FOR RELEASE AT 12:30 P.M.
SATURDAY, FEBRUARY 11, 1956

"DUAL SOVEREIGNTY UNDER THE CONSTITUTION"

ADDRESS

BY

HONORABLE HERBERT BROWNELL, JR.

ATTORNEY GENERAL OF THE UNITED STATES

Prepared for Delivery

before the

Fordham Law Alumni Association

Waldorf Astoria Hotel

New York, New York

Saturday, February 11, 1956

12:30 p.m.

As has aptly been said, Federal governments are not the offspring of political science; they are the product of economic and social pressures. Such was the origin of our Union. The government that preceded the United States was a collaborative arrangement of thirteen states which, in pursuit of legal sovereignty, was in danger of self-destruction. This was particularly evident in the instance of states having no convenient ports for foreign commerce. As a consequence they were taxed by their neighbors through whose ports their commerce was carried on. In the classic analysis of Madison, New Jersey, placed between Philadelphia and New York, "was likened to a cask tapped at both ends", and North Carolina, between Virginia and South Carolina, "to a patient bleeding at both arms".

To overcome the defects inherent under the Articles of Confederacy, the framers of the Constitution established a central government supreme in its sphere, with power to protect the economic interests common to all the states and to enforce its authority directly upon the people, not merely by grace of the states.

In order to correct prior inadequacies and abuses, the Constitution was drafted so as to enumerate specific restrictions upon state and national power. For example, the states are forbidden to impair the obligation of contracts, to coin money, to lay tonnage duties, or to make treaties. Conversely, the Federal Government is forbidden to tax exports, or to lay a direct tax not apportioned accordingly to population, or to give preference to the ports of any state. On the other hand, the Federal Government was given certain specific powers: to coin money, for example, and to declare war. But it is

not the particularized provisions which so often raise thorny problems of construction. The really troublesome questions as to the distribution of power between state and nation more usually arise in the application of the comprehensive clauses giving Congress the power "to regulate commerce . . . among the several states" and "to lay and collect taxes." They arise also from the implications of the fact that we are a union of states.

Inevitably, therefore, the interplay of forces within a federalism is largely moulded by judicial interpretation. We need only touch the periphery of the body of Supreme Court opinion to view a few of the developments of the Federal-State relationship in its sovereignty aspect.

Reading of the Court's opinions vividly reflect the struggle throughout our history for supremacy by each of the two sovereign systems. The high points of public clamor for the state's occupancy of paramount position was most evident immediately after the adoption of the Constitution and, again, in the pre-civil war era. During the first period, the Court, under Marshall's brilliant leadership, was able to command sufficient respect for its emphasis on the need for strong federal powers to quiet the fears of the public. I need not detail the result of the second states' rights surge.

At other times, we have observed stronger concepts of Nationalism leading the Court in its shaping of Constitutional doctrine. For example, in the eighty-one years from 1789 through 1869, only four Acts of Congress had been declared invalid. Yet, in the four years from 1870 to 1873, six of such Acts were held unconstitutional. Some of

our landmark cases in the Supreme Court portray the pulls and stresses among our people as groups of opposite opinion looked to the Court for support of their position.

Looking back, it is interesting to observe that the very first three suits entered in the Supreme Court involved the question of state sovereignty. The right of the Federal judiciary to summon a State as a defendant had been the subject of deep apprehension and active debate at the time of the adoption of the Constitution. But the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government. And it was largely through their dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted. Yet, in spite of such disclaimers, the first suit filed with the Court at its February Term in 1791 was brought against the State of Maryland by a firm of Dutch bankers as creditors; and the question of State sovereignty became at once a judicial issue. The next year, at the February 1792 Term, a second suit was entered by an individual against the State of New York; and, at the same time, a suit in equity was instituted by a land company against the State of Virginia. These suits aroused great alarm among those who feared that the independence of State Governments might be lost in the increasing growth of the Federal Government. But the issue was squarely decided in still another proceeding in the Supreme Court. In 1793, in Chisholm v. Georgia, a suit was brought by two citizens of South Carolina as executors of an English creditor of the State of Georgia. The state hotly declined to appear to defend the suit, denying the

jurisdiction of the Supreme Court to entertain such an action. To the general surprise, the Court, under Jay, held that a state could be sued in the Supreme Court by an individual. Within two days of the handing down of the decision in Chisholm v. Georgia, a Constitutional Amendment was introduced into Congress depriving the federal courts of all jurisdiction in cases brought against a state by citizens of other states or of any foreign country. This was ratified in 1798 and became the Eleventh Amendment.

As history unfolded, the action of the Court in that case set the stage for the several decades of the Marshall Court. Inquiry into almost any phase of Constitutional doctrine usually begins with the opinions of the great master, John Marshall. As we know, there is no doubt as to the position of Marshall on the basic issue of sovereignty. His nationalism was boldly and eloquently proclaimed in case after case. Here, in this period and in these decisions, we find the birth of those concepts of Federal sovereignty which were to contribute such vitality and strength to the infant nation. In such important areas as interstate commerce, banking, and contractual rights, among others, this brilliant jurist marked out many of the important lines of division between the permitted reach of state and national powers.

