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The Founding Fathers and the Courts

We have begun our bicentennial. With a deft touch of irony, Fate has ordained that this time of jubilation come on the heels of Watergate, our painful humiliations in Southeast Asia, and our demonstrated inability to maintain our society with prosperity and security for all. Perhaps because this is a time for humility it is also a time to draw strength and pride from our past.

It is in the spirit of trying to discover something of our history both relevant to our times and not likely to be wholly familiar territory to you, that I speak on this Law Day occasion of how the Founding Fathers came to give us the Constitution and how they viewed the role of the third branch of the government they created. For in rediscovering our roots lies much of the understanding of our unique form of government and the secret of its durability.

The story starts at least a hundred years before Independence, for we owe much to our Founding Fathers' grandfathers. Their own initiation in law and the courts took place in the English tradition, in which the judges held a position unmatched in other European countries, not just because of their professional competence but also because royal grant and ancient usage had peppered every town, borough, manor, and county with courts in which ordinary people participated. The workings of law through the courts were part of an Englishman's life. In the colonies, the settlers in time drew away from the English pattern of three separate court systems -- King's Bench, Chancery, and Exchequer -- and invented the model of one system, divided into trial and appellate jurisdiction. Governor Andros, for whom our neighboring county of Androscoggin was named, was a leader in combining all three courts into one superior court. Moreover, the colonists insisted wherever they could on jury trials. Their jury trial syndrome was equaled only by their passion for appeals. The result was that court processes and organization were so familiar to so many colonists that one scholar has said that this familiarity and concern was as large an element in the struggle over the ratification of the Constitution as economics or ideology.

More important than their stress on centralized courts, jury trials, and right of appeal was the growth of a distinctly American attitude regarding the function of judges, the expectation that on occasion judges should declare statutes void as being inconsistent with common law, or, as it later was expressed, the constitution. Bear in mind that in the English system whatever Parliament said was supreme. This was also the guiding principle in all of the civil law countries on the continent of Europe. How, then, did the idea of judicial review of the legislative and executive become part of the American set of values?

The story begins in the early 1600's when Edward Coke was practicing, reporting, and later pronouncing law. In several famous cases he had proclaimed the principle that even Parliament could not legislate against the deepest principles of common law. He was not speaking casually. There had been two strains developing in English law. The first was that lands acquired by the King other than by descent were to be treated as if gained by conquest and subject, not to the primary authority of Parliament, but "extra regnum", subject only to the King's

will. The colonies, of course, were in this grouping. The second development was that the King, in cases where he had given a grant or patent, to form a borough or a guild of merchants, would, beginning in the 1200's, send judges around for what was called the General Eyres. At first they inquired only to see if new laws were within the limitations of the grant. Soon a second principle emerged -- to inquire if practices were obstructive of "common justice". "Common justice" meant common law and grew into the concept of due process of law. In 1596, an ordinance providing for imprisoning any inhabitant refusing to pay an assessment was held by a court to violate Magna Carta. In 1615, in the Case of the Tailors of Ipswich, a monopolistic ordinance secured from the King by the Merchant Tailors Company was declared to be against the common law. In other words, not even a royal patent could make good a void ordinance.

This was bold doctrine, but, in England, confined only to royal grants, a diminishing area. It so happened, however, that the doctrine applied directly to the King's royal provinces -- his grants -- which, by 1754, included nine colonies, all but the two proprietary colonies of Maryland and Delaware, and the two corporate colonies of Connecticut and Rhode Island. In the nine royal colonies the doctrine took root that the courts could provide a check against powers being exercised beyond the charter or in violation of the common law. So a footnote to the law of England became a cardinal principle in America.

The principle was first confined to private matters such as the law providing for succession of estates until the mid-1760's. Up to that time, the relationship of England and the colonies had been loose, allowing room for play in the joints. Walpole coined the phrase "salutary neglect" to describe the policy. Then, beginning in 1763, Parliament passed statute after statute aimed at the colonies -- empowering the royal navy to collect customs on every ship, and allowing the citizen informer whose tip led to the arrest to choose the forum -- with or without jury; the Sugar Act, increasing duties and red tape, and allowing an informer to send the case to trial at Halifax; the Stamp Act with another informer's choice of forum; the Statute of Foreign Treasons to deal with rioters, the trial to be in England; the Dock Act; and the Administration of Justice Act -- one of the Intolerable Acts, again with trial not in the neighborhood but in far off England.

