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LIMITED GOVERNMENT AND THE RULE OF LAW

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Thank you, everyone at the Federalist Society for your commitment to the subject of this year's conference, limited government, and to the rule of law.

I thought I would begin by sharing with you a few thoughts about last week's election from a Republican's point of view. The voters obviously wanted to get our attention last week. While I would have preferred a gentler reproach than the one they delivered, I'm not discouraged nor should any of us be. Democrats had a good election night. We did not. But no defeat is permanent. And parties, just like individuals, show their character in adversity. Now is the occasion to show ours.

The election was not an affirmation of the other party's program. Try as hard as I could, I couldn't find much evidence that my Democratic friends were offering anything that resembled a coherent platform or principled leadership on the critical issues that confront us today. Nor do I believe Americans rejected our values and governing philosophy. On the contrary, I think they rejected us because they felt we had come to value our incumbency over our principles, and partisanship, from both parties, was no longer a contest of ideas, but an ever cruder and uncivil brawl over the spoils of power.

I am convinced that a majority of Americans still consider themselves conservatives or right of center. They still prefer common sense conservatism to the alternative. Americans had elected us to change government, and they rejected us because they believed government had changed us. We must spend the next two years reacquainting the public and ourselves with the reason we came to office in the first place: to serve a cause greater than our self-interest.

Common sense conservatives believe that the government that governs least governs best; that government should do only those things individuals cannot do for themselves, and do them efficiently. Much rides on that principle: the integrity of the government, our prosperity; and every American's self-respect, which depends, as it always has, on one's own decisions and actions, and cannot be provided as another government benefit.

Hypocrisy, my friends, is the most obvious of political sins. And the people will punish it. We were elected to reduce the size of government and enlarge

the sphere of free and private initiative. We increased the size of government in the false hope that we could bribe the public into keeping us in office. And the people punished us. We lost our principles and our majority. And there is no way to recover our majority without recovering our principles first.

While times may change, the values and principles for which we stand do not. Your work and the mission of the Federalist Society is critical to ensuring that our nation remains faithful to the self-evident truths and enduring principles that have always made the American experiment an inspiration and example to the world.

Ideas like "limited government" or "the rule of law" can sound pretty abstract when we talk about them here in Washington in the halls of Congress. And it's a measure of how divided our politics have become that they are often taken for partisan "buzz words." In fact, they are ideas worth fighting for; worth dying for. And Americans have fought and died for limited government and the rule of law for well over two hundred years, in places as close to home as Brandywine Creek and as far away as Iwo Jima, at Gettysburg and Khe Sanh, at Kandahar and at Shanksville, Pennsylvania.

So, it's important that we remind ourselves that limited government and the rule of law are more than the arid clichés of partisan political debate. In fact, they are the essential underpinnings of our freedom, and the principles for which the Federalist Society has been fighting since its formation over 25 years. To lose either would be to lose freedom, for they are our strongest bulwarks against tyranny. People are suffering today physical and emotional agony, terrible loneliness, and even death to advance those ideals in countries where the power of the state observes no limits, where human dignity is denied the respect and the protections that must form the basis of morality, in any culture, any religion, and any society.

We should never forget their sacrifice and purpose. In the name of those brave people, I want to share with you today my understanding of and support for these vital ideals.

The genius of our founding fathers wasn't that they were better people than those who came before them; it's that they realized precisely that they did

not have a greater claim to virtue, and that the people who followed them weren't likely to be any more virtuous than they were. That critical insight led them to realize something important about power: if its exercise isn't limited, it will become absolute. Power always tries to expand. It's a law of nature, of human nature. As James Madison wrote in *The Federalist* No. 51:

What is government but the greatest reflection of all on human nature? If men were angels, no government would be necessary. If angels were to govern men, no internal or external controls on government would be necessary. In framing 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.

The Founders saw the truth of this insight play out in their lifetimes, in the arbitrary exercise of power by King George III, and in the ominous rise to power of Napoleon in France. Our parents' generation saw it in the rise of Hitler and Stalin, and in the post-war twilight struggle against communism. We've seen it in our generation in the reign of the Taliban in Afghanistan, of Saddam Hussein in Iraq, of Kim Jong Il in North Korea and the reign of the mullahs in Iran. We see it most starkly today in Osama bin Laden's vision of a global medieval caliphate.

