

REMARKS OF THE ATTORNEY GENERAL
NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
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I am delighted to be here today -- and to have the opportunity to address my fellow Attorneys General. I want to offer a few remarks on a subject to which I have given a great deal of thought, a subject central to the formation of our federalist system and to its effective continuation -- the role of the state governments. Too often, officials of the federal government -- and even the people of this country themselves -- have ignored Madison's admonition in Federalist No. 45:

"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 continued to emphasize 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 failed to reflect upon this latter point: "[I]t is only within a certain sphere that the federal power can...be advantageously administered." All of you, who are responsible for the effective operation of the State legal systems, know what I mean. Too often, the federal government has tried to do too much. In the process it has thwarted valuable state and local government efforts. In our contemplation of the Supremacy Clause, we at the federal level have 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.

As I consider the over-reaching role of the federal government -- the Judicial, Legislative, and Executive Branches -- I am reminded of the story of a Chinese Wise man reputed to have tremendous insight into every kind of problem. One day a merchant sought the wise man's advice about a problem in his accounting department.

The merchant said: "I have six men and six abacuses. My business has expanded so much, however, that I need a twenty percent increase in output from the accountants. Unfortunately, even if I could afford it, adding another accountant wouldn't be enough to increase the output by twenty percent and two would be too much."

The wise man thought about the problem for several days, then summoned the merchant. "The solution to your problem is easy," he said. "Each of your six accountants must grow another finger on each hand. That will increase your abacus output by twenty percent exactly."

Pleased that there was a solution, the merchant started to leave. Then, he stopped and asked: "Oh, wise one, but how do I get my people to grow extra fingers?"

The wise man replied: "That's a good question. But, alas, I only make policy recommendations. The details of execution are up to you."

It is time that the federal government admitted that good theoretical policy is not necessarily the same as policy that works. It is time the federal government recognized that state and local officials are often better suited to determine what policies can be effectively and beneficially executed.

The Reagan Administration -- including the Department of Justice -- intends to act on those principles. Today, I want to outline some of the steps the Justice Department is taking to make those principles a reality.

For example, symbolic of our concern for state and local government is 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. Both our litigating strategy in the federal courts and our crime program are being constructed to reflect that concern.

To combat crime, new approaches are necessary. Much of what has been tried in the past has not proved very successful. In the last decade, for example, violent crime has nearly doubled. During the same period, the federal government increased its total annual spending on criminal justice nearly four-fold. And state and local governments more than tripled their spending. Clearly, something is missing from our efforts besides increasing dollars.

Less than six weeks ago, I announced the Reagan Administration's comprehensive program to improve the federal fight against crime. Many of its features resulted from recommendations made to our Violent Crime Task Force by state attorneys general here today. A new proposed Federal Criminal Code that forms one part of that package 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. It will streamline and improve the effectiveness of federal law enforcement without offending the essential balance between state and federal jurisdiction.

The cornerstone of this sweeping program, however, is one initiative that will help to make the others effective -- the creation of Law Enforcement Coordinating Committees and the development of 94 different federal law enforcement plans that recognize local criminal justice priorities.

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 specific crime problems experienced in different localities. Since the primary responsibility for fighting crime rests on the state and local level, we are going to restructure the federal effort to lend real assistance to state and local law enforcement. We must reverse the trend in recent years toward federal law enforcement officials' deciding their own priorities without fully consulting state and local officials. U.S. Attorneys and federal law enforcement entities must not take an elitist approach to their role in enforcing the law. They have frequently focused their resources on specific types of cases without consulting local authorities.

For example, in several cities in this country where heroin is a major problem, U.S. Attorneys' offices had been declining prosecution when the amount of heroin involved was perceived as too small. As a result, many cases that could have been dealt with in the federal system were processed through state and local criminal justice systems whose resources and facilities were at the breaking point.

In some cities, local district attorneys must handle many times the number of felony cases brought in the U.S. Attorneys' offices next door. Yet some of those district attorneys' offices do not have comparably greater prosecutorial resources; do not have a speedy trial act to ensure swift justice; and do not have room in state prisons.

Therefore, I have directed implementation of a program that requires all U.S. Attorneys and other

federal law enforcement officials to emphasize careful consideration of the resources and priorities of state and local law enforcement.

In each district, we are forming a Law Enforcement Coordinating Committee. Federal law enforcement officials will meet with the appropriate state and local enforcement officials to discuss the community's most important crime problems upon which federal resources can have an impact. Next, the U.S. Attorney will develop a plan for using federal resources and jurisdiction to achieve the maximum impact on the most serious crime problems facing that community.

