Department of Justice

ADDRESS

OF

THE HONORABLE EDWIN MEESE III
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE FEDERAL BAR ASSOCIATION

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WESTIN HOTEL
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As attorneys before federal courts and agencies, you are at the center of some of the liveliest and most controversial issues in the law. And those of you who have been around for a few years are also cognizant of how drastically federal practice has changed.

During the last several decades at least two major phenomena have reshaped our legal system: the increased litigiousness of American society, and the federalization of the law.

The first of these doesn't require much elaboration. The caseloads of all our courts, state and federal, have grown tremendously. Disputes that were once resolved informally, or not at all, are now grist for the judicial mill. As one federal district judge has wryly observed: Litigation has become America's "fastest growing indoor sport."

The second phenomenon, the federalization of the law, is quite related to the first. Since the New Deal new federal agencies have sprouted like mushrooms, creating not only job opportunities for members of the Federal Bar, but entire new arenas for disputants. In areas of workplace safety, health,

labor relations, environmental regulation, and many others, federal law has moved into and sometimes pre-empted areas once exclusively the province of the states. The agencies, bureaus, and offices that have been created to administer these federal concerns have been called, quite properly, "a fourth branch of government."

Relaxed standing requirements, increased use of habeas proceedings, an inflation-lowered amount in controversy test for diversity cases, and judicially-expanded definitions of due process have combined to "federalize" non-regulatory law as well.

And, as none of you needs to be reminded, the responsibilities of the federal lawyer have grown correspondingly.

Some aspects of this legal revolution have been good. They reflect a willingness on the part of our society to take on some difficult questions, such as civil rights and racial discrimination, that for too many years had been ignored. But it also has been a revolution with a high price.

By federalizing so many issues we have shifted the forum of dispute resolution away from our communities, away from our local governments and courts, to Washington. By creating an immense federal beauracracy to regulate, promulgate -- and, too often, obfuscate -- with regard to federal legal matters, we have

lost an ability to affix responsibility; and that is an ability central to the health and success of our democratic government.

Tonight I want to talk about responsibility. How we lost it, what we in the Reagan Administration and at the Department of Justice are doing about it, and what remains to be done. By responsibility I don't mean simply a legal definition of liability. I mean the ability of the people to identify and hold accountable -- for both the good and bad -- their government officials. As with so many troublesome legal issues, a good place to start looking for answers is with the Founding Fathers.

The men who wrote the Constitution were keenly concerned with accountability. They were too familiar with the dangers of despotic authority and the weaknesses of an unwritten constitution to leave the spelling out of authority and the accumulation of power to chance. The Founding Fathers could not anticipate all the problems with which government would eventually grapple, but they could do at least two things: they could count and they could divide. They created a federal government of <u>three</u> well-defined branches. And they carefully enumerated the powers and responsibilities of each. With a few exceptions, such as the veto and impeachment powers, they vested the legislative power <u>solely</u> in the Congress, the executive power <u>solely</u> in the President, and the judicial power <u>solely</u> in the courts.

This constitutional plan has served us well for almost two hundred years. But I would submit that some of the chief problems of government today stem from the fact that how the federal government works in practice doesn't always resemble how it is supposed to work according to the Constitution. It is a problem of too much and too little. It is a problem of the various branches of government often failing to fulfill their constitutional responsibilities and at the same time seeking to exercise other powers they do not constitutionally possess.

While the Framers recognized the tendency of power to be, as James Madison put it, "of an encroaching nature," one wonders whether the contemporary shirking of responsibility might not surprise them.

There is probaby no group who understands better how the federal government really works than the members of the federal bar. You see it, as one sportscaster is fond of saying, "up close and personal." You tangle routinely with the participants of our modern Administrative State.

Let me share with you the thoughts of one distinguished lawyer on what really comprises the federal government.

> The rise of the administrative bodies probably has been the most significant legal trend of the last century . . . . They have become a veritable fourth branch of Government, which has deranged our three-branch legal theories . . .

That's pretty strong stuff. And it wasn't even written by a member of this Department of Justice, or even of the current Administration. Those are the words of Justice Robert Jackson, dissenting in a case decided in 1952.

Since that time the problem has only grown more acute. Increasingly, the real law making power in Washington is wielded neither by the Congress or the President, but by relatively anonymous members of the federal agencies.

