

# BOOK REVIEW

## SAM ERVIN: THE BOOK BY AND ABOUT HIM

PRESERVING THE CONSTITUTION: THE AUTOBIOGRAPHY OF SENATOR SAM J. ERVIN, JR. By Sam J. Ervin, Jr. The Michie Co., Charlottesville, Va., 1984. Pp. xiv, 436. \$19.95.

*Reviewed by George B. Autry\**

*United States Senator Sam J. Ervin, Jr., was a member of the North Carolina Bar for sixty-six years. He served in both houses of Congress and as a North Carolina Supreme Court, Superior Court, and county court judge. Despite national prominence, Ervin was, as he said, just a country lawyer.*

Sam Ervin's last book is difficult to categorize. There is, of course, biographical material—some of it new even to Ervin's closest friends<sup>1</sup>—but most of it is found in the first quarter of the book and in a chapter toward the end. More than an autobiography, Ervin's book is part legal history, part primer on legal writing, particularly judicial prose, and always a polemic. Indeed, it is not so much an autobiography as a series of exhortations urging all Americans, especially lawyers, and most especially judges, to "become born-again supporters of the most precious instrument of government the world has ever known."<sup>2</sup> It is Ervin's own epitaph, his justification, and it is a collection of much of the good and some of the bad that has been said about him by scholars, journalists, and peers. It is, in other words, a great kitchen sink of a book—one that rambles about for over 400 pages with Ervin turning over legal, political, philosophical, and constitutional rocks, dusting them off, examining their

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1. See, e.g., S. ERVIN, PRESERVING THE CONSTITUTION: THE AUTOBIOGRAPHY OF SENATOR SAM J. ERVIN, JR. 21-27 (1984) (recounting Ervin's service in World War I) [hereinafter cited as PRESERVING THE CONSTITUTION]. This was the first time Ervin revealed the circumstances surrounding his resignation as an officer and the events leading to his heroism as a private, for which he received the Silver Star, Distinguished Service Cross, and the French Fourragere. *Id.*

2. *Id.* at 123.

value, revealing their wisdom, and always returning to the point—preserving the Constitution.

The common thread to the book is a devotion to American constitutional government, and there is an especially timely emphasis on the separation of church and state. Ervin first came to public notice for a speech he delivered on the floor of the North Carolina House of Representatives.<sup>3</sup> The speech concerned religious liberty, and Ervin was the first representative to speak against a bill aimed at prohibiting the teaching of evolution in North Carolina public schools and colleges.<sup>4</sup> In the debate he used characteristic wit to describe the “one happy result” if the bill were to pass: “The monkeys in the jungle would undoubtedly be delighted to know that the North Carolina Legislature has absolved them from all responsibility for the conduct of the human race in general and that of the North Carolina Legislature in particular.”<sup>5</sup> And he used characteristic wisdom: “The passage of this resolution would be an insult to the Bible. . . . [T]he Christian religion’s endurance [does not depend] upon the passage of some weak-kneed resolution of the General Assembly of North Carolina.”<sup>6</sup> His speech helped ensure that the Scopes “monkey trial” carnival starring William Jennings Bryan and Clarence Darrow would later take place in Tennessee and not in North Carolina.<sup>7</sup>

Twenty years after that trial, John Scopes wrote that the fight for religious freedom is never permanently won. Rather, he said, “Freedom is a cause that must be defended over and over, day by day, and by many people.”<sup>8</sup> Few people have the opportunity to defend freedom for more than one generation; and forty-one years after defending religious freedom in one legislature, Ervin found himself embroiled in a similar fight in another legislature. This time the issue was prayer in public schools, and his forum was the United States Senate.

Politicians and preachers had whipped the public into a frenzy over the Supreme Court’s decisions striking down state-approved prayers in public schools.<sup>9</sup> Senator Everett Dirksen, the minority leader, intro-

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3. P. CLANCY, *JUST A COUNTRY LAWYER: A BIOGRAPHY OF SENATOR SAM ERVIN* 93-94 (1974).

