



REMARKS BY SECRETARY EUGENE SCALIA  
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It's a great pleasure to join all of you at this conference, and to have the opportunity to speak to you today.

The Federalist Society is a deeply important institution to which my family and I feel a strong personal tie. Many of us had the pleasure last night of attending the dinner now named in honor of my father, Justice Scalia. He was a professor to Lee Otis and David McIntosh—two Federalist Society founders—and was the first faculty advisor to the University of Chicago Law School chapter. In his years on the Court, my father enjoyed few things more than speaking to Federalist Society law school chapters, teaching his Fed. Soc. separation-of-powers course over the summer, and of course coming many times to this conference. He relished the opportunity Federalist Society events gave to teach, explain, and above all, perhaps, to argue. He drew strength from the friendships and camaraderie here, which on more than one occasion helped boost his spirits after a disappointing decision or Term.

Among our fondest memories as a family was the 2011 annual dinner, when the Society recognized my father's 25<sup>th</sup> anniversary on the Court by inviting my eight brothers and sisters and me to join my parents on stage. My father proudly introduced us and said, "Nine children, and not a dullard among them." My brother Chris complained under his breath, "Daddy always forgets about me." Chris is the family comedian.

For my part, the first time I ever made public remarks was at a 1986 meeting of the Washington, D.C. Lawyers' Chapter; I was asked to introduce my boss at the time, Education Secretary William Bennett. That's when I had the good fortune to meet two young Reagan Administration lawyers who had helped start the Federalist Society at Yale and would go on to clerk on the Supreme Court and do other interesting things, Steve Calabresi and Peter Keisler. I joined the Society in law school about a year later, and have been an active member since.

I recognize, of course, that I was not asked to speak at this week's conference because of my personal connection to this organization, but because of the position I now hold as U.S. Secretary of Labor. The subject of this conference is originalism and the Constitution. I run a 15,000-person cabinet department that has important enforcement responsibilities; issues what are called *legislative* rules; and houses several *adjudicative* agencies. Evidently Gene Meyer thought I should come here and give an accounting.

Or perhaps Gene and Leonard Leo thought I should address one of the important constitutional decisions involving labor and employment law. There's *Lochner v. New York*, an early application of substantive due process, where the Supreme Court struck down a regulation of working hours. The *Lochner* era ended with *West Coast Hotel v. Parrish*—the so-called switch in time that saved nine—which involved a state minimum wage law. That same year, 1937, the Supreme Court upheld the constitutionality of the National Labor Relations Act in *Jones & Laughlin Steel Corp.*, a decision that set the Court on its modern-day approach to the Commerce Clause.

As for the Labor Department itself, it's been involved in many noteworthy decisions at the Court. Who can forget *Garcia v. San Antonio Metropolitan Transit Authority*, where the Supreme Court disclaimed much of its role in policing Congress's use of the Commerce Clause to regulate the States? And some in this audience have been heard to complain about yet another decision involving the Labor Department, even though it was a unanimous decision written by the great originalist Antonin Scalia. In *Auer v. Robbins*, my father presciently recognized the appropriateness of courts deferring to what I, the Secretary of Labor, say in *amicus* briefs.

Any of these labor and employment cases would provide rich material for a speech on originalism. But that will have to await some other time. Today, being new to my position at the

Department, I wanted to talk about some constitutional principles that will guide me as Labor Secretary. I'll conclude with a foundational constitutional principle that is currently embattled, and which lawyers have a special interest in defending. No one is better equipped for that task than members of the Federalist Society.

### **Take Care Clause**

Article II of the Constitution directs the President of the United States to “take Care that the Laws be faithfully executed.” The Supreme Court has said that the Take Care Clause embodies the President’s “*most important* constitutional duty.” It’s a duty that I consider myself to hold as well, as a principal officer appointed by the President with responsibility for administering, and enforcing, a range of statutes enacted by Congress. Put differently, the President takes care that the laws are faithfully executed in part through the officers he appoints to run the cabinet departments.

