



Department of Justice

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REMARKS

OF

THE HONORABLE EDWIN MEESE III
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

JOSEPH STORY SOCIETY
CENTER FOR JUDICIAL STUDIES

7:30 P.M. EDT
WEDNESDAY, JUNE 11, 1986
WASHINGTON, D.C.

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.

Thank you, Jim, for those very kind words and for this award, which means as much to me as any I have received as a result of public service.

Joseph Story, perhaps more than any of our great justices, truly personified the republican commitment to the rule of law and fundamental notions of natural law and justice. To be so honored by an award bearing his great name fills me with humility and appreciation. And to receive it here, tonight, in the midst of so many of his intellectual descendants, people who share his commitment to limited popular government, makes this an occasion that I will never forget.

I am deeply touched and greatly honored to receive this, the first Joseph Story Award and to participate in the dedication of this building to the memory of the Founding Fathers. Thank you all very much.

As I endeavored to prepare a few brief remarks for this evening, it occurred to me that we gather during an especially auspicious constitutional moment in the history of our great Federal Republic. For we now find ourselves engaged in a great public debate over how to interpret our Constitution. This evening, as we approach the Constitution's bicentennial, I would like to share just a few thoughts on this matter.

At the bottom of the contemporary debate -- to reduce it to its most simple formulation -- is the question of whether the Constitution is, as Charles Evans Hughes once quipped, "only what the judges say it is," or does it have an inherent discernible and applicable meaning that goes beyond judicial opinion.

Of course, such public disputes over constitutional meaning and the proper role of the courts are not new. In fact, when Joseph Story himself ascended to the highest Bench, this nation was divided between the Federalists and the Republicans over the nature and meaning of the Constitution. Federalists -- such as Hamilton and Marshall -- favored a loose construction approach. The Republicans, of course -- men such as Madison and Jefferson -- favored a stricter or more literal construction of our fundamental law. So fierce was that old debate that Jefferson despaired when his friend, President Madison, turned to the 32-year-old Joseph Story as a nominee to the Supreme Court. Story was, Jefferson feared, "too young." But even worse, Story was, in Jefferson's view, "unquestionably a tory." Once on the Court, of course, Story only confirmed Jefferson's worst fears.

But however deep were the political divisions spawned by that earlier constitutional debate, they pale in comparison to those we face today. For even during the Federalist-Republican disputes between the strict constructionists and the loose constructionists, both sides were still constructionists. That is, they both thought the Constitution had meaning that could be

discerned and applied, that it was not simply what judges say it is. Their differences were ones of degree, not kind. They were "family" differences.

Today, the debate has radically changed. It is no longer between friends, or among family. It is no longer, as it was in Story's time, a debate over how to read the Constitution. Today, sadly, the question seems to be whether the Constitution should be read, or interpreted at all.

Today the contestants in the debate have been dubbed interpretivists and non-interpretivists -- the former believe in the sanctity of the text; the non-interpretivists don't.

The implications for popular government posed by those judges who choose to wander far from the constitutional fold are striking. Justice White sought to remind the Court just today in his dissent in Thornburgh that:

When the Court ventures further and defines as "fundamental" liberties that are nowhere mentioned in the Constitution (or that are present only in the so-called "penumbras" of specifically enumerated rights), it must, of necessity, act with more caution, lest it open itself to the accusation that, in the name of identifying constitutional principles to which the people have consented in framing their Constitution, the Court has done nothing more than impose its own controversial choices of value upon the people.

Speaking in particular to the failure of Roe v. Wade, Justice White concluded that:

The Court's opinion in Roe itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people, as does the continuing and deep division of the people themselves over the question of abortion.... [T]he fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy strengthens my own conviction that the values animating the Constitution do not compel recognition of the abortion liberty as fundamental. In so denominating that liberty, the Court engages not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences.

Now, I know that to argue for interpretivism before this gathering is like preaching to the choir. We may have our differences over what the Constitution -- its text and the original intentions behind that text -- means, but I know we all believe that it does mean something. We share a common commitment that in order to preserve the idea of constitutionalism we must begin by taking the Constitution seriously. The issue is how we may best accomplish this object.

It is in this regard that institutions such as the Center for Judicial Studies play an indispensable role. Through its publications such as Benchmark, its conferences, and its other activities, the Center has contributed mightily to public understanding and appreciation of the proper nature and extent of judicial power under our Constitution. This is as it should be. Justice Harlan Fiske Stone was correct when he said:

I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it.

It is for just such careful scrutiny and fearless comment upon the judiciary that the Center for Judicial Studies has made its outstanding reputation. Almost singlehandedly, the Center has served to provide greater intellectual light in which the public may more easily observe and understand contemporary exercises of judicial power. The Center has dared to question the prevailing ideologies that so dominate modern jurisprudence and contemporary legal education. With wit and wisdom, Benchmark routinely teaches an alternative approach and chides those who wander too far off the constitutional path. The Center has spoken with a clarity and simplicity that has proved to be compelling. As Lincoln once

said, whoever controls public opinion controls everything. The Center for Judicial Studies has been a major force in bringing public opinion on these important matters back from the tattered edges of a mindless and too often strident liberalism that has for too long denied the importance of our greatest national treasure, the Constitution.

Tonight, we also celebrate the Joseph Story Society moving into this splendid new building here in the shadow of the Supreme Court. And that, too, is as it should be. This simple fact may serve as a constant reminder to the people of the good sense of Justice Frankfurter.

Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions...

[J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.

I know, Jim, that everyone here this evening joins me in saluting the good service you and the Center have rendered thus far unto our republic and in encouraging you to keep up the good work.

Thank you.