Department of Justice

ADDRESS

OF

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ATTORNEY GENERAL OF THE UNITED STATES

AT THE

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AMERICAN STUDIES CENTER BICENTENNIAL PROGRAM

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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.

It is a great honor to be invited to participate in this conference. The American Studies Center has selected a most appropriate topic for Bicentennial reflection: judicial interpretation of the Constitution. This topic invites discussion of the unique role of the Courts, of the place in our society of a written Constitution, and of the principles and methods of interpretation.

This conference is evidence of the veritable renaissance of scholarship that is taking place during the Bicentennial. Such a refocusing of our nation's intellectual energy is the best way to celebrate the two hundredth birthday of the Constitution. It is also highly necessary in its own right, since continued implementation of the Constitution requires that its text, its structure, and its principles be as widely known and as respectfully understood as possible.

Respectful understanding of the Constitution -- that phrase fairly expresses a point I have been advocating over the past two years about the way in which we should approach our founding charter. We ought to respect the Constitution as the supreme law that it is, and that means the Constitution as it was understood by those who framed, drafted, and ratified its articles and amendments.

This approach toward the Constitution is especially needed in our day. There has been a tendency over the years by some to view the Constitution, not in its own terms, as the law that it

is, but to transform it into a political advocacy document in support of one policy or another. Too often the Constitution has been, in a word, politicized. The modern-day politicization of our supreme law has been encouraged primarily by political and judicial liberals, but from time to time throughout our history those who would be thought of as conservatives as well as others have shown themselves equally adept at crafting briefs and making public arguments that seek to identify or enfuse the Constitution with their own political views.

Stanford Law Professor Paul Brest has fairly described the approach of far too many when he wrote recently that most of the work he and his fellow academics do consists of, in his words, "advocacy scholarship -- amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good."

That is why I have decided to speak today to the topic of "Politics and the Constitution." In the course of my remarks I will express my views on the conference topic of judicial interpretation of the Constitution. But I also will discuss the obligations of other branches under the Constitution. For as I hope to make plain, we all serve under the Constitution, and this Bicentennial year offers the perfect occasion to remind ourselves of this important fact.

It is, of course, entirely appropriate to think of the Constitution as a political document in one sense. Underlying

the Constitution is what Alexander Hamilton called a "science of politics." The principles of this then new science of politics -- federalism, separation of powers, representation, an extended republic -- decisively influenced the Framers as they drafted, debated, and eventually proposed the Constitution.

The Constitution is political in this sense, and it is political, too, in the sense that in its framing and ratifying a great political act took place, an act by which the American people gave their consent to the government that was established through the Constitution and to the law that its provisions expressed.

The Constitution is political in these senses, but it is not political in a partisan or ideological sense. In most ordinary political disputes, the Constitution does not take sides. It is not a manifesto for one political side or the other to brandish and wave -- or, as so often happens nowadays, to jab opponents with. It does not side with the left or the right of the political spectrum or points in between. Rather, in most instances, the Constitution stands to the side of politics -- or, more accurately, <u>above</u> politics. On the issue of abortion, it does not explicitly endorse the position of either "pro-choice" or "pro-life". It succors neither the friends of balanced budgets nor their enemies.

What I wish to say today can be boiled down to this: The Constitution is a political document, but it cannot be identified

with a political agenda, whether right, left, or center. The reason for this ironically is the very science of politics that underlay the Constitution at its creation. For that science of politics set up institutions through which the people themselves could make their ordinary, day-to-day political decisions. And even where the substantive provisions of the Constitution place some limits on those decisions -- such as in the First Amendment's Religious Establishment Clause, or in Article I's Contracts Clause -- the people still are left with a very large arena in which they -- we -- can choose politically.

Unfortunately, this point is insufficiently understood by some in our own political culture. Consider some coverage of, and commentary on, the Supreme Court. There you will find a decision that was made on statutory or constitutional grounds -- or was supposed to have been made that way, at any rate -- and yet you sometimes find it presented to the reading and listening public mostly in terms of its political result. You know the standard phrases: "In a victory for the Administration..." "In a setback for the Administration..." "In a victory for women..." "In a setback for women..." "In a victory for pro-life forces..." "In a setback for pro-life forces..."

I remember a David Brinkley show a few years back where Professor Philip Kurland, of the University of Chicago Law School, almost stopped Sam Donaldson speechless by calling certain decisions "good" even though he disapproved of their

policy results. Professor Kurland said: "It's only for the press that the results alone count. And when we continue to feed the press with this kind of nonsense, we are disloyal to our function as lawyers."

So there is a major problem with the way in which judicial interpretations, whether of the Constitution or of statutes, are presented to the public, not only by some of the media, but also by some political advocates and lawyers who comment upon them. And this problem is only compounded when judges view their role in terms of political results.