The legal fights provoked by this legislation moved quickly on to constitutional ground. The colonists, who were fond of quoting John Locke, patron saint of the Whigs, ironically found their sustenance in the Tory Bolingbroke who believed in the fixity of the constitution and had written, "A Parliament cannot annul the Constitution." Strange doctrine this, to Englishmen, but increasingly familiar to Americans. They were not only predisposed to a fixed constitution put in writing but were prepared to commit the power of enforcing conformity to that constitution to the judiciary.

What came next were Independence and a decade of living under the Articles of Confederation. The lessons learned during this period were capsuled in the experience we had trying to administer justice in Prize Appeals -- cases where American privateers or our Continental Navy had captured foreign vessels and claims were submitted to our courts. General Washington first brought the problem to the attention of Congress. Not only was it inappropriate for courts in various colonies to judge cases involving continental vessels, but it was important that justice to other nations -- some of whom we were interested in attracting to our cause -- not be at the whim of a parochial jury. Congress attempted to establish a national court of appeal. But the experience was one of frustration, the memory of which was fresh when the Philadelphia Convention was convened. In many other ways, our period of flirtation with the Articles of Confederation was a nursery for the national conscience. Debts due British creditors, no matter

how just, were resisted. Requisitions of funds by Congress were cavalierly avoided. Widespread absenteeism by representatives to Congress was the rule.

Finally, in 1786, things began to move again. A group of states, worried about trade and the economy, met at Annapolis. They asked Congress to call a convention. After a few months of being unable to form a quorum, Congress issued a call for a convention to revise the Articles, but, wittingly or not, inserted in the preamble the words which were to prove fateful -- that the proposed convention was "the most probable means of establishing in these states a firm national government". This broad preamble, by long established rules of construction going back to the early 1600's, overrode the language that the Convention was to be for "the sole and express purpose of revising the Articles of Confederation".

The Convention met on May 14 and got down to work on May 30, 1787. Three and one half months later it had completed the most remarkable and enduring large work of social organization ever struck off by any group of human beings. There are several things to note about this group. It was, even from our perspective, incredibly young. Franklin's advanced age of 81 was required to raise the average age to 43. The key men were James Madison, 36, and Alexander Hamilton, only 30. John Adams, temporarily removed from the scene as an ambassador -- but only physically -- was 37. While two thirds of the 36 were forgettable men, a dozen were outstanding in the breadth of their vision and in their parliamentary ability.

They began. Though this may seem a technical point, it is worth noting that they were inspired to adopt a procedure whereby points relevant to any article could be reconsidered later. Certain issues were gnawed over, like a bone, again and again. But sometimes in the gnawing an issue which had seemed portentous suddenly dropped from sight. In any event, under this rule, they knew that no one vote would be crucial and final. This, I think, set the stage for true deliberation, which allows room for second thoughts

The major issue, underlying most of the debate, was the allocation of powers between states and the national government and within the national government. Our story, the birth of the judicial section, is a chapter in that tale, but an important one. Randolph of Virginia had submitted a "Virginia Plan" which proved to be the model worked on by the Convention. The debate was strongest on such issues as the appointment, tenure, and salary of the federal judiciary. Significantly, there was little dispute with the idea that judges should hold office during good behavior. The memory of the King's removal of stubborn judges was too fresh in the minds of the members. As to salary, Madison argued that it should be fixed, subject to neither decrease nor increase. Franklin, always a realist, pointed out that there was such a thing as inflation. The suggestion was made that judges' salaries be tied to the purchasing power of so many bushels of wheat. In the end the Congress voted that judicial salaries could not be reduced.

