

## TALKING POINTS

### JOHNSTON-HELMS AMENDMENTS TO DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION BILL FOR FISCAL YEAR 1982.

° These provisions limit the power of lower federal courts to order student transportation to schools beyond those closest to their homes, with certain exceptions, beyond 10 mile or 30 minute round trips, and restrict the power of the Justice Department to seek busing decrees.

° These provisions do not restrict the power of school boards or state courts to order desegregation decrees. They do not limit the power of the Supreme Court to consider constitutional questions.

° Congress has substantial power over the jurisdiction and remedial powers of the lower federal courts. In numerous instances, most notably with respect to the Norris-La Guardia Act, the Supreme Court has upheld legislative restrictions on the power of the courts to issue injunctions.

° Mandatory cross-town busing has been destructive of quality education and the goal of desegregation. The Supreme Court has held that busing may be limited by factors of time and distance which would "risk the health of the children or significantly impinge on the educational process."

° These provisions are within Congress' power under Article III of the Constitution and Section 5 of the 14th Amendment. They do not violate the Equal Protection or Due Process Clauses.

° The restrictions on Department of Justice authority, while unnecessary and unduly restrictive of Department discretion, are not unconstitutional. The Department retains ample authority to enforce civil rights statutes.

### LIMITS ON SUPREME COURT'S APPELLATE JURISDICTION

° S. 1742, limiting Supreme Court appellate jurisdiction over cases involving prayer, raises fundamental and difficult constitutional questions regarding the role of the Supreme Court. Prominent constitutional scholars have reached different conclusions.

° After careful and lengthy analysis, the Attorney General has concluded that Congress may not, consistent with the Constitution, make "exceptions" to Supreme Court appellate jurisdiction which would intrude on the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.

° Various factors must be considered in determining whether the core function would be invaded by particular legislation including whether constitutional issues would be withheld from the Court, the need for uniformity of results among the states, the extent to which Supreme Court review is necessary to ensure supremacy of federal law and whether suitable alternative forums have been left in place.

° If Congress determines to consider S. 1742 further, it may wish to do so in light of the Attorney General's analysis of the constitutional issues and the factors enunciated by him.

° The legislative record, debates in Congress, and committee reports are important analytical tools and final Attorney General analysis is necessarily predicated on completion of that process.

° As a policy matter, the Department of Justice has grave concerns over the withdrawal of Supreme Court appellate jurisdiction over classes of cases. The integrity of our federal system depends upon a single court of last resort having final say on the resolution of federal questions.

° Ultimately it is for Congress to enact laws and for the Executive to defend them unless clearly unconstitutional or an infringement on Executive Branch powers. If S. 1742 were enacted, the Attorney General would defend its constitutionality in the courts.



U.S. Department of Justice  
Office of Public Affairs

Office of the Director

May 6, 1982

AG  
DAG  
Associate  
Olson  
Rose  
McConnell  
Lee  
Starr  
Morris  
Lezar  
Habicht  
Roberts  
Kuhl  
Stewart  
Fein  
Hiller

Attached is the information provided to the White House today--all but the talking points were provided to the press at noon for release at 1 p.m.

Tom DeCair



U.S. Department of Justice  
Office of the Solicitor General

Washington, D.C. 20530

November 10, 1981

MEMORANDUM

To: The Attorney General  
From:  Rex E. Lee  
Solicitor General

According to my notes, the attached pages deal with the matters whose discussion I was assigned. Other matters -- looking to the future as well as the past, and emphasizing that this is not a dispute between the judiciary and the courts -- are dealt with by my earlier suggested answers to Art Brill's questions.

cc: Edward Schmults  
Deputy Attorney General  
  
Theodore B. Olson  
Assistant Attorney General  
Office of Legal Counsel  
  
Kenneth W. Starr  
Counselor to the Attorney General  
  
Tex Lezar  
Special Counsel to the  
Attorney General  
  
John Roberts  
Special Assistant to the  
Attorney General  
  
Thomas P. DeCair, Director  
Office of Public Affairs

RECEIVED  
OFFICE OF THE  
ATTORNEY GENERAL  
NOV 10 1981

STOCK, GENERAL ANSWER TO BE USED  
AS OPENING LINE OF DEFENSE TO ANY SPECIFIC QUESTION

I am glad that you asked about that. My speech to members of the Federal Legal Council dealt with an important subject. It is somewhat unfortunate that concentration on individual phrases and sentences taken out of context have diverted attention from the central message of that speech, which has to do with the allocation of governmental power among the three branches of government.

