

**Talking Points: Law Day Address
U.S. Court of Federal Claims
Tuesday, May 1, 2018**

Chief Judge Braden, thank you for your service to our nation on the United States Court of Federal Claims, and thank you for the invitation to speak on this special day.

The Claims Court has always had special place in my heart, for two reasons. First, I cut my teeth in Claims Court when, as a young lawyer, I had the opportunity to litigate the *Winstar* cases. Second, while in the White House Counsel's Office during President George W. Bush's administration, I had the privilege of advising on the President's nominees to the Claims Court, where I worked on the nominations of Chief Judge Braden and Judges, Lettow, Coster-Williams, Wolski, Horn, and Block.

The Claims Court is also central to concept of separation of powers, which is the topic of your gathering. And I'll come back to that.

About five years ago, I had opportunity to join Justice Scalia in his Law Day address at Marine Corps University at Quantico. Your theme—"Separation of Powers: A Framework for Freedom"—was precisely the theme Justice Scalia focused on with a room full of Marine Corps officers and their families. Most people, he explained, think that the Bill of Rights is the most important part of the Constitution. But, he explained, every banana republic has a Bill of Rights, most of which are more detailed than ours. In the end, it is the system of separated powers that protects our freedom.

There is, of course, no “separation of powers clause” in the Constitution. Rather, the vesting clauses of Articles I, II, and III allocate the “legislative,” “executive,” and “judicial” powers, respectively. There is not a great deal of elaboration, which leaves room for debate about exactly how the separation of powers applies to given cases. As Justice Jackson memorably put it in his concurrence in *Youngstown Sheet & Tube v. Sawyer*, “Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”¹

My objective today is not to advocate any particular application of the separation of powers. Rather, the important point is that, as Justice Scalia recognized, the separation of powers is the Constitution’s central means of protecting individual liberty.

Perhaps the best evidence for that proposition is that the original Constitution lacked a bill of rights. That omission was surely not because the Framers were insensitive to individual rights; after all, they had just fought a revolution to liberate themselves from British tyranny. Nor did the Framers lack for words to describe individual rights; the Declaration of Independence famously described “certain unalienable Rights,” including “Life, Liberty and the pursuit of Happiness.”²

Rather, the reason the original Constitution did not include a bill of rights is that the Framers believed that the constraints imposed on the federal government—in particular, the checks and balances imposed by

¹ 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

² Declaration of Independence ¶ 2 (July 4, 1776).

the three branches upon each other—would protect individual liberty. Thus, Alexander Hamilton wrote in Federalist 84 that “the Constitution is itself, in every rational sense ... a bill of rights.”³ And James Madison described the separation of powers as providing “the great security” against tyranny by preventing the “gradual concentration” of power in any one branch.⁴

The Supreme Court has reiterated the connection between the separation of powers and individual liberty countless times. In *Bowsher v. Synar*, for example, Chief Justice Burger observed for the Court that “[t]he declared purpose of separating and dividing the powers of government ... was to ‘diffuse power the better to secure liberty,’ and that ‘checks and balances were the foundation of a structure of government that would protect liberty.’”⁵ Justice Scalia explained in his *Morrison* dissent that the purpose of the separation of powers “was not merely to assure effective government but to preserve individual freedom.”⁶ And in an apt summary, Justice Scalia explained for the Court in *Plaut v. Spendthrift Farm*, “Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.”⁷

In short, it is the separation of powers—a system in which each Branch is confined to its role, with tools to enforce the limits on the

³ The Federalist No. 84, p. 515 (C. Rossiter ed. 1961); see *NFIB v. Sebelius*, 567 U.S. 519, 535 (2012) (opinion of Roberts, C.J.) (quoting this passage).

⁴ The Federalist No. 51, pp. 321-322 (C. Rossiter ed. 1961).

⁵ 478 U.S. 714, 721 (1986) (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

⁶ 487 U.S. at 727.

