Welcome & Opening Address

Hon. Paul D. Clement: United States Solicitor General

Introduction: Ladies and gentlemen, my name is Leonard Leo, and I serve as Executive Vice President of the Federalist Society. On behalf of the directors, officers, and management of the Federalist Society, it is a privilege for me to welcome you this morning to our 2006 National Convention. For the next three days, we will explore a variety of fascinating and important issues dealing with constitutional law and legal policy. How these issues are ultimately resolved by courts and political institutions will have far-reaching impact on the lives of many, many Americans.

We have Steven G. Calabrese, the Federalist Society's national co-chairman, to thank for organizing this year's plenary sessions around the theme of limited government. And we are grateful to our practice group leaders for their creative spark and energies and developing 25 sessions with more than 125 speakers on cutting-edge legal topics.

Professor Calabresi was a bit of a prophet when he hatched the idea of focusing our attention on limited government this year. Here is an excerpt from the polling company's election night survey of actual voters: "By a margin of nearly 3 to 1, Americans vote for small government, even if it means fewer services. When given a choice between a larger federal government that provided more services and charged higher taxes and a small federal government that provided fewer services and charged lower taxes, Americans indicated a clear desire to downsize. In fact, 62 percent of voters preferred the smaller government. By comparison, just 22 percent opted for the more expansive government."

There are many important questions to address, however. What are the constitutional limits and how are they enforced? What role can courts, or perhaps political mechanisms such as the line-item veto or initiatives, play in policing limits on government power? Where do we trim the sails, and not trim them? Are there tensions between limited government and a foreign affairs policy that seeks to spread democracy abroad? And there is the perennial question of what role government ought to play in inculcating cultural norms through various forms of more regulation. These and other questions will be in the forefront of our debates this weekend.

Before launching into our arsenal of panels, we traditionally open the Convention with remarks from an accomplished lawyer. This one happens to be a bit younger than our normal stock, but no less distinguished. There are few, if any, who could make the claim that they have argued as many cases before the U.S. Supreme Court as they are years old. With 36 years under his belt, U.S. Solicitor General Paul Clement is just four shy of the mark—probably on his to-do list for the next term of the Court.

General Clement, we have very much appreciated your friendship over the years as a private practitioner, as legal counsel on Capitol Hill, as a Supreme Court law clerk to Justice Scalia (who we're honoring later today), as a Harvard law student, and now as the United States' leading advocate in the federal courts. Thank you very much, General Clement, for joining us this morning. And please, all of you, join me in welcoming the Solicitor General of the United States, Paul Clement.

General Clement: Well, thank you very much, Leonard, for that kind introduction, and good morning. Welcome to all of you, to the Convention this year. It's great to see so many people up at this hour willing to discuss limited government, when most people haven't even had their morning cup of coffee. As a veteran of many national conventions, I can also say that one of the great things about the opening day of the National Convention is to watch the group grow over the course of the day as more flights come in from out of town, as some of the day-students from the Washington, D.C. law firms finish up the last project before they can come over to the Mayflower. It's great to watch the group grow. And today, it will grow to the point where, by this evening, the group is going to fill one of the largest ballrooms in Washington, D.C. That's an amazing thing to watch and behold.

I'm very happy to be here this morning. Leonard asked me a while ago to give some remarks this morning and to try to tie them into the Convention's theme this year of limited government. Now I realize that for some of you, having the guy who argued *McConnell v. FEC* and the *Raich* case (involving federal regulation of medical marijuana) talk to

you about limited government might be a bit rich. I'm willing to admit that there's little question that because of my day job—that job being to defend the constitutionality of federal statutes and the legalities of exercises of federal authority by federal agencies—I and many of the other lawyers in the Department of Justice, by necessity, are many times not exactly advocating the position of limited government.

Nonetheless, I think it's important that even lawyers who are duty-bound to defend the federal government attempt to do so in a way that is sensitive to the limits on federal power and in a way that's respectful of the responsibilities of state and local government and the rights of the citizenry. Let me try to point to three examples of situations in which I think DOJ lawyers in general, and lawyers from the Office of the Solicitor General in particular, are in a position to promote principles of limited government.