The separation of powers principle, which lies at the bedrock of our Constitution, teaches that the basic responsibility of the elected branches -- particularly Congress and the state legislatures -- is to make policy. That is, their responsibility is to decide what is best for the people who elected them, and to make the difficult trade-off choices between competing policy objectives.

The stewardship of the courts, by contrast, is over interpretation of the laws, including the Constitution. I recognize full well that the distinction between policy-making and constitutional interpretation is not always a fine, bright one. But the central message of my speech was fine and bright: in those cases where constitutional interpretation has the effect of displacing fundamental policy choices made by the legislatures, courts should err on the side of doing less rather than more.

There are two basic reasons. The first is that the elected branches are, by definition, more responsive to the people whom they serve. If the people disagree with the decisions that their legislators make, the people can have their own impact on policy in November of each even-numbered year. The second reason for favoring legislative decision-making over judicial decision-making in those areas where lawmaking and constitutional interpretation overlap is that legislatures by their nature are more effective policy-makers than courts. They are better suited to the task. Probably the principal difference is that legislatures have unlimited fact-finding capability. Courts, by contrast, are limited to the facts that are presented to them by the parties to a lawsuit, whose interests may be far narrower than those of other people whom the broader policy may affect.

STOCK ANSWER CONCERNING FUNDAMENTAL RIGHTS  
AND/OR SUSPECT CLASSIFICATIONS

The words "fundamental rights" make a very attractive label. It sounds like the kind of thing that no one could oppose, because everyone is in favor of rights, and "fundamental rights" must be the most important ones. But just as the phrase is very attractive, it is also inapt, as used in this context.

As used in the context of constitutional interpretation, "fundamental rights" means that some rights are more important than others, and since it is the judges who determine which rights occupy the preferred position, "fundamental rights" has simply become a euphemism for the substitution of judicial judgment for legislative judgment.

With regard to suspect classifications, the net effect, once again, of designating a classification as "suspect" is to shift more authority from the legislatures to the courts. As I stated in my speech, we believe that there is one classification that deserves special treatment, and that classification is race. The reason, of course, is that it is very clear that the purpose of the Fourteenth Amendment was to guarantee against racial discrimination.

## JUSTICIABILITY

This is a term that refers to the constitutional limitation on the kinds of cases that federal courts may constitutionally consider. Article III of the Constitution declares that the federal courts may consider "cases or controversies". "Justiciability" is the term that is sometimes used to describe this limitation. It is also referred to simply as the case or controversy limitation.

The Supreme Court has stated that the case or controversy requirement includes four elements: (1) standing, (2) ripeness, (3) lack of mootness and (4) absence of a political question.

Both statistically and doctrinally, the most important of these is the standing requirement. Basically, standing to sue means that in order to invoke the federal judicial machinery, the plaintiff must show that he has suffered personal "injury in fact." The standing requirement highlights one of the fundamental differences between the courts, on the one hand, and the political branches of government, on the other. One of the well-established rules of standing, for example, is that the plaintiff must be injured more narrowly, and in a more specific way than the injury to the populace as a whole. If the plaintiff's interest is merely an interest in seeing a particular philosophy of government prevail, it is the kind of interest that can be taken to the elected branches of government, who are free to entertain it. Courts, by contrast, decide issues not because they are of interest to the courts or to some individual citizen. They decide them only as those issues arise in actual lawsuits brought by persons who are injured in fact, which means an injury more specific than the effect shared by the populace as a whole. Because it permits judicial decisions to be made only in actual lawsuits in which some person is specifically injured, the standing requirement is probably the most important feature that distinguishes the courts from other branches of government. It is also the most effective check on judicial power -- the feature that prevents courts from ever becoming general overseers of government.

Ripeness has to do with lawsuits that are not adversary in nature because they have been brought too soon. That is, they involve an attack on a statute before the statute has ever been applied. The political question doctrine, unlike the other three elements of case or controversies (standing, ripeness, and mootness) concentrates on the substance of the question presented, and teaches that there are some kinds of issues which by their nature ought not be decided by the courts. The rules here are far from clear, and about the most that can be safely said is that some

issues pertaining to (1) the internal operation of other branches of the government (2) the conduct of foreign affairs, and (3) the adoption and ratification of constitutional amendments are political questions.



