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An Independent Judiciary: Bulwark of the Constitution*

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Our Constitution was drafted in 1787, and ratified by the necessary number of states in 1789. The first ten amendments to the United States Constitution, commonly called the Bill of Rights, were ratified in 1791. The Constitution which the framers drafted was primarily a structural document, dividing power among the three branches of the government—executive, legislative and judicial. It contained some protections of individual rights, but the most familiar of these protections—guarantees of freedom of expression, safeguards for the defendant in a criminal trial—are found not in the Constitution as originally drafted but in the Bill of Rights. Important as these guarantees are, by themselves they were not a uniquely American contribution to the art of government. Long before them England had produced the Magna Carta, the Petition of Right, and the Declaration of Rights. Simultaneously with them in France there was the Declaration of the Rights of Man.

The uniquely American contribution consisted of the idea of placing these guarantees in a written constitution which would be enforceable by an independent judiciary. This idea—that the rights guaranteed by the Constitution would be enforced by judges who were independent of the executive—was something found in no other system of government at that time. It was a unique American contribution to the theory and practice of government. Other countries before or at the time of the adoption of our Constitution had adopted declarations of rights, but it was the United States who put teeth in these declarations by providing a means by which the individual could enforce them.

The people who populated the thirteen colonies at the time of the American Revolution had come primarily from the British Isles.

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* Text of a speech delivered by Chief Justice William H. Rehnquist at Northern Illinois University in DeKalb, Illinois on October 20, 1988, as part of a series of lectures celebrating the Bicentennial of the United States Constitution.

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At this time England was regarded as the most tolerant and enlightened nation of any of the great European powers. The Magna Carta wrung by the barons from King John in 1215 was scarcely a charter of individual liberty for the average citizen, but it was a beginning: it guaranteed trial by jury of one's peers. The Petition of Right, passed by Parliament in 1628, prohibited taxation without the consent of Parliament and the quartering of soldiers in private houses—a prohibition nearly identical to that found in our Bill of Rights.

The Declaration of Rights, enacted upon the accession of William and Mary in 1689, guaranteed the right to petition the sovereign, the right to bear arms, freedom of debate in Parliament and the right of trial by jury, and prohibited excessive bail. Several of these rights have their counterparts in our Bill of Rights.

But all of the charters were, at most, acts of Parliament guaranteeing rights to individuals as against the King and his agents. Parliament could legally repeal any of them at any time it chose to do so. And that is exactly the way it is in England today: Parliament is supreme, and the English courts have no authority to declare an act of Parliament "invalid" or "unconstitutional."

The whole idea of "judicial review"—that is, the right of a court to declare an act of the legislature unconstitutional because it transgresses the bounds set in a written constitution—was entirely a creature of the American colonists. To them, Parliament was the oppressor—when it imposed the Stamp Tax, when it enacted the Navigation Laws, when it imposed the Tea Tax which led to the Boston Tea party in 1774. After the Americans had won their independence and convened in Philadelphia to draft a constitution, their idea of limited government encompassed not merely restraints on the Executive Branch, but restraints on the legislature as well.

The Founding Fathers drafted a constitution which provided for the authority of the federal government to be divided among the Congress, the President, and the federal courts. Each of the three branches of government was granted certain limited powers. There were a few specific guarantees of individual rights in the Constitution as drafted in Philadelphia: a prohibition against the suspension of the writ of habeas corpus, limitations on the government's authority to try and to convict for treason, a prohibition against the impairment of obligation of contracts. But to many of those who debated the Constitution in the ratifying conventions held in the thirteen states, these guarantees did not seem enough, and strong sentiment was expressed in several of the larger states that there ought to be a Bill of Rights. After the Constitution was ratified without one, the First Congress took the matter up and proposed the first ten amendments to the United States Constitution, commonly called the "Bill of

Rights." These proposed amendments were duly ratified and became part of the Constitution in 1791, two years after the government began functioning under the Constitution. These amendments guaranteed freedom of speech, freedom of the press, freedom of religion, and various rights such as that of jury trial to defendants in criminal cases.

But it still remained to be seen whether this written constitution, Bill of Rights and all, had teeth or was in reality only a paper tiger. The answer to this question depended on the federal courts, and the answer was shortly given by the Supreme Court of the United States in its famous opinion in the case of *Marbury v. Madison* in 1803. There the Court, in an opinion authored by Chief Justice Marshall, declared that it was the province of the federal courts to have the last say on questions arising under the United States Constitution.

Thus there was established the principle that the United States government was limited not merely in a philosophical or theoretical sense—and whose limits could therefore be pushed aside any time the executive or legislature thought it desirable to do so—but also in the practical sense that the courts of the United States were authorized to check the other branches of government when they exceeded the bounds placed upon them in the Constitution.

