

REMARKS OF THE ATTORNEY GENERAL  
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Thank you, Dean Watts. I am very pleased to be here today. The National Judicial College, 20 years old this year and already one of the nation's valuable educational resources, provides excellent opportunities for state and local judges to refine their skills and reflect on a variety of jurisprudential issues.

Where I work, in Washington, the courts of the United States receive much attention. But you who are here today and your colleagues back home play an equally important role in the administration of justice. Indeed, I would be quite satisfied if more of the cases the federal courts now decide were entirely in your hands. I have confidence in the ability of our state courts to be fair, and I submit for your reflection the remark of one of the nation's great Attorneys General and Justices of the Supreme Court, Robert H. Jackson, in whose name this lecture series was established. Said Jackson:

"It is a difficult question and always will remain a debatable question where, in particular instances, federal due process should step into state court proceedings and set them aside. When the state courts render harsh or unconsidered judgments, they invite this power to be used. But I think in the long run the transgressions of liberty by the Federal Government, with its all-powerful organization, are much more to be feared than those of the several states, which have a greater capacity for self-correction."

At the heart of Jackson's remark lies the subject I intend to discuss today. With the Bicentennial of the framing of the Constitution just four years away, it is appropriate that we as a nation reflect on the origins of that supreme and fundamental law. Towards this end, I have begun a series of speeches on the Constitution. In the first speech -- on May 20, before the American Law Institute -- I focused on the original Constitution of 1787, and how that remarkable document was designed to secure the goal of the American revolution, the liberty of the people.

Today I would like to address the subject of federalism. Federalism seems to involve almost the entire universe of American politics. And issues of federalism have always been with us, just as they have always inspired heated debate.

Very early in our national life, Chief Justice Marshall remarked in one of the Supreme Court's most famous cases, *McCulloch v. Maryland*, that "the question respecting the extent of the powers actually granted is perpetually arising." Justice Jackson himself, writing in 1955, reviewed our history and concluded that "it is the maintenance of the constitutional equilibrium between the states and the Federal Government that has brought the most vexatious questions to the Supreme Court." More recently, the noted constitutional scholar Walter Berns has remarked that "no aspect of the United States Constitution has been so vigorously and so persistently disputed as" federalism.

Recognizing the enormity and complexity of the subject before us, I would like to narrow my focus to the historical origins of the concept of federalism. And I would like to begin by asking you to clear from your mind the modern definition of federalism -- a method of dividing power between the national and state governments. Federalism was the key issue of the Constitutional Convention, but the term did not mean at that time what it does for most people today. If we are to discover that original definition, if furthermore we are to understand how we arrived at the modern definition, and if finally we are to establish a stronger role for the states many of you here today so faithfully serve, we will find it useful to leave our contemporary world for a few minutes and enter the intellectual and political universe of the Framers'.

The men who met in Philadelphia can be fairly divided into two camps. While both camps agreed that the Articles of Confederation were defective, one camp thought the Articles merely needed revision, while the other thought the Articles needed to be replaced by a entirely new constitution.

These two views reflected fundamental political differences. To be sure, everyone agreed that power came from the people, and everyone agreed on the need for a central authority. The differences lay elsewhere, on two specific questions. First, should the central authority be created by the people themselves or the states, which had received power from the people? Second, what should

be the nature of the central authority itself? That is, how extensive should its authority be? And what are its objects of governance -- the people or the states?

Those who believed in the primacy of the states thought the Articles of Confederations needed only to be revised. They believed that the states should create the central authority, and that this authority should concern itself primarily with external matters, and govern only the states, not the citizens of the states. These Delegates wanted a league of states united for the common defense. They wanted, in a word, to confederate.

What may strike us as surprising today is that to confederate meant, at that time, the same thing as to federate. Americans used "federal" and "confederal" as interchangeably as we today use "flammable" and "inflammable." Thus, those who went to Philadelphia devoted to the primacy of the states were the original federalists. Their definition of federalism, as one scholar has put it, is "that the states are primary, that they are equal, and that they possess the main weight of political power."

The Delegates in the other camp at the Convention believed that the power of the central authority should derive directly from the people; these Delegates were ready to discard the Articles of Confederation and start anew. They believed in the necessity of strong, central government whose authority extended not only to external matters such as foreign policy but also, if need be, to the affairs of citizens within the states. Clearly, they believed that the authority of the central government should extend not only to the states but also to the individual citizens. As Alexander Hamilton wrote in Federalist 15, "the authority of the Union" must extend "to the persons of the citizens," whom he called "the only proper objects of government." Some of these Delegates would have agreed to the elimination of the state governments and their replacement by administrative entities created by the national government. The Delegates in this camp were nationalists.