Why should this concern us? After all, don't these agencies bring a special degree of expertise to problems? And in the cases of those staffed by career civil servants and directed by appointees whose terms are not coincident in duration with that of the President, don't they seem to be "bi-partisan" or even "non-partisan" to boot?

Well, there are good reasons it should concern us. Principal among them is the fact that excessive agency independence serves to defeat accountability in government.

There is a story that during his administration President Kennedy became exasperated over the fact that his direct orders were not being implemented as policy. So in desperation, President Kennedy finally decided to find the weak links in the chain of command himself. He lined up, in the Oval Office, each

person responsible for transmitting his instructions, from his Chief of Staff down through the poor employee of the office actually responsible for implementing the directive. He then asked each one to tell him exactly the instruction he had received from his immediate superior. It was a lot like playing the child's game of "pass it on" at a birthday party to laugh at how garbled a message can become. But government is no child's game. Administration of political power must be both equitable and efficient; both responsive and responsibly. No doubt the little Oval Office episode confirmed President Kennedy's worst suspicions.

President Reagan has not yet taken such a step. But the Kennedy story does illustrate the difficulty any President has in directing the very government he is elected by the people to lead. The problem is compounded when real law is being made by individuals whose positions are secure, who are directly responsible neither to the President nor to Congress; and who are answerable, if at all, only to judicial review.

I suppose at this time some of you might expect me to say something critical about judicial review. Well, I'm not about to. It's true there is a case to be made against judicial activism, but now is not the time. Instead, I want to note that the courts have often been placed in an untenable position by the irresponsibility of the other branches of government.

Agencies have no inherent lawmaking powers. They are not creatures of the Constitution. Any power they have must be assigned to them. This is where the problem lies.

The Founding Fathers were familiar with the writings of John Locke, who properly argued that "The Legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." Thus arises the theory of non-delegation, the doctrine that Congress cannot surrender the lawmaking power.

It is true of course, that the complexities of modern life make congressional management of all rulemaking impossible. But it also remains true, as the Supreme Court has reiterated on various occasions, that congressionally-assigned power must be accompanied by "intelligible principles" which will give agencies a standard for rulemaking. A carte blanche grant of power should not pass constitutional muster.

Two problems often occur in the enactment of some laws. On the one hand Congress sometimes grants overly broad discretionary authority to the agencies, thereby abandoning its constitutional responsibility. On the other hand, when Congress does choose to address problems legislatively, it too often ducks hard issues and drafts legislation in a purposely ambiguous manner. The courts, and for that matter the agencies, are left with vague

standards and amorphous admonitions to do whatever is "reasonable" or "fair."

This amounts to a convenient political sleight-of-hand. And when the Executive or the Judicial branches later undertake to resolve the contradictions, conflicts, and ambiguities inherent in such legislation, they become the subjects of controversy.

This dilemma is not new. Justice Felix Frankfurter is famous for once remarking that a Justice of the Court had to be a historian, philosopher, and prophet; he would perhaps have been willing to add "translator", or perhaps "magician", to his list of helpful judicial qualifications.

When ambiguous statutes provide the agencies and courts with too little legislative guidance, those institutions frequently make actual decisions (so Congress later tells us) that are at odds with what Congress supposedly wanted to do. A current example of this is the controversy in the aftermath of the Grove City case, which finds Congress trying to redraft the civil rights laws to overcome a Supreme Court decision interpreting the statute in question as permitting the kind of activity some Congressmen thought the legislation had forbidden. The courts often end up accused of "judicial activism" or "thwarting the will of Congress."

Such legislative ambiguity also produces backhanded efforts to redress the problem, such as the legislative veto.

I'm sure that most everyone here is familiar with the controversy over the legislative veto in light of the Supreme Court's decision in the Chadha case, which struck down the legislative veto on separation of powers grounds. But the looming question is now: what next? In the post-Chadha era what can be done to increase responsibility and accountability?

Well, I have some suggestions. In some ways they may sound like new, or even radical proposals. But don't be mistaken, I'm not Captain Kirk. I don't intend to "boldly go where no man has gone before." Instead, to borrow the theme of a currently popular movie, the most effective means of increasing responsibility may be to go "Back to the Future", to recapture a proper sense of how the Framers of the Constitution intended the federal systems to work.