This means that, as Secretary of Labor, I have a *constitutional* responsibility for the agency’s enforcement activities under the statutes it administers. That includes the Fair Labor Standards Act, governing minimum wages and overtime; ERISA, which regulates employee pensions and employer-sponsored healthcare plans; the Occupational Safety and Health Act and the Mine Safety and Health Act; and the worker-protections that apply to unions under the Landrum-Griffin Act. The Department also enforces the non-discrimination requirements that apply to federal contractors.

The enforcement actions we bring under these and other statutes are not merely the responsibility of the capable Labor Department officials we have in the field; they’re activities for which I am accountable, as the Secretary and as the official in whose name those cases are

brought. And so it's incumbent on me—and by extension, on the heads of the agencies within the Department—to exercise appropriate oversight of our litigation activities nationwide.

As I review our enforcement activities, one thing I'm interested in as Secretary is the effectiveness of our investigative programs. We should be selecting companies and unions for inspection and investigation based on the likelihood there will be a prosecutable violation of the laws we administer; our inspections and investigations should be targeted to that end, and if they are not effectively identifying violations of law, resources should be redeployed to places where significant violations may be more likely. Inspections and investigations are not ends in themselves, but tools that must be wielded thoughtfully to enforce the law effectively and efficiently.

In “taking care” that the laws be “faithfully executed,” I also am interested in consistency. As I'll discuss in a moment, we should strive to make the law's requirements clear. The Labor Department administers statutes of national applicability. The regulated public should be subject to a consistent nationwide interpretation of the laws we administer. That interpretation should not vary based on the party involved, or the jurisdiction where the case arises. Consistency in enforcement furthers compliance and respect for the rule of law. It will be one of my goals as Secretary.

Of course, taking care that the laws are faithfully executed includes vigorous enforcement where warranted. I did not shrink from that when I served as Solicitor—the general counsel—of the Labor Department, and we will not hesitate to do so while I am Secretary. In Fiscal Year 2019, the Department's Wage and Hour Division recovered more than \$320 million in wages owed to workers. That's a record for Wage-Hour. Recently, the Department used its “hot goods” authority—a powerful weapon in its arsenal—to recover nearly \$6 million in back-pay

for miners and other employees at a company that shut its doors without paying its employees. This was a 100% back-pay recovery for all the affected workers, except the CEO and two family members.

The Department's Office of Federal Contract Compliance Programs, which enforces the non-discrimination requirements for federal contractors, also obtained record recoveries in Fiscal Year 2019, totaling over \$40 million. And investigations by the Department's Office of Labor Management Standards—which enforces union democracy and financial integrity laws—led to 60 criminal convictions in Fiscal Year 2019. For OLMS, which works together with the Department of Justice, that's five convictions a month.

### **Fair Notice**

A second constitutional principle that will be important to me as Labor Secretary received early expression in a 1926 case involving employment regulation. *Connally v. General Construction Company* involved an Oklahoma statute that required businesses to pay workers “not less than the current rate of per diem wages in the locality where the work is performed”; the statute provided for financial penalties or imprisonment of 3 to 6 months for each violation. The Supreme Court found this criminal prohibition void for vagueness, and said, “The dividing line between what is lawful and unlawful cannot be left to conjecture.” This is generally known today as the principle of fair notice, and has been extended to actions of administrative agencies. In the 2012 case of *FCC v. Fox*, for instance, Justice Kennedy wrote for seven justices that “regulated parties should know what is required of them so they may act accordingly; . . . precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”

My Department has not been immune from criticism in this area. In another 2012 case, *Christopher v. SmithKline*, the Court refused to give deference to a Labor Department interpretation of its own regulation that had been articulated in *amicus* briefs, not rulemaking, and which had changed over time. Justice Alito quoted an opinion by my father in explaining that “defer[ence] to the agency’s interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’”

In my view, the criticism in some quarters of doctrines of administrative deference—*Chevron* and *Seminole Rock* deference—has been animated in part by concerns with applications of those doctrines that risk depriving parties of fair notice.

