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ADDRESS

OF

THE HONORABLE EDWIN MEESE III
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE JUDICIAL CONFERENCE OF THE TENTH CIRCUIT

FRIDAY, JULY 31, 1987
U.S. GRANT HOTEL
SAN DIEGO, CALIFORNIA

NOTE: Because Mr. Meese often speaks from notes, the speech as delivered may vary from the text. However, he stands behind this speech as printed.

Thank you, Judge Baldock, ladies and gentlemen of the Tenth Circuit, and friends. It is a great honor to be invited to help out with your conference and with your Bicentennial reflections on the U.S. Constitution.

The best way to celebrate the Bicentennial, I think, would be through a summer full of public yet scholarly debate on separation of powers, the proper extent of the federal role, and other Constitutional principles. But just now, as you know, our nation's political attention is riveted on a few issues in the here-and-now, leaving little time for Constitutional reflection. On the other hand, the great controversies of our day involve Constitutional principles in very direct ways, so perhaps the Constitution is getting something like an appropriate birthday celebration after all.

Yet with all the attention focused on Washington, there is a danger of forgetting that one of the central principles of the U.S. Constitution has to do not with focusing power exclusively inward, in the nation's capital, but with distributing much of it throughout the states.

I am speaking, of course, of federalism, and I keep returning to it not just because it has been a dominant theme of President Reagan's domestic policy throughout his career (though that happens to be the case), nor because our Administration deeply believes in it (though that too is the case), but first and foremost because the Founding Fathers believed in it.

Let me say right away about what federalism is not. It is not the simple "states' rights" notion that was advanced in the fifties as a thin disguise for continuing segregation, in violation of a Constitutional provision, specifically, the 14th Amendment. The 14th Amendment, which of course was duly ratified by the states, gave the federal government responsibility to oversee and enforce the eradication of governmentally supported racial discrimination.

Too see what federalism is, it is necessary to go back to the founding of our nation and the drafting of the Constitution, that event whose Bicentennial we are now observing. When one goes back to the many written sources left to us by the founding generation of our nation, a remarkable story begins to unfold. To understand it, one has to liberate oneself to some extent from present-day political concerns, and imagine a time in which the burning political question in the United States was whether the thirteen states were to be one country, thirteen separate ones in a league of friendship, or a set of smaller confederacies of three or four states each. In other words, one has to place oneself in a political climate in which the very existence of what we now call the federal government was highly controversial.

This debate takes us back earlier than 1787. When the colonies declared independence, they became, in the words of the Declaration of Independence, "free and independent states." The word "state" in that context implied sovereignty, and sovereignty

entailed a degree of political separateness. The newly independent states were in effect a set of thirteen separate countries, mutually allied for purposes of throwing out the British, and recognizing a small measure of authority in a Congress common to all thirteen. This arrangement was that of the Articles of Confederation.

But the experience from the drafting of the Articles to 1787 showed Americans the perils of having a legislative body alone at the head of their confederation. It particularly showed the ill effects of relying on a legislative body to conduct foreign and military policy. George Washington had to divide his time between fighting the British and pleading with Congress for supplies. Had it not been for his personal military genius, Britain would unfailingly have reasserted her colonial power in America.

In fairness to the Continental Congress, we should note that its power to help General Washington was hampered by its lack of power to levy taxes. But altogether, it comes as no surprise that General Washington, after the war, became a staunch defender of stronger national power, especially executive power. It should also come as no surprise that, as Professor Forrest McDonald points out in his recent book Novus Ordo Seclorum, the regions that saw the most action in the war became hot-beds of sympathy for a stronger national government.

The question was, how much stronger? Some of the Framers, including New York's Alexander Hamilton and Virginia's Edmund Randolph, were what we might now call "nationalists." They thought the states should relinquish their sovereignty and united to form one sovereign entity under one government. This tendency provoked strong resistance from other Framers who advocated only a modification of the loose confederation that already existed. This position might best be called "confederalism."

What emerged at the end of that sultry summer in Philadelphia was a fusion of nationalism and confederalism, an arrangement that had no name then, but which we now call "federalism." It created a national government with a unitary executive and an independent judiciary in addition to a legislature, and it gave that government powers that the previous one had not had. But the full list of powers given to the national government was finite and specific. In all areas not on that list, the states and the people were to retain their sovereignty as before.

