Department of Justice

ADDRESS

OF

THE HONORABLE GRIFFIN B. BELL

ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

AMERICAN BAR ASSOCIATION

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A year ago in Chicago it was my honor to appear before an Assembly luncheon at the annual meeting. I am honored again to be here.

It is my privilege today to share the platform with the Attorney General of our mother country. Although our titles are the same, there are many differences in our duties and responsibilities. In England, for example, the Attorney General is the head of the bar of the country. Whatever one might say about the Attorney General of the United States -- I hear a lot, and there is probably a lot I don't hear -- it has not been suggested that he is the head of the bar.

When the Right Honorable Samuel Silkin spoke to this Association two years ago in Atlanta, he had long been Attorney General. I was a practicing lawyer, after a stint on the bench. Not too long after that I found myself holding his title. Now I am involved in many activities, many of which range far afield from the usual conception of a lawyer's work.

I would like to reflect on the role of the Attorney General in the United States and note some of the differences between my job and Mr. Silkin's. Then I want to give you a brief progress report on the Justice Department's legislative program, something of vital interest to ABA members.

As I understand it -- and Mr. Silkin may have to correct me in his remarks because it is not always easy to understand the way English institutions operate -- but as I understand it, the primary duties of the Attorney General of England and Wales are to be the chief legal advisor to his government, its chief legal advocate - we would say - in the House of Commons, and he holds the ministerial power of prosecution. Unlike the American Attorney General, he does not also have to administer a vast government Department. There are times when I envy my English colleague's ability to give his full time and attention to his more purely legal role.

The historic and traditional role of the Attorney General of the United States, beginning with its creation in 1789, was to serve as legal advisor to the President and other executive officers, and to represent the government in court. That is the role which I share with the Attorney General of England. Yet, because of all of the other responsibilities since laid upon the Attorney General, that has become only a part, and is now not even the larger part, of my responsibilities.

I must also administer a bureaucracy with some 55,000 employees spread across the continent and throughout the world. Of those 55,000 employees, only about 3,800 are lawyers engaged in litigating for the government and in rendering legal opinions to executive officers. My responsibilities, beyond litigation and legal advice, include the administration of the federal prison system, investigations of federal crimes, administering the immigration and naturalization laws, granting millions of dollars to the states for law enforcement work, dispensing funds for research, and recommending to the President persons to nominate for United States Attorneys, United States Marshals, and judges of the federal courts. Almost all of these duties have been added to the job of the Attorney General since 1870 when the Department of Justice was established.

Yet, the role of counsellor and advocate is at the heart of the Office of the Attorney General. It is the central mission which above all else must be performed in a professional manner if we are to have a government administered under law. To carry out this mission, the Attorney General must have a substantial degree of professional independence to

interpret and apply the law to the best of his abilities. This responsibility is, of course, carried out under the authority of the President, who bears the ultimate constitutional responsibility to take care that the laws be faithfully executed.

Because of this ultimate constitutional authority in the President, who is in turn accountable to the American people, the Attorney General cannot be wholly independent. In fact, complete independence might set the stage for irresponsibility in the administration of the laws. It is contrary to the assumptions of our government that any executive officer can be unaccountable. At the least, it could result in an incoherent and disorganized discharge of the executive function as it is defined under our Constitution.

There are some unavoidable tensions in the relationship between the President and the Attorney General, as there are in other parts of our government. On the one hand, the Attorney General must be responsible to and accountable to the President. The President can remove the Attorney General instanter and without cause. On the other hand, the Attorney General, under the power delegated by the President, must exercise while he serves, an independent professional judgment in giving legal opinions and in making decisions concerning litigation.

One of the most sensitive areas in which these tensions are felt is in making decisions whether to prosecute.

The President must, of practical necessity, delegate his law enforcement function, including these prosecutorial decisions. Once delegated to the Attorney General, as has been done by President Carter, the Attorney General must be left independent to exercise this prosecutorial discretion. Any effort to influence these decisions might be publicly perceived to stem from improper motives. It is absolutely essential that the Attorney General not be interfered with -- either in fact or appearance. This method of operation is what President Carter promised the American people; he has substantially honored the promise. I gave a complete disclosure on this subject to the Justice Department press on last Thursday.

On this matter, I think it is instructive to look to the position of the Attorney General in England. As a practical matter, it appears he is in a better position to function professionally and independently as a lawyer for the government than is the Attorney General of the United States. As I look at the situation of my counterpart, it seems to me that there are two circumstances which bolster his role and protect him from any perception of undesirable political pressures and influences.

One is custom, which is the explanation underlying many English institutions. Through accepted tradition, the Attorney General is to be left alone to function as a lawyer, using his own independent judgment on legal questions. It is improper for anyone in the Cabinet or in the Parliament to attempt to bring political pressure to bear upon him on decisions such as whether to prosecute a particular individual.