At the start of the Convention the nationalists supported the Virginia Plan. The plan declared -- and here I am quoting -- "that a Union of the States merely federal will not accomplish the objects proposed by the articles of Confederation, namely common defense, security of liberty and general welfare." The Virginia Plan argued that therefore "a national government ought

to be established consisting of a supreme Legislative, Executive and Judiciary."

Thus was put before the Delegates the issue that lay at the heart of the Convention -- whether we should have a "merely federal" union of the states deriving its power from the states and limited in its authority to matters mainly of foreign policy; or a national and supreme government deriving its power from the people and directly governing them. Gouverneur Morris expressed the options then apparent when he drew a contrast between a federal union, on the one hand, and a national, supreme government, on the other. The former, he said, was "a mere compact resting on the good faith of the parties; the latter . . . a complete and compulsive operation."

Support for a federal or confederal union reflected the enduring influence of the belief, as old as the Greek city-states of antiquity, that small states generate the qualities of character and citizenship on which the preservation of liberty is thought to depend. Support for a federal union also reflected the enduring influence of the fear, also as ancient as the Greek city-states, that large democracies invite despotism. By contrast, support for a national government reflected the increasing influence of what Hamilton in Federalist 9 would later call "the new science of politics."

This new science of politics challenged the classical republican theory by holding that small states themselves were prone to tyranny. In the Convention, a Connecticut supporter of federal union remarked that the "objectives of Union . . . were few," limited mainly to external matters. James Madison responded that in addition to these objects of Union there was another, very important purpose -- "the necessity of providing more effectually for the security of private rights and the steady dispensation of Justice."

Madison's reply would have been purely theoretical had he not had history on his side, especially the brief history of the young nation. "Interferences" with liberty "were evils," he told the Delegates, "which had more perhaps than anything else produced this Convention." And these interferences were occurring in the states, whose administrations were, according to Madison, characterized by "vicissitudes and uncertainties."

Those who were arguing that only a federal union could preserve liberty had to contend with such disturbing events as Shays Rebellion, a conflict in which armed banks of Massachusetts farmers closed the courts in the interior of the state and even threatened to lay siege to Boston in order to force passage of inflationary legislation. Such threats to liberty in the states were just as troublesome to the original federalists as the threats they thought were posed by a national government. Eventually many of them were forced to acknowledge that they wanted more from union than they were willing to admit, or than their theory was willing to let them admit. And many of them became receptive, in the end, to Madison's powerful argument that a large or what he called an "extended" republic was not only compatible with republican government, but necessary to it.

The degree to which Madison and other supporters of a national government were successful in undermining the purely federal position was evident in later proceedings. When the Virginia Plan was close to approval, a plan devised by a Delegate from New Jersey, described as a plan "purely federal and contradistinguished" from the nationalist Virginia Plan, was presented to the Convention. The New Jersey Plan provided for a central executive and judiciary, gave Congress authority over both foreign and interstate trade, gave the Union an independent revenue source, made all central laws and treaties "the supreme law of the respective states"; and empowered the central executive to use the armed might of the union to compel compliance of intransigent states.

The New Jersey Plan indicated that even the partisans of small states wanted a great deal from Union -- more than their own theory would admit. Madison, in a speech to the Delegates, demonstrated just how much was now wanted -- central economic controls over the states, specifically over the "emissions of paper money"; the "internal tranquility of the States themselves"; and "good internal legislation and administration" in "the particular States."

The Philadelphia Convention voted down the New Jersey Plan. In doing so, the Convention rejected more than a mere blueprint for government. It turned away the idea of a federal union, and it left by the way the classical republican theory that postulated small states as the guardians of liberty. With this vote, the Convention finally reached theoretical agreement, for now it was clear that there would have to be a national

government and that this government, by necessity, would extend over a large nation and involve itself directly in the lives of its citizens. Nothing is so clearly indicative, perhaps, of the loss the original federalists sustained than the words spoken by Patrick Henry, at the Virginia ratifying convention. One can almost hear the fiery Henry saying:

"What right had they to say, WE, the PEOPLE? . . . Who authorized them to speak the language of WE, the PEOPLE, instead of We, the States? States are the characteristics, and the soul, of a confederation. If the States be not the agents of this compact, it must be one great consolidated National Government of the people of all the States."

After the vote on the New Jersey Plan, the focus of the Convention shifted to the new question of whether a basically nationalist government should include any federal features.

And as we know, certain modifications were made. According to the Virginia Plan, a thoroughly nationalist document, the people, not the states, would have equal representation in both houses of Congress. This particular proposal provoked stormy objection from federal quarters, resulting in the famous Connecticut Compromise, by which the House remained a national institution, representing the people, while the Senate became a federal institution, representing the states.