The nationalists at the convention had envisioned a national government that would be the primary holder of power for the country. But, in deference to the concerns of those who defended state sovereignty, this idea was modified in a fundamental way: the states, not the national government, were to be the final political authorities, except in areas specifically marked off as federal concerns. The national legislature was to function only

in those areas of policy that the Constitution -- specifically, Article I Section 8 -- gave to it, and subject to the restrictions in Article I Section 9.

The classic formulation of this principle is that of James Madison, in number 45 of The Federalist:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.... The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the United States.

And as a matter of fact, even Hamilton, who had argued at the convention for a fairly extreme nationalist position, nonetheless proclaimed the continuation of state sovereignty when he took his turn defending the Constitution. In Federalist Number 32 he wrote that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States."

It is important to remember that no Constitutional amendment has ever abolished the arrangement that Madison and Hamilton were describing. On the contrary, the Bill of Rights, which -- at the

request of the states -- placed still further restrictions on the powers of the federal government, contained an amendment that further reinforced the powers of states. That is, of course, the Tenth Amendment, which reads in its entirety: "The powers not delegated to the United States by the Constitution; nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Tenth Amendment was necessary to calm the fears of a group of political commentators at that time who are today known as the "Antifederalists." This name is misleading, because it suggests that they were opposed either to state sovereignty, or to the balance between federal power and state sovereignty that the Framers aimed at. Actually, the opposite is the case. The name "Antifederalist" means that they were opposed to ratifying the Constitution as drafted. They were stalwart defenders of state sovereignty, and as for the balance desired by the Framers, the concern of the Antifederalists was that this balance was unmaintainable: the system would tip over, and since the federal government was bigger than that of any of the states, it would tip in the national direction, at the expense of the states.

We will come back to the Antifederalists in a moment. But for the moment, now that we've looked at federalism as it was understood by the Framers of the Constitution, I'd like to look for a moment at its purely pragmatic virtues.

The doctrines of the Founding Fathers with regard to federalism may seem to be a dead letter in this era. Nonetheless, there are fields of government action that the federal government has not usurped from states, and in these fields there has been much fruitful experimentation in such important areas of public policy as education, insurance, banking, telephone deregulation, and enterprise zones. And there are good reasons for this.

Where the states constitutionally have power, they can tailor laws to meet their distinct needs, instead of having to squeeze into regulations drafted uniformly for a large and diverse nation. Furthermore, states have more of an incentive to excellence in government than does the federal government. After all, very few people would actually move to a different country because of obnoxious federal laws. But a great many people might move from one state to another so as to live under laws they prefer. People who take jobs in cities with suburbs in more than one state often make their home-buying decision on the basis of which laws they would rather live under. This phenomenon is even more evident at the city and county levels. The fact is, the lower and thus more accessible the level of government, the easier for the electorate to obtain the kind of government it wants.

Unfortunately, the electorate has had fewer and fewer chances to exercise that power as American political history has

unfolded. The Framers' vision of a limited national government of enumerated powers has gradually given way to a national government with virtually unlimited power to direct the public policy choices of the states. While the states were once the hub of political activity and the sources of political tradition, they have now been, reduced, in significant part, to administrative units of the national government, their independent sovereign powers usurped by a seemingly inexorable process of centralization.

Back in the late 1780s, Hamilton, in addressing the fear of the Antifederalists that the federal government would overshadow the states, expressed the opposite concern: namely, that the states -- because there were more of them -- would gang up on the national government and keep it weak. But, distressingly enough, Hamilton was wrong about that, and the central argument of the Antifederalists has proved right. The federal government <u>has</u> improperly intruded into the states. The states <u>have</u> lost substantial amounts of their constitutionally legitimate powers.

The process by which this took place is too long to describe in any detail here. It is largely a story of Congress exceeding its powers under Article I Section 8, and of the Supreme Court acquiescing in these errors. Several Constitution provisions in particular have been abused: the Necessary and Proper Clause, the Commerce Clause, the spending power, and the preemption power.

