

1987 ANNUAL MEETING
SEPTEMBER 29, 1987

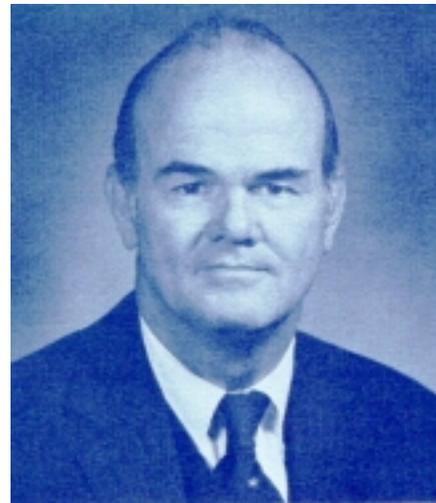
**SOME OBSERVATIONS
ON GOVERNMENT
BY THE PEOPLE**

RICHARD C. VAN DUSEN
CHAIRMAN
DICKINSON, WRIGHT, MOON,
VAN DUSEN & FREEMAN

625 SHELBY STREET, DETROIT 48226-4154
909 MICHIGAN NATIONAL TOWER, LANSING 48933-1738

The Citizens Research Council of Michigan is a private, nonprofit corporation supported primarily by voluntary contributions from Michigan's business and industrial community. It plays a unique role in our state by providing objective information based on factual research on state and local taxes and spending, governmental organization and operations and public policy issues. Representative government that is responsible and accountable to the people can function effectively only if both the public and their elected officials are well informed on public issues. This has been the job of the Citizens Research Council for 71 years and it has earned a reputation for objectivity and developed a high degree of credibility with both public officials and citizens.

The aim is simple. It is to promote the choice of sound policies in the field of public affairs; their effective and economical administration; and responsive and responsible governmental operations at all levels. It is only to the extent that these goals are sought that we can have reasonable assurance of a healthy and progressive social, economic and financial climate for us all. To know what we are doing, and to be as sure as possible that we are doing the right thing - this is the ultimate aim of the continuing, year-round study, recommendation and reporting of the Citizens Research Council of Michigan.



Richard C. Van Dusen is a senior partner and Chairman of Dickinson, Wright, Moon, Van Dusen & Freeman, the Detroit law firm with which he has been associated since his graduation from the Harvard Law School in 1949.

Interspersed with his professional career have been several periods of government service, including the Michigan House of Representatives, 1954-1956, Delegate to the Michigan Constitutional Convention, 1961-62, Legal Advisor to Governor George Romney, 1963, and Under Secretary of the U.S. Department of Housing and Urban Development, 1969-1972.

Mr. Van Dusen is a director of a number of corporations, including FNMA, Pennwalt and Primark (the parent of Michigan Consolidated Gas Company). He is a director and past Chairman of the Automobile Club of Michigan, and is the current Chairman of the Greater Detroit Chamber of Commerce. He is a Trustee of the Kresge Foundation and a member of the Board of Governors of Wayne State University.

SOME OBSERVATIONS ON GOVERNMENT BY THE PEOPLE

I regard the opportunity to speak to you today as an honor.

For over 30 years I have admired and respected the work of the Citizens Research Council. Some of you have been active in its work. Most of you have given it financial support. All of us see regularly the work product of Bob Queller and his able staff, which has helped us to understand complex public issues and to take informed positions.

To all of that I'd like to add another dimension. In my several incarnations in state government, I've had first hand opportunity to experience the effectiveness of the Citizens Research Council in providing public officials objective, credible information on which to base their decisions.

My first real exposure to the work of the Council came in the mid-1950's when I served in the Michigan House of Representatives. Red Miller was then the Director of the CRC. Red had a wonderfully energetic way of making sure that a young legislator was well informed on issues in which the Research Council was interested. When it was important enough, he came and delivered the message in person.

Later, when I served as a delegate to Michigan's Constitutional Convention in 1961 and 1962, the Council under the leadership of Bob Pickup provided a wealth of information and guidance. Provisions of the Constitution which authorize county charters, such as that adopted in Wayne County, owe much to the Council's advice, as do provisions which have required adequate funding for public pension plans, and many others.

In subsequent positions as Legal Advisor to the Governor and as a member of the Board of Governors of Wayne State University I have found the Council's published work uniformly objective, factual, credible and helpful. I did not plan this as a testimonial. But I thought that as supporters of the work of the Citizens Research Council you might find these comments from the perspective of a sometime public official useful validation of your investments.

