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LIMITED CONSTITUTIONAL DEMOCRACY: LESSONS FROM THE AMERICAN EXPERIENCE

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The protection of political and civil rights is an unending task. As one of our founders said: "Eternal vigilance is the price of liberty."[1] These rights perpetuate only because people continue to care about them and continue to work to sustain them. What is written in a constitution is important, but what is in the people's hearts and minds, as Judge Hand told us a long time ago, is much more important. People's willingness to struggle for those rights is critical to the maintenance of those rights.

In the United States, we have a bewildering number of political and civil rights in our constitution including the Bill of Rights, federal legislation, and Supreme Court decisions. We also have rights embodied in our state constitutions, because every one of our states has a constitution which has the equivalent of a bill of rights. Increasingly, our state courts are interpreting these provisions in ways that provide greater protection for individual liberty than the current Supreme Court is providing for rights on a national level. I will briefly address what seems to be the core, or essence, of political and civil rights as they exist in the United States. I think these rights are coming to be universally accepted as the bedrock fundamental principles that all people are entitled to. I would argue that the international community is assuming an obligation to protect these rights in all nations.

When the American confederation of states established a federal union, they created a limited central government that exercised limited powers. The states were free to do whatever they wanted, including limiting the rights of their own people according to the parameters of their own state constitutions. It was not until the adoption of the Fourteenth Amendment following the Civil War that the courts began to interpret the United States Constitution as limiting the ability of the states to interfere with the political and civil rights of the people. One

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1. John Philot Curran, 1790, *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 397 (15th ed. 1980).

exception to this was the Republican Clause. It is a little known, but very important clause in the Constitution, which mandates that the United States shall guarantee to every state a republican form of government.[2] The federal government was obliged to intervene to protect the basic core of rights; to preserve what the founders referred to as "a republican form of government." This is the equivalent of what we now think of as a democratic form of government, or what is best described as a limited constitutional democracy.

There are certain basic principles that we have in the United States that are at the core of what it means to live in a limited constitutional democracy, and for which the federal government has an obligation to provide to the states. Thus, I will briefly lay out what I think are the essential elements of that limited constitutional government.

The first and most obvious element is the set of procedures for periodic free elections which actually lead to a change in government. That is, there has to be a process by which people compete for political office in elections in which people are free to vote without fear of intimidation. Furthermore, elections must produce a government which actually runs the country. What we see in some nations is a formal process of elections giving rise to new governments while the military typically continues to run the country regardless of who is elected. So, the first element of a limited constitutional democracy is rules which provide for periodic elections in which people are free to organize and participate. Those elections must also lead to a change in the group of people who actually have the power to run the country.

The second element, closely related to the first, is the legitimacy of political opposition. This is the notion that people have a right to criticize the policies of the government, the structure of the constitutional system, particular initiatives or policies of the government, and to proclaim their superior ability to govern the country. Individuals must be free to disagree without fear of arrest and abduction, as has happened in many societies.

People must also be able to get access to the media of the society. This requires that where there is government-controlled media, there must be rule which provides for fair access. If there is privately-controlled media, the government must not have tools which prevent opposition groups from gaining access to the media. The society also must not have rules which prohibit certain kinds of political discourse, whether such discourse criticizes the leader or criticizes the government. The

2. U.S. CONST. art. IV, § 4.

United States constitutional system contains the majestic First Amendment which says, among other things, "Congress shall make no law . . . abridging the freedom of speech or of the press."[3] The Supreme Court has said that at the core of this amendment is the right of political dissent, and the right to express one's opposition to the government's policies in ways that are obnoxious to not only the government, but to most of the people.[4]

The United States watched its own people burn the American flag as a way of expressing opposition to various government policies. When the Supreme Court was confronted with the question of whether it was constitutional to prohibit flag burning, it held that a state could not prohibit such conduct precisely because it was obnoxious speech, and precisely because most Americans were revolted by the act and by the message intended to be conveyed by the act.[5] We then had a debate in the United States for the first time in our 200 year history regarding a proposal to amend the First Amendment of the Constitution to prohibit a particular kind of political expression.[6] The president of the United States supported that constitutional amendment.[7] It was, however, defeated in the Congress. This episode reminded us once again that even this bedrock principle is not immune from criticism and debate within the

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3. U.S. CONST. amend. I.

4. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 509 (1991) (applying strict scrutiny test to strike an ordinance which financially burdened the publishing of criminal accounts); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1987) (refusing to accept a subjective standard of "outrageousness" to prohibit the publication of political cartoons which some persons may deem to be offensive); FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1977) (stating that "[T]he fact that society may find speech to be offensive is not a sufficient reason for suppressing it"); *see also* R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) (invalidating an ordinance which criminalizes bias-motivated disorderly conduct such as cross-burning, since an ordinance discriminates according to the content of the speech); Texas v. Johnson, 491 U.S. 397 (1989) (finding flag desecration law inconsistent with the First Amendment). *But see* United States v. O'Brien, 391 U.S. 367 (1968) (affirming a conviction for burning a conscription registration card despite the symbolic message of such an act).

5. Texas v. Johnson, 491 U.S. 397 (1989); *see also* Helen Dewar, *Senate Votes to Outlaw Flag Desecration*, WASH. POST, Oct. 6, 1989, at A7 (reporting on the passage in Congress of a statute outlawing flag desecration); Ruth Marcus, *Justices Expedite Flag-Burning Cases*, WASH. POST, Mar. 31, 1990, at A4 (discussing the Supreme Court's eagerness to decide upon a federal statute outlawing flag burning).

6. 136 Cong. Rec. S8694-02 (daily ed. June 26, 1990); 136 Cong. Rec. S8432-02 (daily ed. June 21, 1990); 136 Cong. Rec. H4035-01 (daily ed. June 21, 1990).

7. Marcus, *supra* note 5, at A4.

United States.

During the McCarthy period, the United States witnessed an attempt to outlaw speech which was said to come from those under the control of international communism. The greatest threat to this fundamental principle of the right of political opposition, at least in the United States, is the charge that this opposition is really not American, but directed from the outside. Some speech, we are told, is un-American conduct. For many years, such speech was said to be a tool of the international communist movement. We had statutes in this country banning the communist party.[8] As you know, we are now lecturing Russians that it is an impermissible act in violation of political rights to ban the communist party of Russia. We seem to have forgotten that the Congress in the United States, in a resolution pushed by Hubert Humphrey, banned the communist party of the United States when it posed a significantly lesser threat to democracy than the communist party of the former Soviet Union now does to the democracy of Russia.

The third essential element of a limited constitutional democracy is a system which leaves people free from fear of arbitrary arrest and detention, and guarantees the right to a fair trial. The essential underpinnings of this element differ from society to society. The United States has a system based on the common law, and on the writ of habeas corpus. Other societies have different systems of criminal justice. I think that no one can say that one system is better than the other, or that there is only one system which protects the rights of people. However, I do think that there are basic elements that are required in all systems. First, the system must not be arbitrary, and there must be some mechanism of judicial review of arrest. Second, the government must not have the right to detain people indefinitely without trial. There must be a process for determining guilt and innocence which the people perceive and respect as fair. There must be limits on punishments, such as the provision in the United States Constitution which bans cruel and unusual punishment. We can debate which of these elements are essential and which are not, but I think the fundamental principle is that the government cannot have an arbitrary criminal system.

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8. The Smith Act of 1940, c. 439, §§ 2,3,5, 54 Stat. 670, 671 (current version at 18 U.S.C. § 2385). *See also* Dennis v. United States, 341 U.S. 494 (1950) (refusing to strike the Smith Act on grounds of vagueness). *But see* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis and Holmes, JJ., concurring) (demanding a clear and present danger to government or society before adridging the rights of free speech and assembly).