The story of the decline of federalism is for the most part a story of good intentions. As history shows, our great lurches towards centralization have mostly occurred in times of national emergency and concentrated national effort, such as the immediate post-Civil War period and the Great Depression. But there has also been a certain amount of inexcusable slighting of our Constitution.

Where are we today? As we all know, the federal government is now regarded by most Americans, of both parties and of all political persuasions, as the agency of first resort, not last. It deals with thousands of issues that go far beyond those specified in Article I Section 8. Last year Congress even passed a law regulating the practices of used car dealers with regard to odometers. A very useful law, most likely -- but very much a state matter, not a federal one, as the Founders understood federalism.

The Necessary and Proper Clause in Article I Section 8 authorizes Congress "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof."

Chief Justice John Marshall established in the 1819 case McCulloch v. Maryland that there are criteria for use of that clause. To be sure, it was not merely a repetition of other parts of Article I Section 8, but neither was it a grant of

plenary power, in violation of the whole idea of enumerated powers.

And if the Necessary and Proper Clause is not a grant of plenary power, then surely, neither is the Commerce Clause, which gives Congress the power "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." This is a much more precisely worded clause than the Necessary and Proper Clause. Yet of the two, the Commerce Clause has been even more widely used than the Necessary and Proper Clause in breaking down state sovereignty and turning the states into administrative sub-units of the federal government.

This process may be described as follows: the federal government finds some connection, even a tenuous and far-fetched one, between interstate commerce and the regulation it seeks to impose. This stretching of the clause is then upheld by the Supreme Court. An example can be found in the 1937 case National Labor Relations Board v. Jones & Laughlin Steel Corp. In this decision, the Court reversed its previous trend in Commerce Clause jurisprudence, and it did so under the threat of the administration's plan to add six new justices to the Court, a plan that might very well have passed Congress. The Court thereby illustrated the popular Washington maxim that when you feel the heat, you see the light.

Yet even in Jones & Laughlin, the Court insisted on some limits. The Commerce Clause, it said, could not be stretched "so

as to embrace effects upon interstate commerce so indirect and remote that to embrace them ... would effectively obliterate the distinction between what is national and what is local."

But that saving reservation did not last long. Only five years later, in 1942, the Court handed down its decision in Wickard v. Filburn, in which it upheld, under the Commerce Clause, a law that regulated a farmer growing wheat on his own farm for the exclusive use of his own family, with no intent to sell it in another state, or even another town.

Wickard seemed an almost lethal blow to federalism. Then, just two years ago, in Garcia v. San Antonio Metropolitan Transit Authority, the Court declared its refusal to hear any further challenges to Congress's authority under the Commerce Clause. We were asked to believe, in effect, that when the Framers gave Congress the power to regulate commerce between states, they were actually giving it plenary powers beyond the dreams of the British Parliament that they had rebelled against.

In Garcia, the court said that the states must safeguard their separate interests primarily through -- quote -- "the built-in restraints that our system provides through state participation in federal government action." In other words, write to your Congressman. Apparently, there is only a small role for the courts in enforcing the constitutional principle of federalism.

Garcia deserves a place among what University of Chicago Professor Philip Kurland calls the "derelicts of Constitutional law," cases such as Dred Scott and Plessy v. Ferguson that cried out for reversal.

But in the meantime, where do we stand? I do not think federalism is dead. It is still alive, because the doctrine of enumerated federal powers, with remaining powers left to the states, is in the Constitution. But there is no doubt that decades of misguided practice, capped by the Garcia decision, have had the effect of locking federalism in the basement. How can we set it free?

For one thing, there are initiatives this Administration has already taken, such as consolidating categorical grants to states into block grants, reducing the regulatory burden of some federal programs, and cutting federal taxes, which erode the tax bases of the states and focus taxpayers' attention on Washington rather than on their state capitals. We are very proud of these achievements.

But more needs to be done. For instance, within the constraints of Garcia -- which held that Congress is the sole judge of the extent of its own Commerce Clause power -- we can propose to Congress that it adopt a policy of stating, for each bill that it passes, the Constitutional authority on which that act rests. Even proposing such a reform would have the effect of focusing public attention on questions of federalism and

constitutionalism, and that is desirable in and of itself, especially in this Bicentennial year.

