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OF

BY

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BEFORE

THE AMERICAN ENTERPRISE INSTITUTE AND THE UNITED STATES
DEPARTMENT OF JUSTICE BICENTENNIAL CONFERENCE ON
"HOW DOES THE CONSTITUTION ESTABLISH JUSTICE?"

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NOTE: Because Mr. Meese often speaks from notes, the speech as delivered may vary from the text. However, he stands behind this speech as printed.

Thank you. I am very pleased to be here this morning, and very glad that the American Enterprise Institute has joined with the Department of Justice in celebrating the Constitution by means of this conference.

Whenever a conference centering on the Constitution is organized -- as many have been in this Bicentennial year -- it is useful to pick some sub-topic that will help focus the papers and the comments. In this regard, those designing this conference have been audacious indeed. For we have been asked to look at the dauntingly broad question: how does the Constitution establish justice?

I don't mind saying that I am glad to be merely introducing this conference. After all, the topic calls for us to look at the concept of justice itself, which has been profoundly debated for centuries by the greatest religious leaders and philosophers.

In the Old Testament, justice is closely tied to reverence towards God. Interestingly enough, pagan Greece also linked justice and reverence. In Plato's dialogue Protagoras, the title character tells a story about how Hermes asked Zeus whether he ought to distribute the virtues of justice and reverence to everybody, or only to a few.

"To all," said Zeus; "I should like them all to have a share; for cities cannot exist, if a few only share in the virtues, as in the arts. And further, make a law by my order, that he who has no part in reverence

and justice shall be put to death, for he is a plague of the state."

No doubt about it, the ancient Athenians were serious about justice and reverence. We may be glad that today, most of the time, the maximum penalty for being deemed deficient in justice and reverence is that you get pilloried in the op-ed pages.

Socrates, Plato tells us, tried to explore further the meaning of justice. In the greatest Platonic dialogue, The Republic, Socrates is confronted by a young man of political ambition, Thrasymachus, who tells him that justice is simply the interest of the stronger. The rest of the dialogue is largely Socrates's effort to lead Thrasymachus and his friends to a nobler notion of justice.

Aristotle identified the just with the proportional, and the unjust with the disproportionate. He also called justice "the principle of order in political society." That is, it is the basic principle on which all political order must rest.

Justice in this sense was of great concern to the ancient Romans, with their long centuries of republican government before the coming of the Empire. Cicero, who was a practical statesman of the late republican period as well as a philosopher, believed in natural, objective principles of justice, and railed against the positivists and relativists of his time. In his book The Laws, for example, he said:

If, as some people insist, justice is nothing more than a conformity to written laws and national traditions, and if everything is based on a standard of expediency, then anyone who sees something in it for himself will go ahead and break the law. If this were our point of view, we could only conclude that there is no justice....

Further along Cicero says:

In fact, we can tell the difference between good and bad laws only on the basis of nature. Nature not only distinguishes between the just and the unjust, but also between what is honorable and what is dishonorable. Since our common sense helps us to understand and conceptualize things, we do ascribe honorable actions to virtue and dishonorable actions to vice. Only a lunatic would assert that these judgments of ours are merely opinions and not based on natural law.

I have thought Cicero worth quoting both because of his own eloquence and because he and the other statesmen of the Roman Republic were held in such high esteem by our own Founding Fathers.

The coming of Christianity added one element that had been only imperfectly visible -- or else absent altogether -- in previous philosophies of justice: the element of mercy, and of

giving better than you get. Numerous passages proclaim the virtues of forgiveness and compassion toward wrongdoers, rather than the more rigid formula of "an eye for an eye -- tooth for a tooth."

It was left to later Christian philosophers to apply the new faith to political reality. The first to do this systematically was St. Augustine, in his writing, The City of God. He wrote at a time when new kingdoms were being formed by what were basically bands of marauding tribesmen, on the territory that had been the western half of the Roman Empire. When did a band of marauders become a kingdom worthy of the name? According to Augustine, when such a body began to implement justice.

Some nine hundred years later, St. Thomas Aquinas returned to some of the same problems, and also to Aristotle. Following Aristotle, Aquinas divided justice into commutative justice, which is basically the law of fair exchange and of contracts, and distributive justice, which has to do with rights.

It is the former that primarily interested Adam Smith and the other theoreticians of the free-market economy, because without adequate commutative justice, there is no guarantee for contracts, and therefore, little or no commerce. As Smith put it in The Wealth of Nations:

Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not

feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay.

These are some of the major ideas that have come up over time on the subject of justice. By citing at the end Adam Smith, who published the Wealth of Nations in 1776, I have conveniently taken the subject down to the same year as the Declaration of Independence.

Now the men who signed that document and those who subsequently framed the Constitution and Bill of Rights were men well aware of the best that had been thought and said, from Old Testament times to their own, on the subject of justice. And I think it appropriate to say, by way of introducing this conference, that they agreed with two points often made in the great tradition of the West. One is that unique to man, of all creatures, is the capacity for moral judgment, for declaring something right and something else wrong. The second, a related point, is that law and political society arise from this unique capacity. As Aristotle put it, "It is the peculiarity of man in comparison with the rest of the animal world that he alone possesses a perception of good and evil, of the just and the unjust; . . . and it is association in [a common perception] of

these things which makes a family and a polis" or political community.

So it is that the preamble to the Constitution states that "we the People of the United States" do "ordain and establish this Constitution" in order, in part, to "establish justice." And so it is that James Madison, the Father of our Constitution, wrote the fifty-first number of the Federalist that "justice is the end of government and the end of civil society."

Yet it is important to note, indeed it is vitally important to note, that the government established by the Constitution does not seek to obtain justice at any cost. In this respect, the Framers broke with the past. They were aware of how governments in ages past, in the pursuit of justice and virtue, had trampled on the rights of individuals and denied liberty. And it was to secure the rights of man -- rights declared in the Declaration of Independence -- that our government was instituted by means of the Constitution. It was for the cause of liberty, after all, that the War for Independence was fought.

So it is in discussing how the Constitution secures justice that we find the Framers in agreement with this inherited tradition of classical philosophical thinking, yet also in disagreement. Justice is the end of government, yes. Concern for justice beats in the heart of every man, yes indeed. But government must not seek justice in such a way that liberty is denied.

Madison, again, contributes much to our analysis. The full text of that passage in Federalist 51 reads as follows: "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." The key words in that passage are the last seven: "until liberty be lost in the pursuit."

For the Framers, liberty and justice were closely related. Indeed they were mutually essential. It is no coincidence that our pledge of allegiance refers, in the same famous phrase, to "liberty and justice for all." Doubtless these two ideas will frequently be discussed -- in the same sentence, no less -- over the next two days.

In closing, I would like to observe that the Constitution, considered from start to finish, was indeed designed in order to secure liberty and establish justice. The Framers' new science of politics informed the Constitution, and its principles provide a starting point for any discussion of these concepts of liberty and justice. One of those principles, of course, is that of an independent judiciary, and it is entirely appropriate, indeed necessary, that major portions of this conference be devoted to the role of the courts in our constitutional democracy, and in particular to their power of judicial review. But the Framers themselves understood that the other features of their science of politics also secured liberty and established justice.

Representation, separation of powers, federalism, the concept of an extended commercial republic -- each of these principles is relevant to the conference topic.

As we examine such ideas as "original intention", "constitutional interpretation", "the securing of rights", and the other subjects on the ambitious agenda of this conference, the timeliness and vitality of these discussions demonstrate the vibrant and enduring nature of our living constitution on its bicentennial anniversary.

Thank you very much.