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Remarks of  
WARREN E. BURGER  
CHIEF JUSTICE OF THE UNITED STATES  
at the  
Osgoode Hall Law School

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In certain respects, your experience in Canada experience with your constitution parallels ours. In both our countries, the Constitution was followed by a Bill of Rights. Today, rather than discussing contemporary legal problems, I ask you to indulge me in some historical reminiscences; this is an appropriate time to take a look back at the struggles that began in Philadelphia nearly two centuries ago, when the Constitution of the United States was drafted there, in that hot and humid summer of 1787.

As we approach the Bicentennial of that Constitution, we, in the United States hope to stimulate Americans—and others around the world—to be talking to each other about the evolution of what was an utterly unique experiment in government. We hope that interest in our Constitution and its history will not be confined to our borders, for its great principles can be shared by people everywhere who seek freedom. We need to recall how that remarkable, unprecedented document came into being, what it meant—and what it means today. This should not be thought of as a subject exclusively, or even primarily, for lawyers. And so, with that admonition to myself, I will try to stir your recollections of some great events, well known, but often overlooked.

I do not mean to discuss the contents of our Constitution but rather to ask: how did it come about that 55 men in a country of barely three million were cast by history to take actions that would place them forever in Freedom's Halls of Fame, when they were sent to Philadelphia by 12 states to consider how our newly independent people would govern themselves. I say 12 states, for one state of the original 13—Rhode Island—sent no one to Philadelphia to speak for it.

From time to time in recent years, people have expressed serious concerns about attacks on the Supreme Court and even on the Constitution and the institutions which sprang from it. There is nothing new about such attacks, and there is nothing inherently bad in most of them. The Constitution itself was under attack almost from the moment it was signed in Philadelphia. When free people challenge their ser-

vants—the Executive, the Congress or the Courts—temperately and with reasoned debate—we have nothing to fear. That is what an open society of a free people is all about.

One of the unique features of our Constitution is that it was not a grant of power from government to the people, but a grant of power by the people to a government which they—the people—had created. In this respect, it differed from King John's surrender of powers at Runnymede 770 years ago.

The delegates had labored four months to produce the document, and finally on that cool Autumn morning—Monday, September 17, 1787—42 of the 55 delegates were present, and, as we know, three of those delegates declined to sign their names to the draft.

Benjamin Franklin, one of the wisest of all the Founding Fathers, and the most senior, made some observations as that historic final meeting opened, almost exactly 198 years ago. His words are so important, so filled with wisdom that they are worth recalling. He said this:

Mr. President, I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information or fuller consideration; to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others.

Some other men had less moderate things to say about the new Constitution; and some of them were very harsh indeed. One example is found in the following year, at the Massachusetts Ratification Convention, where one of the delegates had this to say:

Mr. President, . . . some gentlemen [have] called on them that were on the stage in the beginning of our troubles, in the year 1775. I was one of them . . . . And I

say that, if any body had proposed such a constitution as this in that day, it would have been thrown away at once. It would not have been looked at . . . . [D]oes not this Constitution . . . . take away all we have—all our property? Does it not lay *all* taxes, duties, imposts, and excises? And what more have we to give?

Another Massachusetts delegate, Mr. Smith, answered him saying this:

Mr. President, I am a plain man, and get my living by the plough, I am not used to speak[ing] in public, but I beg your leave to say a few words to my brother ploughjoggers in this house. I have lived in a part of the country where I have known the worth of good government by the want of it.

Mr. Smith then explained that when he had been a member of the convention that formed the Massachusetts Constitution, he had learned something of the need for checks and balances of power. He went on, saying this:

I did not go to any lawyer, to ask his opinion; we have no lawyer in our town, and we do well enough without. I formed my own opinion, and [I] was pleased with this Constitution.

To secure the ratification of our Constitution was no easy task, with articulate and popular heroes like Patrick Henry in Virginia opposing it, and with Thomas Jefferson taking no part but known to be somewhat cool. We know that it was the great prestige of George Washington and James Madison, buttressed by a rising young public leader, John Marshall, whose logic countered the powerful oratory of Patrick Henry in the Virginia Convention, and helped bring about Virginia's ratification. Without Virginia's ratification very likely there would have been no Constitution—at least at that time. The vote in Virginia was 89 for and 79 against ratification. The vote in New York was 30 for and 27 against; New Hampshire ratified the Constitution by 57 to 47.