SOME OF THE CASES THAT HAVE ESTABLISHED FUNDAMENTAL RIGHTS

As pointed out in the speech, many of the fundamental rights are not specified in the Constitution itself, but have been read into it. Among these are:

1. The right to travel (Shapiro v. Thompson, which held unconstitutional a New York statute requiring a minimum waiting period in order to become eligible for welfare benefits.)
2. The right to marry (Zablocki v. Redhail, holding unconstitutional a Wisconsin statute preventing marriage by persons with existing support obligations for minor children unless and until they established that those obligations had been adequately taken care of.)
3. The right to procreate (Skinner v. Oklahoma, invalidating an Oklahoma law requiring sterilization of persons convicted three times of a crime involving moral turpitude.)
4. Right of privacy in sexual matters (Griswold v. Connecticut, invalidating Connecticut's law prohibiting the dissemination or use of contraceptives by anyone, including married persons, and Roe v. Wade, invalidating Texas' abortion laws.)

## A COMMENT ABOUT PRIVACY

The word "privacy" is not to be found anywhere in the United States Constitution. It is true that some of the constitutional guarantees are rooted in values to which the label "privacy" might be attached. Examples are the Fourth Amendment's guarantee against unreasonable searches and seizures, the Fifth Amendment's privilege against self incrimination, and some of the First Amendment guarantees.

Nothing in the Constitution says, or even vaguely implies, however, that the existence of some rather specific guarantees, arguably privacy related, means that any interest to which the label "privacy" might properly be applied as a matter of acceptable English usage is thereby constitutionally protected. The Court itself does not believe that, and has not practiced it, as evidenced by its decisions dealing with private obscenity (Paris Adult Theatre v. Slaton, holding that Georgia could regulate theatres showing obscene movies, even though the only persons affected were consenting adults) and homosexual conduct. (Denial of certiorari in case upholding a state law prohibiting homosexual conduct.)

In these privacy cases, and many others, the governmental decisions that have to be made are choices between competing values. The right to marry case is a good example. On the one hand, the person who has been married before and has children certainly has an interest in remarriage. But there is a legitimate competing interest, the interest of his children in seeing to it that their parent's new venture into matrimony does not impair their ability to survive. Who is to say that one of these sets of interests are more important than others? That kind of interest balancing, choosing between competing policies and competing values, is the kind of thing that under our system falls within the stewardship of legislatures. Moreover, legislators are better qualified to perform those tasks.

A QUOTE FROM JUSTICES POWELL, HARLAN AND HOLMES  
CONCERNING THE PROPER ROLE OF THE COURTS

(In U.S. v. Richardson, 418 U.S. 166, 180, 189 (1974),  
Justice Powell, in a separate concurring opinion, stated:

"The argument that the Court should allow unrestricted taxpayer or citizen standing underestimates the ability of the representative branches of the Federal Government to respond to the citizen pressure that has been responsible in large measure for the current drift toward expanded standing. Indeed, taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of government. 'We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'" (Justice Powell was quoting from Justice Harlan's opinion in Flast v. Cohen, 392 U.S. 83 (1968), which in turn quoted Justice Holmes in Missouri, Kansas & Texas R. Co. v. May, 194 U.S. 267, 270.)

## Reston speech

OFFICE OF  
THE ATTORNEY GENERAL



Looking to new  
situation - not  
trying to retreat

No fight - speech

given to quit litigators  
want to diminish corruption  
more principled

Exposed to attack if overstep

Judge released that speech made - said in  
dissenting opinions - from USSC in 1960s.

election returns

listen to argument against whether follows  
election returns election  
who should make policy decision - not  
judge but to elected hands.



U.S. Department of Justice

Office of Public Affairs

---

Washington, D.C. 20530

November 10, 1981

MEMORANDUM FOR THE ATTORNEY GENERAL

FROM: Tex Lezar

SUBJECT: Politicizing the Courts

Should anyone ask whether your Reston Speech urges the courts to follow the election returns, I would suggest a response like the following:

"Far from urging the courts to follow the election returns, I urged a return to neutral principles based upon the Constitution rather than a judge's desire to reach a particular result. The principle of judicial restraint -- and its practice by the courts -- would do more to protect the independence of the judiciary and to ensure popular support for its decisions than any other principle that could be urged upon the courts. Unrestrained intrusion by the courts upon the domain of the political branches is the real cause of their politicization. My speech announced our plan to urge that realization upon the courts -- when we appear in court -- to urge them to restrain themselves from entering the arena of political policymaking."

cc: Rex Lee  
Ed Schmults  
Ted Olson  
Ken Starr  
John Roberts  
Tom DeCair



U.S. Department of Justice

Office of Legal Counsel

Office of the  
Assistant Attorney General

Washington, D.C. 20530

1 2 NOV 1981

MEMORANDUM TO THE ATTORNEY GENERAL

The following is a suggested response, for discussion purposes, to a question which might arise out of the Reston speech relative to a Constitutional right of privacy.

