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# SPEECH

## STRUGGLE: A POWER RESERVED TO THE PEOPLE

An Address delivered by  
The Honorable Judge Revius O. Ortique, Jr.\*

A decade or so ago, Black Americans, particularly the young, raised loud and demanding voices, in rebellious and raucous tones, as if they had suddenly invented the phrase "power to the people." One cannot help wondering whether the fundamental relationship between the people of the United States and the government they created had escaped our attention for two centuries, or was just coming into focus – two centuries later. For the very essence of government in these United States has been unmistakably enshrined, since 1787, in that venerable document which begins: "WE THE PEOPLE OF THE UNITED STATES . . . do ordain and establish this Constitution for the United States of America. . . ." This mighty instrument was not at the request nor the behest of the people. For until then there had been no mandate by the people of the colonies. In the beginning of this government, there was "*the people*." The presumption that people are sovereign was a revolutionary concept which destroyed and swept away the concept of the ages, i.e., that sovereignty resides in government. Until the founding fathers ordained, on behalf of their constituents, and the people, a social and political contract, whereby the organs and institutions of government were creations of the people, who vested the nature and degree of sovereignty in a federal structure, by and with the consent of the governed, the revolt against the king would have been a fleeting ripple on the sea of British tyranny. For it was the Constitution, not the Declaration of Independence, which legalized and legitimized the Boston Tea Party and the Battles of Lexington, Concord and Bunker Hill.

It is the Constitution of these United States which has legalized and legitimized the rights, powers and responsibilities of every citizen, most important and compelling of which are those powers retained by "the people." Constitutional authorities agree that the Constitution survives because "it is the supreme law, fundamental and eternal . . . authorized by the people." It also has endured because the people have never surrendered their ultimate sovereignty, but have authorized through their Constitution only certain limited powers. This concept was first elaborated upon by Chief Justice John Marshall in *Marbury v. Madison*.<sup>1</sup> While numerous constitutional law scholars laud that historic opinion as establishing the supremacy of the Supreme

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\* Judge, Civil District Court, New Orleans, LA. This address was delivered in celebration of "Law Day" on May 17, 1987 at the Cascade United Method Church in Atlanta, GA.

1. 5 U.S. (1 Cranch) 137 (1803).

Court, a more reflective analysis demonstrates the *limitations* the decision imposed on the judiciary with equal clarity and precision!

As we celebrate the bicentennial of this awesome document, it is necessary that we recognize the perimeters of that instrument, for it is both powerful and fragile. And even though its endurance has been measured by the tolling of years, we have yet to witness the ultimate implementation of its powers because all of the people have not been embraced by the sovereignty it protects and preserves. As we celebrate, we must be alert to and discerning of the limitations beyond which government is forbidden to transcend. For it is this limitation of power which preserves *for the people* their honor, their dignity and their liberty!

Our vigil must lead us to the understanding that we — Black people — have not always been “people of the United States”. When the founding fathers pledged their honor, fortune and lives to the preservation of liberty, they did not contemplate Negroes as beneficiaries. In mandating the formula for determining representation in the Congress, the framers noted with particularity that a slave was less than a person. Slaves were not sovereign people and obviously *not* “citizens.” This position is clearly reinforced by the authors of the Federalist Papers.<sup>2</sup> “Citizen” is a term of art which was framed and brought into existence by the Constitution. Those who wear that mantle are at once clothed with privileges and immunities accorded only to “*the sovereign people.*”

Very early on, the very foundation of this nation was shaken when a slave sought to invoke those privileges and immunities. The nation had to wrestle with the fiber of its character, the sinew of its resolve and the very viscera of its convictions when Dred Scott marched to the bar of justice in Missouri demanding his freedom and seeking damages in the Circuit Court for the District of Missouri against the defendant, John F.A. Sandford, a New York resident. Sandford claimed he had purchased Dred Scott, his wife, Mrs. Harriet Scott and their two daughters, Eliza and Lizzie. Few of us remember the simple but poignant love story. Dred Scott was a slave who resided in St. Louis with his master, Dr. Emerson, an army officer. In 1834, Dr. Emerson was transferred to the army post at Fort Snelling at Rock Island, Illinois. Rock Island was in that portion of the Louisiana Territory which the Congress of the United States had designated as a “free territory.” In 1835 one Major Taliaferro, also an army officer, was assigned to Fort Snelling and he brought with him, as part of his entourage, the slave Harriet who was subsequently sold to Dr. Emerson. Shortly after becoming a member of the Emerson household the two courted and were married. Of this marriage two children were born, Eliza and Lizzie. Years later, Dr. Emerson returned to Missouri and sold the family as slaves to the defendant, John F.A. Sandford. Since the Scotts had lived in a “free territory”, so declared by the Congress of the United States, Scott reasoned that once free, he was no longer a slave and sued for damages of \$2,500.00, *each* for himself and his wife, and \$750.00 for each of his minor children. These were enormous sums for the day, which standing alone would have attracted attention. But the issue was a fundamental one. Chief Justice Taney recognized it as such and addressed the issue in one of the longest and most meticulous opinions in the annals of the Supreme

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2. See generally THE FEDERALIST No. 54 (A. Hamilton).

