REMARKS BY THE ATTORNEY GENERAL
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There is something in the air of Williamsburg -- a scent of American history -- that breathed deeply draws the mind back to the origins of this unique republic. America has not always been the great economic and military power to which we and the world have grown so accustomed. Since its beginnings, however, this Nation has always been something grander. Our country was founded upon a novel idea -- the idea of liberty. Its federalist system of government was designed to perpetuate and preserve free institutions and a free people.

Just last Tuesday night, in his State of the Union Address, the President placed renewed emphasis upon the role of federalism in our system of government. He noted: "This Administration has faith in State and local governments and the constitutional balance envisioned by the founding fathers." In recent years, however, too few federal officials have shown full faith in the other levels of government in this country -- and a recognition of the faithful governing that they do every day.

In No. 45 of The Federalist Papers, James Madison admonished:

> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State."

In Federalist No. 46 Madison reemphasized the same point even "[i]f...the people should...become more partial to the federal than to the State governments...." As Madison warned, "it is only within a certain sphere that

the federal power can, in the nature of things, be advantageously administered."

In the nearly two centuries since the publication of The Federalist Papers -- and the adoption of our Constitution -- federal officials have too frequently thwarted valuable state and local government efforts. In its contemplation of the Supremacy Clause, the federal government has sometimes forgotten that state and local officials also swear adherence to the U.S. Constitution and often know how best to govern the affairs of their own states.

Nearly fifty years ago, Justice Brandeis wrote the following:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the country."

Experiments attempted by the federal government inevitably affect the entire country. Those attempted at the state level, however, present less of a risk -- what doesn't work can be more easily changed, and what does work can be taken up by other states on a broader and firmer basis.

It was against a background of federal insensitivity to the role of the States, however, that the Reagan Administration entered office one year ago. We were in a situation not unlike one faced by Justice Oliver Wendell Holmes. Holmes, so the story goes, found himself on a train. Confronted by the conductor, he couldn't find his ticket. Recognizing the distinguished jurist, however, the conductor told him not to worry, that he could just send in the ticket when he found it. Holmes looked at the conductor with some irritation and replied:

> "The problem is not where my ticket is.
>
> The problem is, where am I going?"

For years, the federal government seemed as if it didn't know where it was going in its rush to find federal solutions to public problems. President Reagan knew, however, that a more effective federal approach would require a greater recognition of the importance of state governments.

The Reagan Administration is acting on that basic principle of federalism. Today, I want to outline some of the steps the Justice Department is taking to make federalism more of a reality.

Symbolic of our concern for state and local government is, for example, our new litigation notice policy. Under this Administration, the Justice Department will give prior notice to state governors and attorneys general before commencing any litigation against entities of state government. We will consult with the appropriate state officials, and we will defer to the state policy decisions whenever that is legally permissible. As a result, more potential controversies can be resolved without confrontation.

In many other ways, moreover, the Department will show greater concern and appreciation for the role of state and local government in our system. For example, our crime program has been constructed to reflect that concern.

As I mentioned in my remarks last evening, the Administration has proposed a comprehensive program to improve the federal effort in our Nation's fight against crime. The proposed Federal Criminal Code that forms part of that program contains over 100 significant improvements in federal criminal law. In addition, the package addresses some twenty other areas of criminal justice -- and contains another forty legislative proposals and fifteen administrative initiatives.

The first goal of our crime package is to ensure full federal cooperation with state and local law enforcement -- and to direct federal resources more effectively against the different crime problems experienced in different localities. To achieve that end, I have directed each U.S. Attorney to create a Law Enforcement Coordinating Committee and to develop -- in conjunction with state and local law enforcement -- a plan that recognizes local and state criminal justice priorities. The proposed Federal Criminal Code would reenforce that commitment to state and local priorities by explicitly authorizing federal law enforcement to

decline or discontinue use of federal concurrent jurisdiction whenever an offense can be effectively prosecuted by the states and there is not a substantial federal interest in the prosecution.

