DRAFT ARTICLE ON JUDICIAL RESTRAINT

On September 27, 1787, the Nation's first President, in one of his earliest official acts, offered the position of Attorney General to Edmund Randolph. In his letter, George Washington wrote:

> "Impressed with a conviction that the due administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and to the stability of its political system."

Attorneys General of the United States since the first have shown a similar concern for the role and functioning of the federal courts. With that in mind, the time has come to recognize that, in many instances, the courts have been drawn by litigants before them into areas properly and constitutionally belonging to the other branches or to the states. Those intrusions have not fostered, in Washington's words, "the happiness of our country" or "the stability of its political system."

In the spirit of Washington's admonition to the first Attorney General, the Department of Justice is undertaking a conscious effort to encourage judicial restraint. We have supported and will continue to support the selection and appointment of federal judges who recognize the limits of judicial power and the virtues of judicial restraint. We will review our litigation efforts across the board and bring our concern about judicial restraint to bear in deciding what cases to bring and what appeals to prosecute. The arguments which lawyers from the Department of Justice make in court -- whether as plaintiff, defendant, or amicus curiae -- will consistently reflect an awareness of the vital importance of judicial restraint in our democratic system and an effort to secure its implementation.

At the outset I want to make clear that the announcement and implementation of this program should not be viewed as any sort of "attack" on the courts. As Chief Justice Taft recognized long ago:

> "Nothing tends more to render judges careful in their decision and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism . . . . In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practical and available instrument in the hands of a free people to keep judges alive to the reasonable demands of those they serve." Taft, Criticisms of the Federal Judiciary, 29 American Law Review 642-643 (1895), quoted in Mason, William Howard Taft: Chief Justice 92 (1965).

Chief Justice Stone reiterated these themes: "I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it." Preface, Supreme Court Review (1961).

Twenty years ago on the "President's Page" of this Journal, John C. Satterfield, viewing judicial action which threatened to alter fundamentally the nature of our government, issued a plea for responsible criticism of the courts: "It is the inherent right and the highest duty of the Bar to analyze, criticize, make recommendations, and work toward improvement in both the rulings and operation of courts, from the lowest to the highest level." 48 ABA J. 595, 662 (1962). Neither judges nor -- as Justice Jackson has told us -- justices are infallible, and the many instances of overruled precedents or shifts in analyses indicate that careful criticism of court action has a vital role to play in development of the law.

Congress and the Executive can be checked by the judiciary when they exceed their powers, but the judiciary is unique among the three branches in that it is the judge of its own power. As Justice Stone put it, "the only check upon our own exercise of power is our own sense of self-restraint." United States v. Butler, 297 U.S. 1, 79 (1936) (dissenting opinion). In such circumstances it is incumbent upon the other branches to aid the courts in their exercise of self-restraint. This is precisely what the Department of Justice will be doing in the arguments its lawyers present in litigation. Our effort is one to persuade the courts, who of course retain the ultimate power of decision.

A conscious effort in our litigation to curb judicial activism should not be viewed as an effort to politicize the courts. The federal judiciary is an independent branch of government, purposefully and carefully insulated by the Framers from direct popular pressure. The reason the courts were insulated from popular pressure, however, was precisely because their function was not conceived to embrace policymaking. Responsibility for policymaking in a democratic republic must reside in those directly accountable to the electorate.

Not only are unelected jurists with life-tenure less attuned to the popular will than regularly elected officials, but judicial policymaking is also inevitably inadequate or imperfect policymaking. 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. Legislatures can also devise comprehensive solutions beyond the remedial powers of courts.

The greatest threat to judicial independence occurs when the courts flout the basis for their independence by exceeding their constitutionally limited role and the bounds of their expertise by engaging in policymaking committed to the elected branches or the states. When courts fail to exercise self-restraint and instead enter the political realms reserved to the elected branches, they subject themselves to the political pressure endemic to that arena and invite popular attack. Recently, Judge Malcolm Wilkey of the United States Court of Appeals for the District of Columbia Circuit expressed a "sense of relief" upon learning that the federal government would raise arguments designed to limit courts to their proper role rather than thrust them further into the domains of the elected branches. As Judge Wilkey put it:

> "When we judges act within our constitutional competence, we are supported; when we act outside that competence, then distrust, disrespect, and active dislike of the courts set in, impairing our ability to perform with the confidence of the people even unquestioned judicial tasks."

By urging courts to observe appropriate self-restraint and avoid intrusions into the domain of the other branches, we will be taking significant steps to secure their independence.

Our concern is not with results in a particular case; it is with the institutional role of the courts in our federal system and the scheme of separation of powers. Our effort, therefore, will focus on the procedures and approaches which help define the judicial role. We will, specifically, urge courts to observe strictly the requirements of justiciability, to avoid testing the constitutionality of laws by those devices which permit ready intrusion into the domain of the legislature, and to exercise restraint in the formulation of equitable decrees.

A focus on these areas, directly related to the role of the courts rather than the merits of any particular dispute, evinces a concern that does not depend upon political exigencies. Throughout history and to this day both liberal and conservative interests have sought to enlist an activist judiciary in the achievement of goals which were not obtainable through normal political processes. In the era which has come to be epitomized by the decision in Lochner v. New York, 198 U.S. 45 (1905), for example, it was conservatives who urged judicial activism under the banner of due process to strike down popular enactments. Judges read their personal predilections into the flexible terms of the Constitution, at the expense of the policy choices of the elected representatives of the people. The Court retreated from this activist stance with the announcement of such decisions as Nebbia

v. New York, 291 U.S. 502 (1934) and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), but the process of judicial policy-making -- under such guises as substantive due process or heightened equal protection analysis -- has resurfaced in other contexts in recent years. Now different groups urge judges to substitute their own policy choices for those of federal and state legislatures, but the evils of judicial activism remain the same regardless of the political ends the activism seeks to serve.

