Speech to the Fifth Circuit Judicial Conference on Joseph Story 4/21/87

It is appropriate — perhaps no more appropriate for any group than for a group of lawyers and judges — to get together to talk about the Bicentennial as our nation begins its celebration of the 200th birthday of our founding charter.

As many of you know, the role of the judicial branch was a subject of some debate at that convention in Philadelphia in 1787. As a matter of fact, the drafters of the Constitution remembered very well the pre-revolutionary days when the judges were essentially functionaries of the executive power, rather than independent arbiters of justice.

Accordingly, they determined that in this new form of government that they were founding, an independent judiciary was critical to the preservation of liberty and to the just interpretation of laws.

The question for the Founders, after they decided upon an independent judiciary, then became one of how judges should be appointed and how much they should be paid — which I guess only proves things haven't changed too much in 200 years.

In any event, as we look at the role of an independent judiciary in the two centuries of success we have had under our enduring Constitution, I thought it might be useful to discuss with you how this concept has been implemented by some of the leading jurists in our nation.

Today, therefore, I would like to focus attention on a great figure from American judicial history who deserves to be better known to the general public than he probably is. He was truly a man of the ages, I believe. He was a great believer in the value of the common law, which he viewed as simply the practical law of past generations, whose lessons could be applied to current situations. He is a man whose judicial service we should examine, because the question of how to situate American jurisprudence within the grand tradition of natural law — a tradition that began in the Roman Republic and extended through the English Middle Ages into Colonial American times — is obviously a question with many lessons for the present and the future of American law.

So as judges and lawyers we have the privilege of learning through the history books as well as case reports about some of the great judges that have graced the federal bench throughout our country's history. You remember, of course, John Jay, the first Chief Justice, who had interesting responsibilities in the executive branch as well, and who is also remembered as one of the authors of *The Federalist,* that series of essays that persuaded the states to ratify the Constitution. And John Marshall, of course, is remembered as the Chief Justice who affirmed both the power and the limits of judicial review.

My subject today is another important figure in the development of an independent judiciary. Like Jay and Marshall, he was a member of the Supreme Court, but unlike them, he was an Associate Justice, not Chief. He was appointed by President Madison, who, like some of his successors in the executive office, was later not necessarily pleased with some of this man's work on the bench. I am speaking, as you may have guessed, of Joseph Story.

Story had a very independent mind. Today, just about anyone who wants to examine his writings can find something they can disagree with if they wish. Some will be dismayed by his fervent belief in common law based upon a natural law with ultimate roots in divine revelation. Others will balk at his aggressive defense of the authority of the federal government over the states, an authority that, some would argue, Justice Story greatly expanded.

At the same time, I suspect that many who have read his works would applaud his critique of Rousseau's concept of natural rights and the social contract, a philosophy that was very successfully implemented in our country but which had bitter fruit in the French Revolution.

Others reading what he wrote during his tenure would welcome his attack on the secessionist thinking in the territory of the present-day Fifth Circuit. But on the whole, whether you agree or disagree with his approach to judging or with some of his major decisions — such as *Swift* v. *Tyson* or *Martin* v. *Hunter's Lessee,* which I will talk about a little bit today — still, there was probably never a judge more learned than Joseph Story in the history of the American federal bench; nor was there any judge more earnestly devoted to the task of searching the entire legal tradition of Western civilization for correct answers to pressing problems.

For him, the past, present, and future constituted a marvelous unity as he viewed the law. He was a man of the ages, if ever such a one has graced our judiciary. Perhaps his most urgent lesson for us today, as we look back at his tenure, is not necessarily the example of his erudition nor his doctrine of common law, but rather his loyalty toward what he regarded as the essential distinction between law and politics.

It is true that his concept of this distinction drew a rather wide boundary around the law, and a correspondingly narrow one around politics. He had served in Congress and was perhaps less sanguine than most people, then and now, about the ability of legislative bodies to produce good government.

In any event, together with his view of the common law, this view of politics led him to seek solutions in law for some problems that some people might regard as political. But in doing so, he never lost sight — as some do today — of that essential distinction between politics and the law. As a judge, he was very careful never to usurp legislative authority. He never asserted any duty for judges to shape or to mold the Constitution, nor did he claim a right for them to do so.

