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Bicentennial Perspectives (Program)

Institute of Bill of Rights Law at The College of William & Mary School of Law

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BICENTENNIAL PERSPECTIVES

The Sixth Annual Bill of Rights Symposium

April 6, 7 & 8, 1989

The Institute of Bill of Rights Law
Williamsburg, Virginia
Thursday, April 6

Millington Auditorium
8:00 p.m.

THE FIRST AMENDMENT
John Henry Faulk

John Henry Faulk has long been recognized as one of the nation's most entertaining and widely acclaimed commentators on American culture, and as a humorist, essayist, and storyteller in the great tradition of Mark Twain and Will Rogers. He is a passionate and entertaining defender of the Bill of Rights, particularly the First Amendment. In 1955, during the height of the national hysteria of the McCarthy era, Faulk — a well-known radio and television personality — was blacklisted. In a celebrated legal battle led by lawyer Louis Nizer, Faulk fought back against McCarthyism. His 1964 bestseller Fear on Trial, and the television movie of the same name carried his story of injustice to millions, and rekindled his popularity as a public personality. Recipient of the prestigious James Madison First Amendment Award, Faulk has been applauded time and again for his vigorous defense of civil liberties, and his abilities as a humorist, historian, and folklorist. He will be speaking on his favorite topic, the First Amendment.

Welcoming remarks will be presented by Rodney A. Smolla, James Gould Cutler Professor of Constitutional Law, and Director, Institute of Bill of Rights Law, Marshall-Wythe School of Law, College of William and Mary. Mr. Faulk will be introduced by James A. Bill, Director, The Reves Center for International Studies, and Class of 1935 Professor of Government, College of William and Mary.

Millington Foyer
9:15 p.m.

Friday, April 7

Panel Session
Marshall-Wythe Room 120
9:00 a.m. - 12:00 p.m.

THE MADISONIAN THEORY OF LIBERTY
Jack N. Rakove
Professor of History, Stanford University

Professor Rakove is a leading scholar on the life and thought of James Madison. None of the framers of the Constitution was more concerned with the protection of individual and minority rights than James Madison, nor did any member of the first federal Congress play a more crucial role in the adoption of the Bill of Rights. Yet privately Madison was far from persuaded that bills of rights could play a useful role in protecting liberty. This paper will examine the nuances of Madison’s thinking about the problem of rights within the larger context of his constitutional theory.

Commentators are: Charles F. Hobson, Editor, The Papers of John Marshall, College of William and Mary; Joseph Gordon Hylton, Jr., Professor of Law, Illinois Institute of Technology, Chicago Kent College of Law; Robert A. Rutland, Professor of History, University of Tulsa. The moderator is Melvin I. Urofsky, Professor of History, Virginia Commonwealth University.

Welcoming remarks will be presented by Timothy J. Sullivan, Dean of the Marshall-Wythe School of Law, John Stewart Bryan Professor of Jurisprudence, and Executive Director of the Institute of Bill of Rights Law, College of William and Mary.
THE NEW PROPERTY AFTER 25 YEARS

Charles A. Reich

In the 1960s, Charles Reich, then a professor of law at Yale, wrote a pathbreaking article in The Yale Law Review, entitled "The New Property." In slightly different form, that article became one of the central chapters in Reich's bestselling book, The Greening of America, one of the principal intellectual manifestos of American counter-culture during that time. Reich's argument was that a new species of "property" had come to exist in American life, in the form of entitlements to governmental largess: welfare benefits, government pensions, disability payments, admissions to state universities, tax subsidies, governmentally issued franchises, licenses, and operating permits — an entire gamut of valuable interests that depend in some way on government. These governmentally created interests, he argued, had come to occupy a place as central in the lives of modern Americans as more traditional forms of "property," such as real estate or chattels, had occupied in the lives of Americans at the time the Constitution was created. We should no longer think of such interests as charity, he maintained, but as a form of property, protected from arbitrary interference by government. Reich's work had an enormous influence on law and culture; his writings were cited with approval in a landmark Supreme Court decision establishing rights to a due process hearing prior to the revocation of a welfare recipient's benefits. Reich has not publicly commented on "The New Property" for 25 years. His paper will present his views about the legacy of his theories, and his current thinking about the nature of property in the American constitutional scheme.