Theodore B. Olson

Enclosure

cc: Edward C. Schmults  
Rex E. Lee  
Kenneth W. Starr  
Thomas P. DeCair  
Tex Lezar  
John Roberts

Q. Is there a constitutional right to privacy?

A. There are numerous rights articulated in the Constitution, including the right to be secure in our homes, the right to be free from unreasonable searches, the right not to testify against oneself and the right to worship as one pleases, which provide the citizens of this nation with protection from governmental invasions of privacy. What we are concerned about is the unreasonable and unlimited extension of certain specific protections in order to create rights which the founders of the Constitution simply did not contemplate and did not place in the Constitution. This process leads to the proliferation of judicial participation in areas that the Constitution leaves to the legislatures which are the best qualified bodies to deal with these problems.

Q. In your speech you criticized federal courts for exceeding their proper authority and going beyond their abilities in fashioning equitable remedies in a broad range of areas -- desegregation, prisons, housing, employment, and so on. Could you give us specific examples of instances in which courts went too far?

A. I want to emphasize that my address looked to the future, not the past. Our concern is with urging appropriate restraint on judges in future cases, not dwelling on past errors or difficulties. Increased judicial activism is pervasive and I'm certain everyone has their own favorite egregious examples. I'll simply cite two instances in which the Supreme Court itself chastised lower federal courts for exceeding appropriate bounds just last year. In the case which reversed a lower federal court ruling that double-celling of prisoners violated the Constitution, the Supreme Court specifically noted that the considerations relied on by the District Court "properly are weighed by the legislature and prison administration rather than a court." The High Court also stressed that "courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution."

In another case the Supreme Court reversed a district court judge who imposed detailed construction requirements and timetables on a local sewer system. The Supreme Court ruled that any such requirements should be set by legislatures or expert agencies, not courts using "vague and indeterminate nuisance concepts and maxims of equity jurisprudence." The Court stressed that the planning problems were too complex for the courts and not suited to case-by-case development.

These examples also illustrate that concern about judicial activism is felt in the highest levels of the federal judiciary itself. In many areas our effort is simply to guarantee that lower courts heed the admonitions of the Supreme Court.



Q. Your reference to Finley Peter Dunne's character Mr. Dooley suggests you intend to politicize the courts. Is this wise?

A. There has been some misunderstanding about this. The courts are affected by political changes not because they follow the election returns, but because the election returns affect the sort of arguments which the government will be advancing in the courts. The courts retain the final decision, but the arguments we advance will reflect the policies of the government we represent. Remember the context in which the speech was delivered -- it was an address to the governments' lawyers, to guide them in present arguments to the courts.

- 1) campaign issue
- 2) policy advocated by those thus elected
- 3) political maneuvering

Q. In your address to the Federal Legal Council you decried judicial activism and then noted several arguments your Department would be pressing on the courts, including urging them to rethink past approaches. Aren't you really just asking courts to be activist in a different direction?

A. Not at all. The arguments which I indicated we would be making are all addressed to the proper institutional role of the courts, not to any particular result on the merits. Regardless of one's views on the merits of a dispute, a concern for the proper role of the courts requires strict adherence to justiciability doctrines, limits on judicial policy-making, and limits on the scope of remedial decrees.

Q. Give an example of your new approach to standing.

A. One clear area of change is in environmental litigation. It was the policy of the previous Administration not to raise standing challenges in environmental litigation without a prior effort to accommodate opposing counsel. As a result, standing objections were rarely raised. Assistant Attorney General Dinkins reversed this policy upon assuming office. We also recently stressed a standing challenge in a case before the Supreme Court in which a taxpayer sought to contest a government transfer of land. The standing requirement is critical in that it distinguishes between those with concrete, particularized grievances who may seek redress in the courts and the general citizen who should raise his complaint in the legislature.

*Example?*

Q. What's so bad about "fundamental rights" such as the right to travel and the right of privacy?

A. Stated abstractly as in your question, nothing. The problem is that since these so-called fundamental rights are found nowhere in the Constitution their meaning in any particular case is essentially left to the unbounded imagination of lawyers and judges. A "right to privacy" may sound acceptable, but just last Term it was argued to the Supreme Court that this right prevented states from requiring doctors to notify parents prior to performing an abortion on their minor daughter. The Court rejected the argument, but it illustrates the extent to which the "fundamental right" label can encourage judicial interference with legislative determinations.

