Larry D. Thompson
Senior Fellow, The Brookings Institution

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Good morning. I would like to talk to you today about a couple of initiatives that I was involved in and led at the Justice Department that were important and which received some criticism, even by some conservatives. There is no better opportunity to set the record straight than at a Federalist Society gathering.

Corporate Fraud

First, although I spent a great deal of my time at Justice dealing with our efforts to prevent and disrupt terrorism, as a former prosecutor and white-collar defense lawyer, my responsibilities in the Department's efforts against corporate fraud were near and dear to my heart. Some have criticized the Department's very tough regime of attacking corporate fraud as unnecessarily chilling legitimate risk-taking among businesspeople. I will talk to you briefly about the role I believe swift and strong prosecution decisions play in maintaining a vibrant business environment.

Just about a year and a half ago the president established the Corporate Fraud Task Force. He asked the Justice Department to lead the task force and asked the task force to help restore Americans' confidence in our financial markets. The task force has had remarkable success. One statistic tells the story of success: since its inception the task force has obtained over 250 corporate fraud convictions or guilty pleas, including at least 25 former CEOs, all of this was accomplished in really record-breaking time. I can tell you from experience that these

investigations have, in the past, taken two to four years to complete.

Now these corporate scandals are not new. We had the savings and loan bankruptcies of a decade ago. Less than two decades ago we had the high-profile insider trading scandals and the spectacular collapse of the junk bond schemes. Three decades ago we discovered that some of our prominent corporations were engaging in corrupt foreign practices. The list goes on through the stock manipulations of the 1920s, and the antitrust conspiracies, and the robber barons of the early twentieth century, to the real estate scams that marked the dawn of the republic.

Now the lesson here is not that greed and criminality have always been with us—although, clearly, they have. Rather, the lesson is that Americans have overcome each of these jolts, and our economy has remained the envy of the world. Each fresh business scandal has brought calls for more regulation, tighter rules, better weapons to fight the last war, to make certain that the chicanery used so successfully in the scheme just past can never be used again. Regulations expand with each ensuing scandal, to encompass every possible abuse—except the next one.

Of course, some regulations have been laudable. Those that promote transparency can give the market more uniform and accurate information. But overzealous and sometimes mindless regulation can be very bad. Too many regulations, rules that become Byzantine in their complexity or rules that seek to advance social policy preferences unrelated to the general economic welfare, are not only undesirable—these rules can seriously stifle innovation.

As Philip Howard, author of *Death of Commonsense*, has pointed out, we are already in this country suffering some of the ill-effects of over regulation. Companies must hire legions of experts and consultants merely to comply with regulatory dictates. These regulations' frequent shifts, and virtual immunity from legislative recourse, make the future business climate more difficult to predict and further increase the cost of capital. Start-up businesses are deterred from

even entering heavily regulated industries. Companies choose the safest course, not the one that might pay dramatic returns.

I can tell you this. Without the success of the President's Corporate Fraud Task Force there would have been a vacuum. There is absolutely no doubt that the vacuum would have been filled by a broad and minutely intrusive regulatory framework.

Vigorous criminal enforcement is thus, I believe, harmonious with the healthy economic development to which we aspire. It does not, by and large, creep toward inserting the government as the decisionmaker and undermining the entrepreneurial spirit. A strong regime of criminal enforcement leaves honest businesspeople free to compete while weeding out those few—and I do believe few—who break the law. Vigorous criminal enforcement—in support of the Rule of Law—is appropriate for punishing fraud while preserving economic freedom. Almost 60 years ago, the philosopher Friedrich Hayek recognized that, "While every law restricts individual freedom to some extent by altering the means which people may use in pursuit of their aims, under the Rule of Law the government is prevented from stultifying individual efforts by ad hoc action. Within the known rules of the game the individual is free to pursue his personal ends and desires…"[1]

I am proud of what the department, its prosecutors and FBI agents, the SEC, the IRS, and the U.S. Postal Inspection Service have done in combating the clear greed and corruption presented in the corporate fraud cases these past several months. Their terrific and professional efforts have done nothing less than help preserve the economic freedom we all cherish and allow honest business people to do their jobs.

Diversity

One of the most perplexing issues that our country faces is race. Conservatives, I believe,

correctly decry policies that categorize people as simply members of a group as opposed to looking at a person as an individual. Conservatives also correctly believe that any attempt by the government to categorize people by race should be subject to very strict scrutiny from a legal standpoint.