What is absolutely crucial, yet easily forgotten amid the din of politically oriented lawyering, judging and reporting, is that the Constitution itself is not politically oriented. It does not belong to liberals or to conservatives, as those terms are used in partisan politics. So long as the processes the Constitution sets up are observed, and so long as the rights that it spells out are respected, it leaves to individuals, to communities and to succeeding generations the right to decide which political goals should be pursued.

Now, I would be among the last to repudiate the idea of agenda-driven leadership. Obviously, leadership on the basis of clear and definite political values and objectives is essential in the legislative and executive branches of a system such as ours. But the judicial branch is different. Its role, as Hamilton put it in The Federalist No. 78, is to exercise

judgment, as distinct from will. The exercise of will -- the policy-making power -- is left to the popularly elected branches of government.

Where judicial activism has occurred, it has helped erode the distinction between will and judgment. People have been invited to turn to the judiciary, and to try to persuade it that a political outcome rejected by the elected branches should somehow be required by the Constitution. And some judges, who evidently believe it is their role to change the Constitution to keep it in tune with their view of the times, have all too often gone along. The result is that many disputes -- minor as well as major -- have been given the status of Constitutional issues, with the result that the range of legislative or executive discretion -- and therefore, ultimately, the discretion left to the control of the people -- has been correspondingly narrowed.

In other words, our Constitution has been politicized whenever our politics have been "constitutionalized."

I would like to look at a few examples of cases that are more or less neutral in terms of conventional political categories, but which illustrate how ordinary political disputes have been so "constitutionalized."

For example, in 1971 there was a case from a federal district court in Alabama that was affirmed by the Supreme Court in 1974 under the name of Wyatt v. Aderholt. The district court had ordered three state mental institutions to provide specified

levels of psychiatric care and treatment to those committed to them. It issued a host of highly specific orders regarding the care that patients were to receive, and declared that these directives represented what it called "constitutional minimums."

In other words, one was asked to believe that the U.S. Constitution -- not common sense, not Alabama law, not federal law, but the U.S. Constitution -- prescribed detailed minimum standards of care for psychiatric patients. The issue was not to be decided by the hospitals, or by local government, or even by elected officials at higher levels. It was a constitutional case -- or so the court said.

One might also look at Kite v. Marshall, a case decided in 1980 by a federal court in Texas. A Texas high school rule made athletes who attended special summer training camps ineligible for varsity sports the following year. Now, one can debate whether the rule was wise or fair -- or good or bad for jump shots and free throws. But was it an issue that should force us to go to the U.S. Constitution for a solution? The judge in this case thought so, because there existed, in his opinion, a constitutional right -- and here I quote -- "to send a child to summer basketball camp."

Perhaps that's the subject the Framers could have turned to when they had finished discussing proper levels of psychiatric care. But in this case it was not, since Kite fortunately was reversed by the Fifth Circuit Court of Appeals, whose copy of the

Constitution presumably left out the right to send a child to a summer basketball camp. The Supreme Court declined to review the case.

One more example: in Johnson v. City of Opelousas a circuit court of appeals struck down a local curfew for unemancipated minors, citing those minors' "fundamental rights protected by the Constitution." Again, there are legitimate arguments against the law in question. But it is hard to see a curfew as the sort of thing with which our fundamental charter of government out to be concerned.

I do not mean that rights specified in the Constitution have no practical application, and that no discrete, local issue can ever raise legitimate Constitutional questions. The terms of the Constitution must be enforced. States may not impair to any person the equal protection of the laws, religion may not be established, freedom of speech may not be abridged, and so forth.

But my point here is that when the argument is made that a law is unconstitutional, the argument ought to mean that the law in question violates a specific provision in the Constitution. It should not mean merely that some provision in the Constitution can be stretched beyond reason so as to strike down that law. To stretch the Constitution like that is an act of will rather than judgment, and therefore inappropriate for the judiciary.

Not so for legislatures or other local bodies: school officials in the basketball camp case could have decided that its

rule penalizing the use of summer training camps was too strict; the city of Opelousas, or the Louisiana legislature, could have decided that the curfew was silly, or inadvisable on other grounds. While the Constitution does not decide these issues, it does leave their resolution to the American people and their elected representatives.

The point is, most political decisions are neither mandated nor forbidden by the Constitution. In most cases, all options are constitutional in the sense of being permitted by the Constitution, and none is "constitutional" in the sense of being required by the Constitution.

Courts can hold laws to be constitutional without considering them to be good laws. This is what Justice Hugo Black meant in his famous dissent in Griswold v. Connecticut, in which he said:

> My point is that there is no provision of the Constitution which either expressly or impliedly vests power in the Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional [Justice Black continued], if ever

> it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country.

