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Lessons of Founding Fatherhood

By Neal Devins

Imagine being sent back in time to Philadelphia 1787, where James Madison, Benjamin Franklin and others were hammering out details of the U.S. Constitution. Imagine being asked your views on how to improve upon their handiwork. Sound daunting? Sound bizarre? Sound like a project for the American Bar Association?

Well, yes. Thanks to the democratic reform movement in Eastern Europe and the American Bar Association, some American lawyers have been given a rare opportunity to live this dream and contribute to the constitution-drafting of emerging democracies.

Thanks to serendipity, I was asked by the ABA to participate in workshops with Bulgarian members of parliament and other officials in Sofia (in June) and Romanian members of parliament in Washington (in August). Through these workshops I learned a great deal about the prospects for enduring constitutional reforms in these countries and a good deal more about the strengths and weaknesses of the U.S. Constitution. What follows, in no particular order, are the four chief lessons I gleaned from these experiences:

Lesson 1: The U.S. may not be the center of the universe after all.

When first contacted about the trip to Sofia, I hadn't given a nanosecond of thought to the sweep and significance of constitutional reform in emerging democracies. Indeed, I needed an atlas to spot Bulgaria (west of Turkey, east of Yugoslavia, south of Romania and north of Greece). This isolationism showed through in my reading of Bulgaria's draft constitution. Many of my comments highlighted ways in which the Bulgarian system would differ from ours. (And, after all, wasn't the ABA delegation supposed to bring to the table tried-and-true American constitutional know-how?) These differences included a constrained view of the presidency (no veto power, no power to appoint and remove "officers") and the prohibition of citizen-initiated litigation before the constitutional court.

The committee of experts that helped draft Bulgaria's constitution, however, had already considered and rejected these American innovations. In their view, aspects of the American system were simply ill-suited to Bulgaria. The committee preferred, instead, features of the constitutions of West Germany, France and most other Western nations.

Gulp. The American system completely and thoughtfully rejected? The American system a minority approach among Western nations?

Lesson 2: Constitutions are as much about political compromise as they are about lofty-sounding principles.

Various provisions in both Bulgaria and Romania's draft constitutions made little sense—little sense, that is, until one understood their political context. Both constitutions, while speaking of freedoms of speech and association, set severe limitations on political participation.

Romania's draft constitution provided no protection for political organizations that "militate against political pluralism" and prohibited members of the armed forces, policemen and others from becoming members of political parties. Bulgaria's constitution specifies that the inner organization of political parties "shall be in line with the principles of democracy," that "no organization shall act to the detriment of the country's sovereignty and national integrity," and that the president "not participate in the leadership of any political party." These provisions, although contrary to

the marketplace of ideas that characterizes America's supposed full-throttle embrace of association and expression values, make perfect sense.

In both Bulgaria and Romania, there is a continuing apprehension of "communist-type" single-party domination—an apprehension heightened by a continuing fear that democratic reform is too new not to be vulnerable.

That constitutional language is a byproduct of political compromise is an important, but often overlooked, part of our own constitutional heritage. After all, the U.S. agreed to a great compromise that allowed more populated states greater representation in the House and all states equal representation in the Senate, as well as the heinous compromise of approving slavery (and counting slaves as three-fifths of "free men" for representation purposes). These were critical to the U.S. Constitution.

Lesson 3: Constitutions are temporal, not permanent.

Americans hardly can imagine the U.S. Constitution being amended, let alone scrapped. However, the U.S. Constitution was America's second try at constitutional government. From 1781 to 1786, the Articles of Confederation (which provided for neither an executive nor judicial branch) ruled the day. The ABA delegation's recognition that a first constitution may serve as a stepping stone enabled us to soothe nervous constitution authors. For good reason, these individuals doubted the longevity of a constitution containing problematic political compromises as well as constitutional language guaranteeing, for financially strapped countries, the impossible—health care, a clean environment, safe working conditions, etc.

Lesson 4: A constitution is only as good as those who put it into effect.

Constitutions matter; they matter a lot. But the character and resolve of those who put constitutions into effect matters at least as much. When one examines U.S. constitutional history, this observation seems hardly remarkable. John Marshall's sleight-of-hand in the *Marbury* case helped protect the judiciary in the early republic; Abraham Lincoln's repudiation of *Dred Scott* and Earl Warren's ability to forge a unanimous opinion in *Brown* recognized individual dignity in a way that constitutional language never could; and Sam Ervin's management of the Watergate hearings invigorated the rule of law and America's commitment to separated powers. Our enduring constitutional tradition is as much about these individuals as the document itself.

Emerging democracies lack this tradition. Consequently, great emphasis is placed on constitutional language with too little discussion of the individuals who will put this language into effect. Constitutional reformers are making two mistakes here. First, they worry too much about whether their work is adequate to the task of governing a democracy. Second, (although they worry plenty) they may not worry enough about what will happen when their handiwork takes effect. In both Bulgaria and Romania, the old guard still possesses substantial power. A good constitution will not be enough to keep these anti-democratic forces in check.

These four lessons may seem rather obvious. In many respects, however, these lessons had eluded me before my visits with Bulgarian and Romanian officials. By discussing the role played by a constitution in a democratic government, these lessons became tangible. Indeed, I can confidently report that I learned more about the U.S. system from Romanian and Bulgarian officials than anywhere else. Along the way, the ABA delegation provided some assistance that, with some luck, will help these emerging democracies stand the test of time.

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