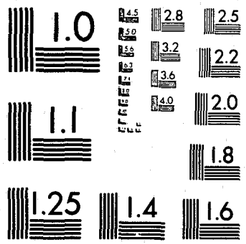

Department of Justice

ADDRESS

OF

THE HONORABLE EDWIN MEESE III
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE PALM BEACH COUNTY BAR ASSOCIATION

12:45 P.M.
MONDAY, FEBRUARY 10, 1986
WEST PALM BEACH, FLORIDA

NOTE: Because Mr. Meese often speaks from notes, the speech as delivered may vary from this text. However, he stands behind this text as printed.

In America we have increasingly placed great importance on our legal system in resolving controversies of every kind. Alexis de Tocqueville wrote over a century ago that "Americans have the strange custom of seeking to settle any political or social problem by a lawsuit instead of using the political process as do people in most other countries."

Tocqueville's observation is perhaps even more accurate today. Indeed, in our own age the courts grapple with a variety of difficult and challenging issues that were beyond the ken of the courts of Tocqueville's age. In just the past 30 years the courts, at both the state and federal levels, have redrawn the legal and social map in areas as diverse as civil rights, criminal justice, and tort liability. And given the turmoil of these decades it is not surprising that particular judicial actions have received both praise and criticism. It is inevitable that when you combine lawyers, controversial political issues, and strong public emotions you will get some very heated discussion.

In our political system we do our best to insulate our judges and our courts from the caprice of transient political issues. This is especially true at the federal level, where judges do not stand for election, and are removable only through

judges do not stand for election, and are removable only through impeachment. Nonetheless there is not, and should not, be a complete separation of the courts from democratic accountability. Judges are sworn to uphold the law -- law which is made by the freely elected representatives of the people.

At the federal level there is another kind of accountability, an accountability established by the Constitution. Article II, section 2 vests in the President of the United States the power and responsibility, subject to the advice and consent of the Senate, to appoint federal judges. There is no getting around the constitutional fact that the political branches of the government were specifically authorized to control the appointment and composition of the federal judiciary.

Over the past five years President Reagan has exercised this power to appoint Article III judges more than 250 times. During the next three years it will be his responsibility continue to make such appointments. Like all his predecessors, he is fulfilling his responsibilities under the Constitution. However, in recent months the subject of the selection of federal judges has sparked considerable attention from the press and from certain commentators. There has been a keen interest both in who has been appointed, and in how the President goes about making his decisions.

Unfortunately, as a result of certain accounts in the media, there seem to be several serious misunderstandings on the part of some regarding how the judicial selection process actually works.

Today, because there does seem to be some confusion, and because the selection of federal judges is a matter of public interest, I want to take some time to describe how the judicial selection process works.

To begin, let me emphasize that the President believes that the selection of federal judges is one of his most important constitutional responsibilities. Federal judges serve for life. And as the members of this bar association realize, they wield tremendous authority within our legal system. Given these realities, the President is committed to making absolutely the best selection possible for every vacancy that occurs.

In making the difficult decisions concerning judicial appointments it goes without saying that the President requires the best assistance that members of his Administration, the Congress, and concerned citizens can provide. As Attorney General, I have the job of providing some of that assistance. The Justice Department is part of the process -- and let me emphasize that it is a process, a process that involves many individuals, both within our department, the White House, and the Congress -- particularly the Senate.

Let me describe briefly how this process works.

When a vacancy occurs or a judgeship is created, members of Congress from the relevant state or federal court circuit are encouraged to call to our attention individuals whom they believe are exceptionally qualified to hold the position. The names we

receive from members of Congress, and sometimes from other distinguished individuals, are then evaluated by lawyers at the Department of Justice.

Our lawyers carefully review the experience, ability, and intellectual qualificiations of each candidate. Usually, several candidates for each judgeship are invited to the Department where they discuss their judicial philosophy and their ideas about the role of a federal judge.

