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ABSTRACT

The contributions that George Washington and James Madison made to the creation of the United States Constitution are discussed. As host of the Mount Vernon Conference and president of the Philadelphia Convention, Washington brought to the growing movement for a new constitution great dignity and political stature. Washington's stamp of approval for the new Constitution gave the advocates of the Constitution, the Federalists, a hefty advantage in the rhetorical battle for ratification. While Washington was the spiritual force behind the Constitution's framing, it was Madison who was the intellectual force. Madison, who first confronted the theoretical problems of confederalism head on, became the dominant voice in the creation of the American republic. It was Madison who argued for the "judicious modification of the federal principle," i.e., the diminution of state sovereignty and an extension of the sphere of influence of the national government. This bicentennial year of the Constitution is a time to glorify the Constitution. It is a time to reaffirm those lasting truths that undergird our individual rights and to salute those responsible for the Constitution's creation. (RM)

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REMARKS

OF

WILLIAM BRADFORD REYNOLDS
 ASSISTANT ATTORNEY GENERAL
 CIVIL RIGHTS DIVISION

BEFORE

THE UNIVERSITY OF VIRGINIA
 LAW AND GRADUATE REPUBLICAN CLUB

CONCERNING

HOW THE CONSTITUTION SECURES RIGHTS

ON

NOVEMBER 14, 1985
 CHARLOTTESVILLE, VIRGINIA

Remarks
William Bradford Reynolds
University of Virginia
Law and Graduate Republican Club
November 14, 1985

It is a pleasure to be here this afternoon to speak to you. In considering possible topics for today, it occurred to me there may be no better place than a meeting of the University of Virginia Law and Graduate Republican Club to consider anew the basic principles of American constitutionalism. Surely few, if any, states can surpass the Commonwealth in its claims on the founding of the American republic. The names of celebrated Virginians fairly dominate the pantheon of American constitutional history.

It was Patrick Henry whose revolutionary eloquence set fire to American patriotism against England, and Richard Henry Lee who brought forth from your legislative assembly in 1776 the call for the Declaration of Independence; it was also Lee who advanced at an early stage the concomitant need for a national confederation. And, of course, Thomas Jefferson penned the ennobling words of our common declaration dedicating ourselves as a people to the belief that all men are by nature created equal -- words and sentiments that guide our policies and politics still.

Nor can we speak of those great patriots without mentioning as well the names of John Marshall, perhaps America's foremost lawyer and certainly its most prominent jurist (who laid the foundations of American constitutional law) and George Wythe, a signer of the Declaration whose lessons in law had a certain

happy impact on his students -- among whom were both Jefferson and Marshall. And, I would be remiss were I not to make reference to George Mason, whose objections to the Constitution of 1787 led to the battle for a Bill of Rights. There is no denying that Virginia's native sons played a prominent role in the founding of American constitutionalism.

It is, for me, striking to note that, with the array of legal talent just mentioned, the two Virginians who arguably did the most for our constitutional cause -- George Washington and James Madison -- were not lawyers but farmers. In an age such as ours, when society is gripped by a spirit of litigiousness and so many of the best and the brightest of our young people are drawn into the legal profession, we cannot, in my view, remind ourselves too often that our Constitution grew not from narrow legal doctrine or arcane maxims; rather, it grew from principles and theories that were the preserve of any public spirited citizen of the time. Thus, it is fitting for us today to reflect for a few minutes upon the magnificent contributions of Mr. Washington and Mr. Madison. It is especially fitting that we do so in this year, 1985 -- the two hundredth anniversary of an event here in Virginia that sparked the political chain of events that led to the creation of the Constitution.

On March 25, 1785, commissioners from Maryland and Virginia convened at Washington's Mt. Vernon. The purpose of the meeting was to hammer out agreements that would allow the two states to reconcile their commercial differences over navigation rights on their common rivers and the Chesapeake Bay. This they did; but

they did more. When the Mt. Vernon conference adjourned three days later, on March 28, the commissioners had covered far more terrain than anyone at the outset might have predicted. The questions they raised had great national import; certain problems, they agreed, could not be resolved by isolated action of any one state.