*example*

Q. Does your resistance to arguments based on "suspect classes" mean that you will not bring or support reverse discrimination suits, which typically argue preferences to minorities are unconstitutional because they discriminate on the basis of the suspect criterion of race?

A.

?

*Any suspect classifications  
other than race?*

Q. Is it appropriate for the Attorney General to be attacking the courts as you did in your speech?

A. My address was not an attack on the courts, but simply an outline of arguments which government lawyers will be making to halt undesirable trends. Many judges have expressed the same concerns about judicial activism in dissenting opinions, and just last Term the Supreme Court itself stressed its recognition that the members of Congress take the same oath to uphold the Constitution that the Justices do. In short, there is no "pro-court" or "anti-court" position on these questions. There is no clearer way to guarantee the health and independence of the judicial branch than to seek to confine it to its proper sphere.

*Willie  
Desiring  
Munin*

Q. You did not discuss in your speech the pending proposals to divest the federal courts of jurisdiction in the areas of abortion, school prayer, and busing. What is your position on these proposals?

A. The proposals raise serious questions both as to constitutionality and wisdom, on which eminent scholars disagree. The Department has been considering these issues but we have not as yet reached a final determination.

# Memorandum



Subject

Judicial Restraint Drafts

Date

November 24, 1981

To Kenneth W. Starr  
Counselor to the  
Attorney General

From John Roberts *JR*  
Special Assistant to  
the Attorney General

Attached are a long (scholarly?) and short (op-ed) piece on the Attorney General's program to combat judicial activism -- the long and short of it, if you will. Both drafts could stand some polishing but I wanted to run them by you now to see if they were on the right track. Should the AG review these now in preparation for his Friday interview, or simply for his comments?



It is one of the most important responsibilities of the Attorney General of the United States to scrutinize and comment upon the activity of the federal courts. It is also his responsibility to direct the litigation priorities of the Department of Justice attorneys who represent the United States in court. I exercised both of these related functions in an address delivered last October to the Federal Legal Council, a gathering of leading government attorneys from the Department of Justice and other federal agencies. In that address I announced a conscious effort to combat the excesses of judicial activism.

At the outset it should be made clear that the announcement and implementation of such a program, while obviously based on perceived excesses of the past, 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."

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."

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.

A conscious litigation effort directed to curbing judicial activism should not be viewed as an effort to politicize the courts. The federal judiciary is an independent branch of

?  
dispute  
Sep.  
will be

government, purposefully and carefully insulated by the Framers from 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. Alexander Hamilton, writing in The Federalist No. 78, noted that there could be "no liberty, if the power of judging be not separated from the legislative and executive power" and that judges may not "on the pretense of a repugnancy . . . substitute their own pleasure to the constitutional intentions of the legislature." The greatest threat to judicial independence occurs when the courts flout the basis for their independence by exceeding their constitutionally limited role and engaging in policymaking properly committed to the elected branches or the states. 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.

*<NYTimes  
editorial*

Our concern is not so much with results in particular cases as 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, avoid particular devices for testing the constitutionality of laws which permit ready intrusion into the domain of the legislature, and 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 Lochner era, for example, it was conservatives who urged judicial activism under the banner of due process to strike down popular enactments. The evils of judicial activism remain the same regardless of the political ends the activism seeks to serve.

As noted, 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. Justice Harlan wisely noted that easing requirements of standing "may involve important hazards for the continued effectiveness of the federal judiciary." Flast v. Cohen, 392 U.S. 83, 130 (1968) (dissenting opinion). 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.

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 classes" analyses, both of which invite broad judicial scrutiny of the essentially legislative task of classification. Federal courts must, of course, exercise their function of determining 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-Facist Refugee Committee v. Grant, 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 classes" 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" minorities, however, represents an unjustified intrusion into legislative affairs. As with fundamental rights, there is no discernible limit to such intrusion. As one Justice 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) (Rehnquist, J. dissenting). Both "fundamental rights" and "suspect classes" stand as "an invitation for judicial exegesis over and above the commands of the Constitution, in which values that cannot possibly have their source in that instrument are invoked to either invalidate or condemn the countless laws enacted by the various states." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 182 (1972) (Rehnquist, J. dissenting).

The last key area in which we will focus our energies 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 own 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 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." 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 the litigation program outlined above. We will not only urge judicial restraint when we are defending the federal government, but will also exercise self-restraint and not rely upon arguments which promote judicial activism even when such arguments might help us in a particular case. The end of victory in any specific case does not justify the means of encouraging illegitimate judicial activism.

