REMARKS BY THE ATTORNEY GENERAL
ABA HOUSE OF DELEGATES
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It is a special pleasure to appear before this prestigious House of Delegates, which represents perhaps the world's largest voluntary professional association. Naturally, my pleasure is heightened by my longtime membership in the Association you govern.

For the past year, as Attorney General of the United States, I have gained new insight into the role of lawyers in our society -- and the public's understanding of that role. The Attorney General -- like all lawyers -- represents clients and is the advocate for their interests in the courts. In addition, however, the Attorney General owes another allegiance -- as do all lawyers -- an allegiance to our Constitution and legal system, to the effective operation of the legal system and to its preservation and improvement.

Over the past year, I have often been struck -- and sometimes bemused -- by the confusion evinced in the press over those two roles. I can personally attest to the accuracy of what is called Knoll's Law of Media Accuracy:

> "Everything you read in the newspapers is absolutely true except for the rare story of which you happen to have firsthand knowledge."

Let me illustrate. During my first months in Washington, one obscure publication called me a "somnambulist", but Time magazine said I was "wide awake". Several columns reported that the Justice Department was "out of control" and "runaway". To the contrary, others said that the Department had been "steamrolled by White House Politicos" or that the "White House...is calling the policy shots on sensitive legal issues." One journal added, in bold headlines, "Justice Department 'Betraying' Conservatives." National Review countered that I was "the point man of the Reagan social counter-revolution." And Time confirmed that I had "given marching orders to [the] department to execute a right face."

As a result, I was not surprised when Newsweek commented that "describing the new attorney general has become a Capital Rorshach test."

I was surprised, however, when this Association's press organ, the ABA Journal, became caught up in the journalistic confusion. Concerning the main subject of my remarks today -- the need for a new measure of judicial self-restraint -- our Journal commented that I was reflecting the Administration's "desire to politicize the federal judiciary and constitutional law." Nothing could be further from the truth. Indeed, my remarks on this subject -- including a piece in the present issue of the ABA Journal -- suggest the grave dangers to the federal courts, and hence the country, when judges stray into the thicket of political policy-making, which the Constitution wisely entrusted to the popularly elected branches of government.

Today, I want to consider the similar danger to the legal profession of a shift in policy-making responsibilities from elected representatives to the courts. I also want to urge the organized bar to join in supporting what is a matter not of politics but of constitutional principle. In doing so, however, I intend to correct some of the mischaracterizations of my previous remarks on judicial restraint.

First, I have called for judicial self-restraint in obedience to the constitutional limits placed upon the courts. I have said that the Justice Department will encourage that self-restraint. And I believe that it is important that lawyers in general understand and support this call to principle. I do not mean that lawyers should be less than zealous advocates for their clients in court. I do mean that your special knowledge of law should elicit your support for the constitutional principle of separation of powers.

Second, judicial restraint does not require judges to abdicate their role under the Constitution as interpreters of that instrument's limits upon legislative and executive authority. It means only that judges should respect the limits upon their own role and recognize the breadth as well as the limitations of the role envisioned by the Constitution for the elected branches of government. Clearly, courts review legislative enactments. Just as clearly, they should overturn them as unconstitutional only when a legislative objective either falls beyond the scope of legislative authority or possesses no rational connection to the

legislative means adopted. There is no bright line marking those distinctions. Nevertheless, the more uncertain the logical connection between constitutional text and judicial interpretation, the more disinclined judges should be to substitute their own judgments for those of elected representatives.

Lawyers, above all others in society, should and must understand the importance of these principles. The inclination of lawyers as a group to turn every social issue into a legal question requiring judicial resolution can only exacerbate the public's suspicion of the legal profession. Those issues resolved by the courts -- and especially those issues resolved on constitutional grounds by the courts -- are removed temporarily or permanently from democratic or popular resolution. And the resolution is instead worked through lawyerly language and procedures that usually bewilder the public's understanding.

