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REMARKS OF THE ATTORNEY GENERAL ON LAW DAY

WILLIAM FRENCH SMITH*

A celebration of Law Day is traditionally a time for reflection on the basic values and objectives of our system of government. And the urge to think deeply about our laws and institutions is heightened by this historic setting at the University of South Carolina — the Nation's oldest educational institution entirely supported by state funds, and the alma mater of one of my predecessors, Hugh Legare, who served as U.S. Attorney General from 1841 to 1843. Tonight, I am going to succumb to the spirit of the day and the setting to talk at the most basic level about the objectives of a government based on ordered liberty.

It is a little-known historical fact that the law in South Carolina and the federal Constitution share something of a common ancestry. In 1669 the group of eight English proprietors authorized by the King to colonize what is now South Carolina hired an English philosopher to draw up the first constitution for the province. That philosopher was John Locke, who did in fact draft what was known as the *Fundamental Constitution* of the new colony. Of course, Locke's more celebrated writings on government would, over a century later, profoundly influence the

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framing of the Constitution of the United States.

In one of those writings, the *Second Treatise of Government*, South Carolina's first lawmaker wrote: "[t]he end of law is not to abolish or to restrain, but to preserve and enlarge freedom: for in all the states of created beings capable of laws, where there is no law, there is no freedom." Both in this passage and in his most famous statement — "Where law ends, tyranny begins" — Locke recognized that the objective for a government of laws was to secure liberty for its citizens. There can be no liberty if all the citizenry is not subject to the restraint of the law. Perhaps Judge Learned Hand captured this basic truth best when he wrote:

And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few. . . .

The most basic restrictions that a government imposes in order to secure greater liberty for all are embodied in the criminal laws. Senator Strom Thurmond, who so richly deserves the honors bestowed upon him today, once wrote that "the primary purpose of government is to protect its citizens against foreign and domestic enemies — and domestic 'enemies' include the common criminal." Enforcement of the criminal laws is the principle means by which government increases the security and liberty of all.

But the criminal laws must be *effectively* enforced if government is successfully to discharge its "primary purpose" and basic responsibility. To quote Locke once again, "[w]here the laws cannot be executed it is all one as if there were no laws." Without effective laws, government cannot secure greater liberty by protecting us from those who would prey upon us. As Alexander Hamilton noted in the very first *Federalist Paper*, it is often "forgotten that the vigor of government is essential to the security of liberty."

The government has simply not been vigorous enough in its efforts to secure for all citizens the most basic freedom — freedom from crime. Americans today do not feel free to walk the streets of their own communities, nor do they feel free from the threat of violence in their own homes. Far from being free, many

Americans are imprisoned by fear of crime — a fear which the statistics demonstrate is all too real.

The incidence of crime — particularly violent crime — has reached crisis levels. In the last decade violent crime jumped nearly sixty percent. In the time it takes to deliver my remarks this evening, an average of 50 violent crimes will be committed across the country. During that same period, over 400 property crimes will be committed. Last year one out of every three households in our nation was victimized by some form of serious crime. And these dry statistics do not begin to tell the tale of human suffering caused by the criminal.

We in the federal government have been quite active over the past year trying to do something about this truly alarming situation. We recognize that law enforcement is largely a local problem, so we have stressed cooperation and coordination between federal officials and their state and local counterparts. I have directed each U.S. Attorney to form in his or her district a law enforcement coordinating committee to achieve this goal. I was able to attend the first meeting of the South Carolina law enforcement coordinating committee in Columbia last fall, and I can tell you from personal experience that the concept is important and is working. As part of our effort to improve the effectiveness of law enforcement, we have also increased the availability of federal training programs for state and local officials.

We have for the first time brought the resources and expertise of the FBI into the war on illegal drug trafficking, which breeds so much violent crime. We fully expect the new partnership between the FBI and the Drug Enforcement Administration to cause a truly significant reduction in the drug problem.

On the legislative front, we have been working closely with Senator Thurmond, chairman of the critical Senate Judiciary Committee with responsibility for criminal reform measures. We have proposed a broad package of reforms which will, if enacted, help in the fight on crime. The most significant of these is the proposed Federal Criminal Code, which would completely modernize the confused and often outmoded body of federal criminal statutes. As Senator Thurmond has written, “[i]t would be hard, indeed, to think of a more basic crime-control issue than reform of this country’s criminal code. The administration of the law, as well as the people dealing with it, are all highly dependent upon the existence of rationally formulated criminal statutes.” Pas-

sage of the Criminal Code would give us such a rationally formulated body of law.