Accordingly, following the deliberations at Mount Vernon and at the prodding of James Madison, Virginia issued a call for a meeting of delegates from the several states to convene in Annapolis, Maryland, in September, 1786, to discuss in greater detail the broader problems plaguing the Confederation. As Richard Morris has said, the Mt. Vernon Conference made the Annapolis Convention "inevitable." And, in turn, the dismal failure of the Annapolis Convention pointed the way to the Philadelphia Convention of 1787.

From the beginning, the participation of George Washington added to the growing movement for a new constitution a lustre it otherwise would not have enjoyed. As host of the Mt. Vernon Conference and president of the Philadelphia Convention, Washington brought to the effort greater dignity and political stature than anyone else (save perhaps Benjamin Franklin) could have offered. After all, the other leading nationalists were relatively young and did not yet enjoy the widespread reputation of General Washington. Madison, for example, was but 36 years old; Alexander Hamilton, only 30. Though he never participated very actively -- Washington's silence during the Philadelphia Convention is striking -- his very presence made a remarkable

difference.

When the Convention in Philadelphia adjourned and the proposed plan of government was transmitted to Congress, again Washington's association with the effort lent it a moral force it otherwise would not have had. Along with Franklin's support of the new Constitution, Washington's stamp of approval gave the advocates of the Constitution, the Federalists, a hefty advantage in the rhetorical battle for ratification. Few seriously doubted that, if the plan were accepted, Washington would be chosen to head the new government. As the victorious commander of the ragged American revolutionaries against the greatest power on earth, Washington loomed large in the public imagination as nothing less than the symbol of simple American virtue and limitless public spirit.

While Washington was the spiritual force behind the framing of the Constitution, it was his fellow Virginian, James Madison, who was the intellectual force. Between the debacle in Annapolis in September of 1786 and the opening of the debates in Philadelphia in May of 1787, Madison buried himself in researching the past. When he arrived in Philadelphia he carried with him his notes on "Ancient and Modern Confederacies" and his analysis of the "Vices of the Political System." And he put them to good use. Throughout the Convention -- while arduously recording the debates for posterity -- Madison guided, pushed, prodded and pulled the arguments along. In the end, his nationalistic Virginia Plan, introduced early in the Convention, though modified and limited in ways he did not necessarily

applaud, largely remained the principled foundation of the Constitution. Through the happy coincidence of his philosophic sophistication and political savvy, Madison proved to be a dominant (many would argue the dominant) voice in the creation of the American republic.

It was Madison who first confronted the theoretical problems of confederalism head on. The theory that political liberty was only possible through a confederation of loosely united and completely sovereign states was, he said, in a word "wrong." Not only was such a scheme as that of the Articles of Confederation not conducive to political liberty, it was destructive of it. The Articles did not shape a government but a "league of friendship." Yet, it was government, Madison understood, that was essential to liberty. The Convention in Philadelphia was the opportune moment to push his new theory into practice, and he seized upon it.

On June 6, he stood forth and argued that "the only defense against the inconveniences of democracy consistent with the democratic form of government" was to "enlarge the sphere" as far as possible. The solution to the political problems that gnawed at the Confederation was not to make the scheme better in a federal way but to make it better by making it less federal. His proposition was truly radical -- but radically true.

The main problem under the Articles, Madison argued, was the two sides of the coin of confederalism. On the one hand, there was no real power or authority at the national level. The Articles had atrophied into a "lifeless mass." On the other hand, the fully sovereign states were characterized by imprudent

majorities that in pursuit of their self-interest ran roughshod over the rights of minorities and individuals. So destructive were these crude majoritarian impulses that there was neither regard for the public good nor security for private rights. What was needed was a Constitution that would at once create a truly national government with all the powers requisite to a government, and yet avoid all the defects that so "tainted" the public administrations of the several states.