4. *PRESERVING THE CONSTITUTION*, *supra* note 1, at 245.

5. *Id.* at 40.

6. P. CLANCY, *supra* note 3, at 94.

7. *See id.* at 94-95.

8. J. SCOPES & J. PRESLEY, *CENTER OF THE STORM: MEMOIRS OF JOHN T. SCOPES* 272 (1967).

9. P. CLANCY, *supra* note 3, at 212-13. The storm was over *Engle v. Vitale*, 370 U.S. 421 (1962) (daily in-class recital of prayer composed by school board violated first amendment despite neutrality of content and voluntary participation), and *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (decided with *Murray v. Curlett*) (opening school daily with Bible readings and recital of Lord’s Prayer held unconstitutional).

duced a constitutional amendment<sup>10</sup> with the avowed purpose of permitting voluntary prayer in public schools and public buildings.<sup>11</sup> Nearly half of the Senate's members were cosponsors, and the polls indicated overwhelming public support.<sup>12</sup> Ervin had been uncharacteristically quiet on the subject, until the floor debate began. He then broke his silence with an extraordinary, protracted and expansive speech, delivered while standing behind a stack of law books arranged on his desk. His argument was simple:

Let us preserve for all Americans of all generations the right to bow their knees [sic] and lift their voices to their own God in their own way. We can do this by standing by the first amendment as it has been written and interpreted. I close with a prayer that the Senate will do exactly this and no more.<sup>13</sup>

He could accept no mandatory prayer to a state-recognized God—he could tolerate no tampering with the first amendment.<sup>14</sup>

The speech was both a testament to the power and value of religion and an indictment of government's historical urge to involve itself with the practice of religion. Ervin's knowledge of the Bible was legendary, but that day his eloquence came not only from Ecclesiastes and St. Luke. It was Ervin himself who affirmed "with complete conviction that the universe and man are not the haphazard products of blind atoms wandering aimlessly about in chaos, but, on the contrary, are the creations of God, the Maker of the universe and man."<sup>15</sup> With quiet reverence he spoke of religion as a source of inspiration, solace, and hope.<sup>16</sup> In contrast, he spoke of the Constitution—which to him was evangelical, immediate, and redemptive—with the ferocity of an Old Testament prophet, reminding the Senate that to discard the Constitution's precepts is to abandon our national soul.<sup>17</sup>

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10. S.J. Res. 148, 89th Cong., 2d Sess. (1966). The bill was introduced by Senator Dirksen on March 22, 1966, and was sponsored by 16 other senators when introduced. 112 CONG. REC. 6477 (1966).

11. PRESERVING THE CONSTITUTION, *supra* note 1, at 239-40.

12. Ervin indicates that the number of cosponsors had increased to 48 by the time the Senate took up the bill, and refers to Gallup and Harris polls revealing that 80% of the public supported the bill. PRESERVING THE CONSTITUTION, *supra* note 1, at 240.

13. 112 CONG. REC. 23,143-44 (1966) (statement of Sen. Ervin). Always tolerant of religious dissidents, Ervin said that lawyers who wander from the Constitution as written are guilty of "apostasy." PRESERVING THE CONSTITUTION, *supra* note 1, at 119.

14. See PRESERVING THE CONSTITUTION, *supra* note 1, at 243 ("The Dirksen Amendment would confer upon public school boards a power the First Amendment now denies Congress and the States, that is, the power to establish religion.").

15. 112 CONG. REC. 23,143 (1966) (statement of Sen. Ervin).

16. *Id.*

17. *Id.* at 23,127-43.