Congress also has a role to play. Too often Congress invites judicial activism by open-ended statutory provisions and by leaving significant questions unresolved in statutory enactments. Congress must face up to its responsibilities and not leave significant policy decisions to be resolved in litigation. Congress should also carefully consider the constitutionality of its enactments, for, as the Court noted last term in Rostker v. Goldberg, such careful consideration by Congress encourages heightened deference by the courts.

Finally, the legal profession itself has a responsibility to urge courts to exercise responsible self-restraint. In all candor the profession must recognize that there exists a possible conflict of interest on this score. The expanding power and influence of the courts has meant a concomitant expansion of the influence and role of lawyers appearing before the courts. Individual members of the profession and professional organizations must constantly ask themselves if their positions are good for society or simply good for fellow lawyers.

Last October 29, I spoke to the assembled general counsels of the various federal agencies about the new conscious effort by the Department of Justice to combat the excesses of judicial activism. I announced that when representing the United States in court the attorneys under my direction would, whenever possible, urge courts to exercise judicial restraint and avoid intrusions into the domains reserved by the Constitution to Congress and the Executive by virtue of the separation of powers or to the states under our federal system.

Several editorial writers took umbrage at my remarks, construing them as an outright attack on the courts or an effort to foster their politicization. Despite some reports, I did not urge the courts to follow the election returns. As I noted in my speech, the federal judiciary is an independent branch of government purposefully insulated from democratic pressures. The greatest threat to the independence of the judiciary occurs when courts exceed their limited role and engage in policymaking which is committed to the popular branches of government. Policy-making by unelected jurists is troubling in a democracy and undermines the basis for judicial independence and insulation from popular control. By advocating the observance of neutral principles designed to deter courts from such policymaking, we will be fortifying their independence. Refused?

Nor should my address have been viewed as an attack on the courts. Here I need only turn to some of the most eminent of our country's jurists for defense. As Chief Justice Harlan Stone remarked, "I have no patience with the complaints 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." Judge Learned Hand went so far as to paraphrase Oliver Cromwell: "I should like to have every court begin, 'I beseech thee in the bowels of Christ, think that we may be mistaken.'" Careful scrutiny of judicial action and fearless comment upon it is a responsibility which no Attorney General should shirk for the false comforts of apathy.

Our campaign against judicial activism will proceed along three major fronts. The first is insisting that doctrines of justiciability -- which determine what cases are suited for judicial resolution -- be scrupulously observed. We will, for example, insist on enforcing rules of standing whereby only suits brought by those suffering a concrete and particularized injury are permitted. This doctrine draws a vital distinction between the realm of the court and that of the legislature. Those with generalized complaints should present their case to the legislature and political process, not a single judge.

Second, we will resist the expansion of analysis based on so-called "fundamental rights" and "suspect classes", devices by which courts engage in broad intrusion into the legislative field. This is an area in which positions are easily misunderstood and misconstrued. Stated abstractly specific "fundamental rights" often sound palatable enough, but, as Justice Black once wrote, this mode of analysis represents "a loose, flexible, uncontrolled standard for holding laws unconstitutional," one which portends "a great unconstitutional shift of power to the courts which . . . will be bad for the courts and worse for the country."

Third, we will urge courts to exercise restraint in fashioning equitable decrees. Courts lack the resources and expertise to undertake executive functions, and many problems are ill-suited to the case-by-case development necessarily employed by courts. Just last term the Supreme Court criticized one district court for undertaking tasks which were too complex and not amenable to ad hoc solution, and in a different case specifically noted that considerations relied upon by a district court "properly are weighed by the legislature and prison administration rather than a court." This indicates that concern about judicial activism is felt not only by the people and their elected representatives but also in the highest levels of the federal judiciary itself. In many areas our effort is simply to guarantee that lower courts heed the admonitions of the Supreme Court.

By arguing that only appropriate cases be accepted for judicial decision, resisting the employment of broad and flexible devices for holding laws unconstitutional, and urging courts to temper equitable decrees with an appropriate sense of their own limits as well as recognition of the good faith and responsibilities of other government officials, we hope to aid the courts in the exercise of judicial restraint and thereby ensure their independence. The courts are unique among the three branches of government in that it is their own sense of self-restraint, rather than the possibility of review by another branch, which controls their exercise of power. It is therefore as much the responsibility of the executive branch to urge judicial self-restraint when appropriate as it is the responsibility of the judicial branch to ensure that Congress and the Executive do not exceed their powers granted by the Constitution.

