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Have the Federal Courts Functioned as the Framers Intended?

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Introductory Remarks

HAVE THE FEDERAL COURTS
FUNCTIONED AS THE FRAMERS INTENDED

Second Circuit Judicial Conference Workshop
Hershey, Pennsylvania
October 17, 1987
9:30 A.M.

Have the Federal Courts functioned as the Framers intended? The question before us this morning 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 topic should not involve us in a discussion of the jurisprudence of original intent to any great degree. 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 fairly 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 duties unknown to the Framers. Federal Courts have been assigned, or have undertaken, some tasks of a kind never even remotely contemplated by the Framers. It therefore follows that our inquiry must be concerned to some extent with the evolution and the changing emphasis in the work of the federal courts.

Yet, despite the additional tasks to which the judiciary has fallen heir, 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.

What part did the Framers expect the Courts to play, and have the Courts played that part?

Bruce Fein is Visiting Fellow for Constitutional Studies at the Heritage Foundation, Washington, D.C. Mr. Fein 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.

Charles J. Cooper is 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.

Walter Dellinger is Professor of Law at Duke University, where he has taught constitutional law since 1969. He graduated from Yale Law School, where he was an editor of the Law Journal. Professor Dellinger served as law clerk to Justice Hugo Black for the 1968-69 Term of the Supreme Court. He has published extensively on various aspects of the constitutional amendment

process and has lectured at a number of universities both here and abroad. In June of this year, he delivered the Second Circuit Historial Lecture in celebration of the constitution's bicentennial.

John M. Walker, Jr. is United States District Judge for the Southern District of New York, having entered into service in September of 1985. Judge Walker is a graduate of the University of Michigan Law School. He served as an Assistant United States Attorney for the Southern District of New York and as an associate and litigation partner in a major New York City law firm. From 1981 to 1985, Judge Walker was Assistant Secretary of the Treasury for Enforcement and Operations.

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

MODERATOR

THE HONORABLE ROGER J. MINER
United States Court of Appeals for the Second Circuit

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This program has been organized in conjunction with
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HOUSE OF THE ASSOCIATION MEETING HALL

THURSDAY, MAY 14, 1987 — 7:30 P.M.

Members of the Bar, their guests, and all other
interested persons are invited to attend

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