Federal officials will then work together with state and local officials to put the plan into effect and to allocate federal resources. Federal law enforcement already emphasizes five areas: violent crime, drug enforcement, organized crime, white collar crime, and public corruption. Through the new Law Enforcement Coordinating Committees, local communities can ensure the establishment among these areas of local federal priorities that will prove most valuable to each community.

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 cross-designation of prosecutors in both the 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 docket.

The concept of Law Enforcement Coordinating Committees depends upon the discriminating use of federal concurrent jurisdiction to target federal resources upon the different needs felt by different localities. For example, at least one-third of the federal criminal cases pending at the end of last fiscal year involved an exercise of our concurrent jurisdiction over violent crime or conduct directly related to violent crime.

We are now also proposing some expansion of that federal concurrent jurisdiction. The proposed Federal Criminal Code would permit federal prosecution of any violent or serious crime committed during the course of any other federal offense. It would also expand or enhance federal jurisdiction over murder for hire, large-scale arson, the leaders of enterprises engaged in organized crime, and persons who facilitate or solicit federal crime.

Through Law Enforcement Coordinating Committees -- and, as a result, the more appropriate use of federal concurrent jurisdiction and resources -- we can make a difference in fighting crime. By employing our resources in unison with state and local efforts, we can improve the security of our communities.

Clearly, the federal government can greatly assist states and localities by directing its law enforcement resources against those problems of greatest local concern. It can also assist state criminal justice systems by ending excessive federal court review of state criminal convictions through nearly unlimited federal habeas corpus. Our proposal in this area would provide for broader deference to the state judicial processes without jeopardizing the legitimate protection of fundamental federal rights. It would reduce the substantial commitment of resources presently required of the states and the federal courts to deal with federal habeas corpus petitions by convicted state prisoners.

Although there are many ways in which our initiatives would assist state and local law enforcement, the measures concerning corrections provide direct and immediate assistance. We have established a Clearinghouse in the Federal Bureau of Prisons to facilitate the transfer to states and localities of surplus federal facilities that could be used as a less-expensive, short-term way to ease the crowded condition of state and local prisons. Although the first such transfer has already occurred, it will not be the last. Indeed, we are seeking legislation to enhance this program -- and will support legislation to make federal vocational education funds available to state and local corrections.

Similarly, we have established a National Corrections Academy to improve the training available to state and local corrections officers through the National Institute of Corrections. In addition, other federal training programs are being established to improve the

operation of state and local corrections facilities. Last, the Bureau of Prisons is giving emphasis to housing in federal facilities those state prisoners who represent the greatest burdens upon state facilities.

We will also work to improve the effectiveness of federal involvement in the training of state and local government attorneys -- through better coordination and advance information about available resources and programs. In addition, the Justice Department will be providing assistance to states in the implementation of new case management systems.

The federal criminal justice system assists the state and local fight against crime in two other important ways. First, state and local governments can devote fewer of their resources to those crimes the federal government attacks effectively -- such as white collar crime, organized crime, and public corruption. Second, when the federal system reflects the best approaches gleaned through the Nation, it then serves as a model upon which state and local law enforcement can confidently build.

Both of these processes are furthered by improvements in the federal approach to fighting crime. Therefore, many of the initiatives contained in our crime program are aimed specifically at improving the federal system itself -- and would thereby further assist state and local law enforcement.

Just a few of the important improvements include:

- We are enhancing the federal effort, on both the domestic and international levels, against drug trafficking and use. That effort will directly utilize the resources of both the U.S. Navy and the FBI. It would include the responsible use of herbicides against foreign and domestic marijuana crops, increased penalties for large-scale drug trafficking, and a mandatory prison term for heroin trafficking.
- We will seek to restore the balance between the forces of law and the forces of lawlessness. We are proposing a modification of the exclusionary rule so that reasonable, good-faith action by law enforcement does not result in the release

of the lawbreaker. In addition, we are proposing new and honest sentencing provisions that add certainty to the judge's sentences and eliminate excessive flexibility. Similarly, our proposals would allow courts to deny bail to persons whose release would present a danger or who are likely to jump bail.

- Other proposals would improve the rights of victims of crime. We have also proposed a new constitutionally sound federal death penalty for appropriate crimes. Mandatory prison sentences have been proposed for the use of firearms in committing federal felonies. We are proposing reforms in juvenile justice to increase the likelihood of apprehending and punishing young violent offenders. Other proposals would increase our ability to combat organized crime.

