then Minority Leader of the Senate. Assemblyman Asch was appointed by Speaker Heck upon the recommendation of Assemblyman Eugene Bannigan, Minority Leader of the Assembly. Governor Harriman concurred in these recommendations.

Governor Harriman, Senator Mahoney and Speaker Heck agreed to recommend to the Commission that Mr. Rockefeller be elected Chairman, and he was chosen at the first meeting of the Commission.

If the people vote affirmatively, then at the general election in 1958 every Senate district in the state elects three delegates; and, in addition, fifteen delegates-at-large are elected by all the voters. The delegates would convene at Albany on the first Tuesday of the following April. In case of a vacancy, caused by death, etc. of a district delegate, such vacancy is filled by vote of the remaining delegates from the district; a vacancy in the office of delegate-at-large is filled by vote of the remaining delegates-at-large.

Delegates receive the same compensation as members of the Assembly plus traveling expenses while the Convention is in session. The Convention has the usual power to appoint officers, employees and assistants, to fix their compensation and to provide for the printing of its documents and journal.⁶

⁶ N.Y. CONST. art. 19, § 2.

Our people are, at least upstate, innately conservative, suspicious of change and wedded to piecemeal rather than wholesale revision. Let me by way of evidence of this caution cite the story of a Genesee Valley delegate to the 1938 Convention. As one of the Long Island representatives, I happened to sit next to this delegate. He addressed only one man in our row in the Assembly Chamber during the first three months of the Convention. Finally he got around to nodding to some of us. He never spoke except to vote with the Majority Leader. At the very end of the session he said to me, "I suppose I'm a puzzle to you. Let me tell you why I'm here. First, I'm not sociable. Second, I aim to save most of my pay and, third, I think our constitution is all right the way it is."

This anecdote leads logically to the problem of the make-up of a convention. The best examples, of course, are those afforded by the Founding Fathers of our nation and state. In those days our leaders knew the importance of selecting the best minds, and not merely paying personal and political debts. They knew that there is only so much wisdom as there are wise men. They were more concerned with broad outlook than with local residence. In those days there was little thought of compensation and expenses. There was a sort of national selection of the presiding officer and of committee chairmen and membership.

Today here in New York much depends on the preliminary work of the Constitutional Convention Commission if there is to be a Constitutional Convention at all. The importance of a genuinely expert, non-partisan approach cannot be overstated. There is as yet no sign of a top-notch staff. It looks as if we will have too many ambitious professional researchers with radical theories to vindicate and academic axes to grind, in the face of the fact that our voters are at most looking for needed improvements in the basic law, not for a social revolution or the millennium.

One of the clichés of constitutional revision has to do with the bulk and size of the Constitution. We are told that we must make a drastic distinction between statutory and basic law. Unfortunately the experience of the past in attempting to compress and eliminate constitutional detail is

disappointing. Immense difficulties are in the way. I doubt whether even the most brilliant editors can realize so academic a concept. There is of course a possibility of skillful editing which, however, is a long way from actual reduction of the scope of our fundamental law. It would be silly to promise to reduce our state constitution to the scope and volume of the basic national law.

The first thing before the Constitutional Convention Commission is to select the topics which in turn will determine the number and names of committees, the membership and the information to be gathered. The Commission must separate as far as possible districting and reapportionment which involves politics and ideologies—acreage versus people—from non-political questions.

The recent Bittenwieser report⁷ on state-city financial relations, with its crazy assertions and foolish remedies, did nothing to encourage voters to approve another Constitutional Convention. Any notion that the Rockefeller Commission is committed to such a wild program will certainly result in the defeat of the Constitutional Convention referendum. Similarly ill-considered, unsupported personal and extraneous attacks on public authorities do not commend themselves to thinking citizens who can figure out better ways of spending three or four million dollars than on irresponsible brain trusters.

The revision of the Housing Article is another pitfall. It is one thing to debate the need and scope of further public and quasi-public housing and quite another to make this the battleground of complete, immediate and universal integration. The Rockefeller Commission must give assurance that the subject of civil rights will not be used to create issues and slogans for the next national and state campaigns.

The forest preserve is also a thorny subject. Shall it be forever wild or open at least to restricted public recreational use? There are fanatics in this state who regard this rather

⁷ The Report of the New York State-New York City Fiscal Relations Committee was submitted to Gov. Harriman and Mayor Wagner by Chairman Benjamin J. Bittenwieser. See N.Y. Times, December 3, 1956, p. 1, col. 1.

simple question as the only one of any consequence to be debated.

Further improvements in court organization and procedure and the simplification of the legal processes depend on the action of the Legislature on the work of the Tweed Commission.⁸ The conscientious labors of this respected group give pretty good evidence of the immense difficulties in the way of constitutional revision even when there is so much to correct that is palpably wrong. The worse the trouble, the more drastic the remedy, the greater the opposition from those whose tender toes are stepped on and those who, like the delegate from the Genesee Valley in 1938, would like things left as they are. I must say that even as a conservative I was amazed at the outraged attacks on the Tweed program by smug, pompous, meagre judges and lawyers who seem to have lost the capacity for indignation.

The relationship between New York City and New York State, very like that of other big cities in other states to the vast relatively unpopulated, or at least not crowded, hinterland, is not nearly as vexatious or urgent a problem as the relation of villages and small cities within a county to the county government. Here, too, the danger of the facile academic approach, of overemphasizing regionalism, of attempting to create some new over-all metropolitan invention, is one which Nelson Rockefeller and his colleagues will have to weigh carefully if they expect to induce the people to call a convention and if they anticipate that the Convention will produce anything acceptable and durable.

As to a timetable, the Commission should warn against piling up of work at the very end of the Convention. It should explore the possibility of an initial April, May, and June session; then adjournment during July, and a final August session. The Commission should aim from the beginning at piecemeal submissions of the new Constitution,

⁸ "The statute which created the Temporary Commission on the Courts [Tweed Commission] (Chapter 591, Laws of 1953) assigned to it broad fields of study relating to the efficiency and quality of the court system. Among these were the administration, structure, procedures and personnel of the courts; alleviation of calendar congestion and delay; revision and simplification of the practice statutes and so on." 1957 Report of the Temporary Commission on the Courts, MCKINNEY'S SESSION LAWS OF NEW YORK A-32 (1957).

not at giving the people an entire new Constitution or even at offering two or three comprehensive amendments. The people would not accept the recommendations of Senator Root's 1915 Convention because they were submitted in bulk, although most of the program was adopted piecemeal in later years. Most of the 1938 amendments were approved because they were submitted separately.

At the moment this seems to be the picture. The Empire State will progress with or without a Constitutional Convention in 1959. Its Constitution will, in any event, be kept reasonably up to date and abreast of the times by piecemeal revision. If the people decide on a Convention, my hope is that a tithe of the genius which guided the Founding Fathers of this nation and state will be assembled to produce something more than conventional debate.