This is what we mean when we speak of the doctrine of "separation of powers" embodied in our Constitution. This doctrine is often thought of as quite abstract and technical, when compared to the far more exciting principles such as freedom of speech, freedom of religion, and the like set forth in the Bill of Rights. But as my colleague, Justice Antonin Scalia, stated in his dissent last Term from the Court's opinion upholding the constitutionality of the independent counsel law provision, "Bills of rights are a dime a dozen if one looks around the world today." And one might have looked around the world in the early days of our constitutional history at a country such as France, as a classic example of the situation to which he referred.

The French Revolution began in 1789, and shortly after it began, the Marquis de Lafayette proposed to the French National Assembly the enactment of a bill of rights. Following a heated debate in the National Assembly, that body voted that a declaration of rights was necessary and that it should be "separate from and preliminary to the Constitution." The matter was referred to a committee, the committee report was debated, and the Assembly then passed the famous "Declaration of the Rights of Man and of Citizens" in August 1789. This was a full two years before our Bill of Rights was enacted.

The Declaration of the Rights of Man granted freedom of religious opinion and the right of every citizen to speak, write, and publish freely, albeit with some limitations. It provided that a person

was presumed innocent until convicted, that no man should be accused, arrested, or held in confinement except in cases determined by law, and that punishment should only be in accordance with a law "promulgated before the offense."

One who compared the language of the French Declaration of the Rights of Man with the Bill of Rights of the United States Constitution would have said that while there were certainly some differences, the basic guarantees provided by each were basically the same. Some scholars feel that the provisions contained in the French Declaration were patterned in part upon the bills of rights contained in the various constitutions of the American states, which also provided the basis for many of the rights contained in the Bill of Rights to the United States Constitution.

But when we turn from the catalogue of rights contained in the French Declaration to what actually happened in France in the few years after 1789, we find a dramatic difference between theory and practice. The constitutional monarchy created in 1789 was abandoned and the king and queen were executed in 1793. A coalition of European powers was formed to oppose the spread of republican principles, and the young French republic deemed it necessary to defend itself against these foreign powers. Within only a few years after the adoption of the Declaration of the Rights of Man, a regime known as the "Reign of Terror" began. During this period of time three hundred thousand persons were imprisoned, about twenty thousand people went to their deaths on the guillotine, and another twenty thousand died in the prisons or were executed without any trial. A "revolutionary tribunal" was created to try any "political offense." According to one scholar, the revolutionary tribunal "functioned like a court martial, inflicting only one penalty, death, with no recourse possible against its sentence." Little attention was given to the separation of the judicial authority from the legislative and executive powers. The chief legislative body was the National Convention; the Convention created the Revolutionary Tribunal, and during its brief existence frequently altered the Tribunal's size and composition to suit political ends. Judges and jurors on the Tribunal were appointed and removed by the Convention. The Convention wrote the laws, frequently initiated the prosecutions, and effectively controlled the courts.

Trials proceeded with inordinate haste. There are examples of a suspect being arrested early in the morning, charged at 9:00 o'clock a.m., tried at 10:00 o'clock a.m., condemned at noon, and guillotined at 4:00 o'clock p.m. When even the Revolutionary Tribunal was perceived as being too slow and deliberate to do the job, a decree

was passed providing that after a trial had lasted a certain period of time, jurors could interrupt and announce their verdict even though all the evidence had not been received. Another law was adopted forbidding accused persons from speaking in their own defense when to do so would entail unnecessary delay or "obstruction of justice."

All of this happened in a country which only a few years before had adopted the ringing Declaration of the Rights of Man and of Citizens. It seems rather obvious that the reason these abuses occurred was that during the Reign of Terror there was no separation of powers in the French Government at all—the legislature was supreme: it promulgated the laws, it authorized the prosecutions, and it controlled the courts. It really didn't make any difference that all of the fine sentiments contained in the Declaration were still formally in effect, because there was no organ of government in France at the time which would stand up and enforce them on behalf of the individual.

Let us now turn our attention back across the Atlantic Ocean to the early days of the United States after the adoption of the Constitution and the Bill of Rights. Our revolution had of course already taken place by this time, and we never had a Reign of Terror. But this does not mean that the guarantees contained in the Constitution were not occasionally put to the test. One example is the trial of Aaron Burr—one of the great state trials in the history of our country. Aaron Burr was the nominee of the Jeffersonian Republicans for Vice President in 1800, at the same time that Thomas Jefferson was their candidate for President. Because of the peculiar method of voting at that time, Jefferson and Burr each received the same number of electoral votes for President, and as a result the election was thrown into the House of Representatives. After many ballots in that body, the opposition Federalist party led by Alexander Hamilton decided that they would prefer Jefferson to Burr and so the House elected Jefferson President.