I believe that the Administration's crime program will ensure a new coordination between federal, state, and local law enforcement. By doing that, while improving the effectiveness of the federal effort itself, we can make a bigger difference in the fight against crime. In doing that, the federal government will show appropriate regard for the concerns of state and local law enforcement -- and we will thereby make better use of the greatest resource in the battle against crime, the capabilities of the state and local governments.

Just as the federal government has failed to recognize the importance of state and local efforts to combat crime -- and to pitch in fully to help in those efforts -- it has frequently failed to recognize the proper role of the states in improving the lives of our citizens. In a rush to find national solutions, the federal government has sometimes impeded state efforts that would have produced better results. Certainly, the federal courts -- and sometimes the Justice Department appearing before those courts -- have had that effect.

In recent years, the federal courts have increasingly intruded upon the policy-making and policy-implementing functions of the Legislative and Executive branches at the federal level. They have also, however, increasingly intruded upon the functions envisioned for the states by the Founding Fathers.

The Solicitor General, Rex Lee, is therefore working with our Assistant Attorneys General to identify key areas in which we might be able to assist the courts in leaving more policy-making functions to the other federal branches or to the states. In some areas, what we consider errors of the past might be corrected. In other areas, past trends might at least be halted and new approaches substituted.

Three areas of judicial policy-making are of particular concern. First, the erosion of restraint in considerations of justiciability. Second, the expansion of several doctrines by which state and federal statutes have been declared unconstitutional -- in particular, the analyses that have multiplied so-called "fundamental rights" and "suspect classifications." And third, the extravagant use of mandatory injunctions and remedial decrees. Constructs employed by the courts in all these areas have resulted in the substitution of judicial judgment for legislative judgment.

Sometimes the courts have engrafted upon the Constitution interpretations at best tenuously related to its text. Thereby, they have substituted judicial policy determinations for legislative policy determinations. They have removed policy-making from the will of the majority expressed through popularly and regularly elected legislative bodies. In a democracy, that insulation of policy decisions from popular opinion is exceedingly troubling. Further, judicial policy-making is inevitably inadequate or imperfect policy-making. The fact-finding resources of courts are limited -- and inordinately dependent upon the facts presented to the courts by the interested parties before them. Legislatures, on the other hand, have expansive fact-finding capabilities that can reach far beyond the narrow special interests being urged by parties in a lawsuit. When policy judgments are to be made by government, the values of the people expressed by their elected representatives -- rather than the personal predilections of unelected jurists -- should control.

Therefore, rather than arguing for judicial activism, we shall urge judicial restraint whenever the issues presented, by their very nature, require -- practically and constitutionally -- the resources of a legislature to resolve. It is to resolve those kinds of issues that the Constitution created both a federalist system and a federal Legislative Branch. We intend to do everything possible to ensure that the federal courts, through excess zeal to do what they consider right, do

not undermine the powers confided elsewhere by the Constitution.

The practice of judicial restraint by the courts would serve to protect the independence of the judiciary and to ensure popular respect for its role. Unrestrained intrusion by the courts upon the domain of the states and the elected branches, however, would foster their politicization. We will urge that the arena of political policy-making should be left to the branches directly responsible to the electorate.

The two areas I have emphasized today rest near the heart of government. The principle of separation of powers -- and its corollary, judicial restraint -- guide the process by which our republic functions effectively. The control of crime represents one of the most important functions of this or any government. By working to improve government in both of these areas, we are fulfilling the greatest traditions of the Department of Justice.

The genius of the American system of government arises from the different roles our Constitution entrusts to those levels and branches of government best suited to perform those roles. This Administration intends to preserve and enhance that all-important balance. For too long, some federal officials have tended to assume that they alone could find the best solutions to problems confronted by our people. The Founding Fathers more wisely realized that the best government is a government of separated and balanced powers -- powers suited to the nature of democracy and the needs of a democratic people.

As the delegates to the Constitutional Convention trudged out of Independence Hall their work completed in September 1787, an anxious woman in the crowd stood waiting at the entrance. She went up to Benjamin Franklin and inquired, "Well, Doctor, what have we got, a republic or a monarchy?"

"A republic," Franklin replied, "if you can keep it."

We intend to ensure that our form of government keeps to that original plan. Neither the well-meaning federal bureaucrat nor judge should be permitted to alter that plan to suit the desires of the moment. Each of you have an important and essential role to play in the process of government. Under this Administration, you and your states will play that important role. Only

together can we ensure better government for all our citizens.