The American Bar Association
7/9/85

Welcome to our Federal City. It is an honor to be here today to address the House of Delegates of the American Bar Association. I know the sessions here and those next week in London will be very productive.

It is, of course entirely fitting that we lawyers gather here in this home of our government. We Americans, after all, rightly pride ourselves on having produced the greatest political wonder of the world — a government of laws and not of men. Thomas Paine was right: "America has no monarch: Here the law is king."

Perhaps nothing underscores Paine's assessment quite as much as the eager anticipation with which Americans await the conclusion of the term of the Supreme Court. Lawyers and laymen alike regard the Court not so much with awe as with a healthy respect. The law matters here and the business of our highest court — the subject of my remarks today — is crucially important to our political order.

At this time of year I'm always reminded of how utterly unpredictable the Court can be in rendering its judgments. Several years ago, for example, there was quite a controversial case, *TVA* v. *Hill.* This dispute involved the EPA and the now-legendary snail darter, a creature of curious purpose and forgotten origins. In any event, when the case was handed down, one publication announced that there was some good news and some bad news. The bad news in their view was that the snail darter had won; the good news was that he didn't use the 14th Amendment.

Once again, the Court has finished a term characterized by a nearly crushing workload. There were 4,935 cases on the docket this year; 179 cases were granted review; 140 cases issued in signed opinions, 11 were per curiam rulings. Such a docket lends credence to Tocqueville's assessment that in America, every political question seems sooner or later to become a legal question. (I won't even mention the statistics of the lower federal courts; let's just say I think we'll all be in business for quite a while.)

In looking back over the work of the Court, I am again struck by how little the statistics tell us about the true role of the Court. In reviewing a term of the Court, it is important to take a moment and reflect upon the proper role of the Supreme Court in our constitutional system.

The intended role of the judiciary generally and the Supreme Court in particular was to serve as the "bulwarks of a limited constitution." The judges, the Founders believed, would not fail to regard the Constitution as "fundamental law" and would "regulate their decisions" by it. As the "faithful guardians of the Constitution," the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.

You will recall that Alexander Hamilton, defending the federal courts to be created by the new Constitution, remarked that the want of a judicial power under the Articles of Confederation had been the crowning defect of that first effort at a national constitution. Ever the consummate lawyer, Hamilton pointed out that "laws are a dead letter without courts to expound and define their true meaning."

The Anti-Federalist Brutus took him to task in the New York press for what the critics of the Constitution considered his naivete. That prompted Hamilton to write his classic defense of judicial power in *The Federalist,* No. 78.

An independent judiciary under the Constitution, he said, would prove to be the "citadel of public justice and the public security." Courts were "peculiarly essential in a limited constitution." Without them, there would be no security against "the encroachments and oppressions of the representative body," no protection against "unjust and partial" laws.

Hamilton, like his colleague Madison, knew that all political power is "of an encroaching nature." In order to keep the powers created by the Constitution within the boundaries marked out by the Constitution, an independent — but constitutionally bound — Judiciary was essential. The purpose of the Constitution, after all, was the creation of limited but also energetic government, institutions with the power to govern, but also with structures to keep the power in check. As Madison put it, the Constitution enabled the government to control the governed, but also obliged it to control itself.

But even beyond the institutional role, the Court serves the American republic in yet another, more subtle way. The problem of any popular government, of course, is seeing to it that the people obey the laws. There are but two ways: either by physical force or by moral force. In many ways the Court remains the primary moral force in American politics.

Tocqueville put it best:

> The great object of justice is to substitute the idea of right for that of violence, to put intermediaries between the government and the use of its physical force . . .
>
> It is something astonishing what authority is accorded to the intervention of a court of justice by the general opinion of mankind . . .
>
> The moral force in which tribunals are clothed makes the use of physical force infinitely rarer, for in most cases it takes its place; and when finally physical force is required, its power is doubled by his moral authority.

By fulfilling its proper function, the Supreme Court contributes both to institutional checks and balances and to the moral undergirding of the entire constitutional edifice. For the Supreme Court is the only national institution that daily grapples with the most fundamental political questions — and defends them with written expositions. Nothing less would serve to perpetuate the sanctity of the rule of law so effectively.

But that is not to suggest that the justices are a body of Platonic guardians. Far from it. The Court is what it was understood to be when the Constitution was framed — a political body. The judicial process is, at its most fundamental level, a political process. While not a partisan political process, it is political in the truest sense of that word. It is a process wherein public deliberations occur over what constitutes the common good under the terms of a written constitution.

