Department of Justice

ADDRESS

OF

THE HONORABLE GRIFFIN B. BELL
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

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When I spoke to you last year, the President had recently made his celebrated speech on lawyers to the Los Angeles County Bar Association, and the Chief Justice had just made a statement about the need for better training of lawyers. The media were filled with stories, most uncomplementary, about the profession, to the point that I dubbed 1978 on the Chinese calendar system as "The Year of the Lawyer."

In some ways, the atmosphere this year has changed quite a bit. Our profession has reassumed its traditional low public profile. On Law Day, the President hosted a reception for the bench and bar at the White House. He had some kind words to say about lawyers. The Chief Justice was present and appeared amiable.

Our work at the Department of Justice in the past year will give you some basis, I think, for a feeling that the change in attitude of the President and Chief Justice is justified.

I first want to report to you on the status of our efforts to fill the large number of vacancies on the federal bench as a result of the Omnibus Judgeship Act. The President and I have both been spending a lot of time on this important process.

Most of you already know the details of how a federal judge gets selected today, so I will not take coals to Newcastle. You perhaps know that we have superimposed an affirmative action plan on the regular selection process. In addition to the ABA screening process, we now accept comments on candidates from the

National Bar Association, a predominantly black lawyer group, and from a women lawyer's committee.

The Judiciary Committee system has changed. Both the Democrats and the Republicans on the Committee have an investigator. We make the FBI file on a candidate available to them. If they are not satisfied, they go out and check for themselves to get more information. There is, of course, nothing wrong with that, but it does take a little longer. In fact, from the experience with the first few nominees this year, it looks as if the Senate confirmation process will take from 60 to 90 days on the average. I am hoping that the time can be reduced now that the Committee is organized and its procedures are in place.

Twenty-two new judges have been confirmed by the Senate. Counting the number of vacancies remaining to be filled under the Omnibus Act, plus the vacancies caused by death and retirement, there are now 158 judgeships to be filled. Of this number, the President has signed off on 86 and they are being investigated or are pending in the White House or at the Senate. There are in fact 27 nominations at the Senate. It now appears that no appreciable number will be confirmed prior to mid-June or later.

In sum there are 108 judges in process or confirmed in this Congress. There are 72 judges yet to be chosen.

Now a word about the affirmative action effort. All of you know of the President's commitment to increase the representation of women and minorities in the Federal judiciary. The composition of the bench necessarily reflects the composition of the bar, and historically in this country the bar has been an almost exclusive reserve of white males. The Solicitor General, in a speech a few months ago, cited some arresting facts about the previous exclusion of women. For instance, Harvard Law School did not admit its first woman until 1950, and many major law schools like Notre Dame, Washington & Lee, Michigan and others first admitted women in the late 1960s or even at the beginning of this decade. Similar facts could be cited to explain the comparable paucity of minorities in the bar until quite recently.

When this Administration took office, the historical absence of women and minorities from the bar had resulted in a miniscule number of women and minorities on the Federal bench. Four of the nation's 399 district judges were women, five were Spanish surnamed, and only 17 were black. Only one of the 97 circuit judges was a woman, none were Spanish surnamed, and only two were black.

This Administration took office at a time when the nation had recognized the imperative that its judiciary should better

reflect the diversity of our society. Both the President and I are committed to that goal. But our efforts are tempered by some important realities. Perhaps the most important is that the influx of women and minorities into the bar is still a recent phenomenon, and there is not yet a large pool of women and minority lawyers of sufficient maturity and experience to assume judicial duties. The President is equally committed to maintain the high standards of the Federal judiciary.

Thus the process is fraught with tension, but I believe that our record to date stands up well to reasonable scrutiny both by those whose primary interest is increased female and minority representation, and those whose primary interest is the maintenance of judicial standards. Seven of the 29 circuit judges nominated to date by the President have been women, and five have been black and one has been Spanish-surnamed. Eleven of the 86 district nominees have been women, and 10 have been black, and four have been Spanish-surnamed. This means that 33 percent of the President's nominees have been female or minority. Stated differently, 16 percent of

the nominees have been women, 13 percent black, and 4 percent Spanish-surnamed. This compares favorably with the percentage of lawyers in each group to the total lawyer population.

Indeed, we will approach correcting, or even in some instances correct the historical imbalance through President Carter's appointments alone.

Let me turn now to another matter of great importance -- our efforts to enhance the skills and the professionalism of government attorneys.

No system of justice can work properly, or do justice, without well trained advocates with a high sense of professional responsibility. I continue to devote a considerable amount of time and energy to improving the Justice Department's lawyers on both scores.

