Department of Justice

REMARKS

OF

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AT

THE UNIVERSITY OF RICHMOND

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NOTE: Because Mr. Meese often speaks from notes, the speech as delivered may vary from this text. However, he stands behind this text as printed.

Remarks of the Attorney General

Constitution Day - University of Richmond

17 September 1986

It is a pleasure to be with you today. There is something about the first weeks of September that seems to demand getting out of the office, out of Washington, and onto a college campus. There is an intellectual vitality at the beginning of a school year that is unequaled at most other times. As a former professor, I truly appreciate the chance to visit you today to speak to an issue that matters to a quickly growing number of citizens. My topic today -- Constitution Day -- is not surprisingly -- the bicentennial of our remarkable Constitution.

September 17 is the day that the Federal Constitutional Convention of 1787 sent forth the proposed Constitution for discussion and ultimate ratification. It is a day that most of us do not formally pause to celebrate in the same way that we do, say July 4. Yet as we near the bicentennial year itself, I think it more and more important that we, as a people, do endeavor to remember this day which commemorates the source of our liberties.

It seems especially appropriate that we spend this Constitution Day in Richmond. It is the home of the man largely regarded as our greatest Chief Justice, John Marshall, a strong Federalist to say the very least. Virginia and its native sons played critical roles in the activities which led up to the ratification of the Constitution. George Washington not only served as Commander in Chief in the Revolutionary War -- he also

chaired the Constitutional Convention in Philadelphia -- and of course was elected the first President of the new Federal government.

Thomas Jefferson, who was Ambassador to France at the time was not present at the Constitutional Convention, but he contributed greatly to the formation of the fundamental principles embodied in it as Father of the Declaration of Independence.

And of course James Madison was the man who probably contributed most to the drafting of our Constitution and was known as the "Father of the Constitution." In addition to his genius as a political philosopher, Madison displayed one of the great virtues of a Southern gentleman as he modestly disclaimed this title: "[The Constitution]" he declared, "was not...the offspring of a single brain. It ought to be regarded as the work of many heads and many hands." Indeed it was, and ultimately, what united these men of diverse talents was a common goal -- the preservation of liberty for their fellow citizens and all future generations of Americans.

It is a tribute to the success of their enterprise that you and I can almost take for granted the principles which these men struggled to implement through the constitutional structure of our national government.

I think we can learn many things of value by remembering the constitutional period, the extraordinary men who brought the Constitution into being, and more particularly, how they addressed the judicial controversies of that age. So I would

like to reflect briefly on the history, context and political philosophy of the Constitution, particularly as it shaped the formation of the independent judiciary.

The Framers knew a great deal about the abuse of judicial power. The Declaration of Independence was quite clear on that point. Jefferson listed among his indictments of the British sovereign that "He has obstructed the Administration of Justice, by refusing his Assent to laws for establishing judiciary powers. [And] he has made judges dependent on his will alone...."

Although the Declaration of Independence set forth the principles of individual freedom and self-government that were to guide the colonies, it took the bitter and hard fought campaigns of the Revolutionary War to secure these liberties. Often the hardship threatened to turn men away from the noble goals expressed in the Declaration of Independence. Washington's men became restless in Valley Forge and during the winter of 1783 spent in Newburgh, N.Y. At times they seemed on the verge of threatening to revolt against the civilian authority of the Continental Congress. Some suggested that Washington himself should seize control and become King. Of course we know that he rejected this anti-democratic notion emphatically, as he stated "If you have any regard for your country, for yourself or posterity, or respect for me, banish these thoughts from your mind."

After the Revolutionary War, the Framers reacted to their experiences at the hands of the British monarchy. In establishing the first national government under the Articles of

Confederation, they dispersed most power among the states. The Continental Congress would declare war and make peace, regulate commerce and maintain an army and navy -- but it would not even collect taxes. Its laws were the supreme law of the land, yet it had virtually no executive to enforce them, and a very limited judiciary to apply them.

Unwittingly, the authors of the Articles of Confederation had gone too far in dispersing government power -- the national government was left impotent and could not maintain order necessary to allow men to go about their ordinary business.

Since it couldn't tax, Congress couldn't pay its debts, and on one occasion was chased out of Philadelphia by unpaid, mutinous troops. The revolutionary unity faded as the new states raised tariffs and restrictions against each other's goods, and the country moved towards balkanization and the establishment of jealous economic fiefdoms. Shay's rebellion highlighted the need for a viable national government.