1987 - A Year Of Anniversaries

This year - 1987 - marks a number of anniversaries of importance to those interested in government. It is, of course, the 200th anniversary of the Constitution of the United States, the drafting of which was completed in Philadelphia 200 years ago this month. It is also the 200th anniversary of the Northwest Ordinance, adopted by the Congress, meeting under the Articles of Confederation, in July of 1787. The Northwest Ordinance was the organic law under which the territory from which Michigan, Ohio, Indiana, Illinois and Wisconsin became states was governed until statehood. This year marks the 150th anniversary of Michigan's admission as a state. And 25 years ago this year the Constitutional Convention which drafted Michigan's present constitution completed its work.

This afternoon I'd like to share with you, first, some observations on the drafting of the Constitutions of the United States and of Michigan; second, some observations on the operation of "government by the people" under their provisions; and finally, a thought about the contemporary importance of a provision of the Northwest Ordinance of 1787.

The Drafting Of The U.S. Constitution

For the next few months, I'm afraid that all public speakers will be required to give the obligatory "Biden disclaimer." Thus, I should give appropriate credit to President Lincoln for the phrase "government by the people," which he used in the Gettysburg Address. There have been suggestions that he, in creating the phrase, borrowed somewhat from earlier remarks by Daniel Webster. More seriously, for a number of my historical references I'd like to thank Catherine Drinker Bowen, whose book, *Miracle at Philadelphia*, makes the Constitutional Convention of 1787 come alive.

Earlier this month, I found myself with a couple of free hours before a business meeting in Philadelphia. I used them to visit Independence Hall, and the room in which, from May until September of 1787, 55 delegates from 12 of the 13 original states proposed, debated, and eventually wrote and signed the Constitution of the United States of America. The room, in what was then the Pennsylvania State House, is simple but quite elegant. The detailed woodwork is attractive, windows on two sides make the room pleas-

antly light, and the high ceiling must have made the hot summer days in 1787 more bearable.

Note that only 12 states sent delegates. Rhode Island didn't see any need to amend the Articles of Confederation, and boycotted the convention.

The attendance of the 55 delegates who did was uneven. Some delegates came late. Others were called away during the convention by business or family matters. Others left in protest of the convention's departure from what they saw as its limited charter - to amend the Articles of Confederation, not to establish an entire new government structure. At the end, only 39 delegates signed the document.

The delegates were a distinguished group. There were a number of lawyers, of course; 33 of the 55, to be exact. But there were also merchants, planters and financiers. It is fair to say that it was more a convention of leading citizens than of politicians.

General Washington presided, sitting on a slightly elevated platform facing the other delegates. Incidentally, the chair which Washington occupied, together with the silver inkstand used in signing the document, are the only original pieces presently in Independence Hall. It was interesting to picture the "father of our country" sitting in *that very chair*.

Another fascinating mental image is of Benjamin Franklin. Franklin, at 81 the oldest delegate, suffered from gout, and arrived at the hall each day riding in a sedan chair which he had acquired in France, carried by four prisoners from the local jail.

Bankers will remember that Alexander Hamilton was a delegate. His attendance was intermittent, but his participation had impact. He was the only New York delegate to sign the constitution, and he worked tirelessly for its ratification.

For our contemporary knowledge of the convention and its proceedings we are deeply indebted to Virginia's James Madison, a graduate of Princeton, who had been one of the leading promoters of the holding of a constitutional convention. In addition to his active participation in the debate and development of the constitution, Madison wrote an extensive daily record of the proceedings.

That record is especially important because the daily meetings of the delegates were held in secret, and the delegates were bound by agreement among themselves not to reveal what was taking place. The

architects of “government by the people” didn’t want the people looking over their shoulders while they worked. Their mutual agreement to keep the proceedings secret was honored. Thus, until after it finally adjourned, contemporaneous press reports of the work of the convention were entirely speculative.

In these days of “open meetings” and “government in the sunshine” it is interesting to speculate whether the United States Constitution would ever have been written, much less adopted, if the convention had been open to the public and the press. Historians suggest that the fact that the proceedings were secret enabled delegates to advance proposals from which they could retreat, and to change their minds without embarrassment. This made possible the compromises which were essential to eventual agreement.

The Michigan Constitutional Convention

By contrast, the meetings of the Michigan Constitutional Convention of 1961-62 were open to the press and to the public. Even Committee meetings were open. But, given the fact that the Michigan Constitution required ratification by popular vote of a vastly expanded electorate, the exposure of its proceedings to the public may have been a necessary element of the educational communication which led to ratification.

