

Read May 1, 1987  
at Federal Court Bangor

May it please the Court --

Rebbit IsaacS

Chief Judge Cyr -- ~~My Colleagues of the Maine Courts~~

New Citizens *students*

New Lawyers

Ladies and Gentlemen

We come together here today at this important and impressive ceremony in celebration of Law Day, of the admission of new citizens to our great country, of admission of new members of the Federal Bar, and in celebration of the 200th anniversary of our United States Constitution.

I can't think of four more important or characteristic symbols of our American way of life. These symbols stand for principles which have given us 200 years of enormous progress in the history of mankind, not only of material progress but progress in our ever present quest for justice.

We celebrate the rule of law because we believe and we practice the idea that all people are equal before the law, that the law is supreme, and that no person has any special status or privilege before the law. We do indeed have a government of laws and not men.

We celebrate the admission of new citizens to our country because new citizens have been the great strength and glory of our history. From every group of new citizens, this country has gained improvements to our culture and energy to carry forward

our progress towards a more just society. A country needs a continuing supply of new blood to keep it vital and progressive.

I want to tell again the story of Col. John Black of Ellsworth, a new citizen. I have told this story many times when I have presided over the admission proceedings in the Maine Superior Court.

John Black came to the United States from England as a boy of 17 to be an accountant for the House of Baring, an English merchant banking firm and half owners with William Bingham of Philadelphia of what is now the land encompassed by Hancock and Washington Counties except the coastal townships. This land grant was called the "Penobscot Million," because it was a million acres and close to the Penobscot River. John Black prospered and became the richest man in Eastern Maine. He was appointed Colonel of the Militia in and around Ellsworth during the War of 1812 with England. The English in that war occupied Castine and did considerable destruction here in Bangor and other towns down the river.

The English naval ships cruised up and down the coast of Maine and sometimes landed men to get supplies and water for the ships.

These landings of course much alarmed the countryside and the militia was called out to repel these mini-invasions or at least to make their presence known.

In 1813 a British frigate was hovering around near Some's Sound and the militia was called out to appear at Southwest Harbor.

Col. Black called out his regiment and upon learning that there had been discussions by some of the men about his loyalty to the country in view of the fact that he was English-born and the enemy was England, made a speech to the soldiers in which he said:

My friends (I say friends, for I know of no foes among you), I have been informed that some persons, pretending to be friends to you (no doubt) and to the country, have endeavored to create in your breasts suspicions of me, as I understand, because I was born in England -- the country with which we are now at war. It is true I was born in England, and I would thank any of these jealous, suspicious people to inform me how I could prevent that, had I been so disposed; and I would ask if a man in this country of boasted liberty is to be suspected and convicted without a trial. I came to this country when but a boy. I have lived in this neighborhood for almost fourteen years, and have been known to most of you for that term of time. Notwithstanding the insinuations alluded to, I have the strongest proofs of the regard and confidence of my neighbors and friends. I have been elected to perform the duties of several important offices; and presume that I have hitherto performed those duties to the satisfaction of the electors, or I should not now have the honor to

command the Second Regiment of the Second Brigade of the Tenth Division of the Militia of Massachusetts.

Brother Soldiers: I should not have noticed the base insinuations of such men as would make those I have alluded to, had it not been to satisfy you and them, that I consider my character and reputation as a citizen-soldier invulnerable against such attacks. I am a citizen of the United States of America; have renounced allegiance to the Government under which I was born, and many now present were born under the same; have a wife and children and property here to protect; and I appeal to you, brother soldiers, whether these are not the strongest ties; and be assured, while you will stand by me, and I have strength to wield this sabre, I will defend your wives, children, and property, and the Constitution of our country, as far as my abilities permit, against the attacks of all enemies whatsoever.

It was said he asked any man to step out of ranks and he could be dismissed if he had any doubts of his commander's loyalty. None did step out, and the march to Southwest Harbor began.

John Black had the advantage of being a citizen by choice just as you folks are citizens by choice, more than we native born can say.

We celebrate the admission of new lawyers to practice before the courts because without a free and independent judiciary and a

free and independent bar, there is very little likelihood of maintaining our liberty and civil rights as we know them. Lawyers are the great equalizers in our society. They see to it that the over mighty follow the law just like everyone else. When everyone has to follow the rules, then the chances are very great that the issue will be decided on its merits.

We celebrate the 200th anniversary of our United States Constitution because it is the bedrock upon which our society is founded. The Constitution is so basic to our society that it is almost impossible for us to imagine our country without it.

When our Federal Constitution was written there was very little that was new in it. Many of the states had already adopted constitutions that contained the basic principles of the Federal Constitution.

John Adams noted a year after the Constitution was written:

What is the Constitution of the United States but that of Massachusetts, New York, and Maryland! There is not a feature in it which cannot be found in one or the other.