Madison wrote worriedly that "if present paroxysm of our affairs be totally neglected, our case may become desperate."

Yet even in this turmoil some Founders saw one problem as more dangerous than all others: Madison was convinced that the "mutability of the laws" under the Articles of Confederation was the primary cause of the uneasiness leading to the Constitutional Convention. Alexander Hamilton concurred -- the "want of a judiciary" was the crowning defect. After all, he said (and everyone knew) "Laws are a dead letter without courts to expound and define their true meaning and operation."

The only judicial power provided in the Articles was exercised by a special court to settle boundary disputes, but this court had no power to enforce its decrees. Finally, in 1784, war nearly broke out between Pennsylvania and Connecticut over a border controversy.

Ironically perhaps, it was the lack of centralized national jurisdiction over these state-line conflicts that paved the way for the adoption of the Constitution as we know it. In 1785, Maryland and Virginia met at Mount Vernon under George Washington's guidance and settled their longstanding quarrel over navigation of the Potomac River. Bouyed by this success, Virginia and Maryland led the call for the Annapolis Convention, which was then held in September of 1786, to improve commercial relations among the states.

The Annapolis Convention was a failure that ultimately paved the way for success. Only five states showed up at Annapolis. However, those delegates who did attend drafted a strong resolution calling upon Congress to convene a second convention in Philadelphia with the power to propose such changes as were "necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union."

And so the Framers set about to craft the institutional arrangements necessary to preserve the delicate balance between individual freedom on one hand and legitimate government power on the other. In all, 55 delegates from the 13 states gathered in Philadelphia in the spring of 1787. They were called upon to

propose Amendments to the Articles of Confederation, but soon concluded that a completely new structure was needed.

Many of you are probably familiar with the lessons from classical history, Enlightenment thinking, and the revolutionary experience that they drew upon in their deliberations. The Constitution is witness to their genius. But you may not be so familiar with some of the less momentous acts and statements of the delegates, or how they addressed the judiciary which Hamilton called "the least dangerous branch" of their new government.

On various issues, judicial and otherwise, passionate arguments, learning, skillful insights, and bitter disputes were lightened by wit and good humour.

For example, George Washington, who served as president of the convention, was content to preside and keep himself out of the formal debates. Still, when one of the delegates proposed a constitutional provision that would have limited the size of the Army to no more than 5,000 men, Washington could not resist whispering to a colleague that the motion should be amended to also provide that "no foreign enemy should invade the United States at any time with more than 3,000 troops."

Despite the high temperatures during the summer and the important issues at stake, tempers usually stayed cool. Of course there were exceptions. At one point Luther Martin of Maryland was so upset by the way the Constitution was taking shape that he exclaimed: "I'll be hanged by the people of Maryland if I agree to it." To which another delegate answered, then "I advise you to stay in Philadelphia."

One of the most important features governing the Convention was secrecy. Washington let it be known that he would tolerate no discussion of the Convention's business with outsiders.

Yet it was the problem of how to preserve both order and freedom which was the greatest concern of the Framers at the Convention. Despite the problems that arose from lack of an orderly government, the Framers were reluctant to cure these problems by surrendering any measure of the freedom they had so recently won in the War of Independence. The memories of George III's centralized and heavy-handed rule were still too strong in 1787 for a Hamiltonian nationalism to prevail.

Accordingly, the Framers were under a unique pressure to devise a Constitution and system of government that could guarantee both order and freedom.

In order to secure a balance in the new republic of order and freedom, the Framers had to devise two concepts which we now take for granted but which were almost revolutionary at the time. The first was the concept of a written Constitution. Prior to 1787, it was unheard of for a people to assemble through their representatives and organize a system of government. Such an assembly became possible only because the Framers believed in law and thought that it would be possible to create a supreme law that would bind the government itself, thereby preserving freedom. The confidence in written constitutions as a method of limiting government grew out of the experiences with the Magna Carta, the Mayflower Compact; and England's Glorious Revolution of 1688. But in the American Constitution and Bill of Rights,

the concept of a written Constitution as the organizing focus of government reaches its full fruition.

A second revolutionary concept developed by the Framers has also proved essential to the unique American balance of order and freedom. That concept is the system of checks and balances which characterizes our Constitution and distinguishes us from the many parliamentary democracies. Power is divided among the three branches of the federal government and between the national government and the several states. Both Separation of Powers and Federalism preserve freedom by fragmenting power so that "ambition counteracts ambition." The result is that government action at the national level becomes possible only when there is a sufficiently strong popular consensus so that all branches of government are prepared to move in the same direction.

