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OUR ENDURING CONSTITUTION†

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In a narrow sense, we meet to do homage to a great institution of learning as it approaches the beginning of its third hundred years of service. In a broader sense, it is an event in the life of a great nation which we celebrate.

One century may possess few events—or at least few which are memorable—while another is crowded with them. In years, the United States is a youthful nation; but, with us time has marched at a terrific pace, and in terms of what has come to pass our history is one of the longest in the annals of mankind. Today it is appropriate to recall the fact that this college was established just before (if I may intrude a modern metaphor into an age which could not have understood it) the development of our country went into high gear. Here is the thing to be remarked—this institution was here to serve the nation before there was a nation to be served. Its span of life begins earlier than, and runs along with, the span of national life.

When Augusta Academy was founded, save for the wilderness and the French and the Indian Wars, all was quiet on the placid surface of the eighteenth century. But within a dozen years thereafter, a storm broke which left its impact upon all the institutions which make up the social order. It was *after*—and I am disposed to say, *because of*—the establishment of this academy and the environment which produced it, that society was shaken to its foundations. It all came about through an awakening of the common people and a liberation of the minds of men, of which this early colonial venture was a part. The spirit of the colonies was fused with—and gave dominance to—European streams of thought; and out of the fusion was born a new world. A Mr. Newton, later Sir Isaac, had struck a blow at the ancient order, by insisting, and by his laws of motion and in his *Principia*, even proving that the very

†From an address delivered by the Chief Justice of the United States at the Opening Convocation of the Bicentennial Year of Washington and Lee University, Lexington, Virginia, on Friday, September 17, 1948.

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force which causes the apple to fall holds the celestial bodies in their courses. A young Mr. John Locke had committed the Newtonian physics into a political theory that a rightful government rested upon the consent of the governed. So plausible was he in his attack upon divine right and absolute authority that the authorities at Yale found it necessary to forbid their students to read his essays. Against the opportunities which the American colonies offered, the powers-that-be could no longer tell the poor people of Europe to be content with the stations in life to which Providence had appointed them.

It is not fitting here—nor is there time—to recite in detail the course of human events, so disturbing at the time, so rich in promise for the future. In passing, however, mention must be directed to certain events which happened in a rather remote part of the British Empire—may I say that at the time Virginia was of less consequence to England than the Barbadoes—yet were felt around the world. To these events this University, then an academy, had to make its accommodation; and to their course it made a substantial contribution.

The American colonies in time outgrew their official status as plantations; a series of incidents, including a stamp tax, a sugar act, and navigation laws, brought disputes; and thirteen newly-pledged states, in Congress assembled, solemnly resolved to sever the ties which bound them to the mother country. I have often wondered how the history books can turn so dramatic a happening into so abstract an occasion. For respectable and law-abiding men had resorted to revolution and were quite sensitive to the fact that “a decent respect for the opinions of mankind” dictated that they should put their reasons on parchment. So Mr. Jefferson, a young Virginia squire who was facile with his quill, was called upon to draft the document. With young Mr. Adams at his elbow, the general judgment is that a classic was created. He couldn’t have done half as well, had he not been a man of books. Yet genius and the occasion served him well; for books alone would never have done the job. A theory of representative government begins the document; a list of charges against the English King, working up to a magnificent climax fills the middle section; and it ends with a pledge by the delegates to each other “of our lives, our fortunes, and our sacred honor.” In fact, seventeen seventy-six was a very human sort of event. For, by a resolution and a signature, underwritten at Yorktown, the signers of the Declaration became citizens of their several sovereign states and *almost* American citizens.

I said, quite advisedly, that the signers became *almost* American citizens. For their first allegiance was to their several states; it could

not be to a country, which under the Continental Congress, was as yet not quite a nation. Such a loyalty had to await a more perfect union; and that in turn depended upon a newer and more fundamental instrument. An academy was not enough for the new republic; it had to change and grow in the country it served. My mind easily associates the transformation of Augusta Academy, first into Washington College, and later into Washington and Lee University with the formation of our Constitution. For the person who first gave his name to this college presided over the Convention which framed the Constitution. His greatest gift was his executive ability. He insisted upon having about him a group of strong men who differed widely among themselves. It was his superb ability to secure from them a result which no one of them could have effected, yet all were willing to accept. His supreme accomplishment was his quiet, yet effective, direction of the gathering in Philadelphia during the hot summer months of 1787. There, as always, he succeeded in making the whole exceed the sum of its parts.