The two conventions, 175 years apart, did have one thing in common, and that was the generally high quality of the delegates. I don’t mean to equate the draftsmen of the Michigan constitution with Washington, Franklin or Madison. But we did have an unusually well qualified group, including such business leaders as Dan Karn, who had then recently retired as President of Consumers Power Company and George Romney, who was still serving as Chairman of American Motors; educators, including John Hannah, President of Michigan State University, Charles Anspach, President-emeritus of Central Michigan University, and James Pollock, a distinguished professor of political science at the University of Michigan. And we had Coleman Young, whose career as a political leader lay largely before him.

I think that today most of us tend simply to accept the structure of our national and state governments. We don’t give much thought to the fact that those structures were conceived and debated and put in place by the efforts of citizens devoting a part of their time to public service.

Amendments To Our Constitutions

The durability and effectiveness of our constitutions, which establish the systems which enable “government by the people” to work, has been impressive. The Constitution of the United States, in particular, is distinguished by the infrequency with which it has been amended.

The first 10 amendments, the Bill of Rights, came along immediately following ratification. It is interesting that most of the delegates had thought a “bill of rights,” assuring individual rights and freedom from government intrusion, to be unnecessary. They were concentrating on creating a government to which they would give certain defined powers which would enable it to be effective. In their view it was by definition a limited government, and a list of “no-no’s” - things the government couldn’t do - would be redundant.

(I don’t disagree on many things with Judge Bork, who I think should be confirmed as a Justice of the Supreme Court. But as I understand it, he has been critical of judicial opinions upholding a citizen’s right of privacy, because he doesn’t find an articulated right of privacy in the Constitution. My own view is that the draftsmen regarded the citizens’ rights to privacy as basic, and unless the Constitution specifically permitted government to intrude on that privacy, the government could not do so.)¹

But back to the first 10 amendments. When the Constitution was presented to the states for approval, the opponents of ratification pointed to the absence of a Bill of Rights as a deficiency. The proponents, notably John Hancock (with some prodding and guidance from Samuel Adams), argued that the deficiency could be corrected by amendment, and that proved persuasive in the important Massachusetts ratifying convention. The Massachusetts convention narrowly approved the constitution, and called on Congress to

¹ Mrs. Bowen reports that in the course of the ratification debate, Noah Webster, the lexicographer, wrote, with exquisite sarcasm, that a truly comprehensive bill of rights should contain a clause “that everybody shall, in good weather, hunt on his own land, and catch fish in rivers that are public property ... and that Congress shall never restrain any inhabitant of America from eating and drinking, at seasonable times, or prevent his lying on his left side, in a long winter’s night, or even on his back, when he is fatigued by lying on his right.” However, see *Griswold v Connecticut* 381 U.S. 499 (1965) holding unconstitutional a 1958 Connecticut statute prohibiting the use of contraceptive devices.

propose a Bill of Rights. With Massachusetts in the fold, Virginia and New York followed. Shortly after ratification the Bill of Rights was indeed proposed by the Congress and promptly approved by the states.

The 13th, 14th and 15th Amendments, adopted between 1865 and 1870, prohibited slavery, required the states to grant to every citizen due process and equal protection of law, and extended the vote to citizens without regard to race, color or previous condition of servitude. However, with the exception of those "civil war amendments," most of the 16 amendments which followed the Bill of Rights have been rather mechanical.

For example, it was concluded quite early that it didn't make sense to have the Presidential candidate who came in second serve as vice president. We are indebted to the 12th amendment for the fact that President Nixon didn't have Hubert Humphrey as Vice President in his first term, and George McGovern in his second. Two other amendments dealt with presidential terms, one providing that they start on January 20, and the other providing that one person could only have two of them. One amendment provided for direct election of Senators rather than selection by state legislatures. Several amendments extended suffrage: the 15th to former slaves, the 19th to women, and the 26th, in 1971, to 18-year-olds.

In a recent column, Russell Baker argued quite persuasively that with few exceptions the 20th century amendments have not added much. Certainly the 16th amendment, which authorized the income tax, and the 18th, which ushered in prohibition, do not generate great enthusiasm.