There were a number of Senators listening that day, some trying to find a politically safe rationale to vote against the amendment, others trying to decide what was right and looking to Ervin, the constitutional authority,<sup>18</sup> for guidance. The speech had rare quality for the modern Senate, where great issues usually are decided in committee and cloak-room, rather than in floor debate. The speech made the difference. The Dirksen Amendment was defeated, and the first amendment survived, undiluted.<sup>19</sup>

Ervin said the Bible gave his ancestors the fortitude "to fear God and nothing else." As a result, he did not fear his constituents, whom he respected, or Presidents and Supreme Court Justices, toward whom he thought it his duty to be eternally vigilant.<sup>20</sup> It is not surprising that sixty years after facing up to anti-evolution madness, and twenty years after defeating the Dirksen Amendment, Ervin was back at the old stand, fighting still another generation's struggle over religious freedom. This is from his letter to President Reagan in late 1984:

Despite my admiration for you, I am constrained by my duty to our country to assert that what you say, do, and advocate in respect to religion shows that you do not understand the religious clauses of the First Amendment and how obedience to them is essential to the preservation of the religious freedom they are designed to secure to all Americans of all faiths.

You urge the adoption of a constitutional amendment to authorize prayer in the public schools. The adoption of such an amendment would drastically alter the First Amendment, which commands the government to be strictly neutral in respect to religion and leaves the task of teaching religion to children to the homes and churches of our land.

The government must keep its hands off religion if our people are to enjoy religious freedom—our most precious freedom.<sup>21</sup>

When he died, Ervin had not won his most recent struggle for the President's and the public's mind. But he left us the spirit to go on fighting, both by his example and with his history and analysis of the first amendment.<sup>22</sup>

*Preserving the Constitution* illustrates that religious freedom was only one part of a larger theme in Sam Ervin's life: a single-minded de-

18. Clancy reports that even Richard Nixon referred to Ervin as "a great constitutional lawyer." P. CLANCY, *supra* note 3, at 2.

19. See *Amen*, *The Washington Post*, Sept. 23, 1966, at A24, col. 1.

20. And consistently admonitory as well. For example, two chapters in his autobiography are entitled "Judicial Verbicide" and "Illustrative Judicial Aberrations." PRESERVING THE CONSTITUTION, *supra* note 1, at 111, 125.

21. Letter from Sam J. Ervin, Jr. to President Ronald Reagan (Nov. 12, 1984), *excerpted in Required Reading—Hands Off*, *N.Y. Times*, March 19, 1985, at A20, col. 4.

22. See PRESERVING THE CONSTITUTION, *supra* note 1, at 209-48.

fense of American constitutional government, illustrated by his attitude toward separation of church and state.

The paradigm for Ervin's Senate career was set early. Fresh from the North Carolina Supreme Court in 1954, with a reputation for legal scholarship and judicial temperament, he was almost immediately thrust to the forefront of two of our nation's most emotional and historic debates. There was the scourge of Joe McCarthy: Ervin emerged a hero from the successful battle to end the Wisconsin Senator's demagoguery.<sup>23</sup> And there were the battles over the consequences of *Brown v. Board of Education*; here Ervin was the intellectual and legal spokesman for the Southern opposition to civil rights legislation.<sup>24</sup> The next twenty years proved to be no different.

On the one hand, he was the Senate's champion of first amendment freedoms, and the principal opponent of legislation that would give the federal government power to use rapidly developing technology—wire-taps, polygraph tests, and computers—to compile and store information on American citizens.<sup>25</sup> "Twentieth century witchcraft," this American Orwell would bellow, when discussing lie detectors.

He fought for those who had little representation or power—the mentally ill in the District of Columbia,<sup>26</sup> American Indians on scattered reservations,<sup>27</sup> federal employees (who had become a whipping-class for politicians),<sup>28</sup> and indigent defendants appearing in federal courts.<sup>29</sup> Indeed, he spent more time on these causes than on such celebrated issues as Watergate, civil rights, and McCarthy. He also created and chaired the Senate Subcommittee on the Separation of Powers<sup>30</sup> and used it and his Government Operations Committee to help curb abuses of executive power,<sup>31</sup> the impoundment of federal funds,<sup>32</sup> and the use of the defense establishment and White House "plumbers" to spy on Americans.<sup>33</sup>

On the other hand, Ervin's record on economic and social issues was similar to that of most Southern Democrats.<sup>34</sup> He was an outspoken sup-

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23. P. CLANCY, *supra* note 3, at 156-65.