Nor can I put Lee's association with the Constitution on a less exalted plane. Chancellor James Kent was once a member of the Board of Visitors at West Point. After putting the cadets through a rigorous examination, he mentions Lee as one of the two who really understood the Constitution. It was that understanding—vouched for by one of the great constitutional lawyers of the day—which led Lee to put on the Confederate gray. He was opposed to secession, but was sincerely persuaded that a state had a right to leave the Union—and that his first duty was to Virginia. He was fighting, as he saw it, for rights guaranteed by the Constitution of the United States. And when Gettysburg, Missionary Ridge, and the Wilderness and Appomattox gave a different meaning, he accepted the result; and by precept and example was first among those who helped to re-form a more perfect union. War-weary, defeated, he accepted the presidency of what was then Washington College. Were there any doubt of his greatness, as an American rather than just a Southerner, as a statesman rather than just a general, it would be dispelled by a consideration of his stewardship of that office. His gaze was to the future, not the past. His emphasis was on healing not perpetuating, the wounds of an unfortunate war. He encouraged the enrollment of Northerners, and by word and example he urged on his Southern students the necessity of putting behind them the bitterness of past antagonisms. Thus it was Lee, in large measure, who made this into a national rather than a state or sectional institution. It was his influence too which was instrumental in re-orienting Washington College as a well-rounded university. He

incorporated into it the fine law school which Judge Brockenbrough founded here in Lexington 100 years ago. He added an engineering school and a school for commerce, and he included in an undergraduate program—perhaps for the first time in history—courses in that most important subject in a democracy—journalism.

Gladstone, a distinguished English scholar, has called our Constitution “the most wonderful work ever struck off at a given time by the brain and purpose of man.” That it is a most remarkable document admits of no doubt. That it was struck off at a given time savors of a beautiful myth and demands explanation. The Constitution organizes a government, serves the necessities of a national community, guards the liberties of the people. It evolved out of the thought and experience of the past; it makes provision for the future; it is adapted to the society it is called upon to serve. If it was “struck off” in a single summer, its content had been long in the making. Though it takes the form of a document, many quills were dipped into many ink-horns before its words were fixed by the Committee on Style, the Committee on Detail, the Committee on Unfinished Parts, and the Convention itself. The content makes it the most remarkable of documents, but the ideas were forged in the crucible of time and hammered into shape by a process of deliberation amongst very able, intelligent and patriotic men.

The Framers themselves were a remarkable group. They were men of action and of learning. Not indifferent to their own local interests, they were sensitive to the needs of the nation. The lead was taken by the delegation from Virginia. These great Virginians were, of course, joined by other immortals of great stature, whose contributions of patriotism and statesmanship rank high in history. But today the locale is Virginia and the emphasis may well be on Virginians. The Virginia delegation included George Washington, who presided; James Madison, who took the dominant role and whose daily journal is our principal source of information; Edmund Randolph, the titular leader of the group; and the hard-headed George Mason, somewhat democratical in his views. In the whole “business,” Virginia had been to the front. It had early become aware that all was not well with the Continental Congress; that as sovereign and hostile states, the thirteen could not continue to exist; that the tariffs, boycotts and embargoes with which the states were fighting each other were devastating in their effect. So Virginia took the lead in calling a meeting at Annapolis in 1786 to consider the better regulation of commerce. At Annapolis, the commissions were by their instructions confined to a consideration of commerce. But it quickly became apparent that “the power of regu-

lating trade" was "of such comprehensive extent" as "to involve the general system of the federal government." Accordingly "an effective attack was bound to require a corresponding adjustment of other parts of the federal system." So a convention to consider these larger matters was proposed "to meet at Philadelphia" on the "Second Monday in May," 1787. For that meeting the Virginia delegation prepared itself thoroughly and went armed with the "Randolph Resolutions," which served as a tentative draft for the document which finally emerged.