Counting both the 18th Amendment, and the 21st which repealed it, there have been 26 amendments to the Constitution of the United States in the 200 years since it was written. The Michigan Constitution is only 25 years old, and it has already been amended 14 times. However, it is a more detailed document, including many provisions which, like legislation, require periodic updating. And, of course, the amendment process is much easier. As a result, most of the amendments are mechanical, and many would be regarded by most people (though not their special interest proponents) as inconsequential. For example, a 1978 amendment permits collective bargaining by state police. Only one amendment, the 1978 provision which limits certain government borrowing and tax increases without a vote of the people,

has had major impact.

It is interesting that in 1972 the 26th amendment to the U.S. Constitution gave 18-year-olds the vote, and in 1978 an amendment to the Michigan Constitution raised the drinking age to 21. Russell Baker points out that 18-year-olds are much younger today than they were in 1787, when men in their 30's helped draft the Constitution. "Nowadays" he says "you find people in their 30's still at school and dependent on parental remittances."

I think we should be cautious about amending our organic law, even when the objective is appealing. In my view, President Reagan's call for a constitutional amendment requiring a balanced budget misses the mark. We have such a requirement in the Michigan Constitution, carefully drafted with the help of the Citizens Research Council, but it didn't prevent the Governor and the legislature in the last years of the Milliken administration from engaging in fiscal manipulation which created a very large accumulated deficit.

I will acknowledge that my aversion to amendments stems in part from the fact that there have been two or three attempts, all unsuccessful, to amend the one short section of the Michigan Constitution which I wrote in my own hand. Article IX Section 7 may not be lyric prose. But the mandate that "no income tax graduated as to rate or base shall be imposed by the state or any of its subdivisions" has provided useful discipline. Legislators who vote for a tax increase know that they will pay it.

An Appraisal Of Our Constitutions

I'd like to look for a moment at how the basic structures created by these constitutional draftsmen are holding up. My personal appraisal is: "Pretty well." Most necessary maintenance or remodeling can probably be accomplished without further constitutional change.

The genius of our constitutional structure, of course, lies in the division of governmental powers into three co-equal branches. Under the Articles of Confederation there was no national executive, and no national judiciary - the entire national government was the Congress. The framers knew an executive was needed, but they worried about concentration of power in the government. So the delegates in 1787 developed the "checks and balances" of an executive, a congress and an independent judiciary which preserve real power in the hands of the people.

The Michigan Con-Con delegates had a much easier task—they had only to fine-tune an existing three-branch system. I think their best work was done with respect to the executive branch, where the Governor was given a 4-year term and the assurance of a Lt. Governor of the same party, the number of separately elected officials was reduced, and hundreds of independent boards and commissions were consolidated into not more than 20 departments.

Theoretically, the three branches of government are co-equal. And generally it has worked out that way. But there has been some ebb and flow of power between the executive, the legislative and the judicial branches.

The Executive Branch

Certainly we have avoided the concentration of dictatorial authority in the executive. The delegates in 1787 didn't want the executive to evolve into a "King," and the structure they created has avoided that. From time to time we've seen a strong executive dominate the three-branch system, but that tends to be transitory. For example, I watched the concept of "executive privilege" undergo enormous change in the short span of the truncated Nixon Administration. In the early Nixon years the White House staff was quite high handed in its relations with the Congress, and got away with it. In the early Nixon years the Courts were very reluctant to interfere in any way with Presidential action. But the executive pressed its luck too far, and the result was a significant (though perhaps temporary) erosion of "executive privileges" All of a sudden Congressional committees found that they could order the White House staff around, and get away with it; and the Courts became much less deferential to the President's assertions of unfettered discretion.

The Legislative Branch

One interesting aspect of the three-branch structure in recent years, has been the decline of the legislative branch as a fully effective member of the trinity. Both in Washington and in Lansing, the legislature purports to work "full time." In both capitols the legislative branch huffs and puffs a lot, but is only occasionally effective in coming to grips with real problems. The chronic inability of the Congress to deal

with the deficit is perhaps the most spectacular example. I should note, however, that the willingness of the Michigan legislature in 1983 to step up to our fiscal problems was a striking exception.

Another example is the inability of either the Congress or the Michigan legislature to deal with the product liability problem. Here is an issue which demands legislative attention. Its resolution nationally would make American industry more competitive, and its resolution in Michigan would greatly improve the business climate and the prospect for creating jobs. But the Congress has virtually given up on it, and the Michigan legislature has thus far been unable to act.

My own view is that one key reason for the ineffectiveness of the legislative branches of today's governments is the overblown concept of the "full time" legislature and the enormous proliferation of congressional and legislative staff. When I served in the Michigan House of Representatives over 30 years ago it was a part time job and we had almost no staff. We did our own analysis of bills, we listened directly to constituents, we answered our own mail and did our own thinking. Today, many of those functions are delegated to staff, who are numerous and ubiquitous.