Fair notice and consistent, effective, and efficient execution of the law will be important to me as Secretary of Labor. And they are important to President Trump. Last month, the President issued two Executive Orders to implement principles of fair notice and to promote efficient and effective implementation of the law.

The first Executive Order requires agencies to post all “guidance” documents online in a searchable format so they can easily be found and read by the public. Guidance documents not included on the website are considered rescinded. Significant new guidance documents must go through OMB review and public notice and comment.

The second Executive Order instructs agencies to recognize that guidance documents are non-binding, and cannot create an independent basis for enforcement action. Pre-existing statutes and duly-authorized regulations must provide the rule of decision in enforcement actions.

This does not mean that guidance documents are bad or wrong, by the way—on the contrary, if they serve to highlight legal requirements that reside elsewhere, in a statute or regulation, guidance documents help provide “fair notice.” When I was a practicing lawyer, my clients *wanted* guidance. What they rightly objected to, though, were government edicts, labeled as guidance that threatened or coerced them to comply with new legal norms without the protections of notice and comment rulemaking. At the Labor Department we will continue the compliance assistance programs that are an essential part of how we inform the regulated public of their obligations.

### **De-Regulation and the Current Economy**

President Trump’s attention to the proper use of guidance is part of his broader commitment to eliminating unnecessary regulatory requirements that stifle American innovation and productivity and burden the economy. A government of limited powers was, of course, central to the Framers’ original design for our Constitution. In a debate in the House of Representatives in 1789, James Madison deplored what he called “commercial shackles.” It is “a truth,” he said, that “if industry and labour are left to take their own course, they will generally be directed to those objects which are the most productive, and this in a more certain and direct manner than the wisdom of the most enlightened legislature could point out.”

In this spirit, President Trump early in his Administration ordered federal agencies to take two regulations off the books for every one added. To date, the Administration has cut at least eight regulations for every one added. The Council of Economic Advisers estimates that these changes saved the American economy almost \$50 billion, and will achieve cost savings of \$220 billion once fully implemented.

At the Department of Labor, we have taken a number of important deregulatory steps, and have more in the works.

The President's deregulatory efforts, together with other steps like his 2017 tax cuts, are having their intended effect—right now, the American people are benefiting from an extraordinary U.S. economy. Part of my job as Labor Secretary is to gather and report employment-related data through the Department's Bureau of Labor Statistics. Those data show a job market that few of us have seen in our lifetimes:

- The unemployment rate nationally is 3.6%, which is close to the lowest unemployment rate in more than 50 years.
- More than 6.3 million new U.S. jobs have been created since January 2017.
- Wages are rising—they've been rising at or above 3% for 15 straight months. They're rising faster than prices, and weekly earnings are rising faster for the lowest-paid full-time workers than for the highest paid.
- The October jobs report showed the lowest unemployment rate ever for African-Americans. We're also seeing some of the lowest unemployment rates ever recorded for:
  - Hispanic-Americans;
  - Asian-Americans;
  - Americans with disabilities;
  - Adult women; and
  - Americans who do not have a high school diploma.

I recite all this data to you not just because the major media often downplay or ignore it. I recite it also because it confirms a fundamental point that Ronald Reagan believed to his core, and that drives this President too: The single best thing for working Americans—including

women, minorities, and Americans with disabilities—is a vibrant, growing economy in which businesses compete to attract and retain workers.

The current economy helps workers in other, less obvious ways too. When I speak to businesspeople, the concern they cite most frequently is the tight job market—the challenge they face finding workers. That is a problem we need to address to keep the economy growing; it’s one of my principal concerns as Labor Secretary. But this tight job market is helping workers:

- Businesses, in addition to raising wages, are investing more in training, to bring workers up to speed so they can join their companies. This is part of the reason that apprenticeships are a high priority for American business, the Labor Department, and the White House.
- In this tight job market, employers are taking a closer look at job applicants that, in other times, they would not.
  - As I mentioned, the unemployment rate for Americans with disabilities last month was the lowest recorded.
  - Employers are more open to hiring Americans re-entering the workforce from the criminal justice system.
  - In part so they can retain and find new workers, businesses are helping tackle a tragic crisis that’s afflicting the country—opioid abuse, which claims tens of thousands of lives every year, and which has terrible, radiating impacts on countless American families and their communities. Responding to this crisis is a priority for the President and the Labor Department, and American businesses want to help—in part because they recognize it as another means to bring more workers into the workforce.