First, there is a possibility of urging interpretations of federal law that are respectful of the independent prerogatives and responsibilities of the states. A clear example of this is a case from a few years ago that may have flown under many of your radar screens but is one of my personal favorites. It's a case called *Raygor v. the University of Minnesota Board of Regents*. Now, at the risk of talking about civil procedure before 10 a.m., let me set the stage for this case and remind you about the federal supplemental jurisdiction statute. When one incident gives rise to both federal and state claims coming out of the same incident or occurrence, the statute provides that both claims, the federal claims and the state claims, can be brought to federal court together. But it also provides that if the federal claims are quickly dismissed as being frivolous or for some other reason, the case can be dismissed so that the state claims can go forward in the courts they belong in, in the state court system.

There's one potential fly in the ointment in this arrangement of dismissing the case and letting it proceed in state court at that point in the preceding. The state claims that were timely when filed as part of a pending action in federal court, at the time they're dismissed if they were to be re-filed in state court, might be untimely. It might be too late for them to file. The federal statute provides for this by giving the plaintiff in that case an extra 30 days to file in state court, and as long as the claims were originally timely when filed in federal court, they are deemed timely in state court.

So far, so good. But what happens when the defendant is not an ordinary corporation but the state itself; an entity of the state; an arm of the state? The statute of limitations for suing a state government isn't just like any ordinary statute of limitations; it's a limitation or a limit on the state's own waiver of its sovereign immunity. So, obviously, the issue becomes much more sensitive. And a federal law that purports to modify the terms of the state's own waiver of sovereign immunity in its own state court system is quite another matter than a simple 30-day extension in a case involving a private corporation. Nonetheless, the federal statute by terms applied to any action, and the Minnesota Supreme Court, not surprisingly, found that the statute was unconstitutional as applied to a case where the defendant in federal court was an arm of the state, the Board of Regents of the University of Minnesota.

So, what to do for the federal lawyers when the case comes into our office? An act of Congress, after all, has been struck down as unconstitutional, and the general obligation of in lawyers in the Department is to make arguments in defense of the constitutionalities of an act of Congress. Well, what we did is we urged the Court to adopt a clear statement rule and argued that the reference to any action should not the held to mean every and any action, but rather should be applied in a sensitive way along the lines of the *Gregory v. Ashcroft* clear statement rule, not to cover a suit against a state entity like the University of Minnesota. Under such a rule, we could defend the constitutionality of an act of Congress by arguing that it didn't even apply in this particular constitutionally sensitive area where the rights of states were involved. I'm happy to say that the Court accepted the argument six to three and held the statute constitutional but inapplicable in the context of the State defendant.

Two years later, the Office confronted a very similar situation with a federal statute that purported to preempt state laws preventing "any entity" from providing telecommunications services. And then, what do you do when that law is applied to a state law that basically bans any entities within the state government from being in the business of providing telecommunications service? Again, what would normally be a fairly unproblematic federal law becomes, in the context of trying to preempt state laws about how the state is going to organize its own internal government, become quite another matter

and raise sensitive 10th Amendment and other issues in its application in that context. And so, a federal court had struck down a statute as applied to a state law of that nature, regulating the state's own operations.

Again, we faced the same basic dilemma. This time around, though, we did have one major advantage. We could cite the *Raygor* case is favorable precedent for the notion that a statute that purports to apply to any entity would not necessarily apply to a state entity in a situation that raises difficult 10th Amendment issues. Again we make the same argument, and this time, I'm happy to report, the federal government's position, which was sensitive to the role of state governments, prevailed in the Supreme Court by a vote of eight to one.

In a related vein, in a series of cases, the Administration has consistently taken the position that federal statutes that impose conditions on state and local governments as part of federal government spending programs, so-called Spending Clause legislation, should be interpreted narrowly in light of contract principles. The Court has picked up on this suggestion in the context of interpreting statutes like the Americans with Disabilities Act and Individuals with Disabilities Education Act, and so the Court has limited the availability of attorney's fees and punitive damages against state and local fund recipients—again, at the urging of the federal government as *amicus* or as an intervener in these cases.

As a second example, I'd like to make the pretty obvious point that there are times when the federal government can best serve the interests of limited government not by what it says in court but by what it chooses not to say. A case in point was the federal government's decision not to file an *amicus* brief on behalf of the City in the *Kelo v. City of New London* case. As most of you know, *Kelo* involved the question of whether the Takings Clause, which states, "[n]or shall private property be taken for public use without just compensation," precludes states from using their eminent domain authority, or localities to use their eminent domain authority, to take private property from one person, to allow it to be used by another person in order to promote economic development.