Thirteen years later that same John Marshall, who carried the day in Virginia, would become the fourth Chief Justice of the United States.

I have always found it difficult, and I suspect others may share that difficulty, really to understand how separate and independent were each of the 13 sovereign states that made up the Confederation preceding the Constitution. We know that the men of Massachusetts Bay regarded themselves as allies—*allies*—of other states; they thought themselves quite different from Virginians or Marylanders or New Yorkers, even though they spoke the same language. This ambiguity of allegiances is illustrated in a significant episode that occurred 74 years later in another critical period of our history. In 1861, after the fall of Fort Sumter, when war seemed imminent, President Lincoln, acting on the advice of the Chief of Staff, offered to Robert E. Lee the command of all the Union armies.

Lee, then a Colonel in the United States Army, loved the Union, and was distressed at the idea of dissolving that Union. He hated slavery, but he was nevertheless so much a product of the age of his father, General "Lighthouse" Harry Lee, one of George Washington's generals, that he rejected Lincoln's offer. He immediately resigned from the Army, abandoned the beautiful home overlooking the potomac and the City of Washington, fully aware his property would be confiscated by the government in the event of war. That great mansion is now a national monument. Lee then went to Richmond—120 miles south—to offer his services for the defense of Virginia—not for the support of secession, not for the defense of slavery, not for the dissolution of the Union, but simply for the defense of his native state. In the 18th Century and into the 19th, men tended to be Virginians or New Yorkers first and Americans second. This episode has always helped me understand the enormous difficulty of leading the Americans of the thirteen original states to think in terms of creating a federal union and a central government with a Constitution binding them together as a nation.

Now let me take you back from this digression, to 1787, when even the word "constitution" was not a familiar one, in the sense we now know it. The people had a great fear of central governments stemming from the fact we had a Revolution to escape from a distant, strong and insensitive central government in London.

When the Continental Congress met in New York early in 1787 to consider convening what we now know as the Constitutional Convention, the authorizing resolution was carefully circumscribed. George Washington, Hamilton, Madison and others wanted a true Constitutional convention, but the Continental Congress voted only to create a committee to meet in Philadelphia to consider changes in the Articles of Confederation. The resolution was explicit; the committee was created

". . . for the sole and express purpose of revising the Articles of Confederation."

There was no hint of drafting a new Constitution, or of creating a strong central government. Patrick Henry, in Virginia, had refused to be a delegate because, as he put it, he "smelled a rat." This "rat" he smelled was the idea of a strong central government under a written constitution.

When the draft of the Constitution was reported back to the Continental Congress, some members were so opposed to it that they tried to get a resolution to censure the delegates for drafting a Constitution when they were sent only to review and revise the existing Articles.

The language of the Articles of Confederation reflects how jealous the 13 states were about their own sovereignty. The very enabling resolution creating the Continental Congress reads in the terms of a treaty. We must marvel as we recall those words written in 1777:

The said states hereby severally enter into *a firm league of friendship* with each other.

A "firm league" to carry on a war against a great world power! This was Massachusetts, New York, Pennsylvania, Maryland, Virginia and eight other states speaking to each

other in terms sovereigns use when entering a multilateral treaty.

The Confederation had no power to levy taxes and no authority to raise armies. It is nothing short of a miracle that the Revolution was successful, or that there was any occasion to convene what we now describe as the Constitutional Convention. It was the good fortune of Washington's armies that George III had to keep a good deal of his powder dry to deal with France and Spain.

One state, for example, paid nothing in the way of taxes or contributions to the Confederation for at least five years before the meeting in Philadelphia. Rhode Island, remember, declined even to send delegates to Philadelphia in 1787! The soldiers under Washington often furnished their own clothing, their own rifles and sometimes even their own gunpowder. Hamilton, the financial genius of the Revolution and of the Confederation, and later Secretary of the Treasury in the new government under the Constitution, was described in the war period as "Receiver of Continental Taxes"—the "receiver," not "collector." Taxes were like church and charitable contributions—purely voluntary.