There are cultural differences in other parts of the world, to be sure, and we must adjust our tactics based on our understanding of those differences. But there are some basic underlying truths: unlimited government confers unlimited power on its leaders to impose their will on others. That's one truth. Here's another: people generally don't want to live their lives in the crosshairs of government oppression. They want to be free to make for themselves and their children, by their own decisions, talents and industry, a better future than they inherited.

The solution that our founders devised guides us to this day: limited government. Understanding the natural tendency of power to expand, the founders designed our government to restrain it.

They created a federal government of enumerated powers, of three branches whose reach was limited by the powers of the other branches, by the powers reserved to the states, and by the rights reserved

to individuals. They divided the power to make war between Congress and the Executive, making the President the commander-in-chief but giving Congress the power to raise and fund armies and declare war. They gave Congress the power to raise and appropriate money to support the government but the president the power to spend. They gave the President the power to negotiate treaties, but the Senate the power to ratify or reject those treaties. They gave the President the power to appoint judges, but the Senate the power of advice and consent.

They enumerated certain baseline individual rights, but instructed that this list was not exhaustive, and they provided that the rights and powers that were not enumerated were reserved strictly to the states and the people.

They created courts of limited jurisdiction, which could hear only "cases or controversies" "arising under" the Constitution. The further development of the common law we inherited from England, and the scope of the individual rights reserved to the states, were questions left to the individual states, removed from the jurisdiction of the federal courts.

By limiting government in these ways, the founders attempted to ensure that no one branch could dominate the others, that the federal government could not usurp state powers, and that one individual asserting his rights could stop the entire machinery of government from taking away his freedom.

Why has the appointment of judges become such a flashpoint of controversy in the past twenty years or so? When you understand our system in the way I've just described, when you see the wisdom in it and the humility it requires of public servants, it's easy enough to understand why we are so concerned that the judges we appoint share that understanding of the nature and limits of power.

Some basic attributes of judges follow from this understanding. They should be people who respect the limited scope afforded federal judges under the Constitution. They should be people who understand that the founders' concern about the expansive tendency of power extended to judicial power as well as to executive or legislative power. They should be people who are humbled by their role in our system, not emboldened by it. Our freedom is curtailed no less by an act of arbitrary judicial power as it is by an act of an arbitrary executive, or legislative, or state power. For that reason, a judge's decisions must rest

on more than his subjective conviction that he is right, or his eagerness to address a perceived social ill.

This truth was well understood by Chief Justice Roberts' mentor, my fellow Arizonan Chief Justice William Rehnquist, whose passing we mourn. During his thirty-three years on the Court, Justice Rehnquist earned our respect for his sharp intellect, his strong sense of fairness, and his enormous devotion to the Court and to public service. His profound understanding of the balance inherent in federalism, between the states and the federal governments, as well as between the three federal branches—left us a strong legacy.

It's a legacy I hope will be respected by the judges President Bush has nominated, and in whom we have vested great trust to discharge their judicial duties with prudence and principle.

I am proud of my role in persuading my fellow Republican Senators to respect the limits of our own power and not abolish the filibuster rule—changes which promised to empower a different majority under another president to impede our cause of limited government and constrained judicial power. Instead we have focused with considerable success on assuring that a high percentage of the President's nominees have been confirmed. And those judges and justices will interpret our Constitution as our founders intended.

The efforts we undertook a year and a half ago, working with Senators of both parties who were concerned about abuses of the filibuster tradition, resulted in a substantial increase in the confirmation of the President's Circuit Court nominees. Priscilla Owen, Janice Rogers Brown, and Bill Pryor have all been confirmed, and this year Brett Kavanaugh was confirmed to the US Court of Appeals for the D.C. Circuit. The President nominated these individuals; I supported each of their nominations; and we fought successfully to confirm them. President Bush now has a higher percentage of his nominations confirmed to both the District Courts and the Circuit Courts than did President Clinton during his presidency. I am also proud to see Chief Justice Roberts and Associate Justice Alito serving with such distinction on the Supreme Court. They are good people, deserving people, and their decisions will be grounded in the text and history of the statute, regulation, or constitutional provision under consideration, and

interpreted narrowly in light of the specific facts of the case before them.

Of course, to paraphrase Mr. Madison, if angels wrote laws, we wouldn't need judges at all. Unfortunately, angels don't write laws; Congress does. And we're called a lot of things, but no one would mistake us for angels. Too frequently, we write laws that are unclear, we vote on laws we haven't adequately debated, and sometimes, I am sad to report, we vote on laws we haven't even read. When we pass laws like that, we leave too much to the discretion of our federal judges. We fail in our role to ensure that the judiciary's scope is limited. As we debate reforms to the practices and procedures of Congress, I hope, particularly we Republicans, will take an honest look at how we fail to fulfill our constitutional responsibilities when we write laws that invite judicial activism and misinterpretation.