Now I know some would have liked the federal government to file on behalf of the property owners in this case. But generally, the federal government does not file an *amicus* brief just to urge a position that we think is legally correct. Rather, we usually seek to vindicate an interest of the United States in an *amicus* brief, which is generally a governmental interest of the federal government. And, for better or worse, I have to admit, the federal government is a taker of property, not a takee. More to the point, although the federal government did not engage in any comparable use of the federal eminent domain authority, there were some federal economic development grants that funded state and local efforts to engage in this kind of taking; so, there was a certain awkwardness and a certain natural interest of the federal government to support the city. And so, the pressing question was whether the federal government should file a brief in support of the city or sit this case out. Ultimately, we decided to sit this one out, and that decision, too, I think served principles of limited government.

Before I leave the subject of the *Kelo* case, which is a fascinating decision, let me make one brief comment on the aftermath. In a group like this, I'm sure we could have a healthy debate over whether *Kelo* was correctly decided as a matter of constitutional law. Although I suspect that a majority of this group, and indeed a majority of almost any group given the public reaction to the decision, might favor the view of the dissenters in the case, Justice O'Connor's dissent. I also suspect that there might be a few people here who would wonder whether the courts are institutionally well situated to make judgments about what is and is not a "public use" and would have their doubts about whether judicially manageable standards could be provided in this particular area. But whether you think *Kelo* was rightly decided or an abomination, the reaction to that decision has been truly remarkable. It has fostered not so much economic development as democracy. The reaction is a great reminder that when courts decide not to constitutionalize an issue, the democratic process remains available to fill the gap. No less a source than yesterday's edition of the *New York Times* puts at 34 the number of states that have passed laws limiting the eminent domain authority of state and what will governments in the wake of *Kelo*. The approaches adopted range from a flat prohibition on economic development as a valid public use for purposes of state law or state constitutional law to prohibitions subject to a number of exceptions to simply procedural matters that require certain heightened

vote requirements before this kind of use could be made of the eminent domain authority.

All of the approaches that were adopted by the people in these democratic processes fostered limited government to one degree or another. And in contrast to a single federal constitutional standard, the differing approaches allow states to adapt the limitations to the local conditions in the area. Legislative approach has also had the advantage of being able to distinctions between, say, the use of the eminent domain authority to build a new Wal-Mart and the use of the eminent domain authority to build a new stadium. That's not the kind of distinction that a federal constitutional standard could easily accommodate. And, as someone who's spent a lot more time in baseball stadiums over the years than at Wal-Marts, I have to say I sort of welcome the flexibility.

Third, the federal government is sometimes in a position to serve principles of limited government by defending its discretion not to regulate in a particular area. A particularly prominent example of this is the so-called *Greenhouse Gases* case that will be argued just the week after next in the Supreme Court. I say the so-called *Greenhouse Gases* case because the case actually presents a very serious standing question which may prevent the Court from even getting to the merits of the case. But if the Court gets past the standing issue, it will then have to address the question of whether the EPA has the authority to regulate greenhouse gases under the Clean Air Act and, assuming authority exists, whether or not the EPA could refrain from regulating in order to continue to study the issue rather than regulate it.

This suit involves a rather remarkable attempt by Massachusetts and 11 other states and the District of Columbia to effectively force the EPA to regulate more in this area. As a result, although the Office of the Solicitor General is often in a position of defending exercises of regulatory authority, in this case it is the decision not to regulate by the federal government that is under attack. And this is not the first occasion in which our office has been called upon to defend a decision of the federal government to stay out of a regulatory area and refrain from regulation. Just two terms ago, the Office successfully defended the authority of the FCC not to regulate high speed cable Internet access in the *Brand X* case.

There is one final area I should mention where the Office plays an important role in seeking to enforce the principles of limited government, and that is in pressing arguments in the courts that certain issues are not proper subject for intervention by the courts. The courts themselves, after all, are part of the government that the Constitution limits. This can take the form of arguments about standing, as in the *Greenhouse Gases* case, or arguments about the courts' limited role in, for example, superintending secret agreements, such as in the *Tenant v. Doe* case a couple of terms ago, which was the last separation of powers opinion written by Chief Justice Rehnquist, in which a unanimous Court reaffirmed the rule of *Totten* case. And of course, this issue of the proper roles of the courts is front-and-center in many of the cases involving the war on terror.

Let me close my remarks just by stating the obvious. The theme of this Convention is incredibly timely. With two justices on the Court and a number of important cases on the horizon that involve both the limits on the role of the federal government, *vis à vis* the state, and also the proper role among the three branches of the federal government, the Court in the next couple of years is going to have numerous opportunities to address and refine the notion of what a limited government means under our Constitution.