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Lecture

John Jay and the Federalist Papers*

Justice Harry A. Blackmun†

As we all know, it is 200 years today that the first of the Federalist Papers appeared. That initial "essay" was by Alexander Hamilton over, as they all were, the pseudonym, "Publius," the name of a Roman politician of the fifth century B.C. It is now October 27, 1987, and problems still confront our people as they did two centuries ago.

It is a distinct honor for me to be in Rye on this significant anniversary. Mrs. Blackmun and I appreciate the privilege of being here, of being with you, and of participating in this observance centering in the home of Peter Jay. I well recall my other visit to that site was in 1976. I was impressed with the house, with the lawn, with the great trees, some of which are now gone, and with the vista down to Long Island Sound.

It was a place that struck me then as symbolic of what was impressive about certain aspects of the latter part of the eighteenth century — gracious living and status, to be sure, but coupled with a sense of *responsibility*, particularly to government

* The lecture was delivered on behalf of The Jay Coalition, the Rye Historical Society, and We The People . . . Rye to honor the bicentennial anniversary of the publication of The Federalist Papers.

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and to the art of getting along together.

It must be a matter of great pride to be members of an old and distinguished family that contributed so much to early America, that believes in education and leadership then and now, that has sensed the merits, almost the sacredness, of family ties and of what is expected of its members in each generation. I am certain that all of us who are here today join in saluting the Jay family for its significant contributions that meant so much when this Nation that we all love was in its precarious infancy.

I salute, too, the Jay Coalition which, I understand, is an organization of several civic preservation and conservation groups. How refreshing it is that there is widespread interest in endeavors of this kind as contrasted to fifty years ago when most of us were interested in other things.

We all know that the months intervening between September 17, 1787, when the proposed Constitution of the United States of America was signed in Philadelphia, and the time of its ultimate adoption were a period of political uncertainty. There was a distinct awareness that in some of the state conventions, particularly that of New York, there would be significant opposition, heated debate, and doubts about the wisdom of the proposed document and about what it would effectuate for the infant Nation. In some States, the voting was very close. Massachusetts, New York, and Virginia were large, influential, and pivotal. Their joinders were needed. The final vote in Massachusetts was 187 to 168 in favor of ratification. A 10-vote shift out of 355 votes would have meant defeat. In Virginia, it was 89 to 79. Here in New York, it was 30 to 27, a narrow escape by two votes. But New York did approve on July 26, 1788. It was the eleventh state to do so. Can anyone doubt that much of this success was due to Hamilton and to Madison and to Jay? This State's joinder, I think, meant that the country indeed was to survive as a Union.

It has been suggested that I comment upon John Jay's contributions to the Federalist Papers. He wrote, as you know, only five of the eighty-five. His were the second, the third, the fourth, the fifth, and the sixty-fourth. Hamilton wrote the first as a general introduction, so Jay's first four are really the lead-off substantive essays. But illness overtook John Jay in 1787, and the number of his contributions were fewer than those of Hamilton

and Madison.

It would be presumptuous of me to speak in detail about Jay's five papers when so much has been done by Professor Richard B. Morris, who has supplied the definitive scholarship on John Jay, his work, and his accomplishments. But let me touch at least briefly upon the essays. Each is addressed, as they all were, "To the People of the State of New York." The first four are dated, respectively, October 31, November 3, November 7, and November 10, 1787. They thus appeared within eleven days. Some say they were written in haste. Each appeared initially in a New York paper called *The Independent Journal* and shortly thereafter in two others, *The Daily Advertiser* and *The New-York Packet*. Obviously, the four were written as a single project concerned with Union and foreign relations. Just as obviously, their purpose was to support the then proposed Constitution of the United States and to be influential upon those who had the responsibility of voting for or against ratification in the New York Convention.