Our country was founded upon the revolutionary notion that the people should govern. To the extent important social issues are judicially removed from popular debate and democratic resolution, the people inevitably feels its will thwarted by the legal system itself. Each such frustration exacts a toll upon popular support for our legal system -- especially when an ultimate resolution requires years of tortuous twists in the courts.

A critique of judicial activism is neither "conservative" nor "liberal" in terms of the substantive results ordered by the courts. It is merely a recognition of the importance to our constitutional system of the popularly elected branches of government. In 1941 -- after serving as President Franklin Roosevelt's Solicitor General -- Robert Jackson wrote the following:

> "After the forces of conservatism and liberalism, of radicalism and reaction, of emotion and of self-interest are all caught up in the legislative process and averaged and come to rest in some compromise measure such as the Missouri Compromise, the N.R.A., the A.A.A., a minimum-wage law, or some other legislative policy, a decision striking it down closes an area of compromise in which conflicts have actually, if only temporarily, been composed. Each such decision takes away from our democratic federalism another of its defenses against domestic

> disorder and violence. The vice of judicial supremacy, exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts."

Though far removed from that time, we should remember that Jackson's critique of judicial activism followed a conservative Supreme Court's thwarting the economic and social policy decisions of the New Deal era.

At different points in our history, the federal courts have overstepped their constitutional authority and removed questions of policy from resolution by the political branches. Invariably, bad policy has resulted -- as have serious attacks upon the independence and legitimacy of the courts. In an early example, the Dred Scott decision, the Supreme Court overturned an attempt by Congress to limit the spread of slavery. This limitation, which the Court imposed upon the ability of Congress to limit or eliminate slavery, was overturned only by the War Between the States. During the subsequent Reconstruction period, the Court continued to be viewed as so political an institution that Congress felt no qualms about manipulating the number of Justices for purely political purposes.

In the early years of this century, the Supreme Court again entered upon an era of judicial over-reaching at the expense of legislative authority. In the 1905 case of Lochner v. New York, the Court overturned the New York Legislature's attempt to ameliorate sweat-shop conditions in the baking industry. So began an era of judicial supremacy that lasted about one-third of a century. The policies implicit in the substantive due process decisions of that era were subsequently repudiated. In addition, by 1937 they had provoked the court-packing assault upon the "nine old men" of the Supreme Court.

I do fervently believe that it was wrong for the Supreme Court to use the constitutionally fictitious concept of substantive due process to strike down democratically arrived at decisions of legislative bodies. Four decades later, I believe that a similar critique applies to many court decisions today overturning legitimate legislative determinations. And I believe that, irrespective of the "liberal" or "conservative" result that flows from any court's decision.

The effort to encourage judicial restraint is most emphatically not an effort to engage the courts in politics or to undermine their independence. This audience should recognize that the courts themselves engage in politics if they exceed their constitutional role and intrude on the policy-making responsibilities of the political branches. The promotion of judicial restraint is thus an effort to secure the independence of the judiciary, not undermine it. Justice Felix Frankfurter recognized this when he wrote that:

> "the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic, and social pressures."

Or, as Robert Jackson put it:

> "It is precisely because I value the role the court performs in the peaceful ordering of our society that I deprecate the ill-stared adventures of the judiciary that have recurringly jeopardized its essential usefulness.... By impairing its own prestige through risking it in the field of policy, it may impair its ability to defend our liberties."

Judicial restraint by the courts would serve to protect the independence of the judiciary and to ensure popular support for its role. Unrestrained intrusion by the courts upon the domain of the states and the elected branches would thrust the courts into the political arena.

It is for these reasons that, in a speech to the Federal Legal Council last October 29th, I announced a new and major effort by the Department of Justice to urge judicial restraint upon the courts.

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 classes." And third, the extravagant use of mandatory injunctions and remedial decrees. Constructs employed by the courts in these

areas have resulted in substitution of judicial judgment for legislative judgment.