But that was not entirely accurate. There was a feature that was unique and that was the Federal nature of the Constitution, the compounding of government, the arrangement whereby Americans lived under two governments -- the Federal government and a State government. Each government governed individual citizens. The Federal government did not govern the States as such but governed the citizens of that State for certain purposes and in certain

activities, and where the Federal government had proper jurisdiction, Federal law was the supreme law of the land. The system was a bold experiment. It continues to be a bold experiment. We Americans spend a good deal of our time and energy still debating just what role each government should play in our lives. We can expect this debate over Federalism to continue a long time into the future. I think the Constitution will be alive and well just so long as we can argue about it. We have had 200 years of great disputes about the Constitution and on the whole these disputes have served us well. A non-controversial constitution wouldn't be any constitution at all. A non-controversial constitution would be arbitrary and dogmatic and entirely inflexible -- fit only for robots.

The founding fathers were perfectly aware of all this because James Madison told them so, if they didn't already know it which I'm sure was the case. Madison said,

In framing a system which we wish to last for ages we should not lose sight of the changes which ages will produce.

Well, we do have a constitution which has lasted for ages, is presently well, and the future for it looks bright, the prognosis is good. We can be sure the future will bring changes. We can be sure the world will not look any more similar to Now in 200 years than Now looks like 1787. And we also can be sure that basic human rights will still be the same and the necessity of

limited government will be the same, although in an entirely different context.

Some people lament that the public isn't better informed about the Constitution. A recent public poll called "The American Public's Knowledge of the U. S. Constitution" indicates that the public confuses the phrases in the Constitution with Lincoln's "Gettysburg Address" and the "Declaration of Independent<sup>ce</sup>." I can't think of any better phrases to confuse -- can you? About half the public believe the President can suspend the Constitution in a national emergency or war and can adjourn Congress. The President has no such authority, but if the President tried to do either it would soon be known. No President has ever tried and I'm not surprised half the people aren't clear in their minds about it.

On the other hand, the public is very aware of their rights in the criminal justice system. Ninety-two percent are aware they have a right to a lawyer and if they can't afford a lawyer, one will be provided, and almost all know they have a right to a jury trial.

The point is, I suspect, that the public knows as much about the Constitution, if not more, as any other topic. Although there may be some confusion about the exact nature of the Constitution in half the people's mind, yet they all know the basics, that the President can't do anything he wants to, or the Congress or the Judges, and they know they have rights. Perhaps the worst thing that could happen to us is that everybody became a constitutional

lawyer. History demonstrates, I think, that the public has a pretty good working knowledge of the Constitution and that we needn't get too upset by public polls. Public opinion polls are like lightning bugs, they give off just enough light to be noticed. We have, you know, learned how to make our Constitutional system of government work. In the beginning it was all experiment without experience and now it is still experiment, but we do have a great deal of experience.

Justice Oliver Wendell Holmes pointed this out 70 years ago when he wrote :

Our Constitution is an experiment, as all life is an experiment.

It is the very definition of experiment that it is uncertain, but there are different kinds of experiments. There are experiments based on reasoned experience and there are experiments based on impulse. Our Constitutions, setting up our States' governments and Federal government, were experiments based on reasoned experience.

I want to tell you now about David Sewall, the first Judge of the United States District Court in Maine, as I believe his career has a direct bearing upon this matter of experiment based upon reasoned experience.

David Sewall was commissioned District Judge for the District of Maine September 26, 1789 at a salary of \$1,000.00. The Judiciary Act of 1789 was passed two days before. Under the Judiciary Act, which set up the Federal Court system in three tiers or levels (it's the same now). The Supreme Court, the highest court, was



to consist of five members, each State was to have a District Court, except Massachusetts and Virginia, which were to have two districts. There was a separate District for Maine, then a part of Massachusetts and a separate District for Kentucky, then a part of Virginia. The Act further provided that there must be a Circuit Court, the middle level, for each of three circuits called the Eastern, Middle and Southern Circuits. Massachusetts was in the Eastern Circuit. The Circuit Court consisted of any two Justices of the Supreme Court and the District Court Judge of the District in which the Circuit Court was sitting. The Act provided that the Circuit Court was to sit twice each year in each District.

The District Court had jurisdiction of criminal cases where the punishment was whipping, not exceeding 30 stripes, or fines not over \$100, or a jail term not over 6 months. The District Court had jurisdiction of all Admiralty and Maritime cases and civil cases up to \$100 and certain other Federal cases. The Circuit Court had jurisdiction of all the bigger cases.

However, the Districts of Maine and Kentucky were given original jurisdiction of all Federal cases, both small and great except where the Supreme Court had jurisdiction. This was done because of the remote location of the two Districts. Maine was a busier place than than Kentucky, Maine with its large maritime industry. And so in the beginning of the Federal Court system, the Maine District Court had the largest jurisdiction and business and was the most important District Court in the New United States.

Judge Sewall was an experienced judge, having served on the Superior Court of Judicature of Massachusetts from 1777 to 1781, and then when the court's name was changed to Supreme Judicial Court he continued to serve until appointed to the Federal Court.