The problem of popular government, Madison knew, was its tendency toward "instability, injustice and confusion." The primary defect was that popular governments tended to operate by the mechanism of majority rule, and majority rule could be unjust. Too often, Madison argued, was the public good disregarded in the conflicts of rival parties; too often, public measures were "decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority." Such majority tyranny was the bane of popular government; such majority tyranny was what the Constitution had to prevent.

Madison defined this unhappy political fact of majority tyranny as the problem of "faction." He described a faction this way:

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate

interests of the community.

While Madison is most commonly thought to have been concerned with protecting economic minorities, his fear of factious majorities was broader. There was no denying, he said, that "the most common and durable source of factions had been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society."

But mankind historically had divided over many other issues as well. Religion, political principles, charismatic leaders, and what Madison called the "most frivolous and fanciful distinctions" --he meant here race and ethnicity--had proved to be, he argued, sufficient to kindle the "unfriendly passions" and to excite the most violent conflicts among men. This tragic propensity had been the "mortal disease" that had caused earlier attempts at popular governments everywhere to perish.

But curing these "mischiefs of faction" was easier said than done. Though minority faction was cured by majority rule, majority rule was the source of majority faction. Since the causes of faction were rooted in human nature--mankind's fallible reasoning and the effects of passion and interest on that reason--the task was somehow to control the effects of faction. The key, Madison argued, was to be found in the "judicious modification of the federal principle."

This "judicious modification" contemplated nothing less than a diminution of state sovereignty and an extension of the sphere

of influence of the national government. The dominant theory of small republicanism could no longer dominate. Not only was political liberty secure in a large republic, it was only secure in a large republic. A greater number of citizens and extent of territory brought within the compass of the new government would render factious combinations less likely.

While politically radical, Madison's theory bespoke his always practical view of political life. "Extend the sphere," he wrote in The Federalist, No. 10, "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 common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison." The great security for civil rights in a free government, Madison concluded, is the same as for the security of religious rights. "It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects." The logic was simple and compelling. By encouraging a large variety of interests, parties and sects, a large country would render it likely that "a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good." The best tactic in combating the evil of majority tyranny was to divide and weaken the majority itself.

This expansive republicanism, with its greater tolerance for a multiplicity of interests, was Madison's "republican remedy for the diseases most incident to republican government." The

Constitution Madison helped to draft and so energetically defended, would be, he promised, the best solution to the defects of popular government. Only under such an arrangement could any one part of society be guarded against the injustices of the other part. Only by rendering majority consensus difficult could the "rights of the minority" be rendered secure. Through the institutional arrangements of the Constitution -- federalism, separation of powers, bicameral representation, and the like -- Madison saw all the opinions, passions, and interests of the people "refined and enlarged." The Constitution, he firmly believed, should create a government that would be at once faithful to the first and only legitimate object of any good government (the happiness of the people) and possessive of the "knowledge of the means by which that object can best be attained." Thus would the Constitution offer a democratic or republican alternative to those other "forms [of government] which [had] crushed the liberties of the rest of mankind."

Adrienne Koch once wrote with admiration of the "great collaboration" between Madison and his best friend Jefferson. Perhaps there is no more impressive evidence of that collaboration than the relationship between the two documents most closely connected to each man in our public thinking. For Jefferson's stirring language of fundamental principles in the Declaration would have had a far less practical effect without Madison's pragmatic vision of the institutional framework that is our Constitution. Madison took seriously Jefferson's claim that governments are instituted among men to secure those rights

nature gives but leaves insecure. Government's only legitimate function is to secure the safety and happiness of the people against both despotism and anarchy. As Madison put it. "justice is the end of government. It is the end of civil society."