The key areas in any focus on judicial restraint are rules about what cases should be decided by courts, how courts should review the constitutionality of enactments, and how they should exercise their power in ordering relief. The first area, justiciability, is critical in distinguishing between the proper role of the courts and the legislature. The Framers did not give federal courts a roving commission to review acts of Congress. Proposals were in fact advanced which would have given the judiciary a general advisory role, through participation in a "Council of Revision," but these proposals were repeatedly rejected. Courts are limited by Article III to deciding live disputes presented to them by parties with a concrete and particularized interest in the outcome. Rules of standing limit judicial recourse to those suffering a particularized injury; those suffering only generalized harm should present their grievance to the legislature and seek redress through the political process. As courts ease requirements of standing they assume the burdens of functioning as a legislature, a role specifically denied them by the Framers of the Constitution. As Justice Powell has admonished, "we should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch." United States v. Richardson, 418 U.S. 166, 188 (1974)(concurring opinion). Strict adherence to standing requirements and the other aspects of justiciability guards against these contradictions.

A second means by which courts arrogate to themselves functions reserved to the legislative branch or the states is through so-called "fundamental rights" and "suspect class" analyses, both of which invite broad judicial scrutiny of the essentially legislative task of classification. Federal courts must, of course, determine the constitutionality of enactments when the issue is properly presented in litigation. In discharging that responsibility, however, courts also must, in the words of Justice Frankfurter, have "due regard to the fact that [they are] not exercising a primary judgment but [are] sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 164 (1951) (concurring opinion). Courts cannot, under the guise of constitutional review, restrike balances struck by the legislature or substitute their own policy choices for those of elected officials.

Two devices which invite courts to do just that are "fundamental rights" and "suspect class" review. It is of course difficult to criticize "fundamental rights" in the abstract. All of us, for example, may heartily endorse a "right to privacy." That does not, however, mean that courts should discern such an abstraction in the Constitution, arbitrarily elevate it over other constitutional rights and powers by attaching the label "fundamental," and then resort to it as, in the words of one of Justice Black's dissents, "a loose, flexible, uncontrolled standard for holding laws unconstitutional." Griswold v. Connecticut, 381 U.S. 479, 521 (1965). The broad range of rights which are now alleged to be "fundamental" by litigants, with only the most tenuous connection to the Constitution, bears ample witness to the dangers of this doctrine.

Analysis based on "suspect classes" presents many of the same problems. Classifications based on race are suspect and do merit careful scrutiny, in light of the historic purpose of the Fourteenth Amendment. Extension of heightened scrutiny to other "insular and discrete" groups, however, represents an unjustified intrusion into legislative affairs. As with fundamental rights, there is no discernible limit to such intrusion. As Justice Rehnquist has put it: "Our society, consisting of over 200 million individuals of multitudinous origins, customs, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (dissenting opinion). Both "fundamental rights" and "suspect classes" stand as invitations for a degree of judicial intrusion not invited by the Constitution, a means through which courts impose values which do not have their source in that document.

Another key area in which we will focus our efforts is the use of extraordinary equitable decrees. This is the all too familiar problem of judges taking over the running of state institutions, most notably prisons and schools. When confronting constitutional problems in the context of the administration of state institutions, courts must be particularly cognizant of their lack of expertise, and the fact that the ad hoc approach inevitable in litigation is often ill-suited to solving the complex and intractable problems of institutional reform. The Supreme Court has adverted to these concerns on many occasions. In Milliken v. Bradley, 418 U.S. 717, 744-745 (1974), the Chief Justice, writing for the Court, expressed concern over the scope of a remedial decree because it would make the court a de facto legislative authority and school superintendent. "This is a task which few, if any, judges are qualified to perform and which would deprive the people of control of schools through their elected representatives." Just last term the Supreme Court criticized a lower court for relying on factors which "properly are weighed by the legislature and prison administration rather than a court."

Rhodes v. Chapman, 101 S. Ct. 2392, 2400 (1981). Our efforts in this area, both as a defendant and in guiding the court as plaintiff or amicus curiae, will be to ensure that the lower courts heed these wise admonitions.

The exercise of sound judicial restraint is of course ultimately the responsibility of the judges themselves, but it is incumbent upon the other branches of government to aid in the endeavor. We in the executive branch will be doing our part through our program of litigation. We will not only urge judicial restraint when we are defending the federal government, but will also exercise self-restraint. We will not advance arguments which promote judicial activism even when such arguments might help us in a particular case. The end of success in any specific case does not justify the means of encouraging judicial activism.

Congress also has a role to play. Too often Congress invites judicial activism by open-ended statutory provisions and by leaving important questions unresolved in statutory enactments. Congress must face up to its responsibilities and not leave significant policy decisions to be resolved in litigation. As John Locke wrote, the power of the legislative branch is "to make laws, and not to make legislators." Congress should also carefully consider the constitutionality of its enactments, for, as the Court noted last term in Rostker v. Goldberg, 101 S. Ct. 2646 (1981), such careful consideration by Congress encourages heightened deference by the courts.

In focusing upon particular results, we must always remain conscious of the limitations implicit within a system of ordered liberty. The Constitution did not grant courts the power to reach results merely because they deem them desirable. It granted that role to legislative action, and it confined even that legislative power within constitutional bounds.

Edwin Corwin tells the story of a young man who called upon Justice Holmes after his retirement from the Court. The young man wanted to know what irreducible principle guided the great jurist in deciding constitutional cases. "Young man," said Holmes, "I discovered about 75 years ago that I wasn't God Almighty." It is time that we all realized that the Constitution envisions judges who interpret the law, not robed prophets who fashion it.