The fourth element of a limited constitutional democratic system is respect for minority rights. This is often a difficult issue. An essential requirement of this element is that the government should not interfere with the rights of a group of people, who see themselves as a minority, to organize their own private cultural, religious and educational affairs in the way they choose. Some years ago, we witnessed a landmark decision in the United States which protected the right of people to educate children in their own home.[9] Even though we have a system of universal compulsory education, the Court said that if somebody thought their children would not be educated in the way they preferred because of religious or cultural values, they retain the right to educate those children in a private school or at home.[10] There is, of course, under our First Amendment, a right of freedom of religion. We still have debates about the full extent of these rights. We now have a conflict in the United States based on a recent Supreme Court decision which many of us think substantially hedged the freedom of religion in this country. The Supreme Court has said that a statute of general applicability could be applied to people even if it violated their fundamental religious beliefs, and so long as the state presented a rational basis for the statute.[11] For example, many states have laws requiring autopsies as a routine matter. Many religions hold an autopsy to be a fundamental violation of religious belief. Those individuals are now subject to autopsies because of the Supreme Court decision. Many view this decision as a fundamental infringement on religious liberty, reminding us once again that these rights are not necessarily perpetual, and that broad constitutional phrases do not protect all people at all times.

The second aspect of minority rights is much harder. This is the question of political rights — the degree to which a minority should be allowed to organize a local area with some measure of political autonomy, and whether it should have guaranteed participation in the political process of the state. There are, I think, no simple solutions to these

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9. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (granting to Amish children an exemption from having to continue in public schools beyond the eighth grade).

10. *Id. See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (finding a state law which required attendance of public schools violative of substantive due process); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a state law forbidding all elementary schools from teaching subjects in languages other than English).

11. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (allowing government to regulate religion only as an incidental outcome of neutral and general laws, or when using the least restrictive means to achieve a compelling state interest).

questions.

In my view, these are the four essential elements. I think that, as I have constructed them, most of the specifics that people talk about fit under one of the four groupings — free elections, legitimacy of political opposition, limits on arbitrary arrest, detention and punishment, and protection of minority rights. As I have suggested several times, an essential element of that system is an independent judiciary with the right to enforce rules which protect the system. Individuals need to be able to go into court and argue that their rights are being violated, and to have an independent judicial system which has the capacity to order the government to change its behavior.

To make such a system work, there must exist, outside the formal constitutional structure, independent private organizations whose purpose it is to protect those rights. This is, for example, the role played by the American Civil Liberties Union in the United States. The oldest such group is the National Association for the Advancement of Colored People, which came into existence to protect the rights of black persons in the United States. We now have a bewildering variety of groups in this country. Every time a new nation is declared in the world, we discover that there is a group of people who have formed an association to protect their rights in the United States and influence American policy towards that country.

In my view, this is an essential element of the system. Using the American Civil Liberties Union as an example, I think it is essential that there be one or more organizations whose role it is to protect this constitutional structure, rather than simply to protect a particular minority or policy. There is a need for individuals and organizations which have the resources to appear in court on behalf of the protection of the constitutional structure.

Finally, there is a question of how to protect this limited constitutional government from being usurped from without, as well as from within by people who do not support limited constitutional government. I think that this is a task for the world community. As I suggested in talking about the United States Constitution, its founders were conscious of the problem. Therefore, they charged the federal government with the responsibility to maintain a republican form of government. They feared not only a coup d'etat by the military, but the force of emotion. They feared that the people of a state might elect a king. Thus, they imposed limits on what people can do even in a free election. They did not establish a pure democracy. They set up a limited constitutional government, and recognized that that government must be protected from mili-

tary violence from without, or from the desire of its own people to terminate that form of government. This is a principle which, as we observe what is happening in Haiti, Cambodia and El Salvador, the international community is beginning to take on, as I believe it should. The international community should assume the obligation to provide the guarantee of the right to live in a limited constitutional democracy, where they have the kind of political and civil rights that I have defined here.