

REMARKS OF THE ATTORNEY GENERAL
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Thank you, Mr. Perkins. I have looked forward to this occasion for some time. This is the first of a series of speeches on the Constitution I will be giving over the balance of this year. 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 the nation's fundamental law, which includes the Constitution and its 26 amendments. I will begin the series today by focusing on the original Constitution, as it was drafted in 1787.

Today we readily acknowledge that the Constitution of 1787 succeeded where the Articles of Confederation failed -- that is, it established efficient national government. We seem less aware, however, of the Constitution's other great success -- indeed its greater success -- of securing liberty for all.

One reason for this, perhaps, is that in recent decades many Americans have grown accustomed to looking to the Bill of Rights and the Fourteenth Amendment for the security of their liberties. As former Senator Birch Bayh wrote: "the guarantees of individual rights found in our Constitution's Bill of Rights are the very foundation of America's free and democratic society."

Senator Bayh's statement is not so much wrong as it is inadequate. The amendments guaranteeing rights are important, but the real foundation of America's free and democratic society is something else -- the unamended Constitution of 1787. As Alexander Hamilton, writing in Federalist 84, observed, "The Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."

Hamilton, together with other Federalists and champions of the new Constitution, deeply believed that the purpose of the Constitution was to protect the rights of the American people. This is a truth that must not be lost with the passage of time.

To grasp what the Framers of the Constitution accomplished, it is necessary to understand their vision of the purpose of government. The second sentence of the

Declaration of Independence begins with these familiar words:

"We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness -- that to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed"

The meaning of the first self-evident truth -- that all men are created equal -- has been misunderstood. As the late Professor Martin Diamond often explained, the Declaration did not assert an abstract equality but an equality defined by the second self-evident truth -- that all men are endowed with certain unalienable rights, including Life, Liberty and the Pursuit of Happiness. The Declaration thus declared the value of equal political liberty or, as Professor Diamond said, "the equal entitlement of all to the rights which comprise political liberty."

The Declaration goes on to claim that the purpose of government is to secure liberty. The language of the third self-evident truth of the Declaration bears repeating: "To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

The problem facing the Framers was precisely that of instituting a government that could secure the rights with which men are naturally endowed. They eventually solved this by establishing an altogether new form of democratic government, but not until they had wrestled with the full dimensions of the problem.

The Framers sought to secure liberty, but they also wanted popular government -- a government in which, as the Declaration specified, all power would derive from the people. Nothing less than a popular or democratic government, in their view, could comport with the principles of the American Revolution.

Yet it was here that the problem of securing liberty became most difficult. All power had to derive from the people, but the people themselves could be their own worst enemy. In the Convention, Elbridge Gerry warned against "the evils" that flow from democracy. Edmund

Randolph similarly complained of the "follies and excesses of democracy."

In perhaps the most famous essay in our political history, James Madison explained the threat to liberty posed by democracy. The threat would arise from what he called "faction." He defined a "faction" as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of community." Madison was worried less about minority factions than majority factions, and specifically majority factions that tyrannized other citizens.

Here lay not only the danger to private rights, but also the threat to the common good, and indeed to the government itself. As Madison pointed out, tyrannical majority factions could cause instability and, worse, injustice. And from these "mortal diseases," said Madison, "popular governments have everywhere perished."

Madison stated the full nature of the problem in this way: "To secure the public good and private rights against the dangers of a faction, and at the same time to preserve the spirit and form of popular government, is the great object to which our inquiries are directed."

Plainly, the Framers did not want to do away with democracy; they wanted to eliminate or lessen what Madison called the "inconveniences of democracy," but only in a manner "consistent with the democratic form of government."

How did they finally do this?

In the Framers' view, the urgency was to find a way to prevent the rule, if not the formation, of an oppressive majority. They rejected what Madison called "a pure democracy" -- one in which, as he put it, "citizens . . . assemble and administer the government in person." They embraced instead what Madison called a "republic" -- what we today might term, and what indeed Hamilton did term, a "representative democracy."