As a result, as Benjamin Cardozo pointed out, "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." Granting that, Tocqueville knew what was required.

As he wrote:

> The federal judges therefore must not only be good citizens and men of education and integrity, . . . (they) must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the union and obedience to its laws.

On that confident note, let's consider the Court's work this past year.

As has been generally true in recent years, the 1984 term did not yield a coherent set of decisions. Rather, it seemed to produce what one commentator has called a "jurisprudence of idiosyncracy." Taken as a whole, the work of the term defies analysis by any strict standard. It is neither simply liberal nor simply conservative; neither simply activist nor simply restrained; neither simply principled nor simply partisan. The Court this term continued to roam at large in a veritable constitutional forest.

I believe, however, that there are at least three general areas that merit close scrutiny: Federalism, Criminal Law, and Freedom of Religion.

Federalism

In *Garcia* v. *San Antonio Metropolitan Transit Authority,* the Court displayed what was in the view of this Administration an inaccurate reading of the text of the Constitution and a disregard for the Framers' intention that state and local governments be a buffer against the centralizing tendencies of the national Leviathan. Specifically, five Justices denied that the Tenth Amendment protects states from federal laws regulating the wages and hours of state or local employees. Thus the Court overruled — but barely — a contrary holding in *National League of Cities* v. *Usery.* We hope for a day when the Court returns to the basic principles of the Constitution as expressed in *Usery*; such instability in decisions concerning the fundamental principle of federalism does our Constitution no service.

Meanwhile, the constitutional status of the states further suffered as the Court curbed state power to regulate the economy, notably the professions. In *Metropolitan Life Insurance Co.* v. *Ward,* the Court used the Equal Protection Clause to spear an Alabama insurance tax on gross premiums preferring in-state companies over out-of-state rivals. In *New Hampshire* v. *Piper,* the Court held that the Privileges and Immunities Clause of Article IV barred new Hampshire from completely excluding a nonresident from admission to its bar. With the apparent policy objective of creating unfettered national markets for occupations before its eyes, the Court unleashed Article IV against any state preference for residents involving the professions or service industries. *Hicklin* v. *Orbeck* and *Baldwin* v. *Montana Fish and Game Commission* are illustrative.

On the other hand, we gratefully acknowledge the respect shown by the court for state and local sovereignty in a number of cases, including *Atascadero State Hospital* v. *Scanlon.*

In *Atascadero,* a case involving violations of § 504 of Rehabilitation Act of 1973, the Court honored the eleventh Amendment in limiting private damage suits against states. Congress, it said, must express its intent to expose states to liability affirmatively and clearly.

In *Town of Haile* v. *City of Eau Claire,* the Court found that active state supervision of municipal activity was not required to cloak municipalities with immunity under the Sherman Act.

And, states were judged able to confer Sherman Act immunity upon private parties in *Southern Motor Carrier Rate Conference* v. *U.S.* They must, said the Court, clearly articulate and affirmatively express a policy to displace competition with compelling anti-competitive action so long as the private action is actively supervised by the state.

And, in *Oklahoma City* v. *Tuttle,* the Court held that a single incident of unconstitutional and egregious police misconduct is insufficient to support a Section 1983 action against municipalities for allegedly inadequate police training or supervision.

Our view is that federalism is one of the most basic principles of our Constitution. By allowing the states sovereignty sufficient to govern we better secure our ultimate goal of political liberty through decentralized government. We do not advocate states' rights; we advocate states' responsibilities. We need to remember that state and local governments are not inevitably abusive of rights. It was, after all, at the turn of the century the states that were the laboratories of social and economic progress — and the federal courts that blocked their way. We believe that there is a proper constitutional sphere for state governance under our scheme of limited, popular government.

Criminal Law

Recognizing, perhaps, that the nation is in the throes of a drug epidemic which has severely increased the burden borne by law enforcement officers, the Court took a more progressive stance on the Fourth Amendment, undoing some of the damage previously done by its piecemeal incorporation through the Fourteenth Amendment. Advancing from its landmark *Leon* decision in 1984 which created a good-faith exception to the Exclusionary Rule when a flawed warrant is obtained by police, the Court permitted warrantless searches under certain limited circumstances.