24. *Id.* at 169-99. Ervin noted "how ridiculous it was for federal courts to be acting as local school boards." *Id.* at 199.

25. See PRESERVING THE CONSTITUTION, *supra* note 1, at 87.

26. P. CLANCY, *supra* note 3, at 203; PRESERVING THE CONSTITUTION, *supra* note 1, at 79.

27. P. CLANCY, *supra* note 3, at 204-06; PRESERVING THE CONSTITUTION, *supra* note 1, at 195-204.

28. P. CLANCY, *supra* note 3, at 207-10.

29. *Id.* at 202.

30. *Id.* at 247-49.

31. *Id.* at 254.

32. *Id.* at 257-60.

33. PRESERVING THE CONSTITUTION, *supra* note 1, at 326.

34. Ervin wrote:

porter of a balanced budget and a hawk on national defense. Ervin and Illinois's Everett Dirksen were the Senate's most prominent and outspoken proponents of right-to-work laws.<sup>35</sup> Ervin constantly deplored the Warren Court's "judicial activism."<sup>36</sup> Ervin aided in successfully blocking Abe Fortas's elevation to Chief Justice,<sup>37</sup> and he unsuccessfully attempted to block Thurgood Marshall's nomination to the Court.<sup>38</sup> In both cases, Ervin grounded his opposition in what he saw as "activist" records. His rhetoric about *Miranda v. Arizona*<sup>39</sup> is vintage Ervin outrage:

This decision reveals the major characteristics of judicial activism. It twists the Constitution awry. The self-incrimination clause provides that "no person . . . shall be compelled in any criminal case to be witness against himself." These words have no possible application to a suspect who voluntarily confesses to an officer outside of court that he committed a crime. . . . Besides, a person is not compelled to do what he does voluntarily.<sup>40</sup>

The "conservative" side of the perceived dichotomy in Ervin's record does not hinge, however, on economic policy or criminal justice, but rather on his opposition to civil rights legislation. David Leon Chandler called Ervin's record on civil rights and civil liberties "seemingly schizophrenic."<sup>41</sup> Among those confounded and intrigued was James K. Batten, a reporter for the *Charlotte Observer*, who, nearly twenty years ago, wrote an essay entitled "Claghorn or Statesman? Sam J. Ervin Just Won't Fit in a Mold." Batten summed up Ervin as "[a] sensitive man who recoils from wrongs against individuals, but who is curiously obtuse about an injustice that many admirers regard as one of the greatest moral questions of our time."<sup>42</sup>

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Senators Richard B. Russell and John C. Stennis and I were Southerners of the same generation, and entertained in respect to many public issues kindred philosophies of government. The circumstance that we frequently voted alike on the same issues reflects this truth, and does not indicate that they did my thinking for me or that I did their thinking for them.

*Id.* at 354.

35. See, e.g., *id.* at 193-94 (Ervin and Dirksen formed bipartisan filibuster to defeat attempt to pre-empt state right-to-work laws).

36. *Id.* at 111-23. Ervin quoted Alexander Hamilton's observation that "the supposed danger of judiciary encroachment . . . is, in reality, a phantom," but concluded: "Unfortunately . . . for constitutional government in America, Hamilton's phantom has now become an exceedingly live ghost." *Id.* at 118 (quoting THE FEDERALIST No. 81, at 545 (A. Hamilton) (J. Cooke ed. 1961)).

37. See P. CLANCY, *supra* note 3, at 218-20.

38. See *id.* at 191-93.

39. 337 U.S. 201 (1966).

40. PRESERVING THE CONSTITUTION, *supra* note 1, at 129.

41. D. CHANDLER, THE NATURAL SUPERIORITY OF SOUTHERN POLITICIANS 307 (1977).

42. Batten, *Claghorn or Statesman? Sam J. Ervin Just Won't Fit in a Mold*, *Charlotte Observer*, Apr. 2, 1967, at 1, col. 1.