There was understandably no love lost between Jefferson and Burr after that time, and in 1804 Jefferson used his influence to deny Burr renomination as his running mate for a second term. But the death blow to Burr's political ambitions came in the summer of 1804 when he killed fellow New Yorker Alexander Hamilton in a duel. Burr was a person of considerable aplomb, and even though he had been indicted for murder in New Jersey, he returned to Washington as Vice President in early 1805 to preside over the trial of Justice Samuel Chase of the Supreme Court of the United States before the United States Senate.

Burr bade farewell to public office in March 1805, when his term as Vice President expired, and headed for what was then "the West"—

the valleys of the Ohio and Mississippi Rivers. Burr had a taste for intrigue, and indulged it during the next two years. In the fall of 1806, President Jefferson issued a proclamation warning Americans in this part of the new nation against a conspiracy to cause the states beyond the Appalachians—Tennessee, Kentucky, Ohio—to secede from the Union, or to mount an armed expedition against Spain, which then owned both Texas and what was called Spanish Florida. Pressed by Congress for information as to the leadership of the conspiracy, Jefferson in January 1807 declared that Aaron Burr was the leader, and that "his guilt was placed beyond question."

Burr, then at a place in the Mississippi territory near Baton Rouge, Louisiana, sought to flee in disguise, but was apprehended and taken to Richmond, Virginia, for trial before Chief Justice John Marshall. Marshall was sitting, as did members of the Supreme Court at that time, as a trial judge. The grand jury in Richmond indicted Burr for treason, which was a capital offense, and also for a high misdemeanor. But the Constitution contains very specific limitations on the method by which the government can charge and convict for treason. Treason consists only of levying war against the United States or of adhering to its enemies. Since the United States was not at war at this time, the government had to show that Burr had "levied war" against the United States. But the Constitution contains an additional evidentiary safeguard: for conviction of treason, there must be two witnesses to the same "overt act" of the defendant.

In some other country all of these protections might have existed, but if the judge trying the case were a mere minion of the Chief Executive, Burr would have stood little chance of a fair trial. One can easily imagine that, if during the Reign of Terror in France the presiding officer of the Convention had announced that a particular individual's "guilt was placed beyond question," that person's doom at the hands of the Revolutionary Tribunal would have been sealed. What would be the case now that Thomas Jefferson, the Chief Executive of the United States, had announced that Burr was unquestionably guilty?

Happily for all of us, in the United States the result was quite different. John Marshall was anything but a minion of Thomas Jefferson, although like most Virginians of that day they were distant relatives. Marshall had come from the Federalist party—the opposite side of the political fence from Jefferson—and in fact he and Jefferson had a deep dislike for one another.

Sifting through the evidence offered by the government at Burr's trial, Marshall ruled in effect that the government had not proved an overt act on the part of Burr, and the jury acquitted him on the charge of treason. Marshall went on to rule that Burr should be held

to answer on a charge of organizing an expedition against Spain, but that was only a misdemeanor, and Burr was never brought to trial on the charge.

This bit of history shows, as no amount of argumentation can, that it is not enough to have an impressive catalogue of individual rights in the Constitution if the judges who are called upon to enforce these rights are not truly independent of the executive. It is this principle of separation of powers contained in our Constitution which is the necessary predicate for giving effect to all of the other rights conferred by the Constitution.

How did the framers go about the task of making the judiciary independent of Congress and of the President? They provided in the Constitution that Supreme Court Justices and other federal judges should be nominated by the President, but before they could actually take office, their nominations would have to be confirmed by a majority of the United States Senate. Article III of the Constitution provides that federal judges should serve during good behavior—which means, for all practical purpose, for life—and that they could be removed only by impeachment in the House of Representatives and conviction in the United States Senate of "high crimes or misdemeanors." The Constitution also provides that the salaries of judges shall not be diminished during their terms of office.

Obviously this plan does not take the appointing of judges out of partisan politics, and it was not intended to do so. Democratic Presidents almost invariably nominate Democrats to be federal judges, and Republican Presidents almost invariably nominate Republicans. But the fact that these nominees must survive examination by the Senate Judiciary Committee means the President does not have unlimited discretion as to whom he may appoint as a judge.

Once appointed, however, whether to the Supreme Court of the United States, a federal court of appeals, or a federal district court, a judge has tenure of office for as long as he wishes to remain in the position. While the salaries paid federal judges at the present time are by no means princely—they are definitely on the low side compared to the income of comparably situated lawyers—the Constitution prohibits any reduction in these salaries. The judge's decisions are reviewed, not by the President, not by Congress, but by higher courts which consist of judges selected in the same manner. The judge is thus thoroughly independent of the President, of Congress, and indeed of public opinion. He is to be guided only by the Constitution and the laws, as interpreted by higher courts.

The federal judicial system is certainly not perfect, but there can be no doubt in the mind of any careful observer that the framers succeeded in making these judges truly independent of the other

branches of government. The independence of this body of men and women, whose task it is to construe the provisions of the Constitution, is every bit as important in securing the recognition of the rights granted by the Constitution as is the declaration of those rights themselves.