⁷ 514 U.S. 211, 240 (1995).

others—that is central to protecting liberty. Without this system, I suspect that our Bill of Rights would be no more protective than those paper rights found in many other countries.

Just as the separation of powers protects individual liberty, it also safeguards the rule of law. The rule of law is so deeply rooted in our country that we sometimes take it for granted. But on occasions like Law Day, it is important to remember that our commitment to the rule of law sets us apart from almost every other nation in the world. That commitment dates back to America's earliest days. After reciting the separation of legislative, executive, and judicial powers, the Massachusetts Constitution of 1780 described the resulting structure as “a government of laws and not of men.”⁸ That promise to be a “government of laws and not of men” (or women) continues to define our structure of government—and our work as lawyers.

Chief Justice Roberts captured that point at his Senate confirmation hearing. “When I worked in the Department of Justice in the Office of the Solicitor General,” he said, “it was my job to argue cases for the United States before the Supreme Court. I always found it very moving to stand before the Justices and say, ‘I speak for my country.’” He continued, “But it was after I left the Department and began arguing cases against the United States, that I fully appreciated the importance of the Supreme Court in our constitutional system. Here was the United States, the most powerful entity in the world, aligned against my client, and yet all I had to do was convince the Court that I was right on the law,

⁸ Mass. Const. of 1780, pt. 1, art. XXX.

and the Government was wrong, and all that power and might would recede in deference to the rule of law. That is a remarkable thing.”⁹

I am fortunate to have had a similar experience. When I was in private practice, my clients before the Supreme Court were a criminal defendant, a religious order, and a small business. In every one of those cases, the federal government was the opposing party, represented powerfully by the Office of the Solicitor General. Yet, as the Chief Justice described, my clients convinced the Court that we were right on the law, and the federal government accepted the result.

That commitment to rule of law is one of nation’s deepest strengths. It provides long-term stability. It encourages hard work and savings. It fosters innovation and investment. And it reduces violence and promotes peace.

That brings me to my final point today, the Court of Federal Claims. This Court, perhaps more so than others, stands as a shining monument to this Nation’s commitment to separation of powers and the rule of law—and to the ultimate purpose of both, to protect liberty.

Indeed, it was President Abraham Lincoln who called on Congress to give this Court the power to issue judgments in cases involving claims against the United States. As he explained in his first address to Congress (a predecessor to the modern-day State of the Union), “It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private

⁹ Chief Justice Roberts Opening Statement, <http://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process>.

individuals.”¹⁰ Congress responded with legislation in 1866 that gave the Court some of the key powers that it continues to exercise today.

Many of the cases heard by this Court involve complicated matters—the tax laws and the Takings Clause, for example. But underneath all that is a simple and powerful premise: the federal government will hold itself accountable to citizens who have valid claims against it. More precisely, the government will pay out money to satisfy its obligations to any citizen who can persuade neutral decision-makers that he or she is right and the government is wrong.

How extraordinary to create a court whose principal purpose is to adjudicate claims brought by the citizenry against their government seeking money damages? I am not a scholar of international or comparative law. But I would guess that there are not a lot of countries in the world that have such a court.

Of course, having the Court alone is not enough. This Court’s legitimacy—and longevity—are a result of the integrity and judgment of the many outstanding judges who have sat on its bench over the past 160 years. The government has won plenty of cases in the Court. But it has lost plenty of cases too. Thanks to the Court’s consistent and considered judgment, the government and the public alike have come to trust the Court to adjudicate claims impartially and according to law. The Court thereby serves a vital function in our system of justice—it enforces the limits of governmental power not just in the abstract, but through concrete cases in which people’s property and fortunes are often at stake.

¹⁰ Abraham Lincoln, First Annual Message, Dec. 3, 1861, <http://www.presidency.ucsb.edu/ws/?pid=29502>.

That is a great testament to the rule of law, and a fitting embodiment of the values we celebrate today.

Thank you for inviting me to your Law Day event. I could not think of a better group to speak to on the importance of separation of powers to protecting freedom.