Joseph Story learned his law as an apprentice to the great Massachusetts federalist lawyer, Samuel Sewall. Under Sewall's guidance he steeped himself in English common law. Like most lawyers of that day, he studied especially the works of Coke and Blackstone.

But even in his early career, he admits some concerns about his newly acquired profession. He wrote to a friend, during his apprenticeship, that "the law is a profession whose general principles enlighten and enlarge, but whose minutiae contract and distract the mind." Throughout his life he demonstrated that he had no intention of letting his own mind become either contracted and distracted. Thus, he has provided an example to our profession.

Though his views were completely compatible with those of Washington, Hamilton, and the other Federalists, Joseph Story had inherited from his father an affiliation with the Jeffersonian Republican faction. Ironically, this resulted in his being called a radical in his own home town. Actually, there had never been a less radical or revolutionary man than this man who would eventually become a Justice of the Supreme Court.

Thomas Jefferson, who had more radical ideas himself, knew as much. As a matter of fact, when Story was presented as a possible candidate for the Supreme Court, Jefferson counseled President Madison that he should not fill the vacancy with Story, who at that time was a U.S. Congressman from Massachusetts. Jefferson warned Madison that Story, in his opinion, was "unquestionably a tory."

The root of the split between Jefferson and Story lay in conflicting interpretations of the American Revolution. This in itself is a little-known fact about how the people in the early days regarded the genesis of this country.

To Jefferson, the 13 states had made a clean break with the past. They had a clean slate on which to build a society based on the rights of man. Story, on the other hand, believed that this new nation had inherited an illustrious corpus of law and custom, and he believed that it should now use that tradition to build a society in harmony with the natural law.

It was one of the glorious paradoxes of American history that those two conflicting interpretations of our origins both have a great deal of historical support, and both have honorable histories in subsequent scholarship. On the battlefields of the Revolutionary War that ended four years before the Constitutional Convention, some died for the cause of freedom from English custom; others, on the other hand, died for the cause of obtaining the protection due to them and their countrymen under what they understood to be English common law. Yet all who died did so to establish a new and independent United States, which then and now binds together those who embrace the philosophical concepts of Jefferson and those who are partial to the philosophy of Joseph Story.

Anyway, notwithstanding former President Jefferson's objections and his advice to President Madison, as often happens with judicial appointments, history took a very ironic turn. Three alternate nominees that President Madison tapped for the position on the Supreme Court either turned down the post themselves, or were turned down by the Senate. Madison felt that he had to appoint someone from New England because this particular position on the Supreme Court was the one that rode the First Circuit, and that was a more important practice in those days than perhaps it is today. And so as a result, he finally turned to Joseph Story and made him a Justice on the Supreme Court. Jefferson quite likely blanched, and Chief Justice Marshall quite likely rejoiced.

Time does not permit a comprehensive discussion of Story's work on the Court, but at least two of his major cases deserve our attention and I believe are worth a brief dose in this conference.

One of these was a case I mentioned earlier, *Swift* v. *Tyson,* that was decided in 1842. The facts of the case involved the negotiability of a disputed bill of exchange, but the fundamental issue that emerged at the bar was whether commerce could be conducted by different laws in different states, or whether, on the contrary, commercial law was uniform throughout the nation, and indeed, throughout the world.

This is a topic that was very important at that convention in Philadelphia. It's interesting to note that there has been a heated debate through the years as to just how uniform commercial laws should be throughout this country. An interesting sidelight is the fact that in August of this year, a number of us will be going to the People's Republic of China, which is attempting in this modern era to enter into the world of commerce with the other nations of the globe. One of the things that they find is that they have to develop within China some kind of uni-

formity of commercial law. So Justice Story's case of *Swift* v. *Tyson* has had some antecedents to this day.

Justice Story took the view that we should have uniform commercial laws throughout the country. His opinion in the case established the principle that common law governs the commercial world in the absence of a controlling Constitutional provision or state statute. The decision overrode a New York State court.

Story held that a state court decision in such a case does not vacate the relevant common law, and if the Supreme Court acquires jurisdiction — as it did in this case because the transaction involved parties in two separate states — it should rule in accord with common law rather than defer to the state court.

Actually, one should be cautious in stating what *Swift* v. *Tyson* supposedly established, because it was a controversial decision in its time, and it was overturned 97 years later in *Erie Railroad Co.* v. *Tompkins.* This shows, by the way, that Supreme Court decisions rarely acquire invulnerability merely because of the passage of years. The issues in the law are never totally finished but have to be repeated and repeated and decided over the years and acquire a currency today just as they did many years ago.