Court. His pointed and succinct analysis followed: "The words, 'people of the United States' and 'citizens' are synonymous terms . . . [t]hey both describe the political body, who according to our republic institutions, form the sovereignty . . . they are . . . 'the sovereign people,' and every citizen is one of this people, and a *constituent* member of this sovereignty."<sup>3</sup>

Enunciating with graphic and minute detail the pangs of the birth of the nation, the majority reached the conclusion that Negroes were: "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and [even if] emancipated . . . had no rights or privileges but such as those who held the power . . . might choose to grant them."<sup>4</sup>

The Court then made the immoral and irrelevant judgment which has been denounced by decent people of every age and whatever race: "[Negroes have] no rights which white men [are] bound to respect."<sup>5</sup> Thus a race was chained and a nation was crippled and *each* was hobbled by the Court's vicious pronouncement for more than a hundred years!

As we celebrate, then, we, all of us, must stand with Dred Scott and his spouse, Mrs. Harriet Scott and their siblings, Eliza and Lizzie and with Robert M. Field, Esquire, their brave attorney. Standing also at the bar were White females, people of the United States who counted as such for purposes of representation in Congress but who were denied privileges, immunities and powers reserved to the sovereign people — White males. The Taney Court sought a rationale to circumscribe the majesty of citizenship, not only to Mr. Scott, but also to "Massa's mistresses and concubines." White Christian males abridged those rights and denied the privileges to their beloved wives and their blessed mothers!

For that moment in our history, it may have been appropriate for that Court to have reached the conclusion that "slaves" were not citizens. But once the Honorable William Seward, Secretary of State of the United States, declared the alleged rescision of ratification by the assembly of New Jersey "*invalid*" on November 12, 1880, Negroes were blessed with the accords of "citizenship" in the same manner as the patriots and framers—at least in theory! The fourteenth amendment became a cornerstone of the Constitution for all Americans.

If we are justified in celebrating this bicentennial, it is necessary for all Americans to enjoy the vibrancy of the Constitution and its effective protection must clothe every person, *every citizen*, so that each might assist in effectively preserving the compact. It is not merely necessary, it is *imperative* for all to acknowledge that the fourteenth amendment declares and preserves equal protection to all of the citizens, without reservation or exception.

If the compact is to survive for anyone, it must survive for everyone! And we must rapidly determine that those powers reserved to the people are no longer reserved to White people and that the powers retained by White males are the same powers retained by citizens of darker hue and by female citizens of whatever color of ethnicity. This is the promise of America. Even as we celebrate the bicentennial, it has not yet become America's practice!

In a monumental work on the Constitution, the late Judge Loren Miller

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3. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856) (emphasis added).

4. *Id.* at 407.

5. *Id.* at 404-05.

traced the story of the Supreme court of the United States and the Negro. If you haven't read the book you should. Judge Miller's thesis was:

[T]he Negro [has been] the ward of the Supreme Court [of the United States] for more than a hundred years. As befits a dependent, the Negro has had to solicit the intercession of his guardian when he has sought to exercise rights and privileges enjoyed by *grown-up citizens* as a matter of course. It is such a commonplace, that Americans see nothing remarkable in the fact that Negroes have had to secure Supreme Court decrees in order to do what white Americans can do without question, such as buy or rent homes, vote in primary elections, ride on pullman cars, read daily newspapers in city libraries, loiter around in public parks, eat in bus stations, or swim in the ocean."<sup>6</sup>

The list he so rightly predicted "could be extended." And it could you know. We have begged for equal employment opportunities and our great protector, the Supreme Adjudicator, agreed to fashion appropriate remedies to eradicate the evil system which denies Black college graduates an opportunity to work at their highest skills because that job is given to a White high school drop-out who is permitted an "advantage" of color or accident of his birth or ancestry. All this in violation of the provisions of that compact I have come more than 400 miles to help you celebrate. Encouraged by the United States Department of Justice our great Court, the United States Supreme Court, has vacillated. Unlike the positive posture of the Taney Court, the present Court appears to be "waffling" on the *sacred dignity* of the *sovereign people*.

There are 35 million poor people in this nation of affluence. But the increase in our gross national product is of greater concern than the increase in our unemployment rolls. We are swamped with cute commercials urging us to "Buy American," while Ford Motor Company builds its massive assembly plant in Mexico and telephones and toilet seats, like the shirts and dresses on your backs, bear labels of Taiwan, Korea and Brazil. There is debate across the nation, not about whether something should be done about welfare, but about the minimum standards of living to be maintained by the poor as they struggle to shake their chains of indifference, intolerance and injustice. We debate as thousands of citizens, sovereign people, if you please, in the ghettos and in Tunica, Mississippi struggle to survive! As we celebrate today, we acknowledge that we have not reached any meaningful solution to the hurt of hunger that still persists in this land of plenty, gnawing at the innards of our young and destroying the dignity of their elders. I am pleased that we subsidized the airline industry so that it could grow and develop and I could zip over here from New Orleans in 54 minutes on a 747 with its well stocked bar and built-in kitchen. But I am equally concerned that we refuse to subsidize the poor so they can escape the indignities of unemployment and underemployment. I also would urge that men, women, and children, citizens of these United States, of whatever hue or persuasion, should sleep with something better than card-board for a mattress, newspaper for a coverlet and only an elbow for a pillow!