And we sometimes pay a price for our beliefs. When I took issue with a patently illegal, so-called affirmative action or set-aside program being utilized by the City of Atlanta, I was sharply criticized by the then mayor and branded as an African-American who needed to be exposed. But sometimes issues of race, I believe, are misunderstood when we are talking about legitimate diversity efforts undertaken by some government and business organizations, including law firms. Recently, there has been a much publicized flap over the diversity efforts at the Department of Justice. The media strongly criticized the department's decision to release in redacted form a study about diversity that was in fact requested by the department's leadership. There was little, if any, mention in the media that the department had actually funded and implemented diversity initiatives aimed at its attorney workforce, most of which apply to all attorneys in the department. And, earlier, there had been criticism of the department's diversity efforts by some in the conservative press. One publication said that the department's efforts "epitomize[d] the foundationless pursuit of racial diversity."

So let me offer my brief observations not only as to why the department's diversity initiative was important and will, I believe, strengthen the department, but also why we should consider the value of diversity to institutions like the Justice Department.

Now in talking about diversity it is always important—even necessary sometimes—to consider its legal context. You cannot do that without considering the impact of the recent Grutter/Gratz Michigan affirmative action cases.

I agree with everything Solicitor General Olson said in his brilliant analysis of these cases before the Federalist Society gathering at the National Press Club. As General Olson noted, many believe that *Grutter*, involving the law school, may have forever changed our fundamental values and our constitutional jurisprudence in a troubling way by holding that a public institution of higher learning can admit one person over another on the basis of race or ethnicity because of a compelling government interest.

The *Grutter* decision is in fact rather remarkable. Of course, as many of you know, the courts traditionally subject any governmental use of race to a strict scrutiny test. That test generally, until recently, required the government's use of race to further a compelling interest in the most narrowly tailored fashion possible. Until *Grutter*, only two such compelling government interests were recognized: first, when race is used to direct remedies to those who are themselves injured by previous governmental racial discrimination; and second, when race is necessary to protect national security. This national security interest first appeared in the infamous *Korematsu* case. To these two circumstances, the *Grutter* court added a third: the compelling interest in a diverse student body.

But the *Grutter* court never really explains what it means by diversity and why it considers the promotion of racial diversity, instead of economic, political, cultural or religious diversity, to be more important.

By attempting to pigeon-hole and limit diversity into the same old racial and ethnic categories, I believe the court, and certainly the country's university administrators, do not understand how truly diverse we are as a nation. We are a nation of a multitude of views, formed not just by the few race boxes on an application form, which themselves are beginning to appear antiquated as our population intermarries, but by our religions, our places in the economy, our

participation in politics, where we live, our interests, and on and on. It is this diversity which makes America strong and which we should never ignore.

My criticism of *Grutter* should not obscure my strong belief that diversity is not only what makes America strong, but that it is good for the Department of Justice. This is not simply a paean to diversity as an idea or value; it is a practical, common sense recognition that the Department of Justice will be a stronger, more effective organization if its attorney workforce is as diverse as possible across a wide spectrum of backgrounds, including racial and ethnic backgrounds.

So the department's diversity program does include outreach efforts aimed at racial and ethnic minorities, including Asian Americans. But it also includes initiatives that benefit all department attorneys. For example, it includes a loan forgiveness program for students burdened with student loans who want to commit to careers in public service; it includes measures designed to bring more transparency to the hiring and promotions process; it includes a mentoring and career development program available to all department attorneys; and it includes interviewing prospective department attorneys at law schools that are more geographically diverse than in the past.

What the program does not include is any racial preference whatsoever; the department will continue to demand that its attorneys meet the highest standards, qualifications, and excellence as possible. To me, all of this makes eminent sense for a department that must enjoy the trust and confidence of all Americans and whose attorneys must deal with all kinds of people on a daily basis, including: judges, jurors, witnesses, defendants, and simply the general public. Federalism itself is perhaps the framers' greatest reliance upon diversity in public policy. By reserving basic authority over most issues to the states, our federal system of government allows

the states to experiment in the development of public policy. As Justice Brandeis observed, the federal system establishes fifty "laboratories of democracy."[2] After observing the different results achieved by the states, the federal government can then adopt the best policies for the national level. This has worked especially well in law enforcement. The department's effort to reduce gun-related violence—Project Safe Neighborhoods—was originally developed at state and local levels. When the attorney general saw its impact on crime levels, he decided to initiate a nationwide effort.

Now, in the 21st century, diversity is simply a fact of life. Our society is diverse along many lines. And many of society's problems, like crime and terrorism, also proceed along various diverse lines. To most effectively confront these serious challenges, it would be foolish if our government, especially the Department of Justice, did not draw upon one of America's greatest strengths, her diversity.

Thank you.

*NOTE: Mr. Thompson frequently speaks from notes and may depart from the speech as prepared. However, he stands behind the speech as presented in written format.

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[1] Friedrich A. Hayek, *The Road to Serfdom* (Chicago: The University of Chicago Press, 1944).
[2] *New State Ice Co. v. Liemann*, 285 US 262, 311 (1932).