The terrible privations, the needless deaths from starvation and freezing suffered by Washington's troops at Valley Forge, only a few miles from where our Constitutional Convention later met, attest to the inherent weakness of the Confederation. The lack of real sovereign power in the Continental Congress, the absence of central authority, caused those men at Valley Forge to suffer through a terrible winter because the 13 states had no binding duty to provide the promised food, the supplies, and the money necessary to support the armies.

These terrible experiences not only dictated Washington's military strategy of trying to keep his ragged armies of amateur soldiers on the move and out of reach of the trained British forces, but also helped shape his political philosophy, and that of some of his officers. They came to see that for some purposes a strong central government was imperative. A young lieutenant in Washington's army, who spent that

winter at Valley Forge, also saw the need for a strong central national authority. And those views later found their way into his opinions when the lieutenant became Chief Justice. The great cases authored by Marshall—*Marbury v. Madison*, *McCulloch v. Maryland* and *Gibbons v. Ogden*, in particular, bear the imprint of that winter at Valley Forge.

So we see that the suffering and needless deaths at Valley Forge helped shape not only our Constitution but our Constitutional jurisprudence as well. We must never forget that the influence of those who were fearful of a strong central government, very nearly cost us the victory in the Revolution of 1776—and came uncomfortably close to rejecting the Constitution.

Alexander Hamilton surely had it impressed upon him that if the payment of taxes by the people and by the states was a matter purely voluntary, there would never be a nation. Hamilton said that what was needed—and I call on his words—was not the kind of structure that appealed to

. . . the narrow colonial sphere in which we have become accustomed to move, [but rather] . . . that enlarged kind suited to the government of an independent nation.

When we recall that nearly a century later so great an American as General Robert E. Lee could not escape from the shackles of those “narrow colonial” attitudes, it is not surprising that the Continental Congress confined the resolution leading to the Philadelphia meeting to a “committee” whose “sole” authority was to *review* the Articles of Confederation. Washington, Madison, Hamilton, Wilson and others knew that the loose structure of the Confederation, and the Continental Congress, were what might be called today a “paper tiger.” To continue that structure would not only inhibit development of the new nation but would also encourage the parochial rivalries and conflicts that had almost led to disaster.

From 1776 to 1787, there were limits on commerce between the states; each of the 13 states was free to set up

trade barriers and to issue its own currency. The merchants and businessmen wanted a system that would open the channels of trade and commerce and develop manufacture. The new Constitution under its Commerce Clause gave the new nation a "common market" more than a century before that phrase came into our vocabulary with the advent of Europe's common market. A common currency, a central revenue system, a central banking system, a central authority to deal with other nations, and no trade barriers between the states, were imperative to convert the 13 state sovereigns into a true nation.

Hamilton and Madison often disagreed, but on this issue they recognized that only a Constitution creating a central authority could provide the foundation needed for an expansion of the economy and future growth.

James Madison, our third President who is often called the "father of the Constitution," had been a close student of the history of governments. He had immersed himself deeply in study long before going to Philadelphia and he was familiar with the views of the profound thinkers of Rome and Athens and the work the Scottish Enlightenment which evolved in the second half of the 18th Century. One of Madison's writings can be read as foreshadowing what emerged later in *Marbury v. Madison*. Madison had written:

Let the national government be armed with a positive and complete authority in all cases where uniform measures are necessary. . . .

Let it have a negative, in all cases whatsoever, on the legislative acts of the States . . . . [and]

[L]et this national supremacy be extended also to the judiciary department.

John Marshall used 15,000 words to say this!

Madison could not match the eloquence of his fellow Virginians, Thomas Jefferson or Patrick Henry, but he was a profound thinker, a craftsman and an architect in terms of political science. And it was the great good fortune for our country that Madison emerged as one of the chief draftsmen,

as well as one of the principal architects, of our Constitution. In some respects, he was more attuned to the philosophy of Washington, Hamilton, and Adams concerning the future than he was to the thinking of his close friend and mentor Thomas Jefferson. Given Jefferson's visions of a nation of farmers, artisans, and strong yeomen, his skepticism about a strong central government, and his abhorrence of broad judicial power, perhaps it was just as well that Madison arrived in Philadelphia early in advance of the formal meetings and that Jefferson, like Patrick Henry, was not present at the Convention at all.

It is surely clear now that a loose federation of 13 sovereign states would have doomed us to a Balkanization that might have made us easy victims of the predatory world powers of that day and doubtless would have deferred our economic and political development.