It's this part of the process that has been misunderstood by some. Let me pause for a moment and explain what does not happen at this stage.

For one thing, there is no "litmus test" given to a judicial candidate. It would be nice if there was some way you could dip a person in a chemical solution and know if they will be a good judge depending on whether they turn pink or green. But there just isn't.

To emphasize this point, I want to assure you that we at the Department aren't interested in whether a prospective judge favors or opposes legalized abortion. We aren't interested in whether or not they personally oppose the death penalty. And we aren't interested in how they may personally feel about affirmative action, school busing or prayer in schools.

What we are interested in, what we do care about, is whether a candidate is serious about applying the law. We care about finding out whether in fact a person would let their personal feelings interfere with the way they approach the interpretation of a statute or of the Constitution.

It is interesting, by the way, to note that interviewers for other administrations have not always been so circumspect about avoiding personal inquiries. For example, the American Judicature Society conducted an intensive study into judicial selection during a previous administration and found that many candidates were quizzed on their personal, as opposed to jurisprudential, views. Indeed, the Judicature Society study noted that "both panel members and candidates [from the selection process of that administration] reported that applicants had often been questioned about nine contemporary social issues." Among these issues were capital punishment, the Equal Rights Amendment, affirmative action and abortion.

Judicature also noted that the executive order and supplemental instructions governing nominating commissions in that administration "offer[ed] no guidance about questions which should or should not be addressed to applicants during interviews", and that the order "implied that panels may inquire about an applicant's political, economic and social attitudes."

I want to assure you that in our process we do our best to avoid such questions. We are interested in judicial and legal, not personal, opinions.

President Reagan has made it clear that he is committed to appointing qualified individuals who are committed to the principle of judicial restraint. He is concerned about appointing good people who have a real appreciation for the properly limited constitutional role of a federal judge.

To be frank, the President believes, as do many others, that in recent times some judges have not always respected the constitutional limitations of their office. Several months ago President Reagan observed that "the Founding Fathers knew that, like any other part of the government, the power of the judiciary could be abused ... they never intended, for example, that the courts pre-empt legislative prerogatives or become vehicles for political action or social experimentation, or for coercing the populace into adopting anyone's personal view of utopia."

Accordingly, we do discuss the law with judicial candidates. It matters not a whit what they think about issues personally. It matters a great deal whether they appreciate the judicial role and a judge's responsibility to use his or her tremendous power carefully. In discussing the law with lawyers there is really no way not to bring up cases -- past cases -- and engage in a dialogue over the reasoning and merits of particular decisions. But even here, our primary interest is how someone's mind works, whether they have powers of discernment and the scholarly grounding required in a good judge.

It's true of course that some people -- mostly those who have not actually gone through this process -- think that discussing law and judicial philosophy at length with a distinguished lawyer being considered for a judgeship is an imposition. They would have us decide strictly on the basis of a candidate's reputation and standing.

Doing it that way would certainly be less work for us. But it wouldn't be a very good way. As you practitioners know, the qualities that make for a good, or even an outstanding, trial lawyer or practitioner are important but do not by themselves indicate whether a particular candidate will make an outstanding jurist. When someone has written extensively we refer to their scholarly publications, or to the opinions they have written as a state court judge. We also look to their standing and reputation among other lawyers (including counsel in opposing matters) and judges before whom they have appeared.

Our procedures are very exacting, equal to or more so than those of other administrations. But if we work hard at this task, and devote a great deal of time to evaluating candidates, it is only because of the seriousness with which we treat this responsibility. We want to be sure to find the best judges possible.

After these initial evaluations are made, the relative merits of candidates are considered by the White House Judicial Slection Committee, which includes the White House chief of staff, counsel, other assistants to the President, and top members of the Justice Department. At this stage in the process, we discuss seriously the relative merits of the candidates for each position. The evaluations are usually difficult, given the high caliber of the individuals under consideration. There is certainly no indignity in being considered but not selected for a judgeship. And it is heartening to find in this work, as I do

repeatedly, that so many outstanding lawyers are willing to give up successful and distinguished careers in private practice to take on public service, often at substantial financial sacrifice.

