MEMO FROM THE MAYOR

SUBJECT: Finally—What the Constitution Says…or Doesn't Say

At a Glance:

- "The secret of liberty lies in educating people, whereas the secret of tyranny is in keeping them ignorant." Maximilien Robespierre. Public statement (November 1792), quoted in Oeuvres de Maximilien Robespierre (1840), Volume 2, p. 253

- "The defense of one's self, justly called the primary law of nature, is not, nor can it be abrogated by any regulation of municipal law. This principle of defense is not confined merely to the person; it extends to the liberty and the property of a man … it extends to the person of every one, who is in danger…" —James Wilson (1791)

The Summer of 1961

When it comes to US Supreme Court decisions, our current summer comprises the most significant one since Roger Maris topped Babe Ruth's home run record by 1 (hitting 61) in 1961. What in the world does THAT have to do with the Supreme Court, you ask? You'll see.

In 1961, the Court decided *Mapp v. Ohio*, a true landmark decision. There, the Court ruled its previously made-up 1914 exclusionary rule, the so-called "Weeks Doctrine", created when it held in *Weeks v. United States* that the federal government could not use illegally-seized evidence to obtain criminal convictions in federal courts, though not applicable to states, now would be. Although the *Weeks*' exclusionary rule only applied to federal agents and federal courts, nothing in that decision prevented state supreme courts from following the SCOTUS lead. Accordingly, over the ensuing years, several state supreme courts adopted the Weeks Doctrine before 1961. Idaho's adopted it in 1927 for state, county, and municipal law enforcement agents in state prosecutions**.**

After the summer of 1961, then, the "constable" who erred in acquiring evidence no longer had to be a federal officer for court trial exclusion; but more importantly, state officers could no longer hand over tainted evidence on a "Silver Platter" to the FBI; one small stumble for law enforcement, one giant leap for jurisprudence.

The Biggest Decision of 2022 Is Not What You Think It Is

Mapp v. Ohio was huge; but it pales in comparison to this summer's *West Virginia v. EPA.* Ha! You thought I would talk about *Dobbs*, the case that overturned *Roe v. Wade* or, perhaps, *New York State Rifle & Pistol Association, Inc*., the decision that held New York state's "proper

cause" requirement for a concealed carry permit violated the Second Amendment. Heavens, no! Guns, aka "arms" as in "…the right of the people to keep and bear Arms [sic], shall not be infringed" is actually mentioned in our Constitution's Second Amendment, whereas the "right of privacy" or its "penumbra" or even "abortion" are mentioned nowhere in the Constitution or its Amendments.

No, indeed, the biggest blockbuster of SCOTUS' last term has to be *West Virginia v. EPA*. It laid the foundation for more push-back and blockage of Executive administrative overreach. As this writer highlighted in several memos starting last January, going back over one hundred years to the Wilson Administration, so-called Progressive presidents, including FDR and LBJ of the Twentieth Century and Barack Obama and Joe Biden of more recent vintage, did all they could to transfer law-making authority from Congress to administrative agencies.

Thank goodness that for the first time since FDR's first term (1933-36) we have an adult Supreme Court in the room pointing out such schemes often fail to square with the Constitution, especially its Separation of Powers, designed to keep our Republic from going the way of Greece or Rome.

In West *Virginia v. EPA*, the Environmental Protection Agency decided it could force electric utilities to switch from fossil fuels to wind and solar. On 30 June, SCOTUS not only said, "No," but emphasized with, "Knock it off!" SCOTUS appears in its major rulings this last term (in addressing, at least, constitutional issues) not to treat our Constitution as a "Living Document"—which it assuredly is not—otherwise there would be no need for Article V, the process to alter or amend—but, instead, to treat it as the Drafters intended.

Some constitutional scholars and commentators think the Court is finally ridding itself of its 1980s' hangover called the "Chevron Doctrine". In 1984, in the case of *Chevron v. National Resources Defense Council*, the Court ruled that federal agencies could decide the scope of their power when Congressional authorization was "ambiguous." What could possibly go wrong with THAT thinking? No fox watching the hens, there.

SCOTUS appears to be turning away from *Chevron*, strengthening what it calls its "Major Questions" Doctrine. Simply put, this doctrine holds that unelected and unaccountable-to-the-voters-bureaucrats can't make up rules (aka, "laws") on questions of major importance to Americans, absent "clear" Congressional authorization.

Wouldn't it be nice if Congress had to approve *all* of the Administrative Rules the bureaucracy punches out? That day might come, five to seven years hence; but only if we can keep the Republic. "Vive la republique!" Ben Franklin would have said in Paris. Long live the Republic, indeed!