It is difficult to recreate the atmosphere that must have existed in Philadelphia in that summer of 1787. In terms of 18th Century travel and communication, most of the people of our 13 states were very distant from each other. The states spanned the Atlantic Coast from New England to Spanish Florida. To the North were British military forces; the Spanish and French had interests in the South and West. Perhaps it was something of these concerns, these fears, that moved Benjamin Franklin, who was not known to be dedicated to orthodox religious patterns, to offer the motion that a chaplain be invited to open the sessions of Convention with a prayer. And Madison, at the close of the Convention said that all people must:

. . . perceive in [the Constitution] a finger of that Almighty Hand, which has been so frequently . . . extended to our relief in the critical stages of the revolution.

One thing the delegates shared, because of what they had suffered as colonists, was a feeling that a government with built-in checks and balances was imperative. Just how to achieve such checks and balances and still have a strong na-

tion and an effective government was to keep them in Philadelphia for those many hot weeks from May to September. We remember that a theme underlying all the debates and all of the discussions had to do with the notion of the states surrendering some authority and sovereignty to a new, unknown and as yet undefined national government.

James Wilson, one of the ablest men at the Convention, and Pennsylvania's first Justice on the United States Supreme Court, at one point in the debate put his finger on this problem saying:

If no state will part with any of its sovereignty, it is in vain to talk of a national government . . . .

I do not see the danger of the states being devoured by the national government. On the contrary, I wish to keep the states [them] from devouring the national government.

In short, to create a national government, the 13 states had to delegate some of their powers. The fear of central power, the fear of a national government, was hammered at and hammered out all during the convention, and the tensions that these ideas developed were revealed in the rather bitter comments of James Wilson and John Dickinson. Dickinson at one point almost in despair, said:

If the general Government should be left dependent on the State Legislatures, it would be happy for us if we had never met in this Room.

As with any deliberative body, small or large, when the issues are of great consequence, and especially when they probe into unknown territory, feelings grow tense and utterances occasionally become harsh. Yet, that the Constitutional Convention was a process of give and take, there can be no doubt. On the main proposition, that is the system of checks and balances, with three coequal and independent departments, Madison, Hamilton, Morris, Dickinson and Wilson would not yield.

The day after the Convention on September 18, 1787, a delegate from New Hampshire wrote to a member of his family, saying:

[I]t was done by bargain and Compromise, yet notwithstanding its imperfections, on the adoption of it depends . . . whether we shall become a respectable nation, or a people torn to pieces by intestine commotions, and rendered contemptible for ages.

Franklin's closing speech perhaps said it as well as could have been said:

In these sentiments Sir, I agree to this Constitution with all its faults, if they are such.

And when asked what the Convention had created, Franklin's answer: "A republic, if you can keep it."

Two things were utterly unique about this Constitution and what flowed from it. First, its structure with division into three co-equal, co-ordinate branches of government was deliberately created to provide for checks and balances. This had never been tried in all human history. Experience demonstrates that our kind of structure does not necessarily produce the most efficient government, but that it does protect freedoms. Efficiency in the private sector, in the conduct of business and industry is critical, but efficiency was not the primary objective of the draftsmen of the Constitution. Freedom from the kind of restraints, which brought people from Europe to this continent was the primary objective.

The second factor is perhaps even more important, but is, in a sense a product of the first. The freedom created by this new system unleashed the energies, abilities and talents of every individual to develop as the individual's own ambitions, abilities and industry allowed. In the short space of 200 years, this small contingent of three-million people, scattered along the eastern seaboard, developed into a country of 250 million and a world power. Other nations had industrious, talented and ambitious people, but the uniqueness here was that this new system allowed every person to develop

God-given talents and abilities without the heavy hand of government or tradition being a barrier or burden. This theme, which we share with the people of Canada, must be expanded and repeated constantly over the next few years as we celebrate this great experiment in government.

The delegates left Philadelphia exhausted but rightly entitled to be elated, but the document they produced had yet to run the gauntlet of the states' ratification processes and receive the approval of nine states.

We have survived and prospered for 200 years because our strength was not simply in the concepts of the Declaration and the Constitution—great as they are—but because of the strength of the people, of personal integrity, of individual responsibility, of the traditions of home and family—and of a firm belief that our Constitution, as James Madison said, was divinely inspired.