In the main, the Randolph, or "Virginia" plan, triumphed over the Patterson or New Jersey plan, and the Pinckney or South Carolina plan. But the end product was the result of patriotic negotiation and compromise. The Randolph plan came from the Virginia squirearchy, an institution which habituated its leading citizens from early years to a deepseated, disinterested and intelligent concern with public affairs. Rarely, if ever, in human history has there been such a school for the training of statesmen. This school for Virginia squires had run on for nearly a century; it was to enjoy another half century of vitality—a vitality attested by the debates in the Virginia constitutional convention in 1828, which in our history ranks second only to the Convention at Philadelphia in the superb quality of its workmanship. The Constitution could not have been written had there not have been men there competent to write it. And these men were graduates of Virginia squiredom, the country's best school of statesmanship.

But, if learned men were there, the mark of the times is upon the whole document. The quiet of the eighteenth century was broken with the ascension of George III; and an intellectual stream which for some decades had been gathering force broke into the open. The new age was marked by a spirit of inquiry, an appeal to reason, an appraisal of institutions in terms of their functions, a demand for responsibility in public affairs, a faith in the people and their future.

In 1776, the thesis that government is not a matter of privilege, that a political order must do the job it is there to do, that its test is its capacity to formulate and execute a public policy which aims at the welfare of the people, broke into the open. In that year in a *Fragment on Government*, Jeremy Bentham demanded responsibility. He was already formulating his "felicity calculus" as an instrument for attaining "the greatest good to the greatest number." And another Scot, named Adam Smith, curious about it all, conducted a kind of one-man private parliamentary investigation and published his results under the sensational title, "An Inquiry into the Nature and Causes of the Wealth of Nations." The English were far less inquisitive than the

Scots about everybody's business, but a certain Edward Gibbon, quite disturbed about the British imperium, had uttered a solemn warning in his *Decline and Fall*, using the once glorious Roman Empire as his horrible example. By 1787, all of this new learning, as well as the "classics" of Newton, Locke, Rousseau, had reached America and had been widely read. A great many, in fact, the abler among the delegates were men who knew their Hume, their Gibbon and their Adam Smith, as well as the affairs of state. It was these books, and others like them, which created the intellectual climate within which the Constitution was written. It was in fact only a step from the open corridor of the late eighteenth century into the secret chamber in which the delegates met.

In that chamber, George Washington was in the chair, and without any formal election James Madison became the floor leader. My Congressional experience has taught me that in any deliberative body it is impossible to carry on without informal colloquies. A number of passages in Madison's notes can be understood only upon the assumption that informal understandings had been reached off the floor and even outside of committee meetings. I wish that we knew more about the conversation between Washington and Madison during that fateful summer. And we need more light than we have yet had upon the guidance which came to Madison from his friend and political ally, Mr. Jefferson, then overseas. The records indicate a constant concern for the future as well as the present; the debates ring with the word "posterity." The delegates were alike fully aware that they were engaged in building a nation, yet keenly apprehensive that their work—like the old Confederation—might not be a success.

Instead of using "pure reason" as their sole guide, they were very sensitive to the play of sectional interests. But there, as men of affairs, they accepted in a common-sense way the facts of life. In fact, they were quite honest and frank in respect to economic forces. The pages of Madison's journal contain numerous references to the interest which make up the commonwealth. Elbridge Gerry, James Wilson and Alexander Hamilton all have something to say about the matter. And Charles Pinckney, in a detailed statement, resolves the economy into (1) "Professional men," (2) "Commercial men," and (3) "the landed interest." The landed interest was concerned with the staple crops which were exported. It is of note that as yet the subsistence farmer produced almost all that he consumed and ran a miniature economy which was all his own, and that labor had not as yet found an articulate voice.