Each is brief, readable, to the point. Each obviously was meant to be read by persons who were literate and concerned with the great issues. I am impressed by the fact that Jay always acknowledged the opposing arguments, those already made and those he felt would be forthcoming. He knew what was being said and what would be said, and he met it head on. Although it has been intimated that prior to the Revolution, Jay was lukewarm about abandoning the relationship with England, his writing in these four essays discloses his belief in continuing independence and his concern with the formation of a strong central government.

The first paper, No. 2 in the Federalist series, stresses the need for government. He said: "Nothing is more certain than the indispensable necessity of Government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers."¹ He inquired — as he did a number of times in these papers — whether it is not better for the people that they have one unified government rather than separate states or even several regional confederacies as had been sug-

1. THE FEDERALIST No. 2, at 8 (J. Jay) (J. Cooke ed. 1961).

gested. He expressed the thought that union had grown to be an accepted concept, but that now some sought a division. He referred to our geographical connectedness. He spoke of the identity of descent, of language, of religion, of manners and customs, and of attachment to the same principles of government. There had been joint endeavors and joint counsel. There had been "fighting side by side throughout a long and bloody war,"² and the establishment of "general Liberty and Independence."³ Then: "This country and this people seem to have been made for each other, and it appears as if it was the design of Providence"⁴ that it "should never be split into a number of unsocial, jealous, and alien sovereignties."⁵ He spoke of the people having a "strong sense of the value and blessings of Union,"⁶ and that this induced them very early to institute a Federal Government "almost as soon as they had a political existence,"⁷ even though it was a time of flames and bloodshed, of "hostility and desolation."⁸ This all came about at once, and it "is not to be wondered at that a Government instituted in times so inauspicious, should on experiment be found greatly deficient and inadequate to the purpose it was intended to answer."⁹

These defects in government were perceived and regretted. Ample security could be found only in a national government, "more wisely framed."¹⁰ For this purpose came "the late Convention at Philadelphia."¹¹

He stressed that the Convention was composed of men who possessed "the confidence of the people,"¹² and many of them had been "distinguished by their patriotism, virtue and wisdom."¹³ It was now "the mild season of peace, with minds unoc-

2. *Id.* at 9.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 10.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

cupied by other subjects."¹⁴ And those in the Convention were able to pass "many months in cool [?] uninterrupted and daily consultations."¹⁵ The plan the Convention proposed was only recommended, not imposed. It was set forth for "sedate and candid consideration."¹⁶

It is worthy of remark that not only the first, but every succeeding Congress, as well as the late Convention, have invariably joined with the people in thinking that the prosperity of America depended on its Union. To preserve and perpetuate it, was the great object of the people in forming that Convention . . .¹⁷

Those who would promote the idea of substituting for union "a number of distinct confederacies"¹⁸ would

seem clearly to foresee that the rejection of it would put the continuance of the Union in the utmost jeopardy. That certainly would be the case, and I sincerely wish that it may be as clearly foreseen by every good Citizen, that whenever the dissolution of the Union arrives, America will have reason to exclaim in the words of the Poet, "FAREWELL, A LONG FAREWELL, TO ALL MY GREATNESS."¹⁹

What a wonderful line with which to close.

It seems to me that this is strong, positive, powerful material written at a time of discomfort but for an almost sacred cause. Could any of us have written so well?

Jay's second essay, Federalist No. 3, begins with the observation that well-informed people "seldom adopt, and steadily persevere for many years in, an erroneous opinion respecting their interests."²⁰ Among the many objects of a free people's attention is that "of providing for their *safety*."²¹ Indeed, this "seems to be the first."²² And "a cordial Union under an efficient national Government, affords them the best security that can be

14. *Id.*

15. *Id.*

16. *Id.* at 11.

17. *Id.* at 12.

18. *Id.*

19. *Id.* at 13.

20. THE FEDERALIST No. 3, at 13 (J. Jay) (J. Cooke ed. 1961).

21. *Id.* at 13-14.