Ervin was raised in the post-Reconstruction South, steeped in the cultural and legal traditions of the separate-but-equal doctrine. He was a slow but ultimate convert to *Brown v. Board of Education*,<sup>43</sup> yet he never saw affirmative action as anything other than the “heaping [of] new discriminations upon multitudes of Americans who are in no way responsible for the past discriminations.”<sup>44</sup> His opposition, however, seemed more rooted in libertarian philosophy than in tradition: “The civil rights laws vastly expand the powers of the federal government and the scope of its operations.”<sup>45</sup> Ervin’s genius was in rooting out and frustrating the evil that government could do *to* people, rather than developing creative programs *for* people. Ervin’s legislative accomplishments, such as the Bail Reform Act and the Privacy Act, restrained rather than expanded government.

A major reason Ervin resigned as a state trial judge to return to private practice was the emotional difficulty of having to deal with individual problems on a day-to-day basis.<sup>46</sup> The North Carolina Supreme Court was a far more comfortable forum for Ervin because it engaged in detached legal analysis and its constituency was more the body politic than an aggrieved party. As a senator, he could also separate himself from public emotions and thus could protect the rights of racial bigots just as much as those of atheists. As Clancy, his biographer, noted:

It is probably a good thing there were not a hundred Sam Ervins in the Senate during the civil rights years. Because he was unique his voice was valuable, even to those who so passionately hungered for change. He played by the rules, amended what laws he could, and accepted defeat. At the same time he reminded the country of what liberties it was suspending in order to right long-standing wrongs—even if they were the liberties of the most bigoted restaurant owner, school official, or voting registrar.<sup>47</sup>

It is not that Ervin was insensitive to the legitimate demands of blacks. Rather, he believed that “freedom is political power divided into small fragments,”<sup>48</sup> and that power should not be arrogated to a highly centralized federal government: “Although I would have gladly supported state laws or a federal constitutional amendment to this effect; my view in respect to the Constitution in general and the equal protection clause in particular compelled me to oppose [the civil rights laws].”<sup>49</sup>

43. 347 U.S. 483 (1954).

44. PRESERVING THE CONSTITUTION, *supra* note 1, at 163; *see generally id.* at 163-85 (chapter entitled “Civil Rights as Constitutional Wrongs”).

45. *Id.* at 151; *see also id.* at 151-61 (discussing civil rights laws).

46. *See* P. CLANCY, *supra* note 3, at 119-20, 134.

47. *Id.* at 294.

48. PRESERVING THE CONSTITUTION, *supra* note 1, at 169.

49. *Id.* at 176-77.

Ervin's opposition to civil rights legislation may have been mistaken and shortsighted—he may have been a nineteenth century liberal deposited in the twentieth century. He was not, however, inconsistent with his own unique philosophy.

Early in the Watergate hearings, the committee's most partisan Nixon supporter, Senator Edward Gurney, chastised Ervin for his "harassment" of former Secretary of Commerce Maurice Stans. Ervin, in one of the memorable quotes from the investigation, explained his method of examining witnesses: "I am an old country lawyer and I don't know the finer ways to do it. I just have to do it my own way."<sup>50</sup> The press made much of the statement and took it as the self-deprecating description of a Harvard-trained former state supreme court justice. But Ervin was not being modest; he *was* a country lawyer, the kind that "did not specialize"<sup>51</sup> and who accepted "retainers from clients in all walks of life, and tried both civil and criminal cases irrespective of whether they were significant or petty."<sup>52</sup>