Commentators are: Brigitte Fleischmann, Senior Fellow and Visiting Professor, Commonwealth Center for the Study of American Culture, College of William and Mary; William W. Van Alstyne, William and Thomas Perkins Professor of Law, Duke University; Paul R. Verkuil, President of the College of William and Mary, and Professor of Law and Government. The moderator is Robert F. Nagle, Lee Visiting Professor, Marshall-Wythe School of Law, College of William and Mary and Moses Lasky Professor of Law, University of Colorado.

Saturday, April 8

Panel Session
Marshall-Wythe Room 120
9:15 a.m. - 12:00 p.m.

RELIGIOUS LIBERTY
IN THE WELFARE STATE

Richard A. Epstein

James Parker Hall Distinguished Service Professor of Law,
University of Chicago

Richard Epstein is one of the premier conservative theorists in modern American law. Since the New Deal, the Supreme Court has steadily enhanced the substantive and procedural protections in the Constitution for the "civil liberties" freedoms guaranteed in the Bill of Rights. The Supreme Court, for example, has placed freedom of speech, and the free exercise of religion, in "preferred
positions” in the constitutional scheme. In that same period since the New Deal, the Court has consistently retracted the level of substantive and procedural protections granted to the “economic” freedoms of the Constitution. Protections against takings of private property without just compensation, or prohibitions on interference with freedom of contract, for example, have been reduced, often to accommodate the regulatory or redistributive goals of the modern welfare state. Epstein has vigorously attacked this trend, most notably in his 1985 book *Takings: Private Property and the Power of Eminent Domain*. His paper will argue that the 1937 transformation put increased pressure on the religion clauses of the First Amendment. He will discuss economic liberties as a backdrop for how one treats the impact of various elements of large modern government, such as collective bargaining and anti-discrimination measures, on religious organizations.

Commentators are: Anita L. Allen, Professor of Law, Georgetown University Law Center; Bruce Fein, President of Bruce Fein and Associates; Charles H. Koch, Jr., Dudley W. Woodbridge Professor of Law, Marshall-Wythe School of Law, College of William and Mary. The moderator is Lynda L. Butler, Professor of Law, Marshall-Wythe School of Law, College of William and Mary.

Marshall-Wythe Room 120
8:00 p.m.

**THE WAR POWER**

The Honorable Joseph A. Biden Jr.,
United States Senator (Democrat) from Delaware

Senator Joseph Biden, as Chairman of the United States Senate Judiciary Committee, occupies a position of enormous influence in the ongoing process of American constitutional interpretation. As the public debate surrounding the Supreme Court nomination of Judge Robert Bork demonstrated, the Senate Judiciary Committee may, at crucial historical moments, dramatically affect the future evolution of the Supreme Court, and constitutional jurisprudence. Senator Biden is an expert on separation of powers, a theory as central to the framers’ plan for the protection of constitutional liberties as the individual freedoms listed in the Bill of Rights. The Senator’s presentation will focus on one of the most difficult and significant of all separation of powers questions, the war power. He will examine the tensions between the roles of the executive and legislative branches over the use of American armed forces, tensions that have occupied centerstage in separation of powers debates since the Vietnam War, and the passage of the War Powers Resolution of 1973.

Welcoming remarks and introduction will be presented by Rodney A. Smolla of William and Mary.

Marshall-Wythe Lobby
9:15 p.m.

RECEPTION
The Institute of Bill of Rights Law was established at The College of William and Mary in 1982 by a bequest of Laura Lee, who held a lifelong interest in a free press and its role in our society, to support scholarly research on the Bill of Rights, particularly the First Amendment. The Institute functions as a public forum for airing and debating matters of legal and public policy, as a vehicle for education by providing information on constitutional topics, and as a source of creative thought on constitutional and public policy issues.

The annual spring symposium is designed to attract a broad audience of academics and students from various disciplines, practicing lawyers, and journalists. The Institute publishes its symposium proceedings in the William and Mary Law Review. This program, "Bicentennial Perspectives," is the sixth in the series and marks the drafting of the Bill of Rights. The Institute wishes to express its appreciation to Professors James A. Bill of the Reves Center for International Studies and Chandos Brown of the Commonwealth Center for the Study of American Culture for lending their time and talents in organizing the 1989 symposium.
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The Honorable William B. Spong, Jr., Interim President, Old Dominion University; Dean and Dudley W. Woodbridge Professor, Emeritus, Marshall-Wythe School of Law, College of William and Mary; former United States Senator from Virginia.

Wallace Terry, Author, Journalist, and Film Producer, Alexandria, Virginia.

William W. Van Alstyne, William and Thomas Perkins Professor of Law, Duke University.

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