22. *Id.* at 14.

devised against *hostilities* from abroad.”²³ He speaks of the causes of war, just and unjust, real and pretended. Union provides fewer causes for war than does disunion. Already this country has treaties in effect with six nations. Their continued observance is more likely with a national government than by states or separate confederacies. Few so-called just causes of war are likely to be committed by a national government.

He observes that an efficient national government will attract participants from the whole nation. The whole is wiser than its sections. So too with a system of federal courts. A national government lessens the possibility of war that states bordering on another nation might be inclined to wage. There is greater possibility of accommodation. He then cites an example from the year 1685 when Genoa, having offended Louis XIV, endeavored to appease him. The French king demanded that Genoa send its chief magistrate accompanied by four of its senators to ask his pardon and to receive his terms. Jay then asked the rhetorical question: “Would he on any occasion either have demanded, or have received the like humiliation from Spain, or Britain, or any other *powerful* nation?”²⁴

Jay knew how to make the vital point.

His third essay, Federalist No. 4, continues this theme. Here he speaks of pretended causes of war from foreign governments. Nations will make war whenever they have a prospect of getting anything by it. He points out that the United States had reached the point where it was a rival in commerce with major powers. Its proximity to territories claimed by European nations enhanced this rivalry, for it could supply those territories more cheaply than the European nation could. The “best possible state of defence”²⁵ will discourage hostile acts. (How familiar is that observation even to this day.) One government can avail itself of the experience of the ablest men in whatever part of the Union they may be found. “It can move on uniform principles of policy.”²⁶ In forming treaties, it will regard the interests of the whole. It can apply the resources and power of the whole to the

23. *Id.*

24. *Id.* at 18.

25. THE FEDERALIST No. 4, at 20 (J. Jay) (J. Cooke ed. 1961).

26. *Id.*

defense of any part. The militia is under one plan of discipline.

Jay then postulates what the militia of Britain would be if the English obeyed the government of England, the Scottish obeyed the government of Scotland, and the Welsh obeyed the government of Wales. In the event of invasion, would the three be able to operate against the enemy as effectively as the single government of Great Britain would?

“[T]he time may come, if we are wise, when the fleets of America may engage attention,”²⁷ just as do the fleets of Britain. But the British fleets are great because they are regulated by one national government.

Leave America divided into thirteen or if you please into three or four independent Governments, what armies could they raise and pay, what fleets could they ever hope to have? If one was attacked would the other[s] fly to its succour, and spend their blood and money in its defence? Would there be no danger of their being flattered into neutrality by specious promises, or seduced by a too great fondness for peace . . . ?²⁸

Even if they were inclined to assist each other, how would the amount of assistance be determined? If we are divided

into three or four independent and probably discordant republics or confederacies, one inclining to Britain, another to France, and a third to Spain, and perhaps played off against each other by the three, what a poor pitiful figure will America make in their eyes! How liable would she become not only to their contempt, but to their outrage; and how soon would dear bought experience proclaim, that when a people or family so divide, it never fails to be against themselves.²⁹

Again, I say that Jay knew how to conclude his essays.

In the fourth paper, *Federalist No. 5*, Jay begins by referring to Queen Anne’s letter of 1 July 1706 to the Scottish Parliament. She observed the importance of the union then formed between England and Scotland. The Queen said:

“An entire and perfect Union will be the solid foundation of lasting peace: It will secure your religion, liberty, and property; re-

27. *Id.* at 21.

28. *Id.* at 21-22.

29. *Id.* at 23.

move the animosities amongst yourselves, and the jealousies and differences betwixt our two kingdoms. It must increase your strength, riches, and trade: and by this Union the whole Island, being joined in affection and free from all apprehensions of different interest, will be *enabled to resist all its enemies*. . . . [T]he only *effectual* way to secure our present and future happiness; and disappoint the designs of our and your enemies, who will doubtless, on this occasion, *use their utmost endeavors to prevent or delay this Union*.”³⁰

Weakness and divisions at home invite dangers from abroad. Again Jay refers to the history of England and its long-lasting three divisions with constant quarrels and warfare. The same thing would happen here. Three or four confederacies would not remain equal. Distrust would develop and distrust creates distrust. Here the North is the region of strength and it would be “tempted to gather honey in the more blooming fields and milder air of their luxurious and more delicate neighbours.”³¹ We would be formidable only to each other and not to anyone else.