I reported to you last year on our efforts to improve and expand our advocacy training program. That improvement and expansion was completed in March of this year.

We now conduct three-week courses in trial advocacy. The first two weeks of each course in either civil or criminal trial advocacy consists of instruction in case analysis, discovery, opening statements and summations, and direct and cross

examination. This instruction is supplemented with lectures and demonstrations on basic trial techniques, as well as videotape critiques of student performances. It all culminates in two days of mock trial in which all students participate as counsel. The third week of training is held several months after the first two, after students have had some "real world" experience to enable them to deal in the course with more sophisticated questions of trial tactics.

We depend on our most experienced lawyers for instruction and on those members of the Federal judiciary and the private bar who volunteer their time as faculty for the mock trials at the end of our two-week sessions. More than 112 federal judges have taught in our basic courses, and many of them have worked with us several times a year. While I am on the subject of participation, I should note that one of the Department's best and most experienced trial attorneys, Deputy Attorney General Civiletti, has become personally involved in the development of these basic programs and illustrates the priority that we are giving to this effort.

During my tenure as Attorney General, I have become concerned about an area of possible unfairness in the government's legal relations with the public.

The Department of Justice, at my direction, is now examining the possibility of legislation to deal with the problem of unfounded suits or agency actions by the government. Under our proposal, the government would be liable for attorneys' fees if it acts in a manner that is "arbitrary, frivolous, unreasonable, or groundless." See Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978).

Moreover, after a period of experience under this legislation, if adopted, it may well be just to extend this approach to unfounded criminal prosecutions.

In the same vein, we are looking at the often neglected Rule 11 of the Federal Rules of Civil Procedure, which says: "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay."

It is my impression as a lawyer, former federal judge, and Attorney General that Rule 11 is often violated by lawyers. This violates the principle of fundamental fairness: fairness to the client, fairness to the opposing party, and, as importantly, fairness to the legal system.

The Rule 11 problem -- or lack of a Rule 11 as is the case in criminal cases and appeals -- prompted me to announce in a Law Day address an Attorney General's policy that will bind all lawyers within the Justice Department. I intend to hold each lawyer responsible for his or her pleadings, and positions taken orally in court. If we find a knowing violation of the Rule 11 concept in the trial or appellate courts, we will take appropriate action against the attorney, as well as confess error or take such other judicial disposition as may appear proper.

There is a need for fundamental fairness in criminal prosecutions. Our new policy is to ensure that no indictment is recommended by a federal prosecutor unless the evidence presented to a grand jury would be at least likely to produce a conviction. We will not go forward, absent highly unusual circumstances, where we have only enough evidence to withstand a motion to dismiss the prosecution at the close of what would be the government's case at trial.

Through these approaches, I am giving notice to the entire government that we will adhere to the principle of fundamental fairness in our dealings with the courts and the public.

In announcing these policies, I do not mean to imply that government attorneys have been unprofessional in the past. The taking of a groundless position by our lawyers is a rare event.

Indeed, a high sense of professionalism exists among our lawyers. But it must be even higher in the future, because the government lawyers should serve as examples to the bar.

There is comparable professionalism in other parts of the Department as well. Let me give you two examples.

The Federal Bureau of Investigation is today performing admirably throughout its wide range of demanding responsibilities. Under Director William Webster, the FBI has shown a great ability to adapt to new conditions and challenges. It is becoming more effective even as the types of crimes it combats become more complex.

Priorities have shifted, and the FBI is now placing greatest emphasis on the crimes that have the most significant impact on our society. They include massive organized crime operations, large-scale frauds involving banks and computer systems, white-collar crimes, and foreign counterintelligence.

Another example of high professionalism is the Drug Enforcement Administration. I retained Peter Bensinger as Director of that agency, and I believe he has continued to do a fine job of professionalizing the agency and increasing its focus on investigations of major drug trafficking organizations.

The FBI and DEA are now utilizing their resources for combined investigations into major drug trafficking. This new

development in federal law enforcement holds great promise for making significant inroads against the immense profits realized by drug rings. The Justice Department recently brought its first major case stemming from this new FBI-DEA cooperation.

I next want to turn to the area of corrections. It was Dostoevski who said: "The degree of civilization in a society can be judged by entering its prisons." As lawyers and judges, we are all aware that a number of important values must be balanced in corrections: health, safety, security, inmate programs, inmate rights, sound administration. The Supreme Court earlier this week issued an opinion that permits wide latitude to prison administrators in managing their institutions, consistent with constitutional requirements. Bell v. Wolfish, 47 U.S.L.W. 4507 (May 14, 1979). I am pleased with that opinion, but I do not take it to be in any sense an endorsement of the substandard conditions of many of our nation's prisons and jails.