In all of these areas 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, in all of these areas we shall urge judicial restraint whenever the very nature of the issues presented both practically and constitutionally require the resources of a legislature to resolve. It is to resolve those kinds of issues that the Constitution created a 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 in the other branches by the Constitution.

I believe that it is important that this Association join in the effort to encourage judicial self-restraint, not only because such an effort is necessary to secure the well-being and independence of the judiciary -- a primary concern of all lawyers -- but because judicial policy-making threatens the legal profession as well.

Throughout America's history, lawyers have been viewed by the public with suspicion, if not outright hostility. Lawyers were unwelcome in many of the thirteen original colonies. Massachusetts Bay actually prohibited pleading for hire -- as did, for example, Virginia, Connecticut, and the Carolinas. Similarly unkind views of attorneys continued even after the

American Revolution. In 1782, the author of the famous Letters from an American Farmer wrote:

> "Lawyers are plants that will grow in any soil that is cultivated by the hands of others; and when once they have taken root they will extinguish every other vegetable that grows around them."

The historic hostility to lawyers in America has not abated in recent years. In 1978, a Time magazine cover story chronicled "Those [expletive deleted] Lawyers!" Just last year, U.S. News & World Report considered "Why Lawyers Are in the Doghouse" and cited as the public's indictment: dishonesty, incompetence, and greed. When one survey asked what institutions retained the "high confidence" of Americans, law firms finished last in a list of 13 -- behind the Congress, the press, and labor unions.

The age-old complaints about lawyers have, however, assumed a graver importance in recent years. The reason is simple. As the Time magazine cover story noted, lawyers are today "hard to live with -- and without." Among the reasons cited by Time:

> "...the past quarter-century has brought a particularly explosive burst of growth in the legal industry. Since the mid-1950s the courts have discovered a spate of new constitutional rights, protections and entitlements for whole groups of peoples...."

The historic suspicion toward the legal profession is particularly a matter of concern because lawyers have become so seemingly necessary. It should therefore be of grave concern to the organized bar that many now contend the legal system is usurping responsibilities that constitutionally belong to the popularly elected branches of government -- the branches most responsive to all of the people, not just lawyers.

I believe that our adversary system is one of the finest developments in legal history. It guarantees the just application of democratic law to the particular circumstances of individuals with conflicting legal claims. As a result, I recognize the central importance of Canon 7 of our Code of Professional Responsibility: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." As EC 7-4 states, a lawyer's

"conduct is within the bounds of law, and therefore, permissible, if the position taken is supported by law or is supportable by a good faith argument for an extension, modification, or reversal of law." Nevertheless, the Code also prescribes another equally important duty for lawyers. Canon 8 requires that "A Lawyer Should Assist in Improving the Legal System." And EC 8-1 states that lawyers should therefore "participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients."

A lawyer knows the excesses as well as the successes of our legal system. A lawyer is schooled in its mysteries. I believe firmly that lawyers can do much to raise their standing in the eyes of the public by working, for example, to simplify and streamline the resolution of legal disputes.

More fundamentally, however, lawyers should recognize that judges, like other human beings, can overstep their constitutional roles. The result is judicial policy-making, the usurpation of the popular authority that the Constitution confided in the elected branches. If lawyers are best suited to recognize the excess, they should also join in the effort to curb that excess.

Individual lawyers appearing in court must, of course, zealously represent their clients. But individual lawyers both as citizens and as members of the ABA -- and this Association itself -- should also urge self-restraint upon the courts. Our very concept of self-government is at stake. Lest some think that lawyerly duties end within the courtroom, let me remind them that 31 of the 55 delegates to the Constitutional Convention were themselves lawyers. As those lawyers of old framed our unique constitutional system of separated powers, the lawyers of today should work to preserve it. The independence of the judiciary and public respect for our legal system demand that of us all.

In recent years, over half the members of Congress and one-fifth of the state legislators have been lawyers. When it comes to making law, lawyers have -- and should retain -- an important role. They should do so, however, as voters and as legislators -- not as judges. The Constitution and the public envision no more. Neither should the A.B.A.