It was Madison, however, who was most sensitive to, and most con-

cerned with, the detail of the interest which made up the State. He recognized that "all civilized societies" are "divided into different Sects, Factions and Interests," as they happen "to consist of rich and poor, debtors and creditors, the landed, the manufacturing" and "the commercial interest." He was fearful that groups having "real or supposed differences in interests," such as "creditors and debtors, farmers, merchants and manufacturers" through their conflicts would seriously disturb, and possibly, overthrow the government which was being established. Here Madison's great work, like that of any truly able legislative leader, was in putting the question. He was able to state clearly the very real danger which the members were vaguely feeling. And here Madison's superb contribution to political theory—a contribution for which he has never had real credit—comes into play. The task of the Convention was preventive, not remedial. The government it set up was not to wait until a clash had occurred and then attempt to undo the mischief. Instead the very structure of the government must be so arranged, and its powers must be so distributed and conditioned, that such clashes should not become overt. To that end an opportunity was to be accorded, not only to all current "interests" but to any new interest which in the future might become articulate. But no interest was to be vested; and, within the commonwealth there was to be such a balance that no interest could dominate the government. The idea of checks and balances is old; in physics, Newton had given it a classical statement; in England, the Tories had made it captive to reaction. In this country, by his keen thought and careful work, Mr. Madison made it the instrument of the new republic.

Nowhere does this Madison theory find formal statement in the document; almost everywhere it helps to shape the classic lines. The task of the Framers was of a three-fold character. They were attempting (1) to create a framework for the federal system; (2) to enumerate the powers delegated to the federal government, reserving all others to the states; and (3) to define the province of individual liberty upon which the federal government itself could not trespass. How neatly and effectively the Madison theory was employed in the execution of these tasks, the document itself cannot fully tell. You must follow the debates themselves to discover the nimbleness and efficiency of Mr. Madison's constitutional handiwork. Here a sentence or two must suffice for a detailed study of the records—particularly Mr. Madison's journal—which every citizen should read for himself. Early in the Convention, the political questions, such as the number of representatives each state should have in House and Senate, were raised. The result

was to touch off acrimonious debate which, if allowed to continue, might well have broken up the meeting. Some history books state that it was all a clash between the large states and the smaller ones. But the records just do not read that way.

For, before white heat was engendered, some one—was it General Washington or James Madison, or a small group of statesmen more concerned with building the nation than with serving a particular interest—turned the attention of the Convention in another direction. Whoever it was, was well aware that economic issues must be faced sooner or later and the Convention had better get the matter back of it. So to the real trouble spots, the delegates addressed themselves without delay. A minor issue in this list was slavery. I choose the word “minor” deliberately, for in 1787 slavery was not yet the South’s “peculiar institution;” and, in respect to it, the feelings of the delegates did not rise to fever heat. Here is a curious example of an event being endowed with importance by that which came later. For a century and a half there had been slavery in the colonies. But as yet it was not a “burning” issue; in 1787, the slavery question was of lesser magnitude than that of indentured servants. It was the debates over slavery in the territories in the thirties, forties, and fifties of the next century which endowed this skirmish with a significance which for the delegates it never possessed.

Of far greater consequence was the matter of the tax on exports by the federal government and the right of the several states to levy import duties. A vigorous battle raged, but in the end the federal government was denied power to tax exports and the states power to tax imports. In like manner, other economic issues were taken up and settled. When powers were denied, the Convention once more addressed its attention to the structure of the federal system, and a settlement was effected without friction and with little debate.

As for the detail of powers to the several divisions of government, the Madison thesis is as fully apparent. It was a matter of intention that representation in House and in Senate should be on different bases. The equality of the several states, each of which was to have two Senators, gave a plausible excuse; but it was beset with the frailty that it spoiled the equality in representation among the people. Its real rationale is that it served well the purpose of Mr. Madison and his colleagues. For the difference in base served as a guard against the capture of the Congress by any special interest. The six-year term for Senators, one-third being elected every two years, serves the same purpose. As the operations of government were guarded against special interests,

so were they secured against passing currents of opinion. In much the same way, *pains* were taken—I use the word literally—to banish from all departments the arbitrary, and to insure by every department the responsible use of its power. It has become the fashion of late to shrug shoulders at the doctrine of “separation of powers;” and Mr. Justice Holmes is quite right in insisting that “the great ordinances of the Constitution do not create fields of black and white.” And it must be admitted that, in days like ours, with a necessary use of many administrative agencies, the severity of old must be relaxed. None the less the separation of government into the executive, the legislature and the judiciary—an independent judiciary—is to be numbered among the greatest of political inventions. It marks almost a revolutionary step forward in the realization of a government which is truly responsible.