The most prominent among these Fourth Amendment cases were:

New Jersey v. *T.L.O.,* which upheld warrantless searches of public school students based on reasonable suspicion that a law or school rule has been violated; this also restored a clear local authority over another problem in our society, school discipline; *California* v. *Carney* which upheld the warrantless search of a mobile home; *U.S.* v. *Sharpe,* which approved on-the-spot detention of a suspect for preliminary questioning and investigation; *U.S.* v. *Johns,* upholding the warrantless search of sealed packages in a car several days after their removal by police who possessed probable cause to believe the vehicle contained contraband; *U.S.* v. *Hensley,* which permitted a warrantless investigatory stop based on an unsworn flyer from a neighboring police department which possessed reasonable suspicion that the detainee was a felon; *Hayes* v. *Florida,* which tacitly endorsed warrantless seizures in the field for the purpose of fingerprinting based on reasonable suspicion of criminal activity; *U.S.* v. *Hernandez,* which upheld border detentions and warrantless searches by customs officials based on reasonable suspicion of criminal activity.

Similarly, the Court took steps this term to place the *Miranda* ruling in proper perspective, stressing its origin in the court rather than in the Constitution. In *Oregon* v. *Elstad,* the Court held that failure to administer *Miranda* warnings and the consequent receipt of a confession ordinarily will not taint a second confession after *Miranda* warnings are received.

The enforcement of criminal law remains one of our most important efforts. It is crucial that the state and local authorities — from the police to the prosecutors — be able to combat the growing tide of crime effectively. Toward that end we advocate a due regard for the rights

of the accused — but also a due regard for the keeping of the public peace and the safety and happiness of the people. We will continue to press for a proper scope for the rules of exclusion, lest truth in the fact-finding process be allowed to suffer.

I have mentioned the areas of Federalism and Criminal Law, now I will turn to the Religion cases.

Religion

Most probably, this term will be best remembered for the decisions concerning the Establishment Clause of the First Amendment. The Court continued to apply its standard three-pronged test. Four cases merit mention.

In the first, *City of Grand Rapids* v. *Ball,* the Court nullified Shared Time and Community Education programs offered within parochial schools. Although the programs provided instruction in non-sectarian subjects, and were taught by full-time or part-time public school teachers, the Court nonetheless found that they promoted religion in three ways: the state-paid instructors might wittingly or unwittingly indoctrinate students; the symbolic union of church and state interest in state-provided instruction signaled support for religion; and, the programs in effect subsidized the religious functions of parochial schools by relieving them of responsibility for teaching some secular subjects. The symbolism test proposed in *Ball* precludes virtually any state assistance offered to parochial schools.

In *Aguilar* v. *Felton,* the Court invalidated a program of secular instruction for low-income students in sectarian schools, provided by public school teachers who were supervised to safeguard students against efforts of indoctrination.

With a bewildering Catch-22 logic, the Court declared that the supervisory safeguards at issue in the statute constituted unconstitutional government entanglement: "The religious school, which has as a primary purpose the advancement and preservation of a particular religion, must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought." Secretary of Education William Bennett has suggested such logic may reveal a "disdain" for education as well as religion.

In *Wallace* v. *Jaffree,* the Court said in essence that states may set aside time in public schools for meditation or reflection so long as the legislation does not stipulate that it be used for voluntary prayer. Of course, what the Court gave with one hand, it took back with the other; the Alabama moment of silence statute failed to pass muster.

In *Thornton* v. *Caldor,* a 7–2 majority overturned a state law prohibiting private employees from discharging an employee for refusing to work on his Sabbath. We hope that this does not mean that the Court is abandoning last term's first but tentative steps toward state accommodation of religion in the creche case.

In trying to make sense of the religion cases — from whichever side — it is important to remember how this body of tangled caselaw came about. Most Americans forget that it was not until 1925, in *Gitlow* v. *New York,* that any provision of the Bill of Rights was applied to the states. Nor was it until 1947 that the Establishment Clause was made applicable to the states through the 14th Amendment. This is striking because the Bill of Rights, as debated, created and ratified, was designed to apply only to the national government.

The Bill of Rights came about largely as the result of the demands of the critics of the new Constitution, the unfortunately misnamed Anti-Federalists. They feared, as George Mason of Virginia put it, that in time the national authority would "devour" the states. Since each state had a bill of rights, it was only appropriate that so powerful a national government as that created by the Constitution have one as well. Though Hamilton insisted a Bill of Rights was not necessary and even destructive, and Madison (at least at first) thought a Bill of Rights to be but a "parchment barrier" to political power, the Federalists agreed to add a Bill of Rights.

Though the first ten amendments that were ultimately ratified fell far short of what the Anti-Federalists desired, both Federalists and Anti-Federalists agreed that the amendments were a curb on national power.