More recently, Justice Scalia made the same point in the concluding paragraph of his concurring opinion in a case this term involving an Indiana anti-takeover law. The Justice wrote: "A law can be both economic folly and constitutional. The Indiana Control Shares Acquisition Chapter is at least the latter."

A judge who is discharging his responsibilities correctly will at least some of the time have the task of finding a law to be constitutional that he would doubtless vote against were he or she a legislator. From the standpoint of a legislator, a political opinion of the law itself would be requested. But as a judge, all that is requested is a judgment as to whether the law violates the Constitution. And a judge is not entitled to use constitutional interpretation as a tool for imposing his or her own political opinion upon the parties in the case.

All of this leads back to the points I started out with: the Constitution is not an instrument for the realization of any political faction's goals. It is, rather, a set of structures within which political factions can fairly compete. The true function of the Constitution is undermined if we try to settle political disputes by declaring that the victory of one side or

the other is inherent in the structures themselves. It is as if the referees were to declare that the rules require a new first down for one team regardless of the yardage it makes during its allotted four snaps.

Incidentally, what would happen to the great game of football if referees started doing that? The game itself would become an amateurish shambles, while the real action would take place in conferences between the coaches and the referees.

I submit that often this is exactly what occurs in our public life today. Political decisions are being made in some courts, which were created for a far more restricted role. Meanwhile, Congress, its legislative field reduced, tends to invade other areas and to occupy itself in ways that are not its proper concern.

We can find instances in which each of the three branches appear to have forgotten how to think Constitutionally. Henry Lee, during the Virginia Convention for ratifying the Constitution, said that "when a question arises with respect to the legality of any power," the question should be, "Is it enumerated in the Constitution?"

This indeed is the first question that ought to be posed before any action is taken by any branch of government: "What is there in the Constitution that gives me the power to do this?" Unlike the actions of school districts in Texas, or the town of Opelousas, Louisiana, those of the federal government necessarily

involve the Constitution at least in the sense that no exercise of power by the federal government can be legitimate unless there is authority for it in the Constitution. But consider the irony of our day: private disputes and local issues around the country provoke a great deal of constitutional soul-searching, yet actions of the federal government seem to provoke it far too little.

When last was there a debate in Congress, not over the politics of an issue, but over its legality -- over whether Congress in fact possesses the power to legislate in a certain area?

Each of the three branches of the federal government should hold its own actions up to constitutional review. But this does not in any way detract from the unique role of the judiciary. The Constitution clearly includes the power of judicial review, giving to the Supreme Court the power to rule on "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority...."

But, as we celebrate the Bicentennial of the oldest functioning democratic constitution in the world, we must not forget that judicial review requires justification in a constitutional democracy. There must be great care taken before a majority of an unelected committee of nine should overturn a decision made by the people's elected representatives.

The power of judicial review is appropriate in a democratic society when, and only when, it is used to enforce the enduring will of the people as expressed in the Constitution. The Constitution is our nation's fundamental expression of public will. This fact is the key safeguard that the Framers built into our system to protect democracy from some of the excesses to which it might otherwise be prone.

Judicial review, by enforcing the terms of the Constitution, protects the long-term public will against short-term popular passions. That is an awesome power. It is understandable why some people get so angry at seeing the Constitution used in other ways -- for instance, as an alternative vehicle for social changes that have failed in the legislative arena.

For Congress, it is of course legitimate to use political criteria. But Congress ought not to abdicate constitutional decisions to the courts by failing to check its own work for constitutionality. Prior to enacting legislation of any kind, it should ask that first question of Henry Lee's: Is there a power enumerated in the Constitution that gives us the authority to act?

As for the Executive, my own branch of government, I think that, just as Congress ought to check on the constitutionality of laws before it passes them, we should do likewise. Our oath binds us to uphold the Constitution, not to act on whatever comes from Congress regardless of its constitutionality.

As we enter our third century under the Constitution, we would do well to remember that just as the Constitution cannot be reduced to a political agenda, it is also the measure of all political action we take. Or, to turn once more to the football analogy: we must keep the referees from becoming players, while at the same time adhering more faithfully to the rules that the referees are supposed to apply.

History shows that two hundred years is a long time for any one written constitution to remain in force. And here we are, we Americans, planning to keep it going for another two hundred years, and long after that. But of course, we Americans defied historical precedent before: we secured for ourselves a stable, free, and rights-respecting government after a revolution. This is contrary to everything the history of revolutions was supposed to teach us. And the way we did it was, first and foremost, the Constitution.

Daniel Webster stated: "Hold on to your Constitution!" That was sound advice at the time is was said, and is equally sound in this Bicentennial year, and for the future.