REMARKS OF THE ATTORNEY GENERAL
THE CONSERVATIVE POLITICAL ACTION CONFERENCE
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It is a great pleasure for me to be here -- and to report to you on a few of the important issues now being confronted at the Department of Justice. One thing that has become abundantly clear to me during my first year as Attorney General is the confusion many otherwise informed people have about the Justice Department -- and about the Attorney General.

There's an old political story about an aide who rushed anxiously into his candidate's office during the last hours of the campaign. He excitedly informed the candidate: "You've got to fly upstate right away to counter all the horrible lies your opponents are telling about you." To which the candidate responded, "I'm sorry but it's a lot more important for me to rush downstate because they're telling the truth about me there."

The main issues I wish to discuss today fall into the latter category -- issues about which persons of goodwill can have honest disagreements. Before discussing those issues, however, I do want to respond to two criticisms that are less than truthful.

This week, there was issued a highly inflammantory and inaccurate attack upon the Department of Justice's efforts to protect the civil rights of all Americans. The primary function of the Department is to enforce the laws of the United States -- the laws as written, not the laws as some on the left or the right might wish them to be. When we in this Administration disagree with a law, we will of course seek to have it changed -- and we are doing so in many areas. We will, however, continue to enforce the existing laws of this country. Anyone who suggests otherwise is engaging in deliberate deception.

Similarly unfounded is one criticism I have heard from conservative quarters. That criticism reduces to a "more-conservative-than-thou" assessment of which senior officials at the Department supported the President earliest. I want to emphasize the absurdity of that critique. I chose our senior officials. And I have supported Ronald Reagan in every election campaign he has

waged. The senior officials at the Department of Justice are fully supportive of the President's policies and are doing a masterful job of effecting those policies within the constraints of law.

There is an old political maxim that defines a liberal as a person who, seeing a man drowning fifty feet from shore, throws him a rope fifty feet long, but then drops his end and goes off to perform another good deed. By that standard, the federal legal system has been actively and ineffectively liberal for several generations. Its outpouring of attempted good deeds has been overwhelming.

In 1789 the first Congress faced the task of actually setting up a government in conformity with the Constitution. Nevertheless, it enacted only twenty-eight laws and passed five resolutions, which included the Bill of Rights. In 1980, the Ninety-Sixth Congress passed statutes whose total length is nearly fifty times the output of the first Congress. In fact, during the entire first decade under the Constitution, Congress passed barely more acts than it did in 1980 alone.

This vast outpouring of laws accelerated in number and scope during the mid-1960s. As a result, the number of civil cases pending in the U.S. District Courts, for example, has more than tripled in the last twenty years, and had doubled in the twenty years before that.

As I consider the number and complexity of our federal laws today, I am reminded of an old story about Oliver Wendell Holmes late in his distinguished career on the Supreme Court. Holmes, so the story goes, found himself on a train. Confronted by the conductor, he couldn't find his ticket. The conductor, however, recognized the distinguished jurist and 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?"

Both the outlines -- and many, many of the details -- of where we are now going have become clear. Clearest of all is the fact that we are going in new directions. We are working to improve laws that have proven inadequate or counterproductive. We are working to return government to its rightful bounds -- both in

its relation to the people and in the relations between different levels and branches of government.

We have proposed a comprehensive crime package of more than 150 administrative and legislative initiatives that would help to redress the imbalance between the forces of law and the forces of lawlessness.

We have proposed a new approach to immigration and refugee policy designed to reassert control over our own borders.

We have brought the government's antitrust policies back to the real economic world by focusing upon truly anticompetitive activities rather than outmoded and exotic theories.

By revising regulations and guidelines previously in effect, we are restoring flexibility necessary to our intelligence community while protecting the basic liberties of Americans against government excesses.

We have firmly enforced the law that forbids federal employees from striking.

We have opposed the distortion of the meaning of equal protection by courts that mandate counter-productive busing and quotas.

We have proposed legislation to reform the Foreign Corrupt Practices Act in order to remove unnecessary burdens on American business while retaining a criminal prohibition against bribery overseas.

We have proposed modifications in the Freedom of Information Act that recognize the public's need to know but eliminate unintended uses of the Act that unduly interfere with legitimate and essential government activities.

We have helped to select appointees to the federal bench who understand the meaning of judicial restraint.

In cases in which we appear, we have begun a major effort to persuade the federal courts to exercise judicial restraint and to cease their intrusions upon the proper responsibilities of the states and the other, elected federal branches.

Perhaps our most important long-term effort has been in the latter two areas, our attempt to encourage judicial self-restraint both through our selection of new federal judges and the arguments we make in federal court. We are attempting to reverse the unhealthy flow of power from state and federal legislatures to federal courts -- and the concomitant flow of power from state and local governments to the federal level.