Let me mention a final twist we're observing: A robust economy, in which companies are searching for workers, can help sweep away still other unnecessary regulatory barriers. Right now we're seeing a nationwide movement to reform requirements for occupational licenses in the States. In part, this involves increasing state reciprocity. Earlier this year, Governor Ducey of Arizona signed a bill that allows the State's licensing boards to accept out-of-state occupational licenses for new residents—if you're good enough to be a realtor in California, Arizona trusts you to do it there, too. And these State reforms—which President Trump has championed—have been bi-partisan. Colorado Governor Polis recently vetoed bills to re-impose licensing requirements on sports agents and homeowner association managers. The objective, he said, was “to make sure that licenses protect people from harm—not industry insiders from competition.”

These are valuable de-regulatory initiatives, and they result partly from *prior* deregulatory efforts that contributed to today's vibrant job market and high demand for skilled workers. So for all these reasons, I urge you to remember *this particular moment* in our economy, and in federal policy-making: Smart deregulation that frees American business gives an incredible boost to the American worker.

### **Direction of the Bar**

I wanted to conclude by speaking about another bedrock constitutional principle, one that has been particularly important to this organization.

Last Sunday marked the 100<sup>th</sup> anniversary of Justice Holmes's famous articulation of the value of freedom of speech, in the *Abrams* case. The First Amendment, he said, embodies the view that “the ultimate good . . . is better reached by the free trade in ideas”; it is in “the theory

of our Constitution,” he said, that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”

Now, I admit to some doubt that fundamental truths are established in the same manner as the value of pork bellies. But Holmes was right that the free exchange of ideas is at the core of the First Amendment and at the heart of our democracy. Yet it is disfavored in some quarters today. That is most apparent at our colleges and universities, where conservative speakers have been disinvited, banned, assaulted, and—when allowed to speak—accused of harming students merely by expressing ideas that run counter to some students’ preconceptions.

This intolerance is not isolated to our universities. It is a broad trend, so much so that two weeks ago, it even drew criticism from former President Obama.

I believe that this intolerance—and the pressure to suppress ideas that may be unwelcome to some—poses a special threat to the practice of law.

One of the great traditions of the legal profession is to respect the right to legal representation of those we disagree with, and even to undertake that representation ourselves. John Adams’s defense of the British soldiers charged in the Boston Massacre is one of our most important stories about the practice of law. Adams described his defense of the soldiers as “one of the most *gallant, generous, manly* and *disinterested* Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country.”

Adams was not our most modest Founder. But on this he was right. It is appropriate, admirable, and *necessary* for lawyers to take on clients and advance positions that may offend some observers.

In this sense, lawyers have a professional commitment to the “free trade in ideas” praised by Justice Holmes. They should be among its foremost defenders and should recognize, too—in

Justice Jackson’s words—that the “freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom.” Rather, respect for that freedom is most important when the stakes and passions are highest.

And yet, there are growing indications that our most powerful law firms are growing uncomfortable with this commitment.

Earlier this week, the Supreme Court heard argument in the challenge to President Trump’s cancellation of the DACA program, under which certain young people who entered the country illegally received forbearance from deportation, and federal benefits. By my count, approximately 25 large law firms filed *amicus* briefs opposing the President’s action, on top of the three large law firms representing the plaintiffs. Not a single major firm filed a brief supporting the Administration. Similarly, at the start of the Term, the Court heard argument in the *Bostock* case, presenting the question whether Title VII’s prohibition on sex discrimination includes discrimination based on sexual orientation. Around 20 large law firms filed *amicus* briefs supporting plaintiffs and a broad reading of Title VII; not a single big firm filed a brief supporting the defendant.