Why these restraints on federal judges? Because the structure of our government, by itself, will not ensure our freedom. That structure, while it reduces the likelihood of tyranny, is only as strong as our commitment to the rule of law, and the rule of law depends largely on our judiciary's commitment not to impose its will arbitrarily on us.

That's why the appointment of federal judges has become such a flashpoint issue for so many. Judges stand in our system where our commitment to limited government meets our commitment to the rule of law. To the extent that judges impose their own will, they undermine both the structure of limited government and the rule of law.

History teaches us that without the rule of law there is nothing—no form of oppression, no form of physical suffering—that people will not inflict upon one another. I know this to be true. I see it in the appeals I receive every day from supporters of human rights advocates around the world who have been imprisoned, tortured and murdered for daring to challenge the tyranny of their governments. I have seen it in countries such as Burma, where I have met with the woman who willingly surrendered the privileges and comforts of life in the West but has, on behalf of her people, refused to surrender voluntarily her inalienable right to freedom. And I saw it many years ago, as I watched men deprived of every liberty, who were routinely tortured, maintain their dignity and their loyalty to their country, and its ideals. That is why I have been outspoken in

opposition to using torture against our enemies. The moral strength that enables people to stand up to tyranny in other countries resides in their conviction that were the situation to be reversed they would not avail themselves of the abuses of power that they have suffered.

We Americans stand for something in this world. We stand for a vision of human happiness and potential, of human freedom, based on limiting the powers of government and respecting the rule of law.

Those are the ideals I fought for in my youth, and that I fight for today, at less personal risk than faced by the Americans who now stand a post in foreign countries in defense of our interests and ideals. We best honor those who are fighting and dying in the deserts of Iraq and the mountains of Afghanistan by not losing our way.

We honor them by insisting in our every action, from the appointment of federal judges to the trial of enemy combatants, that our ideal of limited government under the rule of law continues to be respected.

So let's resolve here today not to lose our way. We're in one heck of a mess in Iraq, and the American people told us loud and clear last week that they are not happy with the course of this war. Neither am I. But let's be clear: that's the limit of what they told us about Iraq and the war on terrorism.

The American people didn't tell us to forget the people we lost on 9/11, who were going about their lives free to work and dream and love, unaware that they were the intended victims of a jihad. They didn't tell us to forget the sacrifices of our soldiers in Iraq and Afghanistan, or to choose a course that would imperil their mission.

They didn't tell us to abandon our friends in remote parts of the world to moral monsters like Osama bin Laden or to apostles of hate like the Taliban who oppress everything they cannot understand.

Above all, they didn't tell us to forget our ideal of limited government.

I think the American people want us to reaffirm who we are. So let's do that today, my friends.

We are a nation that limits the reach of government because government by its nature will, if permitted, limit the reach of the human heart.

We are a nation that limits the reach of government because we understand that no

government should have a right to impose itself between human beings and their lawful aspirations to make of their lives what they will.

We limit government because the greatness of our country, our productivity, resourcefulness and compassion, is not a product of the state's decrees or prerogatives, but derived from the free exercise of the rights and responsibilities of liberty.

We are a nation that limits government so that government cannot limit us.

I believe this notion of limited government will stand as our lasting contribution to the world. We are proof that people can frame a government to serve as an instrument of the people, not the other way around.

And by our actions both at home and abroad we will prove once more, as we did in the last century, that regimes like the Nazis, or the fascists, or the Soviet Union, or the Taliban, which place the interests of the state or a movement or a cause above the rights of the people, are on the wrong side of history.

America must remain ever vigilant in the preservation of our governing ideals. You must continue your good work in service to that essential work, because you know something that we here in Washington too often forget: that neither the courts, nor Congress nor the President can make us a great country. Only the American people can do that, if we, all three branches of government, safeguard their rights, which we have sworn an oath to do.

The endless ranks of Americans who have died in service to that ideal, and who fight to defend it today, demand of us, who do not share their sacrifice, that we use our talents and industry to keep that ideal inviolate within the boundaries of the country they have loved so well.

I thank you for keeping faith with their faith, and for lending your hearts and minds to the enduring and noble cause of preserving in our time the greatest experiment in human history: government "of the people, by the people and for the people."