When this view was questioned before the Supreme Court in *Barron* v. *Baltimore (1833),* Chief Justice Marshall wholeheartedly agreed. The Constitution said what it meant and meant what it said. Neither political expediency nor judicial desire was sufficient to change the clear import of the language of the Constitution. The Bill of Rights did not apply to the states — and, he said, that was that.

Until 1925, that is.

Since then a good portion of constitutional adjudication has been aimed at extending the scope of the doctrine of incorporation. But the most that can be done is to expand the scope; nothing can be done to shore up the intellectually shaky foundation upon which the doctrine rests. And nowhere else has the principle of federalism been dealt so politically violent and constitutionally suspect a blow as by the theory of incorporation.

In thinking particularly of the use to which the First Amendment has been put in the area of religion, one finds much merit in Justice Rehnquist's recent dissent in *Jaffree.* "It is impossible," Justice Rehnquist argued, "to build sound constitutional doctrine upon a mistaken understanding of constitutional history." His conclusion was bluntly to the point: "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, it is difficult to apply and yields unprincipled results."

The point, of course, is that the Establishment Clause of First Amendment was designed to prohibit Congress from establishing a national church. The belief was that the Constitution should not allow Congress to designate a particular faith or sect as politically above the rest. But to have argued, as is popular today, that the amendment demands a strict neutrality between religion and irreligion would have struck the founding generation as bizarre. The purpose was to prohibit religious tyranny, not to undermine religion generally.

In considering these areas of adjudication — Federalism, Criminal Law, and Religion — it seems fair to conclude that far too many of the Court's opinions were, on the whole, more policy choices than articulations of constitutional principle. The voting blocs, the arguments, all reveal a greater allegiance to what the Court thinks constitutes sound public policy than a deference to what the Constitution — its text and intention — may demand.

It is also safe to say that until there emerges a coherent jurisprudential stance, the work of the Court will continue in this ad hoc fashion. But that is not to argue for any jurisprudence.

In my opinion a drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court would once again be a threat to the notion of limited but energetic government.

What, then, should a constitutional jurisprudence actually be? It should be a Jurisprudence of Original Intention. By seeking to judge policies in light of principles, rather than remold principles in light of policies, the Court could avoid both the charge of incoherence and the charge of being either too conservative or too liberal.

A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection.

This belief in a Jurisprudence of Original Intention also reflects a deeply rooted commitment to the idea of democracy. The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is why it is the fundamental law. To allow the courts to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered. The permanence of the Constitution has been weakened. A Constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense.

Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was. This is not a shockingly new theory; nor is it arcane or archaic.

Joseph Story, who was in a way a lawyer's everyman — lawyer, justice, and teacher of law — had a theory of judging that merits reconsideration.

Though speaking specifically of the Constitution, his logic reaches to statutory construction as well.

> In construing the Constitution of the United States, we are in the first instance to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole and also viewed in its component parts. Where its words are plain, clear and determinate, they require no interpretation . . . . Where the words admit of two senses, each of which is conformable to general usage, that sense is to be adopted, which without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.

A Jurisprudence of Original Intention would take seriously the admonition of Justice Story's friend and colleague, John Marshall, in *Marbury*, that the Constitution is a limitation on judicial power as well as executive and legislative. That is what Chief Justice Marshall meant in *McCulloch* when he cautioned judges never to forget it is a constitution they are expounding.

It has been and will continue to be the policy of this administration to press for a Jurisprudence of Original Intention. In the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.

Within this context, let me reaffirm our commitment to pursuing the policies most necessary to public justice. We will continue our vigorous enforcement of civil rights laws; we will not rest till unlawful discrimination ceases. We will continue our all out war on drugs — both supply and demand; both national and international in scope. We intend to bolster public

safety by a persistent war on crime. We will endeavor to stem the growing tide of pornography and its attendant costs, sexual and child abuse. We will be battling the heretofore largely ignored legal cancer of while collar crime; and its cousin, defense procurement fraud. And finally, as we still reel as a people, I pledge to you our commitment to fight terrorism here and abroad. For as long as the innocent are fair prey for the barbarians of this world, civilization is not safe.

We will pursue our agenda within the context of our written Constitution of limited yet energetic powers. Our guide in every case will be the sanctity of the rule of law and the proper limits of governmental power.

It is our belief that only "the sense in which the Constitution was accepted and ratified by the nation," and only the sense in which laws were drafted and passed provide a solid foundation for adjudication. Any other standard suffers the defect of pouring new meaning into old words, thus creating new powers and new rights totally at odds with the logic of our Constitution and its commitment to the rule of law.

Thank you.