This means we should abandon the idea that there are such things as "quasi-legislative" or "quasi-judicial" functions that can be properly delegated to independent agencies or bodies. Such language has in the past been employed by the Supreme Court, but it is unhelpful in clarifying legislative responsibility. Congress may grant rulemaking authority within limits, but such that authority may itself be assigned only to bodies with legitimate constitutional standing.

In other words, federal agencies performing executive functions are themselves properly agents of the executive. They are not "quasi" this, or "independent" that. In the tripartite scheme of government a body with enforcement powers is part of the executive branch of government. Power granted by Congress should be properly understood as power granted to the Executive.

I believe that the Chadha decision represents an important breakthrough in this area, a return to a better understanding of the proper delineation of executive versus legislative authority. It is a movement towards constitutional clarity and enhanced accountability.

It should be up to the President to enforce the law, and to be directly answerable to the electorate for his success or failure in carrying out this responsibility.

The second important way to increase accountability is something now underway -- and that is making those executive agencies already clearly answerable to the President more accountable. Several important steps have already been taken.

Through Executive Orders 12291 and 12498, President Reagan has put into place a system of presidential oversight of agency rulemaking. We have imposed rulemaking standards on executive branch agencies, to the extent permitted by law. Under

these orders agencies now prepare what is called a "regulatory impact analysis" for major new rules. Such a statement includes a cost/benefit analysis of the proposed rule. Under these orders the President, through the Office of Management and Budget, retains oversight over rulemaking by executive agencies to ensure that the factual and legal bases for new major rules are carefully scrutinized, that new rules are consistent with Administration policies, and that they maximize benefits to the American people.

Additionally, on the substantive side, the Administration believes that government accountability is increased when needless and burdensome government regulations are eliminated, thereby allowing the government to do a better job in enforcing those regulations that are clearly essential.

Accordingly, first through the work of the Vice President's Task Force on Regulatory Reform and now by OMB, the number of new federal regulations has been substantially reduced, with the number of pages in the Federal Register dropping by over 40 percent between 1980 and 1984. This combing of Federal Regulations has been a daunting task. But it is a job that had to be done, and that must continue. By eliminating unnecessary regulations, we make real headway.

These steps reflect progress. They reflect a commitment on the part of the President and the Administration to make

government more accountable. If matched by a similar commitment on the part of Congress to make hard policy decisions in legislation, and provide the executive agencies with clear standards, it would go a long way toward making government work responsibly.

Before closing, I would like to address one other aspect of responsibility, and that is the development of responsible fiscal policies and process.

In the past year we have seen new evidence of the inability of the current budget activity to hold federal spending within the limits of the government's income. Something has to be done to break this institutional deadlock. Congress has become the captive of what is called the "tragedy of the commons," the dilemma where although each congressman, and each interest group, knows that everyone would be better off if special benefits and federal spending were curtailed, each congressman and interest group is aware that if he loses his special project or subsidy he will be particularly hurt. The upshot is that nothing is cut, and federal spending continues to rage out of control.

It is obvious that the federal government needs new legal shears to prune spending growth. President Reagan has asked Congress repeatedly to give him line-item veto authority over the federal budget, the kind of authority that most state governors, including the governor of Michigan, already enjoy.

he expressed it, if Congress won't take the heat for budget cuts he will, and he'll enjoy it.

But more fundamental changes are needed, too. When the Michigan legislature reconvenes it will be taking up the question of asking Congress to call a new constitutional convention to consider a balanced budget amendment to the Constitution. This would be a dramatic step. But in the past similar actions on the part of the states have persuaded Congress to move off center and propose needed constitutional changes. It is my hope that Congress does act, and act soon, to propose a constitutional amendment demanding a balanced budget.

These, then, are a few of the steps that can, and in some cases are, being taken to increase responsibility in government. But in closing I would remind you that the Administration can only do so much on its own. Many of the most necessary changes will only come about only if an aroused electorate will demand that the other branches of government take the necessary corrective measures.

There is an old story that Justice Oliver Wendell Holmes once found himself aboard a train, and was without a ticket when the conductor came came through. The conductor, recognizing Holmes, told him that no ticket is needed in his case. But Holmes said to the conductor, "the problem is not where is my ticket, but where am I going?" I hope in these

remarks I have given you some sense of where the Administration is headed, and have done something to enlist your support in helping us get there.

Thank you.