REMARKS OF THE ATTORNEY GENERAL
BEFORE THE FEDERAL LEGAL COUNCIL
RESTON, VIRGINIA
THURSDAY, OCTOBER 29, 1981

It is a special pleasure for me to be here this morning and to open this first gathering of the men and women who direct the Reagan Administration's legal machinery. Most of us are here because of an election that occurred last November, and I want to use this occasion to outline what that election means to us as the Government's lawyers. Simply put, consistent with the Constitution and the laws of the United States, the Department of Justice intends to play an active role in effecting the principles upon which Ronald Reagan campaigned.

Already, there have been many significant changes. 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 anti-competitive activities rather than outmoded and exotic theories. 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 counterproductive busing and quotas. We have helped to select appointees to the federal bench who understand the meaning of judicial restraint.

As significant as all these changes are, however, they represent only a beginning. Today, I will discuss the next stage in this process. We intend, in a comprehensive way, to identify those principles that we will urge upon the federal courts. And we intend to identify the cases in which to make our arguments -- all the way to the Supreme Court. We believe that the groundswell of conservatism evidenced by the 1980 election makes this an especially appropriate time to urge upon the courts more principled bases that would diminish judicial activism. History teaches us that the courts are not unaffected by major public change in political attitudes. As the great jurist Benjamin Cardozo once wrote:

"The great tides and currents which

> engulf the rest of men do not turn aside in their course and pass the judges by."

Consider for a moment the 1900 Presidential election. That year, a burning issue of the campaign was whether or not the protections of the Constitution automatically attached to the territories annexed after the Spanish-American War. Paralleling the public opinion expressed in the election, in 1901 the Supreme Court held in the four Insular Cases that it did not. In explaining that result, the columnist Finley Peter Dunne caused his fictitious Irish bartender Mr. Dooley to speak the following prophetic words:

> "No matter whither th' Constitution follows th' flag or not, th' Supreme Court follows th' illiction returns."

Federal judges in 1981 -- as in 1901 -- remain free from direct popular control. Nevertheless, basic changes in public sentiment can still portend changing judicial philosophy. Various doubts about past conclusions have already been expressed in Supreme Court opinions, concurrences, and dissents -- which makes the next few years inviting ones to urge modifications upon that Court and other federal courts.

We intend to do exactly that. Solicitor General Rex Lee is already working with our Assistant Attorneys General to identify those key areas in which the courts might be convinced to desist from actual policy-making. 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. Today, I want to outline some of those areas upon which we are focusing.

It is clear that between Allgeyer v. Louisiana in 1897 and Nebbia v. New York in 1934 the Supreme Court engaged in -- and fostered -- judicial policy-making under the guise of substantive due process. During this period, the Court weighted the balance in favor of individual interests against the decisions of state and federal legislatures. Using the due process clauses, unelected judges substituted their own policy preferences for the determinations of the public's elected representatives.

In recent decades, at the behest of private litigants and even the Executive Branch itself, federal courts have engaged in a similar kind of judicial policy-making. In the future, the Justice Department will focus

upon the doctrines that have led to the courts' activism. We will attempt to reverse this 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.

Three areas of judicial policy-making are of particular concern. First, the erosion of restraint in considerations of justiciability. Second, some of the standards by which state and federal statutes have been declared unconstitutional -- and, in particular, some of the analysis of so-called "fundamental rights" and "suspect classifications". And third, the extravagant use of mandatory injunctions and remedial decrees.

Article III of the Constitution limits the jurisdiction of the federal courts to the consideration of cases or controversies properly brought before them. Nevertheless, in recent years, a weakening of the courts' resolve to abide by the case or controversy requirement has allowed them greater power of review over government action. Often, the federal government itself has in the past moved courts to show less deference to the boundaries of justiciability -- in particular, in environmental litigation. The Justice Department will henceforth show a more responsible concern for such questions. We will assert the doctrine in those situations that involve any of its four elements -- standing, ripeness, mootness, and presence of a political question. Vindicating the principle of justiciability would help return the courts to a more principled deference to the actions of the elected branches.

Like the concept of judicial restraint itself, the constitutional requirement of justiciability limits the permissible reach of the courts irrespective of the desirability of reaching the underlying legal issues involved. The doctrine of justiciability therefore limits the possibility of judicial encroachment upon the responsibilities of the other branches or the states -- even in those situations when the other branch or level of government has chosen not to act. Some responsibilities are entrusted solely to nonjudicial processes. In those instances, we intend to urge the judicial forebearance envisioned by the Constitution.

Just as courts have sometimes overstepped the proper bounds of justiciability, their analyses of equal protection issues have often trespassed upon responsibilities our constitutional system entrusted to legislatures. Through their determination of so-called

"fundamental rights" and "suspect classifications," courts have sometimes succeeded in weighting the balance against proper legislative action.

In the 1942 case of Skinner v. Oklahoma, the Supreme Court first emphasized the concept of fundamental rights that invites courts to undertake a stricter scrutiny of the inherently legislative task of linedrawing. In the nearly forty years since then, the number of rights labeled "fundamental" by the courts has multiplied. They now include the first amendment rights and the right to vote in most elections -- rights mentioned in the Constitution. In addition, however, they include rights that -- though deemed fundamental -- were held to be only implied by the Constitution. The latter group -- which has become a real base for expanding federal court activity -- includes the right to marry, the right to procreate, the right of interstate travel, and the right of sexual privacy that, among other things, may have spawned a right -- with certain limitations -- to have an abortion.