He was appointed, of course, by President George Washington, and in writing to President Washington accepting his appointment, he stated that he accepted with diffidence because as the only judge on the Maine District Court, he had the power of life and death over persons convicted of capital offenses and that there were no clear legal provisions for carrying on the work of the court. The first session of the new court was held at Wiscasset, but there was little to do. He wrote that the session of court, "was a little Gawkish to have nothing to do or what nearly amounts to it." But the session went well, and perhaps with his spare time, he played his flageolet for the good people of Wiscasset. Judge Sewall was said to have had a remarkable talent with his flageolet -- a small flute-like instrument with a round mouthpiece and 4 finger holes and 2 thumb holes I learned -- he could blow the flageolet from one side of his mouth and blow the bass notes from the other side. Incidentally, he obtained the flageolet for writing forensic exercises for another student while at Harvard.

The next session of the new Federal District Court was in Portland the first Tuesday of June, 1790 and he noted that he "made the 1st charge to Grand Jury."

I have a photocopy of Judge Sewall's first charge to a Federal Grand Jury. It is in his handwriting and was sent to me

as President of the Maine Bar Association twelve years ago by Pamela Harer of San Bernardino, California. It was placed with the Maine Historical Society.

In those days, the delivery of a charge to a Grand Jury was a notable public event. They were a great source of information to the public and were much talked about. This first charge to the Grand Jury in Portland surely was a curious event for everyone. This was the first contact any of the people had with the brand new Federal Government.

I want to read you a part of the charge concerning Judge Sewall's thoughts on the new government. His charge begins with an historical account of Maine, which he points out was first attempted to be settled 183 years before in 1607 at the mouth of the Kennebec River. Next he spoke of the new government as follows:

Government of some kind is necessary for the preservation of the body Politic, as food is for the body natural. That government is the best, That best serves the rights and privileges of individuals from external force and internal commotions, fraud, and violence. But what kind or form of government is best adapted to these important purposes, is a proposition that all mankind are not agreed upon. And perhaps the kind of government for securing these necessary purposes, may vary according to the prevailing habits, opinions, and degree of knowledge and improvements of the people at large, in a particular community, -- almost all the

forms that have [arisen] in the world, have originated from force, fraud, or accident. The several governments of the American states in the union are an exception. -- These have severally been formed upon deliberate consultation, by the intelligent and enlightened specially <sup>u</sup>dep~~re~~ted for that purpose. -- And the general government which cements the whole, is a form unexampled in the [annals] of time, both in respect to the kind and manner of its origin, it being a union partly federal and partly corporeal, and has been adopted by the free consent of a number of enlightened Republicks.

Next he explained the new Federal court system and then took up the crimes which the Grand Jury were to consider.

The Grand Jury's business at hand was to consider indictments of Thomas Bird and Hans Hanson, who were being held on suspicion of piracy and felony on the high seas. The Grand Jury indicted them for the piratical murder of Capt. John Conner of the sloop, Mary, near the coast of Africa. The trial began soon after and lasted five hours. Bird was convicted of the murder and Hanson was found not guilty. Judge Sewall pronounced the death sentence by hanging upon Bird and he was hung in Portland on June 25, <sup>1770</sup>~~1770~~. From indictment to hanging took three weeks. This was the first piracy case tried and the defendant hung in the new United States of America.

Bird was an Englishman. He ran away from home at the ripe old age of eight years, to avoid going to school and went to sea

with his uncle. He followed the sea until he was hung at the age of 40. He had been in almost all parts of the world. He denied he had killed Captain Conner in what was called a dying speech. In those times a criminal defendant was not allowed to testify in court, so the newspapers usually got and printed a statement of the defendant in a murder case for everyone's edification.

Bird's statement gave a fairly detailed autobiography and he said

I acknowledge I have lived an irreligious, wicked life, profaning the name of God, lying and drinking to excess. I freely wish and pray for God's forgiveness to all men who have injured me, as I hope forgiveness of God through Jesus Christ my Lord.

As a dying man I declare before God the above account to be strictly true.

Bird signed the statement by his mark.

Another interesting event in Judge Sewall's life was that he ran for the Legislature in Massachusetts after he became Federal Judge, was elected, and went to Boston to take his seat in the House of Representatives in 1791. The House refused <sup>him his seat</sup> by a great majority on the grounds that the Massachusetts Constitution prohibited a Federal Judge from being a member of the State Legislature as a violation of the separation of powers. Sewall vigorously disagreed.

To get back to Judge Sewall's charge to the Grand Jury-- the important point he makes is that the constitutional governments

of the several states and of the Federal government were, "formed upon deliberate consultation," and did not like the other governments of the world originate, "from force, fraud, or accident." This was not a new insight of Judge Sewall. Benjamin Franklin had made the same observation during the Constitutional Convention three years before when he said that the success of the new Constitution was very important, otherwise, "mankind may hereafter despair of establishing governments by human wisdom and leave it to chance, war, and conquest."

And so it is that we celebrate here today the Constitution, the rule of law, new citizens, and new lawyers -- all four institutions existing upon the principle of "deliberate consultation" and "reasoned experience" and not existing upon "force, fraud or accident."

We can all be sure in this time, 200 years after the Constitution was established, with all the blessings and potential for our destruction that modern technology gives us, that we need more, not less, deliberate consultation and reasoned experience in the world.