# Memorandum



Subject

Criticism of the Courts

Date

November 10, 1981

To The Attorney General

From

John Roberts *JR*  
Special Assistant to  
the Attorney General

In addition to the quotation from Chief Justice Taft, here are several other judicial expressions recognizing a proper role for healthy criticism of the courts:

"It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism . . . . The moving waters are full of life and health; only in the still waters is stagnation and death." Justice Brewer, Govenment By Injunction, 15 Nat. Corp. Rep. 848, 849 (1898).

"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." Chief Justice Stone, quoted in preface to Supreme Court Review (1961).

"Certainly, Courts are not, and cannot be, immune from criticism, and lawyers of course may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so." Justice Frankfurter, dissenting in In re Sawyer, 360 U.S. 622, 669 (1959).

cc: Rex Lee  
Solicitor General

Theodore B. Olson  
AAG/Legal Counsel

Tex Lezar  
Special Counsel to the AG

Kenneth W. Starr  
Counselor to the AG





11<sup>th</sup> 11/27 ✓  
0

Washington, D.C. 20530

November 25, 1981

MEMORANDUM

TO : The Attorney General  
FROM : John Roberts, Special Assistant *JR*  
RE : Preparation for Interview with Fred Barbash

Attached are:

1. Q & A's on specific examples in each of the three areas;
2. a copy of your Reston speech;
3. a copy of Judge Wilkey's letter.

# Memorandum



Subject	Date
Judicial Activism Q & A's: Specific Examples	November 25, 1981

To	From
The Attorney General	John Roberts

- Q. Could you give us a specific example of a case in which you think a court went too far in permitting standing?
- A. This isn't just a question of what courts permit, but also involves what arguments we will be making as litigants. As you may know, certain parts of the Justice Department previously followed a policy of not raising standing challenges in the most vigorous fashion. This was particularly true in the environmental area. It will be our policy to raise standing and other justiciability challenges to the fullest extent possible.

If you insist on a specific example where we think a court reached out beyond the proper bounds of standing to bring a dispute within its purview, I can cite you to a case which the Solicitor General just recently urged the Supreme Court to reverse. The case, Valley Forge Community College v. Americans United for the Separation of Church and State, from the Third Circuit, involved the transfer by the government of certain property to a religious school. The lower court ruled that any citizen had standing to challenge the transaction, even in the absence of any specific injury to him personally. In urging the Supreme Court to reverse this decision, Solicitor General Rex Lee argued that granting standing to citizens who do not suffer distinct, particularized injury blurs the line between court and legislature.

- Q. Can you give us an example where you think courts have erred in applying "fundamental rights" or "suspect classes" analysis?
- A. Here, as in the other areas, I want to emphasize that our concern is with the role of the courts and approaches to problems in general, rather than with particular results on the merits. We are also more interested in urging proper approaches upon the courts in the future rather than simply criticizing what we may perceive to be errors of the past.

If you insist on an example, the case of Shapiro v. Thomspson may serve to illustrate our concerns in this area. In that case the Supreme Court relied upon the so-called "fundamental right to travel" to strike down state laws imposing a one-year residency requirement before individuals could apply for welfare benefits. The court conceded that there was no explicit "right to travel" in the Constitution, fundamental or otherwise, and blandly stated that "we have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision." As you might recall, Justice Harlan wrote an incisive dissent in that case raising many of the same concerns which I addressed in my Federal Legal Council speech. He argued that the Shapiro decision reflected a notion that the court "possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises." Its that very attitude which we are trying to resist.

- Q. Do you have any examples of cases in which courts went too far in fashioning remedial decrees?
- A. In this area the Supreme Court itself has given us two recent examples by reversing lower court decisions precisely because judges went beyond their proper bounds. In the case of Rhodes v. Chapman, the Supreme Court reversed a district court judge who required single celling of inmates, no matter what conditions were like in the rest of the prison. The Supreme Court specifically criticized the district judge for following his own ideas about how to run a prison rather than the "cruel and unusual punishment" standard of the Constitution, and criticized him for examining factors which "properly are weighed by the legislature and prison administration rather than a court."

[Our position in the Texas prison case, Ruiz, is not inconsistent, since we are not arguing in that case that single celling is always required, only on the particular facts involved there, and we also argue that double celling will be permissible if certain other changes are made.]