The other case that I wish to discuss is Story's famous decision in *Martin* v. *Hunter's Lessee.* Here again, the particulars of the case will take far too much time. The case originated in a dispute over the claimed right of Virginia — now my home state — to confiscate land belonging to the family of Lord Fairfax — he being the patron of the country in which I now live. But as a constitutional issue, it came down basically to the question of whether the Supreme Court had appellate jurisdiction over state courts.

As you know, the Constitution itself contains no provision that expressly addresses this particular question. Had it been otherwise, I am sure the case would have been controlled by Justice Story's respect for the Constitution as it was drafted, ratified, and as it has been duly amended, because he was very definite in his views as to the supremacy of the Constitution. He said in a book that he wrote, called *Commentaries on the Constitution of the United States:*

> Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation. It is only when there is some ambiguity or doubt arising from other sources, that interpretation has its proper office.

Well, *Hunter's Lessee* was just such a case where interpretation was needed. It required Story to apply his interpretive reasoning to the general language of Articles III and VI of the Constitution, in which he found support for the view that the Supreme Court does have appellate jurisdiction over state courts. He also based his judgment on the avowed purpose of the Constitution, on what he called — again, a quote from his *Commentaries:* "its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts."

What Story's reading of the "scope and design of the instrument" told him was that the United States of America was not a contractual arrangement among sovereign states, but an organic whole. To him, the opposite argument, the states' rights arguments of the more radical Jeffersonians, would have been appropriate not under the Constitution as drafted in Philadel-

phia in 1787, but rather under the previous Articles of Confederation, which did not provide a proper basis for an effective government of the nation.

To Story, it was of great significance that the Constitution, in its preamble, describes itself as an act of "the people of the United States," rather than as an act of the states themselves.

Thus, Story resolved the case of *Hunter's Lessee* in favor of the national over the state power. Just as it is clear that his learning was deep and his reasoning was rigorous, it is also clear that he understood the importance of the federal union.

I think it is interesting to examine Story's decision in the light of those times as opposed to the times we face today. To evaluate the case of *Hunter's Lessee* we have to remember that in Story's time, whether the arrangement that had been worked out at Philadelphia two hundred years ago would endure was still not assured. That is why Story's contribution to constitutional success is so appropriate for study in this Bicentennial year.

Story perceived a risk that the country in those formative years could dissolve into a powerless confederation, with the same problems that had plagued it in the first 11 years. Again, looking at it today, we can certainly contrast his view with the concerns of many people today, namely, that our constitutional system does not face a threat from too little central power, but rather from too *much* power in the federal level.

It is arguable that Story's nationalism may have helped provoke the Civil War. On the other hand it is also arguable that more faithful application of his principles would have prevented that war from occurring.

I raise these questions not so as to offer any answers, but merely to call attention to the great legal mind of Joseph Story and the contribution that he made to the constitutional history of the United States. Story showed a great capacity to master much of the legal tradition of republican Rome and medieval England, down to his own time. Today we are the beneficiaries of that strength of legal learning.

Story applied his knowledge to the resolution of important legal and constitutional issues as they took place during the initial period of our country's history. Story's rules of constitutional interpretation, some of which we have examined inn the course of these remarks, show him to be very much what one today would call an "interpretivist," a jurist who attempts to interpret the Constitution in its original sense — the sense in which it was framed and ratified by the nation shortly after its adoption in Philadelphia.

It's important to note that interpretivism is not to be confused with majoritarianism, by which judges generally defer to acts of the legislative bodies. An interpretivist judge, if you will, one such as Story was, will be faithful to the terms of the Constitution and will act in accord with its provisions, using it as the only basis to determine whether a law passed by Congress will be upheld or whether it will be struck down. This approach, I would suggest to you, is as important and correct in Story's time as it is in our own.

In closing, let me just say that Justice Story's fidelity to the Constitution, his reverence for the law, and his understanding of a judge's responsibility provide a shining example of our judicial system. It demonstrates the wisdom, if you will, of an independent judiciary as a cardinal principle of that great Constitution, the Bicentennial of which we celebrate this year, and which you have chosen as the theme for this particular gathering.

Thank you.