His father was also a country lawyer, one who had taught himself the craft from equal measures of Blackstone, life, literature, and history, and who loved to quote to Sam, Jr., from Sir Walter Scott's *Guy Manner- ing*: "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."<sup>53</sup> In school he developed the makings of a good legal mechanic. At the University of North Carolina at Chapel Hill, Ervin completed his undergraduate work and the first year of law school in just four years.<sup>54</sup> Two years later, after having fought in World War I, he passed the North Carolina Bar.<sup>55</sup> He then studied for three years at Harvard Law School, taking the third year first, working backward toward a Bachelor of Law Degree.<sup>56</sup> But along the way Ervin became more than a legal mechanic; he became the kind of architect about whom his father spoke. With an extraordinary talent for recall and a sound classical education, Ervin effectively invoked the works of Shakespeare, Tennyson, and Robert Ingersoll; he quoted the writings of the founding fathers, especially those of Madison and Jefferson; and he was fond of quoting from the King James Bible.

Although Ervin abided by Daniel Webster's aphorism that to be a

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50. S. ERVIN, *THE WHOLE TRUTH: THE WATERGATE CONSPIRACY* 148 (1980).

51. *PRESERVING THE CONSTITUTION*, *supra* note 1, at 35.

52. *Id.*

53. W. SCOTT, *GUY MANNERING* xxxvii (1815).

54. *PRESERVING THE CONSTITUTION*, *supra* note 1, at 29.

55. *Id.*

56. *Id.*

great lawyer is to first be a great drudge,<sup>57</sup> the drudgery is not so apparent in the country lawyer. Rather, it is color, humor, and hyperbole that characterize the country lawyer's advocacy.<sup>58</sup> All this created consternation among such city lawyer colleagues as Senator Jacob Javits of New York, whose face would grow red with anger as Ervin began to tell one of the stories from his lawyer-for-all-seasons practice in Morganton.

Ervin often used his stories and colorful speech to distract and entertain the Senate. For example, in the heat of the debate on whether to censure Senator Joe McCarthy, a bold-print box on page one of the *New York Times* reported Ervin's accusation that McCarthy was "flyblowing":

Sen. Ervin introduced a new term into the McCarthy censure debate today. The N.C. Democrat said that Sen. McCarthy was charged with being "guilty of disorderly conduct by flyblowing—that is a strong Anglo-Saxon word, but a very expressive one." An aide explained that "flyblowing was a word often used in the South, and that it meant 'to smear.'"

The dictionary definition sounds even worse. It says a flyblow is an egg or larvae deposited by a blowfly. A blowfly is any of various species of flies that deposit their eggs or maggots on food or in wounds of living creatures. Hence, the dictionary adds, the verb flyblowing means to infest, taint or contaminate as if with flyblows.<sup>59</sup>

Ervin used his stories to illustrate how McCarthy took statements out of context.<sup>60</sup> And he gave Uncle Ephriam Swink immortality by telling a long story that had the preacher importuning Uncle Ephriam to testify as to "what the Lord has done for you." When he was pestered enough, "Uncle Ephriam arose with his bent and distorted body and said, 'Brother, he has mighty near ruind me.' Mr. President, that is about what Senator McCartly has done to the Senate."<sup>61</sup> Thus, the dawn of Ervin's senatorial career signalled the end of McCarthy's.

The Ervin idiom, style, and color remained characteristic. For instance, he denounced President Nixon's Omnibus District of Columbia Crime Act (which Ervin called the "Omnious Crime Act") as "a blueprint for a police state . . . [a] repressive, nearsighted, intolerant, unfair, and vindictive legislative proposal . . . as full of unconstitutional

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57. *Id.* at 32.

58. See S. ERVIN, *HUMOR OF A COUNTRY LAWYER* (1983) [hereinafter cited as *HUMOR*]. For other books containing some of Ervin's stories, see H. ALTMAN, *QUOTATIONS FROM CHAIRMAN SAM* (1973); T. STEM & A. BUTLER, *SENATOR SAM ERVIN'S BEST STORIES* (1973); B. WISE, *THE WISDOM OF SAM ERVIN* (1973).

59. *N.Y. Times*, Nov. 15, 1954, at 1, col. 3.

60. *HUMOR*, *supra* note 58, at 162-63.