In Gibbons v. Ogden, for example, Marshall told the State of New York that its grant of an exclusive charter for Hudson River navigation was offensive to the commerce clause of the Constitution. "This power," said Marshall, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."

In Cohens v. Virginia, Marshall, in pointing out that "The general government, though limited as to its objects, is supreme with respect to those objects," gave us the teaching that the "constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it."

Perhaps the real core of Marshall's legacy lies in the view that although the Constitution is the supreme law of the land, it must not lose contact with the daily affairs and needs of its people; that it is living law, even when it collides with the will of the legislature, state or Federal; and that the judiciary, with the Supreme Court at its apex, is the natural and final interpreter of the Constitution.

There is much to choose from in Marshall's opinions on the subject of the state and Federal sovereign system. For me, his language in McCulloch v. Maryland, never loses its vibrancy. In that case, you may recall, the State of Maryland sought to impose a heavy tax upon the Maryland branch of the Bank of the United States through assertion of its sovereign right to tax instrumentalities within its boundaries. Marshall's opinion in the case is commonly regarded as his greatest state paper. The opening paragraph is itself a masterpiece of writing. He recognizes, at the outset, that the adjudication of a contest over sovereignty between a state and the national government imposes upon the Court an "awful responsibility" which, nevertheless, must be discharged to avoid the possibility of continued hostility.

Coming to the heart of the crucial questions, Marshall laid down, for the guidance of generations to come, enduring Constitutional principles. This one, for example: "In considering this question, then, we must never forget, that it is a Constitution we are expounding." And the familiar statement that the Constitution is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." The opinion also includes the thoughtful statement that "The Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people." On the familiar theme that "the power to tax involves the power to destroy," the Court held that the states have no power, by taxation or otherwise, to impede or control constitutional acts of the Congress. It was here, too, that Marshall announced the implied powers doctrine -- the most pregnant instrument which has yet been devised for giving breadth to national powers.

In our "case or controversy" system of law, the situations which prompt adjudication of Constitutional questions largely reflect the clash of differing opinions of the day. During the early days of the courts, the impact of state and Federal law on property rights were outstanding issues. It was probably not until the 1860's that a discernible change occurred in the character of litigation before the courts and the consequent development of Constitutional doctrine on sovereignty in relation to personal rights and community welfare.

This change reflected the sharply different social and economic conditions and political atmosphere of the times. For the period from 1830 to 1860 was an era of liberal legislation -- the emancipation of married women, the abolition of imprisonment for debt, the treatment of bankruptcy as a misfortune and not a crime, prison reform, homestead laws, abolition of property and religious qualifications for the electorate, recognition of labor unions, and liberalization of rules of evidence. Of course, the revolution in business and industry methods, in means of transportation, and the expansion of the Nation's activities provided the great stimulus for a new outlook by the Court.

To the Court under the leadership of Chief Justice Taney, the paramountcy of National power within the sphere of its competence was of equal but no greater importance than complete maintenance of the reserved sovereignty of the States. Neither was to be unduly favored or promoted. Under his aegis, there took place a rapid development of the doctrine that the State possessed great powers to provide for its people through the police power. Taney's views were made especially plain in the Charles River Bridge Case. There, he cautioned against depriving the states of "any portion of that power over their own internal police and improvement, which is so necessary to their well-being and prosperity".

Under Chief Justice Taney, the Court particularly reflected a departure from Marshall's conservative nationalism in the interpretation of the commerce clause. To Marshall, the clause granting the power to regulate interstate commerce deprived the states of such

power. In Taney's view, the states could be deprived of this power only by appropriate legislation by the Congress and then only if the state action was in irreconcilable conflict with federal legislation. The supremacy of the national government in this field was not thereby disputed; Taney merely insisted that the national legislature make its will explicit if state action were to be invalidated under the commerce clause.

There is no doubt that this much-maligned Chief Justice, whom we now recognize as a great jurist, personally detested slavery, but who was fearful over the prospect of violent disunion. Quite apart from the unfortunate Dred Scott decision, we are able to observe Taney's deep concern over the possibility of undue infringement of the power of the states to enact legislation necessary to the welfare of their citizens. Because of this concern, Taney is regarded as a vigorous champion of so-called state police powers.

The question whether a state statute which is otherwise a valid exercise of the state's police power has been suspended, superseded, or displaced by a federal statute, enacted pursuant to the paramount power of Congress over the subject matter under the Constitution, has been before the Supreme Court many times. Usually, though not invariably, the basis of the assertion of the superior federal authority has been the commerce clause.

In the development of judicial decision on the commerce clause we find reflected many recurring issues bearing upon our system of dual sovereignty. It was to be expected, of course, that with the tremedous industrial expansion, aided by the large influx of immigrants, the approach of the 20th century would find this Constitutional provision a subject of considerable litigation.

Beginning about 1890, the country held to the theories of laissez faire, which boil down to the idea that the less government interferes with business, the better for all. By then, the Court had firmly established the principle that any state law which affects interstate commerce to such an extent as to regulate it, is void. This doctrine permitted business interests to spread over the country without much regard to state lines.