As should be apparent from my preceding remarks, I have no objection to any of these firms providing the representation they did. I should be clear, also, that nothing I say today should be understood as a criticism of my former law firm, where my friend and mentor Ted Olson argued on behalf of the DACA plaintiffs earlier this week. (He also represented Governor Bush in *Bush v. Gore*.) My concern is not the particular position any individual firm took in any specific case, but the complete absence of *any* large firm on the other side in *either* of those cases, and a similar imbalance in other cases involving hot-button issues.

Everyone familiar with the practice of law knows that these lopsided representations have nothing to do with the legal merits of the two cases, or with the absence of lawyers at large law firms who would be interested in representing a client on the other side. There are lawyers at large firms—I expect some in this room—who would have welcomed the chance to file a brief supporting the government’s position in the DACA case, for example, or supporting the defendant employer in the Title VII case.

One factor preventing that, in these and other cases I believe, is self-censorship. Our elite law firms are hesitant to let their lawyers get involved in cases that might generate criticism from left-of-center, or that conflict with views other lawyers in the firm may hold personally. Second, and related, firms fear repercussions from certain well-heeled corporate clients if they take positions disfavored by progressives. And sadly, there’s reason for that concern. As many of you know and all of you should, some years ago clients of Paul Clement’s old law firm—a different firm than where he works now—pressured the firm to end Clement’s representation of the House of Representatives in connection with the Defense of Marriage Act. Clement left that firm.

In the aftermath of that episode, major law firms are even more hesitant, I think, to get involved in high-profile, controversial cases taking right-of-center positions. Today, it is difficult for certain clients to obtain representation from our top law firms because the firms fear they’ll be marginalized for doing so. Fortunately, smaller, boutique litigation firms step in to provide representation in some cases. But it remains troubling that the largest law firms increasingly shrink from their lawyers representing clients on the right-of-center side in controversial cases.

John Adams would be concerned by this trend, I think. And it should trouble the legal profession—particularly lawyers at private law firms. The public must be reminded that a firm’s representation of a particular client, or its presentation of a particular position, does not necessarily reflect lawyers’ personal views, or the position of the law firm itself. Firms should pride themselves, as they have in the past, on representing people or positions that may be disfavored in some quarters. They should be leading defenders of Holmes’s vision of a “free trade in ideas,” and should push back—firmly—on clients who seek to judge or muscle the firm because of another client the firm represents.

It cannot be assumed that corporate executives will know, honor, and defend the values of the legal profession—that is the role of members of the bar. Firms should explain to clients that no single representation defines the firm—the firm will allow its lawyers to provide pro bono representation to murderers without approving of murder; its lawyers will represent companies charged with securities violations without approving of defrauding widows and orphans; and its lawyers will represent the Little Sisters of the Poor without—heaven forbid—accepting the teachings of the Catholic Church.

Firms should also remind clients that it is this detachment of lawyer from client—of the conduct being defended from the person defending it—that facilitates firms’ representation of corporate clients accused of troubling misconduct. Today, a corporation accused of environmental crimes objects to a lawyer at its outside law firm filing a brief in support of the unborn; tomorrow, why can’t someone schooled in today’s “cancel culture” use the same logic to attack the firm for defending that company’s environmental depredations? “We’re profiting from this work” will not be a satisfactory answer to many, particularly in a culture that devalues

the First Amendment, and which has lost sight of the special place—and independence—of members of the bar.

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It's been a pleasure to be with you today. A central reason many of you came this week is the Federalist Society's commitment to the principle I've been discussing—the free exchange of competing ideas. That's evident from the list of speakers at this conference; as has been observed in the past, if this were an organization dedicated to promoting a single narrow-minded view of the law, you invite the wrong speakers to do it.

I hope that you enjoy the panels and debates this week, and that when you return home, you have occasion to promote these First Amendment values within the profession as a whole. Thank you.