And as with the provisions regarding the legislative branch, so it went with other provisions of the Constitution. Federal features were worked in to such an extent that Madison, writing in Federalist 39, described the Constitution as "neither a national nor a federal constitution; but a composition of both." wrote that in this respect the government cannot be called national because "its jurisdiction extends to certain enumerated objects only and leaves to the several States a residuary and inviolable sovereignty over all other objects." Given this division of power, the Constitution, he said, is federal.

Finally, Madison turned to how the Constitution is to be amended, and he found it "neither wholly national nor wholly federal." "In requiring more than a majority and particularly in computing the proportion by States, not by citizens, it departs from the national and advances towards the federal character; in rendering the concurrence of less than the whole number of States

sufficient, it loses again the federal and partakes of the national character."

Permit Madison to summarize his thoughts on this compound Constitution, at the end of Federalist 39:

"In its foundation (the proposed Constitution) is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national."

Madison wrote that in the winter of 1787-1788, when the ratification debates were in full swing. His analysis of the compound character of the Constitution is persuasive, and it can be applied to the Bill of Rights. Just as the original federalists sought to press some federal features into a document that reflected a nationalist victory, they did the same, in effect, by insisting on later amendments to the original text. The Bill of Rights represented a federalist victory, because the amendments, as Chief Justice Marshall put it, "demanded security against the apprehended encroachments of the general government -- not against those of the local governments."

Parenthetically, let me point out that the three post-Civil War amendments -- the Thirteenth, the Fourteenth, and the Fifteenth -- may be analyzed in Madisonian terms, as nationalist in character. Recall that one of the issues at the Convention concerned whether the central authority should extend only to the states or also to the individual citizens. Recall that Madison said a central authority was necessary to safeguard "private rights" and provide for "the steady dispensation of justice." The Reconstruction amendments were passed to achieve these goals following the gross violations of liberty and the denials of justice that eventuated in our tragic civil war.

Significantly, one of these amendments, the Fourteenth, has been employed by the Supreme Court in our century to make the Bill of Rights apply to the states. Thus a part of our Constitution originally federal in character has now acquired a national side.

Reviewing the work of the Constitutional Convention, we can better understand the origins and

development of federalism as a constitutional concept. Influenced by the original federalists, the Convention worked certain federal qualities into the compound national government. And by preserving the independent authority of the states and dividing power between the state governments and the general government, the Convention gave federalism a definition it had not had before. And this new federalism became associated with the nationalists' cause. The nationalists, recognizing the connection in the public's mind between federalism and republicanism, appropriated the term for themselves and used it to describe the new system of government they had invented. Calling themselves Federalists, with a capital "F," they called their opponents "Anti-Federalists." With as masterful a stroke as has been performed in American political history, the compoundists -- I mean the Federalists -- managed to change the terms of the ratification debate to their own advantage.

Almost 200 years later, we can see the great purposes of the Framers' federalism and its accomplishments. Both the federal features in the general government, and the federal division of power between the general government and the state governments, were designed to help secure liberty, the chief end of government. The federal elements in the national government have generally worked to check the threat of tyranny arising from regionally concentrated factious majorities. And as for the federal division of power between the two governments, for much of our history the power of the one government has provided a check, even if only eventually, on the tyrannical use of power by the other.

A true friend of federalism today will work to preserve those seldom noticed federal elements in the national government. I have in mind, for example, the Electoral College. But only rarely are these characteristics of our general government under attack. The more urgent task -- one that seems to need doing almost every day -- is to maintain the proper equilibrium of power between Washington and the states.

In the past several decades the principal threat to maintaining the right balance of power has come from the national government. So much power has been amassed in Washington over the past 40 years that both the National Governors Association and the President of the United States have been calling for national debate and action on the roles and responsibilities of federal,



state and local government. The federal courts have played a leading role in this story, using a variety of judicial doctrines to impose upon the states almost total uniformity on every significant question of values.

Hamilton, writing in Federalist 32, said that it was more probable that the state governments would encroach upon the national government than that the national government would tyrannize the states. Hamilton also said, in a more famous remark, that the federal judiciary would be "the least dangerous branch" of the national government. Were he living today, I think Hamilton would have to reevaluate the condition of the nation, and also the degree of danger posed by the national judiciary. In the end, I think Hamilton would see why Justice Jackson said that the transgressions of liberty by the federal government are far more to be feared than those by the states.

Federalism decentralizes power, limits the central authority and makes it less of a threat to liberty. It draws our citizens into political life by increasing and simplifying the governments accessible to them. It teaches the vital habit of self-government. And we the people, governing ourselves, are thus free to solve our problems, trying novel solutions if necessary.

I realize that I need not ask this audience to consider the benefits of federalism. But I hope that you will join me in exhorting other Americans to understand our federalist heritage, and to maintain its influence in the compound government in Washington, and indeed our national life.