The independence of the judiciary came to the fore again when the proposal was considered to involve the Supreme Court with the Executive in an advance screening and possible veto of Acts of Congress. This was finally turned down, probably because of the feeling that judges should pass on legislation only when actual controversies were presented to them and that the judiciary should be shielded from any temptation to engage in anything approaching political bargaining. While Randolph's original proposal envisaged one or more supreme courts, the Congress quickly settled on one. More difficult was his proposal to allow Congress to establish other, inferior federal courts. During much of the Convention the hope was held by some that state courts could fulfill this function. But the memory of the prize appeals experience finally won out and Congress was not only permitted but encouraged to set up these courts. At one point the federal courts were given authority to decide anything which might forward the

peace and harmony "of the nation". Had this provision stayed in, I as a federal judge might be presiding over the domestic difficulties of your next-door neighbor.

As the Constitutional Convention came into its final week, some good and bad ideas came to the forefront. In the latter category was the proposal that the Chief Justice look over new legislation to see if it comported with good morals. This was, happily, rejected. Of much greater importance was the final wording of the Supremacy Clause which, after proclaiming that the Constitution and laws pursuant to it, and treaties were to be the supreme law of "the several states", singled out the judges to "be bound thereby". This command pointed clearly at the role of the nation's judges as the arbiters of constitutionality. Thus came to fruition what colonists had come to value in their century long relationship with their mother country. History has generally credited John Marshall with inventing the doctrine of judicial review of acts of Congress in Marbury v. Madison. From what we have seen it is closer to the truth to say that Marshall made explicit what was implicit in the Constitution and clear in the minds of the Founders.

Thus the Convention ended. This had been in the main a meeting on the high ground of rational debate. It also had been a meeting focused on structure: the delineation of powers given to the national government, and the checks and balances effective within that government. Individual rights and liberties were not discussed. This is understandable, for what was at issue was what powers were to be given the national government; if nothing about religion, speech, the press, self-incrimination was given to that government, so the argument went, there was no reason to worry about their infringement.

Nevertheless, a strong liberty nerve throbbed. People remembered too well not only what had happened in Star Chamber trials in England but what had happened in the colonies under the infamous Writs of Assistance. This liberty nerve remained to be played on by the many who opposed creating a new nation. The ten months' debate on ratification was one of the most intensive exposures to all kinds of propaganda that any nation has been exposed to. The newspapers were the medium and the mode was largely vulgar. The various appeals, apart from the remarkable Federalist Papers, were bottomed on prejudice; religious, sectional, fear of a standing army, and distaste of an imagined aristocracy.

The various state conventions were not models of eloquence or rationality. Our own convention in Massachusetts was a fair example. We Mainers, comprising about two sevenths of the delegates, were disposed favorably toward the constitution, feeling that perhaps in this direction lay the best hope for our own independence. History has not been kind to our delegates. One has been characterized by a fellow Mainer as "windy"; one had to have his speeches ghost written; and another was elected on a platform that if he were elected a delegate he would not attend. But history has been less kind to the two most prominent men in that convention. Sam Adams, who had been most critical of the new constitution, was converted to its support when his claque of Boston artisans and tradesmen -- lobbied by Constitution proponents -- came out in favor of it. John Hancock, a vain man, was swung over by the new convert, Sam Adams, and the illusory promise that he would be next in line for the Presidency after Washington. In other states newspapers carrying the latest news were misdirected, crucial letters of support were withheld, quorums were obtained by sending marshals to all the bars and key votes were lost by staying over-long at well planned alcoholic lunches. Chicanery was on occasion a willing man-servant to principle.

The outcome was not all that conclusive. The vote in Massachusetts was 187 for ratification, 168 against; in New Hampshire, 57-47; Virginia, 89-79; New York, 30-27. Rhode Island flatly turned it down. This was far from a ground swell. But it was enough. A nation came

into being.