I have personally spoken to several audiences about the need to encourage judicial self-restraint. Some judges have strayed across the constitutional line to legislate rather than interpret the law. Some courts have intruded upon executive functions by taking upon themselves virtual administration of, for example, school systems and prisons. Such tendencies on the part of judges -- or justices -- is particularly disturbing to the public since federal judges are insulated from the ballot and may not be directly removed by the people. When policy judgments are to be made by government, the values of the people expressed by their elected representatives -- rather than the personal predilection of unelected jurists -- should control.

Some editorial writers and other critics have mischaracterized our effort as a political attack on the judiciary. As more responsible observers have recognized, it is nothing of the sort. 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 draw them into the political arena. The key to judicial independence and security lies not in stilling criticism of the courts but in the observance of principles of separation of powers through judicial restraint.

Those same principles must be observed by the other branches of government lest they invite activism by the federal courts.

Congress itself should avoid enacting legislation that would invite such courts to play an inordinate role in our society. Indeed, that could be the effect of some legislation supported by many who have simply not taken sufficient note of the opportunities they would provide for judicial activism. Such legislation includes the House-passed modification of the Voting Rights Act and regulatory schemes employing the legislative veto device.

This Administration fully supports extension of the present Voting Rights Act -- for an unprecedented ten-year period. Unfortunately, the U.S. House of Representatives has passed a bill now being considered by the Senate that would dramatically alter that important piece of legislation. It could throw much of the entire Nation's electoral system into the federal courts. The House-passed bill would -- without sufficient factual basis -- alter what has been the long-standing test under section two of that Act. Although the previous test outside the South -- and even in the South concerning election laws in effect prior to passage of the original Voting Rights Act -- has been one of intent, the House passed bill would focus instead upon mere effects. As a result, all existing election laws throughout the Nation could be subject to challenge in federal court if the results of elections failed to mirror the racial make-up of the jurisdiction. A most divisive round of litigation would be occasioned in federal court. That litigation could result in federal courts' requiring in some instances that representation be determined in proportion to the racial characteristics of the electorate. I can imagine no more expansive an invitation to judicial action that the Congress could enact.

Over the past five decades the Congress has ceded more and more authority to the federal agencies to, in a sense, make law through regulation. Many of those regulatory statutes have been exceedingly broadly written -- and, to say the least, amorphous in the standards provided to guide or limit executive action. Congress has rationalized passage of these regulatory schemes by employing the device of a legislative veto that can be used to negate specific actions by the Executive without full congressional action that would itself be subject to presidential veto. This scheme has fostered the kind of broad social regulation that so many Americans have found misguided over the years. And the breadth of regulation made possible by the scheme has allowed the courts yet another opportunity to enter the policy-making process by reviewing executive actions. That opportunity has been heightened by the nebulous standards Congress has written into the regulatory schemes -- and that ambiguity has proved politically possible because of the reserved powers implicit in the legislative veto. Rather than emphasizing the legislative veto as a device to control regulatory excesses by federal agencies, it makes much more sense to require Congress to do a better job in setting the standards that govern federal regulation.

In addition to the practical arguments against the legislative veto, there is a more basic objection. The desire to control the bureaucracy is an aim with which this Administration is wholly sympathetic. Nevertheless, Congress' increasing use of various forms of legislative veto raises serious constitutional concerns. Just a few weeks ago, recognizing that constitutional threat, the D.C. Circuit struck down such a device in the FERC case.

By such devices one or both houses of Congress, or a Congressional committee, is empowered to reverse some action by the Executive Branch without presentation of that legislative act to the President for approval or veto.

In 1980, in the Chadha case, a circuit court for the first time invalidated such a device: a statutory provision for single-house disapproval of an Attorney General's decision on express statutory grounds to suspend a deportation order. It did so on the basis of the principle of separation of powers. Last Monday, the Department of Justice supported that determination by the Ninth Circuit in the Supreme Court in the hope of bringing added clarity to an area made all the more troubling by the growing tendency of the Congress to use this suspect device. Although some similar devices that do not exclude the President from the process may well survive constitutional scrutiny, the frequency with which the legislative veto is now being used requires the Justice Department to establish in court that Congress makes the law but only the President may execute it.

The Government's position in the legislative veto case is consistent with basic first principles of conservatism. There are no principles of conservatism more fundamental than that the Constitution prevails over all other law and that, in interpreting the Constitution, the intent of the framers should be honored. As we told the Supreme Court in the Chadha case, the legislative veto offends principles of separation of power and the constitutional requirement that legislation be enacted by both houses of Congress and presented to the President for his approval or disapproval.

Surely, preservation of the constitutional principle of separated power is a conservative doctrine that we should all support. That principle has proved our greatest safeguard against arbitrary government action.

Just as the Department of Justice is opposing legislation that would invite judicial activism, it has proposed important legislation that would cure some unfortunate effects of such activism in the area of law enforcement.