However, with Congressional entry into fields of comprehensive regulation of economic enterprise, beginning with the Interstate Commerce Act of 1887 and the Sherman Act in 1890, the Court proceeded to set up state power as a limit upon the scope of national legislation. The Sugar Trust decision in 1895 is illustrative of the Court's new concept as it affected Congressional legislation. Here, the Anti-Trust Act was held not to apply to a combination of sugar refiners who were conceded to control 98% of that necessary product. Chief Justice Fuller, speaking for the Court, reached this result by labelling the effects of the combination of producers upon commerce among the states as "indirect" and, therefore, beyond Congressional power. Additionally, manufacturing was held not to be commerce. In a number of cases, the Court held that production and mining, along with manufacturing, were subject to state regulation and taxation on the ground that such activities were purely local and not interstate commerce. In following this reasoning, the Court, in 1918, went so far as to hold that Congress could not bar from interstate commerce goods produced by child labor.

However, after 1900, a much larger body of cases established the power of Congress over intrastate transactions. The modern doctrine

is regarded as stemming from the opinions of Mr. Justice Hughes in the Minnesota Rate Cases and the Shreveport Case. These hold that the federal power extends to intrastate acts which are inseparably commingled, either economically through forces of competition, or physically, with interstate transactions so that the latter cannot be controlled unless the intrastate acts also are controlled.

In the years prior to 1941, the constitutional boundary between state and federal power in the area of interstate commerce was customarily phrased in terms of "direct" or "indirect" effects. This led the Court to hold, in 1936, that labor relations in the coal industry only "indirectly" affected interstate commerce, and therefore were outside national legislative competence. It was so held although labor disputes might obstruct not only commerce in coal but the railroads and many interstate manufacturing industries as well. Within a year, however, the coal case was discarded in cases holding the National Labor Relations Act validly applicable to factories shipping goods in interstate commerce. More recently, Mr. Justice Stone shifted the emphasis from the "directness" aspect to the standard "whether the regulation was an appropriate means to the attainment of a legitimate end." His opinion in the Darby case, upholding the application of the Fair Labor Standards Act to a lumber manufacturer shipping in commerce, also re-established for the future that the Tenth Amendment, as its words proclaimed, only reserved to the states what had not been granted to Congress, and therefore was not a limitation of its enumerated powers.

Decisional law on the sovereignty question necessarily presents emphasis on the conflicting claims of each system to supremacy. It

is not able, within its limited function of adjudication, to picture the large areas of reconciliation and progress through cooperative effort and the exercise of powers possessed by each. We have more and more come to understand that the national government and the states need not and should not be regarded as competitors for authority. Rather, wisdom has dictated that we recognize two levels of government cooperating with or complementing each other in meeting the demands upon both. Especially significant has been the increased recognition of the importance of state and local governments as essential and necessary elements in an effective system of government.

Experience has shown that both in theory and in result this dual system of sovereignty possesses the necessary degree of flexibility to meet the crises of the present and future as successfully as it has met them in the past. A proceeding now pending in the Supreme Court illustrates the view that in the important area of seditious activities, for example, there is room for legislative action by the states, notwithstanding federal legislation. Thus, the Government, as Amicus Curiae, in the Nelson case, has taken the position that to warrant a holding that state legislation which is otherwise a valid exercise of the state's police power has been superseded or suspended by an act of Congress dealing with the same subject matter, the Congressional act must be in irreconcilable conflict with the state act, or the Congressional intent to occupy the field exclusively must otherwise appear. This principle, having its roots in early Constitutional history, is believed by the Government to permit the Commonwealth of Pennsylvania as an essential attribute of sovereignty and in the exercise of its police power, to proscribe and punish advocacy of the violent overthrow

of organized government, at least in the absence of clear Congressional purpose to preempt the field.

It seems quite clear that if we bring to our governmental system patience, understanding, and a will to act wisely and effectively, both a proper and effective balance will be maintained. In this relationship, responsibility is a large ingredient. As well put by The Commission on Intergovernmental Relations in its 1955 Report to the President: "The States have responsibilities not only to do efficiently what lies within their competence, but also to refrain from action injurious to the Nation; the National Government has responsibilities not only to perform, within the limits of its constitutional authority, those public functions the States cannot perform, but also to refrain from doing those things the States and their subdivisions are willing and able to do."

In terms of Constitutional power and prohibitions, judicial precedent affords many guides to a determination of what may or may not be undertaken by either the State or Federal Government or both. But this, it seems to me, is not the most pressing question in our present state of development. The problem is, rather, to determine the most prudent and effective means for satisfying national needs through proper divisions of responsibility. These are mainly questions for legislative judgment and the standards to be employed are chiefly economic, political, and administrative. The drive is, as it should be, on mutual and complementary undertakings in furtherance of common aims. Given central strength and local freedom of action as we enjoy them today, there is no impediment to the attainment of an enduring, peaceful and prosperous nation through continued reliance upon our dual system of sovereignty.