The evaluations that result from this careful process are actually no more than recommendations to the President. It is he who makes the final evaluation. And, as the Constitution requires, it is the President alone who appoints a judge.

Ultimately, of course, the measure of any system is its results. And by this measure, we believe that the appointments made in the past five years are a credit to the benches on which they serve. They are truly a diverse group -- men and women from many fields of practice and teaching who are united in their high ability and respect for the law.

To date President Reagan has named more than 250 Article III judges. And we are pleased that among this number are some of the most distinguished names from our law schools, our state courts, and from private practice.

There are some other interesting facts about these appointments. For instance, there are those who believe that President Reagan is appointing an unusually large percentage of the federal judiciary. Well, I regret that this isn't truer than the numbers indicate. To date he has filled about one third of all federal judicial slots. But it is interesting to note that in two terms President Eisenhower named 61 percent of all federal judges and President Wilson 50 percent. In much less than two terms President Johnson appointed 54 percent, Nixon 45 percent.

Indeed, in his first term in office President Reagan appointed only 29 percent of the judiciary, compared with the 39 percent appointed by President Carter in the same length of time.

At the level of the Supreme Court, the President of course has made but one selection: Sandra Day O'Connor. But we are understandably proud of her selection, not simply because she is the first woman to serve on the High Court, but because of her distinguished performance in the position to which she was appointed.

By comparison, President Nixon appointed four justices in approximately 5 and one half years in office. And Franklin Roosevelt, although probably best remembered in this context for his struggles with the Court, was ultimately able to appoint nine justices.

But statistics aside, what matters most in judicial selection isn't the numbers but the quality of the individuals chosen. Statistics don't say anything about the temperament or wisdom of the people appointed. Nor do they reveal anything about their judicial philosophy. Sometimes there are delays in filling particular vacancies, but this reflects the President's desire not to sacrifice speed for quality.

It is on this last point that something more needs to be said. In newspaper and magazine articles it is easy to talk about judges in terms of liberals and conservatives. It is easy to speculate that the so-called "conservatives" will try to place their policy preferences into the law, in the way that so-called "liberal" judges have been accused of doing so in the past.

But if anyone hopes that the idea behind picking judges who appreciate judicial restraint is to put a certain set of policy results into law, they will be sadly disappointed. Judicial restraint is not necessarily conservative, just as judicial activism is not necessarily liberal. A judge who looks outside a statute or constitutional provision for answers invariably looks inward. And the answers he finds may be liberal or conservative, radical or reactionary. But they will not be good law.

The kind of judge we endeavor to appoint is one who looks to the law itself and tries to apply it in accord with its dictates, who scrupulously eschews any attempt to twist or skew results to harmonize them with his personal predilections. There are many laws which do not represent wise policy. But it is for the judge only to decide whether they are constitutional, whether they were validly enacted, and whether they apply to the case before him. It is not his province to declare them good or bad, or to change or repeal them. These are matters for the political branches alone.

It is therefore our hope that through our appointments we may help reinstill in our judiciary, and in our polity, a proper sense of the balance among the courts, the legislature, and the executive. And that we may further invigorate a proper appreciation of the proper role of each under the Constitution.

As members of the bar you appreciate the importance of this task. And in speaking to you today, it is my hope that I have created some greater awareness of what we are about in the process of judicial selection.

In a radio address President Franklin Roosevelt once said: "We want a Supreme Court" -- and I would add this is true for all courts - "which will do justice under the Constitution -- not over it. In our courts we want a government of laws and not of men."

That is a sentiment with which I think we can all agree. And I would close by saying that to preserve a government of laws we will continue to appoint the very best men and women that we can discover.

Thank you all very much for inviting me here today.

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