Accordingly, citizens through their representatives would assemble and administer the government. Representation thus would retain its democratic footing, but it would also have the advantage

of refining and enlarging the public views, thus tempering popular prejudice and partiality. In this way the representative principle would work to prevent the formation of an oppressive majority and thus protect liberty.

The Framers were not so naive, however, as to believe that the representative principle by itself would prevent the rise of tyrannical majorities. They decided, therefore, that it was necessary to design the national government itself in such a way as to prevent oppressive majorities, whenever they might form, from working their will. Accordingly, they divided sovereignty within the government by allocating power among three branches.

Madison, writing in the Federalist Papers, declared that "the accumulation of all powers legislative, executive, and judicial in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective may justly be pronounced the very definition of tyranny." The preservation of liberty, he wrote, "requires that the three great departments of power should be separate and distinct."

As we all know, the Framers of the Constitution distributed power in this manner. They allocated legislative power to Congress, executive power to the president, and judicial power to the Supreme Court and any inferior courts Congress might create. And they also did something further -- again in the interest of liberty. They provided checks and balances on the respective functions of government. These are quite familiar to us today, and include, among others, the presidential veto, the president's legislative initiative, judges' discretion in the adjudication of individual cases, Congressional power over the creation of inferior federal courts and their jurisdiction, senatorial confirmation of executive appointees and judicial nominees, and so on.

The Framers quest to secure liberty did not stop, however, with separation of powers and checks and balances. They believed still more was necessary if liberty was to be secured within the framework of democratic government. In particular they believed the republic should be an "extended" one.

The concept of an extended republic is not familiar to us today. And perhaps it is hard for us to understand how geography, or demography, can have political implications. But during the founding period it

was a very live issue whether a republic should be small or large.

Traditionally republics had been small, both in territory and population. It had been generally believed that a small republic would be more homogeneous in terms of the people's interests and beliefs, and therefore could achieve political stability. Large nations had therefore been considered unworkable, and no one had ever founded a republic on the idea that it should be spread over a large territory having a sizeable population.

Yet the Framers did just this. They believed that in a small republic the representative principle by itself could not produce a sufficient diversity of representatives, and that without greater diversity a faction might gain control and oppressively exercise power. They believed, furthermore, that distributing power among the various branches would avail little in a small republic, for the branches themselves would be constituted by persons so alike they would become the mere agents of oppressive popular will. The Framers believed that "only when there is a distance between the people and their government will there be that difference between the ultimate authority of the people and the immediate authority of their representatives which is the decisive condition for the advantages supplied by the principle of both representation and separation of powers." And only what Madison called "an extended republic" could achieve this condition. The novel idea of the Founding Fathers, which lay at the heart of what Hamilton called the "new science of politics," was that the republic should be a very large one indeed.

The implications of this idea were staggering at the time. For obviously it meant not fewer but more factions, indeed many more. "The latent causes of faction," Madison wrote, "are ... sown in the nature of man." The more people that populate a nation, therefore, the more factions will result, provided the people are free, as the Framers plainly intended them to be. They believed it would be a denial of liberty to try to deny the growth of factions. And they thought that in a nation full of factions, engaged in the give-and-take of politics, the chances would diminish that a tyrannical faction would gain majority status, thus imperiling private rights. "Extend the sphere," said Madison, "and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be

more difficult for all who feel it to discover their own strength and to act in unison with each other."

Representation. Separation of powers and checks and balances. An extended republic. These great ideas influenced the Constitution of 1787. But the Framers did not stop there in the effort to secure liberty.

The people may elect representatives; the government may be separated into three branches; the people themselves may be many and spread over a vast territory. But the Framers believed that if despite all of this the nation was divided into two dramatically different economic classes -- the haves and the have-nots -- neither liberty nor democracy could survive. The Framers therefore designed a Constitution for a particular kind of large nation -- what Madison called a "civilized" nation. By this, Madison meant a nation in which there would be many economic interests. "A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests," he wrote, "grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views."