The framework was intended alike to prevent the capture of any agency by a special interest and to insure adequate responsibility in the conduct of each agency. But, within these limits, the powers of the several departments are written in flexible terms. The Framers were creating a government; they hoped it would endure. The books of the period are full of the opulence of the nation, the progress of the useful arts, the advance of mankind. If posterity, as well as the present generation, was to be served, they knew quite well that the instrument they dared to hope would endure, had to make good, not only under changed conditions, but under conditions which their imaginations could never anticipate. For that reason, as men of learning and of the world, trained in such a school of statesmanship as Virginia squiredom offered, they were content to enumerate the powers delegated to the federal system. They knew well that any attempt at definition would imperil—and might wreck—the edifice they were erecting. For time not only serves up new things, but rings endless mutations upon old ones. Thus, the powers delegated to the Congress can all be written on a post-card; yet they have proved sufficient to pilot the nation from a frontier economy into the atomic age. The Constitution has been able to serve as a guide without resort to rigid formulas.

An important part—perhaps the most important part—of the document is the bill of rights. In form, the bill of rights is a series of amendments to the Constitution; in a way, the Constitution is itself an amendment to the bill of rights. For the territory it guards constitutes a domain which was ancient before the framework of the federal system took shape. A reason for the original omission was that the rights of man emanated from a source higher than the Convention; for they were the gift of God, recently underwritten in seven long years of war

with the blood of patriots. But their advocates wanted to take no chances; the people wanted them spelled out; and the first ten amendments were the price of the ratification of the Constitution.

In the time allotted me, I have attempted to suggest why our Constitution has endured. It was given to a new republic, yet it is today the oldest Constitution in the world. It could no more have been produced by a stroke of the pen than could the common law, or the Magna Carta. Had it been the mere product of an occasion it would long since have passed into the discard. Here I have spoken of the wisdom, intelligence, pre-sight of the small group who framed the instrument. But I insist that they shaped the future from the enduring experiences and history of the ages. John Milton and John Locke and Adam Smith had more to do with what was put on parchment than many men who sat in the Convention. George Mason, even though in the end his conscience would not let him sign, exercised a power over its words greater than the delegates who did no more than lend their names. Mr. Jefferson, in his absence, exercised a dominant influence. Nor may we forget the people of the United States, in whose names the Constitution is written. All that the Framers, jurists and lawyers have done, or can do, is to chisel thoughts born of their experience, suffering and hopes into words which will endure.

It is a far cry from 1787 to 1948. In all that time, as oft said, the principles of the Constitution have proved to be "eternal." In a nation which lives and grows and meets new conditions, these eternal principles have "forever been newly adapted to the infinite variety of the changing circumstances of life." From the beginning of the republic, this process of adaptation has kept the charter abreast of the times, and sensitive to the needs of a great people. The Framers were men of sense and vision. They knew the difference between a statute and a basic grant of power. It never occurred to them that they were omniscient, and could in specific and concrete terms, provide for and guard against every novelty which Time would serve up. The Framers provided us a guide, not a straight jacket. To some extent this adaptation has been effected by amendments for which machinery is provided. Twenty-one amendments have been ratified. The first ten, we have observed, were born with the charter; two cancel out, leaving nine ratified and effective since 1789. Three amendments followed the war between the states. All amendments are firmly embedded as though they were products of the Philadelphia Convention.

The machinery for amendments has another side. It prohibits precipitous change. 'Tis said, there have been 4245 proposals for amend-

ments introduced in Congress. The few amendments ratified as compared with those proposed demonstrate the attitude of Congress and our people toward our Constitution. A study of the amendments will show how greatly they leave the original document unchanged.

Here I have dwelled quite a while—too long perhaps—upon a single event. It is important in itself and for us who are gathered here. But it has a far greater importance, for through such an event, the whole course of history takes its way. The story of a Virginia milltown can be made to reveal the coming of our modern industrialism. A fragment of uranium holds within itself peace on earth or the destruction of man. If we could understand all the impacts which have transformed an Augusta Academy into the Washington and Lee University of today, we would understand everything, or at least all that our finite minds can embrace. For the purpose of the Constitution, and of institutions such as this, without whose support it could never be a living thing, has been, is and ever will be “to form a more perfect Union, establish Justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity.”