As I understand it, this has risen to the level of a constitutional rule. If the Attorney General in England were to be influenced or appeared to be influenced ultimately in these decisions, he would either be dismissed or the government itself might fall, as indeed happened once in the 1920's.

At that time, while Ramsay MacDonald was Prime Minister, it was alleged that the then Attorney General, Sir Patrick Hastings, changed his mind about prosecuting in a particular case because of pressure brought on him by the cabinet. In fact, controversy still exists as to whether the allegation had any merit, but the point is that the mere appearance of impropriety in responding to political pressure from the cabinet caused the downfall of the MacDonald government. As Lord McDermott commented thirty years later, the Hastings episode "gave the prevailing view [of independent judgment] the force of an established rule of the Constitution."

I do not have to remind you that we do not have such an entrenched custom in this country. Yet we should work toward establishing it. In the long run, an accepted understanding of that sort can be more powerful and effective than any formal rules, regulations, or statutes.

The other circumstance, as best I can tell, which enables the Attorney General of England to be more independent as a lawyer than his American counterpart is the fact that he is not involved in an array of activities unrelated to his work as a lawyer. He can be a full-time lawyer for the government. He has no huge department to administer. He is not normally a member of the cabinet. He has nothing to do with the selection of judges. The absence of such responsibilities as these enables him to devote more of his time to being a lawyer, and they keep him free of bureaucratic and even political problems of the sort with which I must deal as the head of a department.

Because of events of recent years, there is concern across the country about the evenhandedness and fairness in the administration of justice. I fully understand that concern, and I share it.

To administer the law, and the Justice Department, fairly and openly has been my highest priority since taking office. We have taken many steps in that direction. We are continuing to study how to make our system better than it is. We have had under consideration for some time proposals to permit the Attorney General and the lawyers

under his direction to exercise a larger degree of independent professional judgment, free of impermissible political pressures or personal considerations. How to arrange this is not an easy matter under our constitutional system. But we hope to be able to devise some plan that will, both in fact and in appearance, give a greater assurance to the American people that the executive branch carries out the laws faithfully and fairly.

We cannot, of course, copy the English arrangements, because of our differing governmental structure. But it may be that some aspects of the way these matters are handled in England can inspire us to new ideas which will strengthen our own institutions.

The English have always had a casual regard, or disregard, for the separation of powers. So it happens that Mr. Silkin, as Attorney General and an executive officer, is also a member of Parliament. In that capacity he advises the House of Commons and its committees on legislation and plays an important role in supporting legislation of interest to his government. I am, of course, not a member of Congress. I am not complaining -- I have plenty to do without taking on that task. But on the other hand, perhaps if I were a member of Congress I could do something more about getting important bills passed to give some badly needed relief to our justice system.

We are at a critical point in the 95th Congress. The final session will come to an end in early October. More bills of importance to the courts and the justice system are pending now in Congress than at any time in recent memory. All of these bills have been developed after long and careful study, and each is designed to provide much needed improvements in the delivery of justice.

I will mention only the most important of these bills. The Omnibus Judgeship Bill, which has passed both Houses and is in conference committee, will create 152 much-needed judgeships for the federal courts. There is the Magistrates bill which will allow these officers to handle many of the cases that now occupy the time of federal district judges. The bill on diversity jurisdiction, which has received wide-spread national support, will affect the business of the state court systems as well as the federal courts. I regret to say that the Board of Governors of this Association has announced its opposition to any measures of this sort. Even so, the arguments in favor of returning at least a portion of these state law cases to the state courts are so persuasive that they have carried the day thus far in Congress.

Another bill, for which no opposition is apparent, would put the appellate docket of the Supreme Court almost

entirely on a certiorari basis. We also have developed a bill that would introduce the use of arbitration in the federal courts.

These four bills -- Magistrates Jurisdiction, Diversity Jurisdiction, Arbitration, and Supreme Court Jurisdiction -- constitute the core of our justice improvements legislative program for this Congress. We hope we can get these behind us to concentrate on a new program - including discovery and class action reforms -- next year.

There are, of course, numerous other legislative measures in which we have a vital interest. Perhaps the two most important of these are the revision of the Federal Criminal Code, which passed the Senate earlier this year, and the Foreign Intelligence Surveillance Act, which has also passed the Senate and which has a House floor vote scheduled for tomorrow.

Although the hour is growing late, Congress can still enact all of these measures to improve our justice system. I ask the Congress to do so, on behalf not only of the Department of Justice and myself, but also on behalf of the American people.

When the Office of the Attorney General of the United States was created in 1789, the title and the duties of the Office were copied from England. Now today, one hundred eighty-nine years later, that Office still exists in both countries. Justice is still administered under law in both countries. Considering what has happened over that span of time, that is no mean accomplishment. We can all hope that 189 years from now the same can still be said.