As I mentioned, there had not been an effective national court system under the Articles of Confederation. The Convention delegates were of one mind on this key issue. In the phrase of the great commentator Farrand, the proposition "that there should be a national judiciary was readily accepted by all." Of course politicians all know that agreeing on a good idea is the easy part. Then comes working out the details.

There was lively debate among the delegates on how to select judges, and how much they should be paid. Ultimately, of course they granted the President the power to appoint judges with the advise and consent of the Senate. To insure judicial independence, all judges were given life tenure and their pay could not be decreased while they were in office.

Definite decisions were also made concerning the proper role of the judiciary and the limited functions of judges.

Proposals were defeated in the Convention which would have established a "council of revision" including Supreme Court justices to examine legislative acts, or to make the Chief Justice part of a privy council. Elbridge Gerry warned that "it was quite foreign from the nature of [the] office to make them judges of the policy of public measures." As John Marshall later pointed out in the now famous case of Marbury v. Madison: "It is, emphatically, the province and duty of the judicial department to say what the law is" -- but what the law should be is ultimately left to the President and Congress.

This view of the Constitution and its limiting character has been assumed by judges, if not explicitly argued for, during most of our judicial history. When they rolled up their sleeves and went to work in constitutional cases, they began by seeking to discern the original meaning of the text, an enterprise that fundamentally assumes its intelligibility. They understood that the Constitution is law -- law that binds judges as well as everyone else.

At the time of the American founding, the prevailing rules of legal interpretation were well known. Finding the sense of meaning of the Constitution as it was accepted and ratified by the Nation required serious consideration of the words in their general and popular usage, the context in which they were written, their subject-matter, their effects and consequences, and the spirit or reason of the law. This widely accepted mode

of analysis sought the intention of the lawgiver as expressed in the words of the law.

Original intention mattered, especially in the context of judicial interpretation of the Constitution. Justice Joseph Story perhaps summed it up the best: "It should [never] be lost sight of that the government of the United States is one of limited and enumerated powers; and that a departure from the true import and sense of its powers is pro tanto, the establishment of a new Constitution. It is doing for the people, what they have not chosen to do for themselves. It is usurping the functions of a legislator."

This common sense approach -- this tradition of constitutional interpretation and this understanding that the Constitution was law limiting all governmental power -- was dominant in legal circles until only recently. But during the past several decades we have witnessed the rise of a differing view of the Constitution and its place in American life. This new -- indeed, radical -- approach denies the validity of the traditional view. It holds that the Constitution's original meaning either cannot be discerned or, if discerned, cannot be applied to the issues of today except with considerable judge-made modification. In this view, we should allow judges to infuse the Constitution with new meanings derived from evolving notions of contemporary morality. It is only a matter, some say, of judges pouring fresh ideological wine into the old constitutional bottle.

The major source of this new jurisprudence has been some of the law schools in our country. In recent decades we have seen, as U.S. Court of Appeals Judge Robert Bork has put it, a "torrent of constitutional theorizing ... pouring from America's law schools." Judge Bork comments that such a "sudden flood of innovative theories [may signify] not the health of scholarship and constitutionalism but ... a sign of malaise and, quite possibly, deterioration."

This modern theorizing also represents a radical departure from the great tradition of interpretation that assumed the intelligibility of the Framers' Constitution. Judges did not routinely invoke their own fresh moral insights in reviewing acts of Congress, nor did they believe that they should make the Constitution into a draft horse that would pull the American people toward some extra-constitutional, judicially-created concept of the ideal world.

Yet not only is the modern theorizing at odds with our past, it more importantly cannot be reconciled with the fundamental principles of a democratic society. Our Constitution does not give judges the authority to rewrite or otherwise amend our fundamental law. Such authority can lie only in the people themselves, for in our form of government, the people rule.

Recognizing that any constitution had to be adaptable to meet new circumstances when necessary, the Framers provided a means for "we the people" to govern ourselves in accord with changing times. Thus, Article V of the Constitution spells out a

method for changing our fundamental law -- the process of formal amendment. Through this process we can propose alterations or additions to our Constitution -- and down through our history we have done so on many occasions.