In considering the contributions of this great patriot, one is struck by the absence of any public commemoration. There is no public holiday to celebrate his birth as there is for Washington and Lincoln; nor is there a public monument for him as there is for his closest friend, Jefferson. At least not in the ordinary sense. But then it would probably have pleased this great constitutionalist to be remembered in more practical ways. After all, the street best known as one of the main centers of American commerce bespeaks the success of his extensive commercial republic --Madison Avenue. And the newest addition to the Library of Congress -- which houses, among other collections, the law library -- stands to his political as well as his "bookish" greatness. Such practical memorials, in a way, celebrate best a man much given to celebration of practical things. For it was, above all else, Madison's practical bent that gave us our justly celebrated and often imitated Constitution.

But today, one might sadly add that Madison also gave us our too readily ignored Constitution. In an age when the language of rights dominates, we are in danger of losing sight of how important is Madison's constitution -- our written constitution -- to the security of our rights.

Nothing threatens our civil rights and political liberties

more than a theory that sees their protection as the result of the benevolence of any public official or any particular institution of government. Yet, such theories have come to dominate our public discourse from time to time, and are again topical today. They have failed, however, thus far precisely because they are insensitive to the reality that rights are secured by limiting government, and that limited government is only the result of institutions that do not depend for their efficacy upon the good will of those who wield the powers of state.

The strength of this country lies in large measure in our ability to maintain the intricate and delicate balance between and among governmental authorities at the state and federal levels -- it is that balance that is the true genius of our Constitution and the true guarantor of our rights.

The men who devised a system of government in which the executive, legislative and judicial functions were dispersed among three distinct branches -- with clearly defined responsibilities for each -- did not do so with the expectation that the lines of authority would in time become so blurred, reshaped, and compromised that the one intended to be the least powerful of the three would become regarded as the most powerful. The men who struggled to found a national government of limited powers -- placing enumerated constraints on Federal authority through the Bill of Rights -- did not do so with the expectation that Federalism would be turned on its head, and that the powers reserved under the Constitution to the States, and protected from

encroachment by the Tenth Amendment, would become but a matter of legislative grace.

We are about to enter the bicentennial year of our Constitution. It is a time to glorify our great charter, not to denigrate or abandon it. It is a time to reaffirm those lasting truths that undergird our individual rights, not to redefine them to suit the current fashion by which the ideals of freedom and equality are misfocused on results rather than opportunities. It is a time to salute those who brilliantly "converted federalism from an occasional accident of history into an enduring expression of the principles of constitutionalism," not to ignore those heroes of our birth as a nation or pretend that their intentions are unknown and unknowable.

We who insist on remaining moored to the Constitution itself -- taking the original intent of the Framers as our guide for applying its principles to current problems in today's world -- have heard this view dismissed as "arrogance cloaked in humility." Yet those who stand unclothed on the other side would have us cast off the constitutional vestments of the Founding Fathers as but relics of "a world that is dead and gone," and substitute judicial pronouncements unhinged from the text and history of the Constitution for the "original intent" of those brave patriots -- men like Washington and Madison -- who fought to give us and our children a government worthy of their noble sacrifices.

The heroes of tomorrow will be those men and women who resist the call to separate constitutional law from the

Constitution itself, and dedicate themselves today to a wholesale reaffirmation of our Constitution during its bicentennial celebration -- so that it will be appreciated and understood by the next generation of Americans as fully as it was by their (and our) early ancestors.

The Founding Fathers were extraordinarily gifted and articulate men. Unlike much of the debate that emanates from the Halls of Congress today, the exchanges they had over constitutional principles were not modulated, obfuscated and adumbrated -- but boldly stated with a clarity of purpose that defies misunderstanding by those who truly seek it. It takes little more than an understanding of history and a willingness to revisit those great debates that marked the Constitutional Convention and the state ratifying conventions to discern original intent and remain faithful to it.

In closing, let me leave you with the challenge that was offered to another generation by one of our greatest constitutionalists, Abraham Lincoln:

Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others. As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred

honor; -- let every man remember that to violate the law, is to trample on the blood of his father, and to tear the character of his own, and of his children's liberty. Let reverence for the laws ... become the political religion of the nation; and let the old and the young, the rich and the poor, ... of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars.

Thank you.