Its work was not over. The First Congress convened with general expectations that a bill of rights would be made part of the Constitution. Several states had even contemplated making this a condition of ratification. The hero in this hour was Madison. He had originally not thought a bill of rights necessary. But, methodical man that he was, he sifted through no fewer than 186 proposed amendments, found 80 substantive ones, cast out the least popular and practicable, and came up with a list of nineteen. With this mammoth job done the House and Senate finally agreed on the ten which joined our Constitution in 1791. To this we must add the Fourteenth Amendment, passed at the close of the Civil War, guaranteeing due process and equal protection of the law to all citizens.

What does all this add up to? It is a concept of government that starts from the proposition that the people are the ultimate arbiter. This was not a unique concept. Witness ancient Greece. But the Founding Fathers and the Americans they represented did not create a pure democracy. They had an abiding distrust of government -- that is to say "the people" -- riding roughshod over individual rights. Hence the Bill of Rights. They developed their own home grown doctrine of separation of powers, making room for both state and nation. They carried their distrust not only to giving a president the power to veto an act of Congress and Congress the power to override a veto, but gave the House the power to initiate tax legislation and the Senate the power to approve Treaties and top appointments. All told, this added up to an intricate balancing act.

Moreover, they watered down a citizen's franchise in several ways. While they created a House where representation reflected population, they created a Senate where a state, no matter how large or small, had two Senators. These Senators were not only picked by state legislators but, being elected for six year terms, were further removed from changes in popular will. And the Presidency was filled by the votes of state electors, the winner not necessarily being the person with the greatest popular vote. Finally, from the beginning they insisted on the appointment of judges who should have permanent tenure and be shielded from legislative or executive pressure.

What was created is a mixed government -- one in which power is so diffused that no "person, faction, class, group, or segment of the population, no matter what its numbers, could ever gain control of all the parts of the multi-faceted government." If one tried to chart our federal-state system, identifying sources of power, there would be so many vertical and horizontal lines criss-crossing the page that it would look like a cat's cradle. While the Founding Fathers probably never expressed it this way, in constructing such a government they were rejecting Montesquieu's teaching that the operating principle of a republic was virtue. For this was a government based on the recognition that man, unchecked, could and would be self seeking, in short, evil. It therefore sought to insure that bribery, chicanery, deals, greed, logrolling, and love of power, prestige and self would over the long haul not overcome the public good by reason of the built-in motives and mechanisms to watch over, to warn, to oppose, and to check.

Such a system had to be in writing. Indeed, insistence on a written constitution, unlike that of England, was evident from the start. For the Fathers knew that Magna Carta had been enacted by Parliament 32 times -- which meant that it had fallen out of the constitution at least 31 times. But putting the system on paper did not mean that all boundaries were located with detailed precision. Power was only generally defined,' allowing it to shift as time and circumstances should dictate. But, if commodious words like "interstate commerce", "due

process", and "equal protection" were to have any meaning, and if definitions were not set forth in the Constitution, how were limits to be set? Here the Founding Fathers, with a century of history behind them, made another peculiarly American contribution. Revolutionists and believers in the sovereignty of the people as they were, they nevertheless pointed to their judges, the least democratic branch, to insure that in fact the Constitution should be the supreme law of the land. And, while the Founders did all they could to make the federal judiciary independent, it is still subject to a series of substantial checks. Attrition among old judges, the appointment of new judges by elected officials, appellate and Supreme Court review of decisions, legislative responses to judicial interpretation, academic commentary on judicial reasoning, and the impact of events on sitting judges all can combine to work ponderous changes in the flow of judicial thought.

This system -- a mixture of systems -- has survived. It has proven workable, adaptable, and enduring through wars, civil and foreign, and revolutionary change, economic, technological, and social. The machinery seldom runs perfectly. The executive branch can be for a time dominated and exploited, or simply sluggish and unresponsive. The Congress can be paralyzed by its own establishment and complexity of the tasks it undertakes. The judiciary can be criticized for being too liberal and too conservative, too passive or too active. The federal government can be for a time too intrusive into the affairs of states, and states at times can be in defiance of federal laws. And every part of this machinery can stand better people, better methods, better ideas. But when all this is said, the American Revolution, because of what it produced, our Constitution, nourishes our pride in the past two centuries and our hope for those to come.