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Roger J. Miner
U.S. Circuit Judge

Introductory Remarks

THE FEDERAL COURTS:
HAVE THEY FUNCTIONED AS THE FRAMERS INTENDED?

The Association of the Bar
of the City of New York
May 14, 1987
7:30 P.M.

Have the Federal Courts functioned as the Framers intended? The question before the House this evening really is a threefold one: First, what role did the Framers foresee for the federal courts when they drafted Article III of the Constitution 200 years ago? What was their vision? Second, what significant functions have the Federal Courts in fact performed during the life of the Republic? And third, does the performance square with the vision?

This is not a debate on the jurisprudence of original intent. The purposes of the Framers in regard to the functioning of the Judiciary, at least as far as this discussion is concerned, are ascertainable. They may be found in the Federalist Papers, in other writings and in the Constitution itself. Our frame of reference, therefore, is well defined.

The nation is, of course, much different from what it was 200 years ago. Thirteen colonies in a wilderness with a population of under 4,000,000, have grown to a continent of 50 states populated by a citizenry of nearly 230 million. Hamilton

considered that it would be "highly expedient and useful to divide the United States into four or five or half a dozen districts, and to institute a federal court in each district," but we now have 94 United States District Courts. He envisioned that the Judiciary would be the weakest of the three departments of power, without sword or purse as he put it, but it seems clear that the judicial department today holds the confidence of the people more than any other.

While the Framers contemplated a very limited role for the national government in general, federal regulation now reaches into almost every phase of human activity. The Bill of Rights, the Civil War Amendments, congressional legislation under the Commerce Clause, expansive statutory and constitutional interpretations by the Supreme Court, all have contributed to the development of judicial functions unknown to the Framers. I often wonder what Hamilton would have thought about the dogbite case I tried as a District Court Judge or about the appeal from a \$30 drug sale conviction that I heard as a Circuit Judge. Justice Scalia may not have been wide of the mark when he said that the federal courts have become too occupied with trivia.

Yet, much of the Hamiltonian vision endures. There is his prediction that the courts would function as "an intermediate body between the people and the legislature in order . . . to keep the latter within the limits of their authority." There is his statement on the duty of the Judiciary "to declare all acts

contrary to the manifest tenor of the Constitution void." There is his assertion that "[t]he interpretation of the laws is the proper and peculiar province of the courts." Hamilton also foresaw the need for the federal courts "to over-rule such [state laws] as might be in contravention of the articles of union." In No. 78 of that amazing series of persuasive essays known as the Federalist Papers, Hamilton envisioned the courts of justice as "bulwarks of a limited constitution," "mitigating the severity, and confining the operation" of "unjust and partial laws."

Hamilton's sense of the judicial function does not, of course, represent the entire spectrum of the Framers' viewpoints on the Judiciary. It does, however, exemplify the depth and richness of their thought in relation to the operation of the judicial branch. It provides important insights into the system of courts they envisioned. And so, after almost two centuries of experience, we turn to an examination of the functioning of the federal judiciary, informed by the perceptions and ideas of those who wrote the Constitution.

Our first speaker will be Norman Dorsen, Stokes Professor of Law at New York University Law School, where he has served on the faculty since 1961. He is a graduate of Harvard Law School and was an Editor of the Law Review there. He served as a clerk in the chambers of Justice John Marshall Harlan at the Supreme Court and has himself successfully argued several landmark cases there. He is the author of a number of books and articles on

constitutional law and civil liberties. Since 1976, he has been President of the American Civil Liberties Union. He is a fellow member of the Second Circuit Committee on the Bicentennial of the Constitution and never will forgive me for roping him into this project. He has prepared an excellent paper, which he will summarize for you in a few minutes. His answer to the question before the House is "yes" and "no," at least as far as civil liberties are concerned.

Our second speaker, who will also summarize an excellent paper, is Bruce Fein, Visiting Fellow for Constitutional Studies at the Heritage Foundation, Washington, D.C. Mr. Fein also attended Harvard Law School, from which he graduated cum laude in 1972. He has served in the Justice Department in various capacities and from 1981 to 1983 served as Associate Deputy Attorney General. From January 1983 to September 1984, Mr. Fein was General Counsel at the Federal Communications Commission. The author of numerous scholarly articles as well as many articles for the popular press, Bruce also is a TV star, having discussed various legal and constitutional issues on MacNeil-Lehrer, Good Morning America, Crossfire and Nightline. His answer to our question is a definite "maybe."

The two speakers will be followed by two commentators. The first will be Charles J. Cooper, Assistant United States Attorney General in charge of the Office of Legal Counsel. Mr. Cooper received his law degree from the University of Alabama School of

Law in 1977. He served as Editor-in-Chief of the Law Review there and graduated first in his class. Following law school, he served as a law clerk to Judge Paul Roney of the Fifth Circuit Court of Appeals. During the 1978 Term of the United States Supreme Court, he served as law clerk to Justice Rehnquist. Before appointment to his present position, Chuck Cooper served as Special Assistant to the Assistant Attorney General and Deputy Assistant Attorney General in the Civil Rights Division.

Our second commentator is Professor Archibald Cox, Carl M. Loeb University Professor Emeritus at Harvard University. Following his graduation from Harvard Law School, Professor Cox served as a law clerk to Judge Learned Hand of the Second Circuit Court of Appeals, the premier appellate court in the nation. (I thought I'd get that in). First appointed to the Harvard Law faculty in 1945, Professor Cox has alternated his teaching duties with distinguished government service, including service as Chairman of the Wage Stabilization Board, Solicitor General of the United States and Watergate Special Prosecutor. He is the author of numerous books and articles on labor law, constitutional law and civil rights and holds a number of honorary degrees. He presently serves as Chairman of the Governing Board of Common Cause.

Following the remarks of our commentators, we will open the discussion to the floor.

Professor Dorsen.