Nearly fifty years ago the great jurist Benjamin Cardozo wrote:

> "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

In the years since, however, a growing imbalance has arisen between the tactics available to the lawless and the powers of the law. There has been an ever-growing public perception that the criminal has gained the upper hand over society itself. Too frequently, Congressional failure to act has invited the courts to fashion make-shift approaches that favor the accused over the accuser. More refined and balanced policies can only be fashioned through the legislative process. It is time that was done, and we have therefore proposed various pieces of legislation that would restore the proper balance between the powers of the law and the rights of the lawless.

Last Fall, the Administration proposed a sweeping package of criminal justice reforms that would have that effect. Although some conservatives have expressed reservations -- often misguidedly -- over some of the more than 150 legislative and administrative changes involved, I am fully convinced of their importance in restoring effectiveness to our criminal justice system.

Foremost among those proposals is modification of the exclusionary rule so that reasonable, good-faith action by law enforcement does not result in release of the lawbreaker. Intended to ensure due process of law, the exclusionary rule too often merely results in a criminal's avoiding punishment due under law. As Justice Cardozo observed long ago, the criminal should not go free merely because the constable blundered.

In addition, we are proposing the elimination of the Parole Commission and the establishment of 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 as well as those who are likely to jump bail. The legislation would also limit federal court intrusion upon state criminal convictions through habeas corpus suits by prisoners. Other proposals would improve the rights of victims of crime. We have also proposed a new constitutionally sound federal death penalty for appropriate crimes.

Some conservatives have mounted a mini-crusade against the proposed Criminal Code, which forms an important part of our reform package. Their efforts are exceedingly misguided. They have relied upon mischaracterization, attenuated arguments, and even former provisions of the proposal that have been amended. Worst of all, they misconceive the significant strengthening of law enforcement that would flow from enactment of the Code now. After more than a decade of debate, we can no longer afford nit-picking that delays reform of the antiquated hodge-podge of federal criminal law. Although improvements can still be made -- and we will work to make any that are feasible -- no conservative should doubt the numerous valuable improvements contained within the proposed Code.

The law enforcement program we have proposed is as expansive as is the need for reform. It can make a difference, and it deserves support from all Americans concerned about crime.

I cannot conclude today without a few words about the Executive Branch itself. The reforms already undertaken by the new Administration -- and demanded by the people in the 1980 elections -- have been substantial. There are many statutes presently part of our Nation's laws that are inconsistent with the direction of those reforms. And the Administration intends to seek changes in many of those laws as a result of the public's less than satisfactory experience with them.

Nevertheless, even statutes with which we disagree or that impose oppressive burdens on the people are nevertheless the law of the land. As such, they must be defended against attack in the courts and they must be fully enforced by the Executive Branch to the extent of their validity and clarity. Some have suggested that this Administration intends to do less. Others have suggested that this Administration should do less.

In fact, the Department of Justice intends to do exactly what the Constitution requires -- to enforce the laws duly and constitutionally enacted by the Congress. If we were to do less, we would be guilty of the same kind of offense against the principle of separation of powers about which I have raised other cautionary notes today. The Executive cannot constitutionally alter the clear enactments of Congress of its own volition any more than the courts can. When he disagrees with a law, the Executive can urge and support changes by Congress. When reasonable defenses are available and a statute does not intrude upon the powers of the Executive Branch, we will present those defenses. That is our responsibility under the Constitution irrespective of our views on substantive policy. In the case of unclear laws, the Executive can in good faith urge and pursue those interpretations that seem most consistent with the intentions of the Congress, the policies of the Administration, and the other laws of the land. The Executive can do all of these things, but it can constitutionally do no more. No one should doubt that this Administration's adherence to the Constitution will exact from us the same degree of obedience and moderation that I have today urged upon the other branches. Anyone who suggests otherwise is venting political propaganda or engaging in deliberate fabrication.

Our efforts to encourage self-restraint by the courts will only be as effective as our positions in court are credible. In other words, the Justice Department must itself show restraint in the interpretations it urges in courts. We cannot urge courts to restrain themselves from making policy only in those instances when the result in a particular case would not be to our liking. We cannot urge judicial activism when the result of judicial policy-making would be more to our liking. The principle of judicial restraint is a principle of general applicability or it is not a principle worthy of general adherence and support. I believe that it is a principle worthy of your support.

Some of the issues I have discussed today are matters upon which all conservatives will not agree. Nevertheless, they are issues of great importance to us all, issues that deserve our fullest attention.

It is healthy for us to have differences of opinion on many issues, but let us not lose sight of the basic point upon which we have no disagreement. The

Reagan Administration represents our best hope of positive reform during the past two generations. That opportunity must not be lost. The future of this country depends upon it.

I remember some years ago when Ronald Reagan was Governor of California and used to tell audiences:

> "I always grew up believing that if you build a better mousetrap, the world will beat a path to your door. Now if you build a better mousetrap the government comes along with a better mouse."

As President, Ronald Reagan is trying to change that. He needs your help. Since all of us share his vision of a government that knows its own limits, he deserves our help. In our debates with one another, let us never forget that. If we do, we may not soon have another chance.