Here the emphasis was on internal division and Jay’s abhorrence of it.

Jay’s fifth essay, Federalist No. 64, appeared March 5, 1788, four months after the last of his other four papers. This one deals with the treaty power. I suspect that Jay must have been asked specifically to write this one. Treaty power, he says, must be meted out with care. He stresses the electoral college in its choosing of the President, and the selection by state legislatures of United States Senators. This distance from the general population results in the selection of men “distinguished by their abilities and virtue”³² and in whom the Nation has confidence and who best understand our national interest. “With such men the power of making treaties may be safely lodged.”³³ This, of course, was spoken in another century and another day. It was spoken when the intellectual aristocracy was dominant. It is not dominant today. We have popular election of senators and the

30. THE FEDERALIST No. 5, at 23-24 (J. Jay) (J. Cooke ed. 1961).

31. *Id.* at 26.

32. THE FEDERALIST No. 64, at 433 (J. Jay) (J. Cooke ed. 1961).

33. *Id.*

electoral college is basically honorary, delegated power to the party faithful who exercise no discretion and who vote as the state returns indicate.

Jay goes on to stress the fact of continuity by reason of the staggered terms of the Senate. He also stresses the fact that with respect to treaties, secrecy and dispatch often are necessary. "[T]here are tides" in the "affairs of men."³⁴ A sudden occasion, such as the death of a statesman, may require fast action.

Some have urged that the treaty power should be exercised only by those with legislative authority. But constitutional acts of power in the executive and in the judiciary certainly have legal validity, and those exercising this power are not legislators. There is also the objection that treaties should not be the supreme laws of the land and should be repealable. His response is that a treaty is a bargain and is contractually binding. He points out that each State is equally represented in the Senate. "[A]s the United States assume a national form, and a national character, so will the good of the whole be more and more an object of attention"³⁵ Finally, he speaks of the corruption arguments and says that "the case is not supposable."³⁶ It is not probable "that the president and two-thirds of the senate will ever be capable of such unworthy conduct. The idea is too gross and too invidious to be entertained."³⁷

Well, if anyone was qualified in 1787 to speak about the treaty power, it surely was John Jay. He had been minister to Spain in 1779. He, with Franklin, later were members of the United States delegation to negotiate peace with Great Britain in 1782. And then, of course, during the British crisis of 1794, President Washington sent the Chief Justice to England on a special mission to negotiate peace. As a result, Jay's Treaty was signed on November 19, 1794.

So much for Jay's contributions to *The Federalist Papers*. These, of course, are part of the rich historical heritage of our country. One must not underestimate their importance and influence upon political thought and political theory. Their signifi-

34. *Id.* at 435.

35. *Id.* at 437-38.

36. *Id.* at 438.

37. *Id.*

cance is splendidly summarized by Clinton Rossiter in his introduction to a 1961 edition of the Papers:

Not every great political theorist has cared much for free and popular government. Of those who have cared, not everyone has been candid enough to expose its diseases, or hopeful enough to counsel a broad scheme of prevention. *The Federalist* is a famous work in political science because it does just that, because it mixes candor and hope, realism and idealism, in a message to all friends of liberty wherever they ply their honorable trade. And the message of *The Federalist* reads: no happiness without liberty, no liberty without self-government, no self-government without constitutionalism, no constitutionalism without morality — and none of these great goods without stability and order.³⁸

What conclusions may one draw from this review of John Jay's five Federalist Essays? Clearly, here was a statesman at work. Clearly, here was a formulator of government at work, one who knew how a democracy should be structured and how it should function when properly structured. Of course, perhaps there was some evidence of the intellectual aristocrat and some hint of intellectual privilege in the man. But this was the latter part of the eighteenth century. Education and literacy were not widespread. The electoral college and the selection of United States Senators by state legislatures were further evidence of this. Those devices seem generally to have worked well for a time. Surely that does not mean that they then were wrong. Times have changed. The college still exists but today is only a formal shell. There is popular election of United States Senators, and, I suppose, not without some curious consequences. What is right today may not be right for another time.