By employing federal resources -- including concurrent jurisdiction -- in response to the specific crime problems that are perceived to be most serious in particular localities, federal law enforcement can and will make a bigger difference in the fight against crime. Through enhanced cooperation -- for example, the Law Enforcement Coordinating Committees and the cross-designation of prosecutors in both state and federal systems -- all levels of law enforcement can begin to employ their resources in unison and in accordance with the strengths each can contribute to the fight against crime. When there is concurrent jurisdiction, cases developed by federal, state, and local investigators could then be presented in the judicial system best suited to the facts, statutes, sanctions, and space on the dockets.

Tonight, I also want to announce another federalist initiative that will affect state judicial systems. We recognize the need for some change in the relationship between federal and state courts.

Some tend to forget that most of the judging done in this Nation is done by state -- not federal -- courts. By 1980 at least five million cases were being filed annually in the state court systems and the local courts of the District of Columbia and Puerto Rico. In fact, depending upon definition and estimation, the actual number could be more than twice that large. On the other hand, less than 170,000 lawsuits were filed in federal courts. Although there are some 17,000 courthouses in the country, less than two percent are federal courthouses.

This does not mean, however, that the federal courts are unimportant -- only that, by an overwhelming proportion, most of the legal rights vindicated in this country are vindicated in the state courts. Unfortunately, it also means that the federal courts sometimes interfere too extensively in the operation of the state court system.

One type of interference is quite familiar to all of the state chief justices in the audience -- the current availability of federal habeas corpus for those convicted in state courts. Next week the Department of

Justice will transmit to the Congress proposals to amend the habeas corpus statutes to correct abuses which have developed and restore finality to criminal convictions without undermining the protection of federal constitutional rights. Our proposals will recognize and foster the independent stature and dignity of the state courts.

The problem in this area has long been clear. Considering the availability of habeas corpus in 1970, Judge Henry Friendly was moved to paraphrase Winston Churchill. He noted that after state trial, conviction, sentence, appeal, affirmance and denial of certiorari by the United States Supreme Court, the criminal process was not at an end, or even the beginning of the end, but only the end of the beginning. There were nearly 7800 habeas filings by state prisoners in federal courts in the year ending in June of 1981. And that number fails to take account of the number of appeals filed in the federal appellate courts from denials by the federal district courts. Thirty years ago, your Conference of Chief Justices complained that federal habeas filings by state prisoners caused "inordinate delays," "grave and undesirable" federal-state conflicts and "the impairment of the public confidence in our judicial institutions." In 1953, Justice Robert Jackson expressed his concern over the "floods of stale, frivolous and repetitious petitions [for federal habeas corpus by state prisoners which] inundate the docket of the lower courts and swell our own." Although that flood reached a peak in 1970, the number of petitions filed last year was over fourteen times as great as when Justice Jackson complained of the inundation. Of further concern, last year saw a disturbing eleven percent increase over the preceding year.

Not only is the number of filings large in itself, but it must be remembered that these are not new cases. They are cases which have already been through the state court system -- and usually through state collateral proceedings as well. The question perhaps should not be how many such filings there are but why there should be any at all. This Conference of Chief Justices itself, in a resolution adopted last August, noted that "a substantial number of duplicative, overlapping, and repetitive reviews of state criminal convictions in the federal courts unduly prolong and call into question state criminal proceedings without furthering the historic purposes of the writ of habeas corpus."

The costs of the current broad availability of habeas corpus have become clear. The continual availability of the possibility of relief has turned many prisoners into writ-writers who never confront the fact of their guilt and get on with the process of rehabilitation, but view the criminal process as an ongoing game in which they are still active contestants. The same appearance is conveyed to the public, with a consequent and deserved loss of respect for the criminal process. Questions may be raised on federal habeas corpus long after witnesses and participants have vanished from the scene, making not only response to the petition but retrial difficult. Gathering witnesses and relevant material is often expensive and time-consuming if required long after the event in question. And, as Justice Jackson has put it, "it must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."