61. *Id.* at 163.

and unwise provisions as a mangy hound dog is of fleas."<sup>62</sup>

Ervin, the country lawyer, took no chances: he always argued the law and the facts, and he always raised hell just in case the law and the facts failed him.<sup>63</sup> The Equal Rights Amendment came in for particularly lavish and frequent tongue-lashings. Ervin was as suspicious of proposed amendments to the Constitution as he would have been of additions to the Ten Commandments.

Constitutional amendments are "for keeps." Unlike ordinary laws, they cannot be easily repealed. Once adopted, they can be removed from the Constitution only by means of the amendatory process created by Article V. Consequently, a constitutional amendment, once adopted, may remain in the Constitution, and bless or curse America until the last lingering echo of Gabriel's horn trembles into ultimate silence.<sup>64</sup>

He thought the Equal Rights Amendment was a curse, one that "undertakes to deny or defy . . . realities of life, and to regulate their consequences by absurd and unrealistic laws passed in genderless language which does not denote that they apply to the two sexes God created."<sup>65</sup> The amendment was evidence that in "a controversy between knowledge and ignorance, knowledge is in peril because it is limited, whereas ignorance is unlimited."<sup>66</sup> He had equally harsh words for the amendment's lobbyists, whom he said "visited Capitol Hill with a zeal comparable to that of the locusts which plagued Egypt in the days of Moses and Pharaoh."<sup>67</sup>

Ervin devoted one of the longest chapters of his autobiography to the Equal Rights Amendment; it contains an exhaustively researched and well-developed legal argument against the amendment.<sup>68</sup> But in that chapter, as in Ervin's oral argument, the heated rhetoric, interspersed with stories, almost overwhelms the analysis. In a world of perfect rationalism, his style would be flawed. Yet in our world of complex emotions, Ervin's country-lawyer advocacy was highly effective. When

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62. PRESERVING THE CONSTITUTION, *supra* note 1, at 277.

63. Ervin was fond of telling the story of a young lawyer who went to an old lawyer for advice on trying a lawsuit:

The old lawyer said, "If the evidence is against you, talk about the law. If the law is against you, talk about the evidence." The young lawyer said, "But what do you do when both the evidence and the law are against you?" "In that event," said the old lawyer, "give somebody hell. That will distract the attention of the judge and the jury from the weakness of your case."

P. CLANCY, *supra* note 3, at 161.

64. PRESERVING THE CONSTITUTION, *supra* note 1, at 273.

65. *Id.* at 258.

66. *Id.* at 263.

67. *Id.* at 264.

68. *Id.* at 249-74.

debating emotionally-charged issues—whether the censure of McCarthy, civil rights, Watergate, the Equal Rights Amendment, or capital punishment—such advocacy wins.

Ervin's mixture of legal scholarship, passion, and hyperbole made him larger than life, alternately a great hero and a great scoundrel to a variety of constituencies. In the aftermath of Watergate, his may have been the only kind of advocacy that could have restored in America an appreciation for its moral and legal heritage, an accomplishment for which Ervin was christened "The Last of the Founding Fathers."<sup>69</sup>

In June of 1985, Professor Philip Kurland and I had a chance to visit briefly in Washington, D.C., where we were both scheduled to speak at a memorial service for Ervin. I mentioned to Kurland that he had traveled a long way to the service. "The Senator brought me a long way," Kurland replied. And in a real sense, Ervin brought the country a long way—back to an understanding of its origins and mission, back to respect for law, especially for the Constitution. In an era of increasing demands that our institutions of government align themselves with forces of religious conformity and transform the Constitution into "Defender of the Faith" from defender of all faiths, the lesson of Sam Ervin's life and work is well worth learning.

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69. This appellation for Ervin was used often. It probably originated with a column by James J. Kilpatrick, see Kilpatrick, *Sam Ervin, Founding Father*, reprinted in *PRESERVING THE CONSTITUTION*, *supra* note 1, at 391-99. For more on Ervin's use of hyperbole, see P. CLANCY, *supra* note 3, at 280.