A commercial society, including an agricultural component, was precisely the kind the Framers envisioned. In such a society, men would not be agitated by huge class differences. Instead, men would pursue their interests and organize themselves into as many groupings as they wished. And the claims of these groups would fall short of the absolute factional kind that could destroy liberty and democracy both.

At the end of Federalist 10 Madison wrote that "in the extent and proper structure of the Union . . . we behold a republican remedy for the disease most incident to republican government." The remarkable genius of the Constitution becomes clear when we realize that the Framers were concerned with securing liberty through representation, separation of powers and checks and balances, and an extended, commercial republic. And as they wrote a constitution reflecting these ideas they defined the key issue of the Convention -- federalism -- in such a manner as to secure liberty in still another way. For by dividing power between the federal and state governments, the Framers sought to prevent the excessive concentration of power in any one government.

Today, as we reflect on the work of the Framers, we must recognize that in one area the

Constitution did not measure up to the ideals of the Declaration of Independence. In those parts implicitly concerned with blacks, the Constitution obviously failed to accord equal political liberty to all men. As we know, slavery agitated the nation until its resolution through civil war. And that war led to the ratification of the three amendments that did much to remedy the defect of the original Constitution. The amending procedure spelled out in Article V thus facilitated the document's self-correction by a people whose conscience must continually be informed by the Declaration of Independence; and with these three amendments we see the amending procedure working to serve the cause of liberty for all men. It would have been better had the Constitution been right to begin with, of course. It would have been better to have avoided the tragedy of our great war. But it is a testimony to the enduring worth of the Constitution of 1787 that its mistake with regard to slavery did not require its ultimate abandonment.

Over the course of two centuries the Constitution has in general achieved what the Framers intended: It has secured liberty. The distribution of power among the three branches has proved fortunate in many instances. Some stand out in American history -- such as Watergate. But almost daily there are interactions among the branches of no headline importance that nonetheless work to secure liberty. Furthermore, whenever we vote, the Framers' representative principle works to the same end. We may not like the politics of someone elected from another state or region, or even from our own state; but in the diversity of our representation lies the protection of our liberties. Finally, the extended, commercial republic, which has grown from 13 states to 50, spanning a continent and more, and including many new enterprises and industries, has ensured a diversity of electorates. So has the constant immigration that has culturally enriched our nation. Perhaps the most remarkable fact about our Constitution is that in ways we have long since come to take for granted, it works still today to secure the blessings of liberty.

As for the Framers' goal of preventing tyrannical majority rule, it has been achieved from generation to generation. Today we may complain about the paralysis on Capitol Hill that seems to result from the multiplicity of factions Madison applauded. But while our constitutional system may at times be cumbersome, it has by and large prevented the rule of oppressive majorities. It has produced rule most often

by moderate majorities -- majorities made up of constantly changing coalitions. Majorities that have formed on certain issues have broken apart on others and then reformed, in new ways, on still others. The many, not the few, have governed. Self-government is not a rhetorical slogan -- it has been our chief characteristic as a people.

Each age offers its own challenge for us to live according to our constitutional ideals. Although the Framers envisioned that the people would make policy primarily through the legislative branch, it can indeed become a "vortex," drawing all power unto itself. Similarly, the executive branch can overreach, and the judiciary, although Hamilton called it the "least dangerous branch," can threaten representative government and frustrate the policy choices of the people, as President Franklin D. Roosevelt recognized. Furthermore, the national government itself can draw too much power away from the states.

The constant necessity is for us to rethink our current politics in light of the Framers' enduring Constitution. If we do this honestly and fairly at this juncture in our history, we may find that we are asking all branches and all levels of government to do too much, consistent with the principle of liberty.

And it is only for the sake of liberty, in the final analysis, that government by right can exist. As we approach the bicentennial of the framing of our Constitution, let us remember that the founding generation went to Philadelphia in the service of liberty. The document they wrote for themselves and their posterity was truly a Constitution of Liberty. By it they secured for us the principle of "Liberty to all." May we never forget, as Lincoln reminded us, that this principle of liberty is the primary cause of our great prosperity as a nation.