In another case, Milwaukee v. Illinois, the Supreme Court reversed a district court judge who, relying upon federal common law, imposed detailed and massive construction

requirements and other specific obligations on a local sewer system. In the course of its opinion, the Supreme Court noted that that the problems involved were too complicated for judicial resolution, and that they were not suited to the case-by-case development necessary whenever courts address problems.

cc: Deputy Attorney General  
Solicitor General  
Ken Starr  
Tex Lezar

UNITED STATES COURT OF APPEALS  
WASHINGTON, D. C. 20001

MALCOLM RICHARD WILKEY  
UNITED STATES CIRCUIT JUDGE

4 November 1981

TO: Editor  
New York Times

Sir:

The difference in both tone and content between the Attorney General's remarks to the Federal Legal Council and your editorial on 3 November could not be more marked. Since both dealt with, and will doubtless influence, the fundamental role of the judiciary in our tripartite representative democracy, a comment from a sitting judge earnestly striving to fulfill his role properly may be appropriate.

From the Attorney General's view of such constitutional questions as "justiciability" I derived a sense of relief that henceforth we judges would be asked -- at least by the Attorney General -- to deal with questions of law with discernible legal standards to guide us, issues with which by training, administrative facilities, and constitutionally endowed powers we are well equipped to deal. From your editorial I gather we judges ought to be thrust further into the maelstrom of conflict in order to achieve much desired political and social goals which our elected representatives in the legislative and executive branches have not been able to attain.

Let me suggest that we have here a confusion of means and ends. Your editorial reflects the attitude of many persons, dedicated to achieving certain political and social goals but frustrated by the elective political process, who have turned to the courts as a means of achieving their goals. My purpose is not to define these objectives nor to take issue with them; indeed, the obvious merit of most and their resulting widespread popular support obscure the inappropriateness of the chosen means. However, as one of the means you would employ in achieving these ends I have more than an average stake in the argument.

My concern is that the people's elected representatives, legislative and executive, are being bypassed. In our tripartite republic the Constitution has placed decisions on economic and social policy in the political branches, whose members must face periodic election, not in a rather senior age group of seven hundred appointed for life. No matter how meritorious the political and social ends, manipulating the judiciary as a means is bad constitutional practice. In contrast to other political and philosophical systems, American theory has never accepted a rationale that the end justifies the means.

Your editorial condemned the Attorney General's "speech -- at a time when the courts, and the Constitution, can use support." You might consider why it is that "the courts . . . can use support." The answer, I would suggest, is precisely that the judiciary has stepped over the line from matters justiciable into the legislative-executive arena. It is this hyperextension of the judicial prerogative, and no more, that the Attorney General is asking be rectified. 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.

The title of your editorial, "Justice, Reaganized," implied that the Attorney General's concept of a role for the judiciary more limited than in the immediate past has no antecedents but the current administration's electoral success. Well, hardly. Surely anyone with an historical perspective knows that the concept of a limited role for the judiciary, of mutual self-respect among the three coordinate and coequal branches of government, comes straight from The Federalist of Madison, Hamilton, and Jay. And while Chief Justice Marshall strengthened the role of the federal courts, he did so, not by trenching upon the prerogatives of the other branches, rather by expanding the role of the whole federal government.

While we all know that The Federalist foresaw judicial review of legislative and executive acts for their constitutionality as essential in a government of limited powers under a written constitution, we should not forget that Hamilton wrote:

The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them; . . .

Hamilton's admonition has often gone unheeded by individual judges who delight in placing their philosophical stamp on society, even in rather plain defiance of law previously put on the books by Congress or other courts. Congress has frequently compounded the problem by leaving difficult policy choices unresolved, inviting judicial intervention.

It is true that throughout our history the Supreme Court has had a limited policy role to play. But it has been limited -- not merely by the Constitution, but by the (usually) careful judgment of the Nine in their unique position. Moreover, what the High Court can -- and sometimes should -- do in its position at the peak of the pyramid, where responsibility and accountability are instantly and visibly fixed, is no model for the inferior courts. Seven hundred federal judges, and many thousand state judges, simply cannot wander all over the map in deciding what the law is or should be, or in performing managerial tasks for which the judiciary is signally unsuited.

The judiciary serves best when it performs its constitutionally defined role, not when it tries to solve all social problems unsatisfactorily handled by the other two branches. Even the ancient Israelites grew tired of being ruled by Judges and in relief turned to a King; what an irony if 1776 and 1787 should come to that here.

Very truly yours,

A handwritten signature in cursive script that reads "Malcolm Wilkey".

Malcolm Richard Wilkey