As many of you know, the Department currently is developing comprehensive federal standards for corrections. We solicited and received hundreds of responses to our draft standards, including detailed and constructive comments from leading corrections experts, medical and mental health groups, law professors,

architects, penal reform organizations, and state and local correctional administrators.

I am pleased to announce today that we will be issuing our federal standards by the end of the summer, after a final consultation with the American Correctional Association, which has been a leader in the corrections standards field.

The standards will require much more in many areas than bare constitutional minima, and it is our hope that they will be useful guides to state and local correctional administrators. For our part, we intend to use the standards in auditing state and local correctional systems and in making LEAA grants. Perhaps most important, we plan to meet the standards in the federal system. I am proud of the federal Bureau of Prisons, and I intend for the federal prison system to continue to be a model for state and local systems. Where necessary, we will seek additional funds to comply with the new standards.

Now a word about the Immigration and Naturalization Service. INS has always been one of the most neglected agencies in the government. Probably as a consequence of the neglect, it also has been one of the most widely criticized by Congress and the public.

One of my New Year's resolutions was to pay more attention to the INS, and events quickly conspired to make a necessity of my intentions. You may remember the strong public reaction in

early January to the violent anti-Shah demonstrations of Iranian students in California. Following those demonstrations, I directed INS to determine the number of foreign students in this country who had overstayed their visas or otherwise violated the terms of entry into this country. I quickly learned that the INS suffered from a terribly antiquated recordkeeping system, and that as a result, quick and accurate answers -- indeed, in some cases any answers at all -- were impossible. This same situation exists with respect to many other immigration records.

Commissioner Leonel Castillo and I are working closely together to change the situation and to bring the modern procedures and equipment available in this era to the INS. We hope to have an encouraging announcement at an early date.

One of the major policy initiatives during my tenure at the Department of Justice -- and certainly our most significant achievement in the foreign intelligence field -- has been the passage and implementation of the Foreign Intelligence Surveillance Act of 1978. This Act is a significant first step toward reassuring the American people that the government's intelligence activity is conducted within the rule of law. The Act establishes for the first time a statutory system involving

the judiciary in the authorization of electronic surveillance within the United States for foreign intelligence and counter-intelligence purposes.

In a sense, this is the era of the "founding fathers" in the field of intelligence law. In addition to statutory initiatives, we are developing a common law of intelligence by the daily decisions of the Attorney General in particular cases where the constitutional implications are more explicitly considered than ever before. When I became Attorney General I inherited the fine work of Attorney General Levi, who designed the initial draft of the Foreign Intelligence Surveillance Act and also established a framework of Attorney General guidelines to regulate FBI domestic security and foreign counterintelligence investigations. It required two years to build on this foundation by negotiating every word of the legislation with the affected agencies and the four committees of Congress that held hearings. In the end, I am satisfied that the Act struck a proper balance between the need for effective foreign counter-intelligence operations to protect our national security and the need to safeguard our most precious constitutional liberties.

This is an historic day in the development of a legal system to govern intelligence activities. Today, the Chief Justice of the United States will establish the two new courts

required by the Act. The Chief Justice will designate seven federal judges to serve on the Foreign Intelligence Surveillance Court, which will consider initial warrant applications from the government, and he will designate three federal judges to serve on a Court of Review to hear any appeals the government may make from rulings of the warrant court. The new courts will operate under strict security procedures established by the Chief Justice, in consultation with the Attorney General and the Director of Central Intelligence, to ensure that the records and facilities of the courts are properly protected.

Court orders authorizing electronic surveillance must specify the target of the surveillance, the location of the facilities to be surveilled, the type of information sought to be acquired, the means by which electronic surveillance will be effected, the period of time during which surveillance is approved, and procedures which the government must follow to minimize the retention, use, or dissemination of information about Americans that may be incidentally acquired in the course of the surveillance.

The establishment of these courts today is a reassertion of our faith that all government activities which have the potential to intrude upon the liberties of our citizens can

be brought within our constitutional framework. It is also a recognition of the trust of the American people in their court which are for the first time being brought into the counterintelligence process.

These are exciting times in the law and in the Department of Justice. It is a privilege to serve as your Attorney General as well as an exhilarating experience.

We can take pride in the contribution we are making as judges and lawyers to our country and to society.

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