Let me interpolate at this point to emphasize once again that the Constitution as originally drawn — and perhaps even as it presently exists with the Bill of Rights and the other amendments — was and is not a perfect instrument. Three glaring defects were present on the face of the original instrument, as measured by present-day standards. The first was the complete exclusion of native Americans from article I, section 2, clause 3, in measuring representation in the House of Represent-

38. C. Rossiter, *Introduction to THE FEDERALIST* at xv-xvi (C. Rossiter ed. 1961).

atives. The second was the compromise reached in the same clause with respect to Negroes, a compromise necessitated, I suppose, by human slavery's brooding presence. The third was the nonenfranchisement of women, despite the valiant efforts of Abigail Adams as far back as 1776 and of many others in later years. It took the worst war this country has ever fought, plus the enactment of the Civil War amendments, the thirteenth, the fourteenth, and the fifteenth, in the period from 1865 to 1870, to begin to cure the second blight. And it is not cured yet. Finally, it took over 130 years, until 1920 and the adoption of the nineteenth amendment, to cure the third. And have we ever really cured the situation with respect to native Americans?

The Constitution was not perfect at its inception. It undoubtedly is not perfect today. We as individuals are not perfect. We see this in the way we treat our environment, in the way we treat those who are not exactly like us, in the way we treat those who do not behave as we do, in the way we treat each other.

I also remember vividly, when I was here on that one occasion before, Dr. John Jay DuBois' courtesy in taking me to the Jay Family Cemetery, just a short way from here. It is a very private place.

I was deeply impressed with what was written on the stone marking the grave of the first Chief Justice. Let me repeat the epitaph slowly:

In memory of John Jay

Eminent among those who asserted the liberty and established the independence of his country which he long served in the most important offices, legislative, executive, judicial, and diplomatic, and distinguished in them all by his ability, firmness, patriotism and integrity. He was in his life and in his death an example of the virtue, the faith and the hopes of a Christian.

Born December 12, 1745

Died May 17, 1829

That epitaph was written by his son, Peter Augustus Jay. It says much in few words. John Jay served in every branch of government and was distinguished in them all. The men and the occasion are different, but it reminds me, in a way, of the Lincoln Memorial in Washington and the words inscribed there: "In

this temple, as in the hearts of the people for whom he saved the Union, the memory of Abraham Lincoln is enshrined forever.”

We salute John Jay and we revere his memory. We pay tribute to him as a diplomat. We pay tribute to him as the first Chief Justice of the United States. We pay tribute to him as active in legislative affairs. We pay tribute to him as a governor of the State of New York. We pay tribute to him as a man, to his ability, to his foresight, to his contributions, to his patriotism (no longer an unpopular word to be avoided), and to his integrity of character and example.

We are grateful for John Jay’s having been a part of our national heritage. He was a rock to which the Nation could cling at a time when it might have drifted apart and become helpless just when rich promise lay ahead.

We are grateful, too, for the challenge of the epitaph and its stress on excellence in all things.

In the Wisdom Book entitled Ecclesiasticus (in the Apocrypha), chapter 44, verses 1-2, are well-known words of homage to the great contributors of the past: “Let us now sing the praises of famous men, the heroes of our nation’s history, through whom the Lord established his renown, and revealed his majesty in each succeeding age.” We pause today to say our words of commendation to one of those.