The direct dollar cost is substantial. Staff costs amount to over \$1 million for each Congressman, and over \$3 million for each Senator. But the real cost is not the dollars expended on staff. It's the insulation of the representatives from the people they represent. And it's the inability of this bloated legislative machinery to take effective action.

Bob Griffin, when he was a Senator, once offered an amendment to a farm bill to the effect that at no time shall the number of employees of the Department of Agriculture exceed the number of farmers in the United States. I think our legislative branches could profit from some introspective thinking along those lines.

And while I would not support the draconian provisions of the "part time legislature" proposal advanced in Michigan a few years ago by Dick Chrysler, I think that a Congress or a legislature which spent less time in the capitol and more time in the real world inhabited by its constituents might do a better job.

The Judicial Branch

Another interesting development in the relative power and performance of the three branches has been the role of the judiciary. In recent years we've seen considerable invasion of both executive and legislative "turf" by judges of our federal and state courts. We've seen judges directing prison systems, school systems, even sewage treatment systems. We've seen courts telling the legislature in effect "you did that wrong -you should have done it this way."²

Part of this is a natural human tendency on the part of judges to want to find a judicial remedy for the problems of the parties before them. But part of it often results from the failure of the executive and legislative branches to do their jobs. Because judges can be quickly decisive, and aren't encumbered by committees and staff, they have stepped in to act.

I'm a believer in judicial restraint, and I think some of our judges have been too willing to assume responsibilities better left to other branches of government. But it's not hard to understand why some judges become impatient with the inaction of the other branches of government, and succumb to the urge to act.

It goes without saying that in Michigan, where our judiciary is largely elected, the thoughtful voter should think about this activist tendency, and give as much attention to candidates for judicial office as to those for executive or legislative positions. The business climate is affected at least as much by judicial decisions as it is by the actions of our Governor or of the legislature.

The Northwest Ordinance And Education

I indicated earlier that I would return to the Northwest Ordinance of 1787. One of its provisions has special relevance for citizens of Michigan and particularly Southeastern Michigan - in 1987. It is a simple phrase, but its policy guidance, and the implementation of that policy has been critical to Michigan's growth and success.

In 1787, when there were only a few thousand inhabitants in the entire northwest territory, the Congress stated that within that territory "schools and the means of education shall forever be encouraged." That statement is repeated, in precisely those words, in the present Michigan constitution. For years, the citizens of Michigan have heeded that admonition. Generations of immigrants have come to Michigan seeking work, and have seen their children go on to better jobs and better lives because of our system of public education.

Today, in Detroit, there is a very real question whether we're fulfilling adequately the requirement of our organic law that "schools and the means of education shall forever be encouraged." The Detroit Public School system is in real trouble, and needs help. I believe business is beginning to recognize that it has a major stake in the Detroit schools, and that unless steps are taken to improve them, we will face serious problems in filling jobs which require increasing skills particularly in reading and mathematics.

The Business-Education Alliance, a Greater Detroit Chamber of Commerce affiliate, is working on the problem, in close cooperation with Superintendent Arthur Jefferson. So is New Detroit. The Metropolitan Affairs Corporation has innovative ideas. The Detroit Strategic Planning Project has a Task Force on Education. I firmly believe that business must play a role in solving the problems of the Detroit Public Schools, and that the coordination of these private efforts is critical to the successful involvement of business.

I've emphasized the needs of our schools at the conclusion of this talk about "government by the people" for two reasons. First, it's an area in which your help and involvement is needed. And second, unless "schools and the means of education" are appropriately encouraged and supported, the future prospects of "government by the people" are in doubt.

As we bring to a close our celebration of the bicentennial of the Constitution, we can reflect with gratitude upon the work of its remarkable authors. But we must remember that it will be the continuing involvement of concerned citizens, and the continuing work of organizations like the Citizens Research Council, which will determine how long this experiment in "government by the people" will endure.

² See, for example, *Shavers v Attorney General* 402 Mich 554 (1978) in which the Michigan Supreme Court, raising issues which had not been argued by the litigants, gave the legislature eighteen months in which to re-write the "No-fault" insurance law to specifications prescribed by the Court. Mr. Justice Fitzgerald, dissenting, wrote: "to day's action by the majority ... dictates to the legislature in a manner neither seemly nor called for" 402 Mich at 670.