While the modern theorizing about the Constitution has arisen mainly in certain of our law schools, it has had consequences more generally in our legal culture -- in court opinions, in congressional debates and hearings, and in that part of the media interested in legal matters. But as I survey the scene today, I am buoyed by signs of a return to health -- of a return to the common sense approach to the Constitution that dominated for so many years. And I think it especially appropriate that this return to common sense -- to an understanding that constitutional law must be rooted in the Constitution itself and that our fundamental law limits even the judicial power -- is occurring during this moment of great historical celebration.

I see a great benefit resulting from the robust debate of recent years, a debate that began long before last year. The late Alexander Bickel of the Yale Law School began the discussion two decades ago with his brilliant critique of the Warren Court. His friend and colleague at Yale, now federal appeals court judge, the Honorable Robert Bork, continued and in important ways has shaped the debate. And certainly Raoul Berger, with this publication in 1977 of Government by Judiciary, has sharpened the issues.

In the past year there has been commentary on this issue of the Constitution and its place in our political life in newspapers, magazines, both popular and intellectual, law reviews and yet other journals. And as I read this mass of writings, I see increasing acknowledgement from across the political spectrum on the need for interpretation of the Constitution that conforms to the original meaning of our basic charter. There is, as well, a growing realization that judicially created rights and remedial decrees based on them, bereft as they are of the support or principles found in the Constitution itself, are not sturdy expressions of principle and will be subject to whatever ideological breezes blow through the legal community, be those breezes liberal or conservative. And there is greater appreciation for the threat to our most cherished principles that occurs when judges act like legislators.

Thus, Stuart Taylor of the New York Times, writing in The New Republic, he said:

> [J]udicial legislation erodes democratic self government. It converts judges into an unelected and illegitimate policy-making elite. Indeed, its most radical exponents evince a deep antipathy for the democratic process ... The urge to do good is powerful, the urge to court greatness is intoxicating. Judges should resist the sincere but arrogant assumption that they know best.

During the past term of the Court, as well, one sees how much alive is a recognition of the importance of original intention. Justice White, for example, in his dissent in the Thornburgh case argued that fundamental "liberties and interests are most clearly present when the Constitution provides specific textual recognition of their existence and importance." To argue otherwise, Justice White concluded, is to risk having the Court "impose its own controversial choices of value upon the people."

Finally, one of the best signs of the return to common sense about our fundamental law came in recent opinions by Chief Justice Warren Burger. His Synar opinion, invalidating a portion of the Gramm-Rudman-Hollings Deficit Reduction Act, is a masterful analysis of the text of the Constitution in light of the intentions of those who framed and ratified it.

Likewise, his earlier separation-of-powers opinion in the Chadha case shows the importance of limitations on governmental power as compared to other values:

As he stated,

> With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

It is a dedication such as this to the fundamental principles of the Constitution -- its various institutional arrangements -- that best secures the idea of limited government.

As we approach 1987 we, as a free people, need to remember that the Constitution is more than the Bill of Rights and the Fourteenth Amendment, important as those parts of it are. It is, rather, a document founded in a sound political theory of individual rights that creates a structure of government that will protect and defend those rights. In the end, we must always remember that the substance of the Constitution "is a design of government with powers to act and a structure to make it act wisely and responsibly. [And] it is in that design ... that the security of American civil and political liberty lies."

Two hundred years ago, the creation of our written Constitution was heralded throughout the then-small new nation as a major accomplishment. Celebrations were held, an elaborate parade demonstrated public support, and a new sense of national unity was proclaimed.

Today, in the Bicentennial year, the need for fidelity to the Constitution has not diminished. Debates about constitutional interpreation stimulate thought and study of this remarkable document. Public attention to the duties of citizenship under the Constitution is fostered by such efforts as those of the Freedoms Foundation at Valley Forge, which has developed a "Bill of Responsibilities" to guide the exercise of our liberties which are proclaimed by the Bill of Rights and protected by the safeguards of our constitutional system. This subject will become increasingly important as we look at how the values and benefits of a free society have been preserved in our structure of constitutional government.

Let me say in closing that it has been a pleasure to appear before you today to speak to the importance of our bicentennial celebration. I ask you to join with me in a celebration of our Constitution that seeks to be true to the Constitution. True not just to the Founders but to their posterity as well, to our great tradition of law. For it is this tradition that has allowed our great republic to flourish for nearly 200 years as a nation which more than any other symbolises the blessing of liberty. And it is this tradition that will allow us to remain, as Abraham Lincoln once said, the last best hope on earth to the cause of freedom.

Thank you.