Sometimes the Justice Department, being in effect the law firm of the federal government, finds itself obliged to defend a federal agency against a challenge from a state, even while our sense of federalism suggests the state might well be right. An apparent difference might then emerge between our public position on the case and our public philosophy on the Constitution. Our duty then is to construct a principled defense of the agency that takes federalism into account.

All told, it may well be that the ultimate solution to the problem of resurrecting the Founders' doctrine of federalism is by way of a Constitutional amendment. Now, I am generally against amending the Constitution. And I think it is with good reason that, while thousands of Constitutional amendments have been proposed over the past two hundred years, only twenty-six have actually been placed in the Constitution. The Constitutional amendment process should not become a continuation of legislation by other means.

But there clearly are times when the presumption against changing the Constitution should be overcome, and perhaps one such time is when the very structure of the Constitutional system is threatened by the continuing neglect of federalism.

Of course there already is a federalism amendment in the Constitution: the Tenth. But the Tenth Amendment has clearly not

sufficed to prevent the aggrandizement of the federal government at the expense of the states. The challenge, then, is to propose an amendment that would bring about an effective restoration of federalism, without at the same time implying that the Tenth Amendment does not do so.

A call for serious consideration of amendments of this sort was recently sounded by Governor John Sununu of New Hampshire, the incoming chairman of the National Governors' Association. Among the bold ideas that he has put on the table for national discussion is a Constitutional change that would empower the state legislatures, by a supermajority among them, to overturn acts of Congress, with due exceptions made for foreign affairs, defense, and civil rights and liberties. Some such plan would help revitalize the states as political entities. This concept and others among Governor Sununu's ideas deserve serious consideration.

Revitalizing the states as political entities is, in my view, a desirable goal quite apart from whatever use the states make of that power. This is an important point to grasp about federalism: it is policy-neutral. It is, strictly speaking, neither conservative nor liberal. We in this Administration are calling for more power for all the states, not just for the states with Republican-controlled legislatures. In some instances more state control would probably result in more so-called liberal policies. But that is not the point. Federalism

is a principle, not a policy, and it is a principle of the Constitution, not only of this Administration or of any given faction in American politics.

The purpose of federalism -- the reason it was adopted by the Founding Fathers, in preference to the alternatives -- is to protect freedom. Federalism hedges against federal tyranny, by fragmenting power. As Madison put it in Federalist number 51, federalism offers a "double security" to the rights of the people.

When the jurists of what one may loosely call the Holmes school argue that the federal system was fine for a small agricultural republic, but that a large industrial nation needs a more centralized government, they have it precisely backwards. The larger a nation, the greater the danger of tyranny if that nation allows power to concentrate in its central government. And out of a sense of expediency, there are many who are often willing to allow that accumulation of power. Far from being outmoded, federalism was never more needed than it is today.

In concluding, let me ask how many of our citizens could name their state legislators? How many could say whether the state treasurer is elected or appointed? Not many, is my guess. Alas, state government is, unfortunately, one of the best-kept of political secrets. The reason for the widespread ignoring of state government is that we've been taught for more than a generation to look to Washington.

In closing, let me recall to you how the federalist nature of our Constitution appeared to Alexis de Tocqueville. In his great study Democracy in America, written barely forty-five years after the ratification of the Constitution, he wrote that our Constitution

> consists of two distinct social structures, connected, and, as it were, encased one within the other; two governments, completely separate and almost independent, the one fulfilling the ordinary duties and responding to the daily and indefinite calls of a community, the other circumscribed within certain limits and exercising only an exceptional authority over the general interests of the country. In short, there are twenty-four small sovereign nations, whose agglomeration constitutes the body of the Union.... [T]he Federal government, as I have just observed, is the exception; the government of the states is the rule.

To restore what Tocqueville described would, in my view, be good policy. But that is not the ultimate reason to do it. The ultimate reason was well expressed by Constitutional scholar Paul Bator in the Harvard Journal of Law and Public Policy:

> I do not think that a credible case for federalism can be made ... without a credible theory about the federalism that is embedded in the Constitution. The

issue of federalism will invariably raise for us the question of what is meant by fidelity to a regime of law and fidelity to the Constitution.

Thank you very much.