Should we celebrate. Of course we should! If for no more than to send the message that we are citizens of these United States and we shall not be moved in our quest to make America's resolve our reality.

We must celebrate because we now know that racism must be eradicated

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6. L. MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 8 (1966) (emphasis added).

from our society. No human being should be fettered by the accident of his birth. The declaration that "all men are created equal" is empty rhetoric, if all men and women are not accorded equal opportunity as well as equal access to every advantage afforded by his or her sovereignty as "*the people* . . ." and the White Christian male's definition of a citizen! Even more, if citizens find it difficult to reach the "door" of opportunity, they ought to be given an additional advantage to facilitate its opening to allow them to pass through.

Now that we understand the power inherent in "citizenry" and now that we understand that White males have enjoyed the majesty and magic of citizenship, we must continue the struggle with every muscle and sinew flexed and every brain cell and consciousness of our being. We must attack every vestige of denial of the powers, rights and immunities accorded Americans because they are citizens. Dred Scott and his loving family died as slaves choked by that evil system that built this land for all who are citizens to enjoy. We are their beneficiaries. That same Constitution, which bathes others with an aura of sovereignty, must shower every American with his inalienable rights!

Thus it is fitting and proper that we march through the streets of Forsythe, Georgia, as well as the sidewalks of Howard Beach, New York, not because the Supreme Court has so pronounced but because *citizens* walk freely everywhere their feet or their money can take them.

It is proper to celebrate the bicentennial and note with pride that our sons and daughters study journalism at the University of Georgia and law at Ole Miss, not because the Warren Court opined it so, but because children of other citizens have strolled arm in arm on the campus of Harvard and through the mysterious halls of science at the University of Alabama, without incident facilitated by a badge of citizenship.

Celebrate because Oprah Winfrey has replaced Donahue and we speculate as to whether her 1987 income will exceed \$10 million or exceed \$30 million because American Television stars sell their talents proportionate to the demands of the market and the Nielsen ratings and not because of a Court decree. Celebrate that Calvin Peete will win the Masters at Augusta, Georgia, not because any court has said so, but because citizens have dug out of sand traps and approached fairways with confidence based on skill not color, for two centuries. Let us leave here today knowing why we celebrate.

It is a struggle. This "cause of being a United States citizen" is worthy of our celebrating with *pride* and *conviction*. Proud of the sacrifices and accomplishments of our foreparents in cover-alls and aprons. With a conviction that citizens exercise citizenship as their reward in the *struggle* for freedom, dignity and justice everywhere. While others light a torch, we may light only one candle, but we must never cease to struggle to keep its feeble flame burning for the mutual *benefit* of Black as well as White people. We, of New Orleans and Atlanta, have one thing in common — our citizenship in our respective cities allows us to elect a mayor of any color or ethnicity we choose. We can elect a White man, a Black one, or a Croatian, if you please. That's what this struggle has yielded thus far.

We must also celebrate so that our struggle against the wrongs perpetuated by Americans against its citizenry in school rooms, board rooms and court rooms will guarantee that they are made right. For it is these wrongs, in

their most revolting essence, before a world standing in judgment that makes the ideals of America stand out in stark contrast to its practices. Wrongs perpetuated against the poor, against Native Americans and against minorities of race, religion or ethnicity will inevitably be made right, not because of any court decree but because principles of freedom and justice are not only etched in the cold grey limestone of courthouses in Georgia and Louisiana but everywhere and because the urge to struggle against evil and tyranny is sculptured in the hearts of all our citizens who nurture justice as an endowment of creation and freedom beyond the vicissitudes of men or legal systems. It is a gift to those who stand militant in the likeness of their God!

We celebrate our struggle because we recognize:

If there is not struggle, there is no progress. Those who profess to favor freedom, and yet depreciate agitation, are men who want crops without plowing up the ground. They want rain without thunder and lightning. They want the ocean without the awful roar of its many waters.

This struggle may be a moral one; or it may be a physical one; or it may be both moral and physical . . . but it must be a struggle. Power concedes nothing without a demand.<sup>7</sup> It never did and it never will . . . men may not get all they pay for in this world, but they must certainly pay for all they get!

We celebrate here at Cascade because the battle is two-fold now, we *are* citizens and our "struggle" is a power reserved unto sovereign and determined people!

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7. J. BLASSINGAME. FREDERICK DOUGLAS: THE CLARION VOICE 46 (1976).