We do not disagree with the results in all of these cases. We do, however, believe that the application of these principles has led to some constitutionally dubious and unwise intrusions upon the legislative domain. The very arbitrariness with which some rights have been discerned and preferred, while others have not, reveals a process of subjective judicial policy-making as opposed to reasoned legal interpretation.

At the very least, this multiplication of implied constitutional rights -- and the unbounded strict scrutiny they produce -- has gone far enough. We will resist expansion. And, in some cases, we will seek to modify the use of these categories as a touchstone that almost inevitably results in the invalidation of legislative determinations. We will seek to modify especially the application of a strict scrutiny to issues whose very nature requires the resources of a legislature to resolve.

We shall also contest any expansion of the list of suspect classifications, which, once established by a court, almost inevitably result in the overturning of legislative judgments. Thus far, the Supreme Court has employed a strict-scrutiny test when legislative classifications turn upon race, national origin, or, in many instances, alienage. In addition, when classifications are based upon sex or legitimacy, the Court has on occasion conceived and applied a middle test

somewhere between the special strict-scrutiny test and the normal rational-basis test.

Already, some limitations have been forged in the Supreme Court to temper these analyses of suspect and quasi-suspect classifications -- for example, in the case of alienage. The Department of Justice will encourage further refinement in these areas -- in particular, by resisting increase in the number of suspect or quasisuspect classifications and by tempering the strictness of the analysis applied to classifications based upon alienage. Throughout, as with the so-called fundamental rights, we shall be guided by the principle that legislatures, rather than courts, are better suited both constitutionally and practically to make certain kinds of complex policy determinations. We shall, however, remain vigilant to the Civil War Amendments' explicit concern over classifications based on race.

The extent to which the federal courts have inappropriately entered legislative terrain can be seen most clearly -- and felt -- in their use of mandatory injunctions and attempts to fashion equitable remedies for perceived violations. Throughout history, the equitable powers of courts have normally reached only those situations a court can effectively remedy. Implicit within that historical limitation is the recognition that some kinds of remedial efforts require resources and expertise beyond those of a federal court -- even one aided by special masters.

Nevertheless, federal courts have attempted to restructure entire school systems in desegregation cases -- and to maintain continuing review over basic administrative decisions. They have asserted similar control over entire prison systems and public housing projects. They have restructured the employment criteria to be used by American business and government -- even to the extent of mandating numerical results based upon race or gender. No area seems immune from judicial administration. At least one federal judge had even attempted to administer a local sewer system.

In the area of equitable remedies, it seems clear that federal courts have gone far beyond their abilities. In so doing, they have forced major reallocations of governmental resources -- often with no concern for budgetary limits and the dislocations that inevitably result from the limited judicial perspective.

In many of these cases, the Department will also seek to ensure better responses to the problems at issue by the more appropriate levels and branches of government. We have already begun that process in the case of busing and quotas, both of which have largely failed as judicial remedies.

Thus far, I have discussed some of those things that the Department of Justice will do to further the goals of this Administration. Through legislation and litigation, we will attempt to effect the goals I have outlined. There are, however, some things that we cannot -- and will not -- do.

Throughout my remarks today, I have emphasized the importance of judicial restraint to the constitutional principle of separation of powers. The Constitution confides certain powers in the Legislative Branch and not in the Judicial Branch. In a similar fashion, the Constitution delineates the proper domain of the Executive and Legislative functions. The Constitution directs the President to ensure the faithful execution of the laws, which forms the basis of the Attorney General's litigating authority for the government as a whole. That constitutional command also requires the Executive branch to defend measures duly enacted by the Congress -- even those with which the Administration does not agree.

Statutes with which we disagree are nevertheless the law of the land. As such, they must be defended against attack in the courts. They must also be fully enforced by the Executive Branch when their validity and meaning are clear. 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 ourselves be guilty of the same kind of transgressions that I have pledged we would combat on the part of the Judiciary. Under the Constitution, the Executive cannot unilaterally alter the clear enactments of Congress any more than the courts can. When it disagrees with a law, the Executive Branch can urge and support changes by the Congress. In the case of laws that are clearly and indefensibly unconstitutional, the Executive can refuse to enforce them and urge invalidation by the Courts. When reasonable defenses are available, we will defend a statute that does not intrude upon the powers of the Executive Branch. That is our

responsibility under the Constitution irrespective of our views on substantive policy. In the case of ambiguous 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 Constitutional principle of separation of powers will exact from us the same degree of obedience and moderation that we will urge upon the courts.

There is an old story about James Russell Lowell when he was the American Ambassador to the Court of St. James during the late nineteenth century. The French Ambassador of the time -- who was himself a historian as well as a diplomat -- approached Lowell with a question:

> "Mr. Ambassador, how long will the American republic endure?"

The American Ambassador replied:

> "As long as the ideals of its leaders reflect the ideals of the Nation's Founding Fathers."

This Administration intends to use every resource at its disposal to ensure that this government reflects the ideals of the Founding Fathers. Those principles have long enabled our Nation both to endure and to prosper. In the furtherance of those principles, however, we will not ourselves seek short-term successes at the expense of basic principles. We will demand of ourselves that same adherence to sound constitutional principles that we intend to demand of the other branches of government.