We have also proposed modification of the exclusionary rule so that evidence obtained by officers in the reasonable good faith belief that they were acting in conformity to the fourth amendment would be admissible. In such a case the rationale of the rule — deterrence of unlawful conduct — simply does not apply. We have proposed comprehensive reform of the habeas corpus laws, to increase the finality of state court judgments in criminal cases. The current endless availability of review saps the deterrent effect that accompanies sure and swift punishment.

Criminal forfeiture legislation submitted by the Administration is pending which will permit us to get at the profits of crime. We recently supported career criminal legislation that would subject repeat offenders to federal law and tougher sentences. We have already succeeded in amending the Posse Comitatus law so that the military can aid in spotting drug traffic by air or sea. Our bail reform proposals would, for the first time, permit courts to deny bail to certain individuals whose release would clearly present a danger to the community. We support the enactment of a constitutionally valid death penalty for certain federal offenses. I am gratified to be able to say that Senator Thurmond has either sponsored legislation or actively supported our efforts in all of these areas.

In developing and proposing this broad array of reforms, we have been met at almost every turn by the reflexive accusation of some that our proposals would somehow infringe on civil liberties or individual rights. This is of course not the case, as I and other Department officials have explained in testimony, often before Senator Thurmond's Committee. Rather than dealing with every objection in turn tonight, however, I would like to consider the broader philosophical question implicit in the debate.

As a society we have focused so much on protecting the accused that we have lost sight of the purpose for which government itself was established — to protect citizens from those who would prey upon them. James Madison wrote in *Federalist* 51 that government must meet the following two basic challenges: "In forming a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place

oblige it to control itself.”

In our focus on controlling the government, we have neglected the need for government to control the governed — that is, for the laws to be enforced vigorously to secure liberty by controlling those who would break the law. Let us be ever mindful of the need to safeguard individual liberty. But let us also recognize that the most basic individual liberty is freedom from violence, and that liberty can be secured only by effective and vigorous enforcement of the criminal laws. As Judge Learned Hand recognized fifty years ago: “[o]ur dangers do not lie in too little tenderness to the accused . . . What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.”

The debate in the area of criminal law enforcement seems to have fallen into a rut. There is a disturbing tendency on the part of certain individuals and interest groups to view anything that promises to strengthen law enforcement as a threat to individual liberties. It is almost as if effective law enforcement and protection of individual liberties were viewed as competing components in a zero-sum game.

I do not believe that to be the case. What I would like to suggest this evening is that we need to rethink the time-worn battlelines in the debate on crime. Efforts to enforce the criminal laws more effectively and to bring more criminals to book should not be reflexively viewed as colliding with civil liberties. Rather, they must be recognized as efforts to secure the most basic civil liberty of personal security and safety, for which government itself was formed. Those self-proclaimed civil libertarians who do not recognize the need for more effective law enforcement to secure freedom from crime have a short-sighted view of liberty. Our liberty is ordered liberty — the only kind which can be attained — and it depends upon effective enforcement of the laws. The need for effective law enforcement if liberty is to prevail is what Edmund Burke had in mind when he wrote: “[t]he restraints on men, as well as their liberties, are to be reckoned among their rights.”

I would urge all of you to consider what you can do to help in the fight against crime. And I would urge all of you to recognize that strengthening law enforcement is not an idle exercise that inevitably infringes on individual liberty, but an effort to attain for us all the security and safety necessary for the enjoy-

ment of liberty. Government has no higher objective. Promoting more effective law enforcement is, I submit, the civil liberties issue of the eighties — for without more effective protection against crime, all our other liberties are hollow and meaningless.

John Calhoun, the South Carolina statesman born 200 years ago, once stood on the floor of the United States Senate and admonished his countrymen that “it is harder to preserve than to obtain liberty.” Faced with this rising tyranny of crime, we must forge the protections necessary to preserve our liberty.

Today, another South Carolina statesman — Chairman Strom Thurmond — is helping to provide the leadership in the U.S. Senate necessary to restore the balance between the forces of law and the forces of lawlessness. With that kind of leadership, we surely will find the means to preserve the right of all Americans to life, liberty, and the pursuit of happiness. Government can and will fulfill its most basic domestic obligation to its citizens — ensuring their safety from crime.