I do not have to tell this audience that the broad availability of federal habeas corpus for those who have been convicted after a full and fair trial in state court, with appellate review, represents a serious strain on federalism. In our view, it is an excessive strain.

Our first proposal involves redetermination of matters previously adjudicated in state proceedings. Under current law there is a somewhat odd contrast between redetermination of factual issues and redetermination of legal issues. No federal evidentiary hearing is required on a factual matter determined after a full and fair hearing in state court, and state court findings are treated as presumptively correct. No similar deference exists concerning legal issues. It is as if state judges were considered adequate fact-finders but incapable interpreters of law.

In historical terms, the disparate treatment of the re-examination of factual and legal issues is a relatively recent innovation. It does not appear that a distinction of this sort was recognized prior to 1953 and the decision of Brown v. Allen. In the 1944 decision of Ex Parte Hawk, for example, the Supreme Court stated that "[w]here the state courts have considered and adjudicated the merits of...[a petitioner's]...contentions...a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated." No distinction was drawn in the statement of the rule between factual and non-factual questions.

We will propose legislative repeal of the rule requiring routine re-determination by federal courts of legal and mixed legal-factual determinations of the state courts. Where an issue -- whether factual or non-factual -- has been fully and fairly adjudicated in state proceedings, a federal court need not and ordinarily should not undertake an independent examination of the issue.

As one state appellate judge wrote in an article published last year:

> "If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable.... State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a full and fair adjudication has been given in the state court."

That is the step we will urge Congress to take. By the way, the author of the passage just quoted is no longer a state court judge. She now sits on the U.S. Supreme Court.

Our second proposal relates to claims that could have been raised in state proceedings, but were not raised at the time or in the manner required by state procedural rules. With the decision of Wainwright v. Sykes in 1977, the Supreme Court instituted a salutary reform in the standard governing the effect of such "procedural defaults," requiring proof of actual "prejudice" and "cause" justifying the default. The question of what constitutes "cause" under this standard has been the subject of considerable litigation. The question has been presented most frequently when an attorney's failure to raise a federal claim may reflect questionable judgment, but does not rise to the level of constitutional ineffectiveness. Under our proposals, lesser degrees of attorney error or misjudgment would not be recognized as adequate cause for failure to raise the federal claim in a state proceeding.

Our third proposal relates directly to the problem of finality. Under current law, habeas corpus petitions can be brought at any time, without limitation. The practical effect of this approach is that petitions are sometimes brought many years -- or even decades -- after the conclusion of state proceedings. The practical difficulties of reconstructing occurrences after so great a span of time has elapsed are apparent. Although the habeas rules do incorporaate vague notions of laches, such an approach depends on a balancing of equities, over which reasonable differences of judgment will often be possible. Hence, they presently afford no definite end to litigation.

I believe that the present approach to delayed filings in habeas corpus petitions does not accord appropriate weight to the importance of finality in criminal adjudication. Accordingly, our legislative proposal will include a limitation period applicable to habeas corpus petitions by state prisoners.

All of the issues I have discussed this evening reflect one basic point. This Administration and Department of Justice believe wholeheartedly in our Constitution and the federalist system it created. In our dealings with the states, we will exhibit a renewed federal sensitivity to the legitimate exercise of their responsibilities under the Constitution.

The Great British statesman Gladstone once observed that the United States Constitution is "[t]he most wonderful work ever struck off at a given time by the brain and purpose of man." It truly is a "wonderful work." It created a multi-faceted system that restrains government from abusing its power, ut allows government to exercise its powers effectively. Implicit in that document is a remarkable realism -- an understanding that no one insitution, no one branch of government, no one level of government possesses all the wisdom needed to govern well.

In a speech to the Constitutional Convention, Benjamin Franklin summed up both the insight of the Founding Fathers and the nature of our constitutional system when he said:

> "I cannot help expressing a wish that every member . . . doubt a little of his own infallibility."

It is time the federal government recognized its own fallibility. It is time the federal government recognized the contributions to governing America of which the states are capable. This Administration will do exactly that.