

ORIGINAL

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REMARKS

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THE HONORABLE GRIFFIN B. BELL

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ATTORNEY GENERAL OF THE UNITED STATES

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BEFORE

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THE

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FIFTH CIRCUIT JUDICIAL CONFERENCE

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WEDNESDAY, MAY 9, 1979

18

ATLANTA, GEORGIA

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MARRIOTT MOTEL

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P R O C E E D I N G S

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2 ATTORNEY GENERAL BELL: Thank you.

3 Chief Justice Burger, Chief Judge Brown, Judge
4 Morgan, Judges, distinguished lawyers, ladies and gentlemen:

5 It's good to be with you. I won't try to respond
6 to Judge Morgan's introduction, because I know he'll fall into
7 my net one of these days.

8 (Laughter.)

9 I told you Monday, when I introduced Senator Kennedy,
10 about the woman asking me if I was a salesman from Ohio. You
11 are pressed for time, but I want to tell you something else
12 that happened to me recently. It seems like every trip I go
13 on, some unusual thing happens.

14 I was at Boca Raton, at the American College of
15 Trial Lawyers, and I was walking through the lobby of the
16 hotel going to speak, and a man introduced himself to me, said
17 he recognized my accent. He said he was from Milwaukee,
18 Wisconsin, and his name was Glenn Bell. Said he wanted to
19 thank me for the limousine he got at the airport the day
20 before.

21 (Laughter.)

22 I said, "I didn't have a limousine. I ride with
23 the F.B.I."

24 (Laughter.)

25 He said, "But they had one there waiting on you,

1 and they were paging Mr. G. Bell."

2 He said, "I answered the page, and they said, 'Your
3 limousine's ready.'" I said to my wife, "Let's go."

4 (Laughter.)

5 So they got in the car, and they had gone about 20
6 miles, and the driver said, "You sure don't have a Southern
7 accent."

8 (Laughter.)

9 He said, "Should I?" He said, "My name's Glenn Bell.
10 You were paging Mr. G. Bell."

11 He said, "I was paging the Attorney General."

12 (Laughter.)

13 That was a true story.

14 A lot of people ask me what it's like to be in
15 Washington, and I have lately been telling the story of the
16 response that the Territorial Governor of Nevada sent back
17 to Washington, when they asked him about how he was doing out
18 there. And he said, "This is no place for a Christian."

19 (Laughter.)

20 "And I did not remain one long."

21 (Laughter.)

22 I want to talk to you about a -- I want to mention
23 four things to you this morning. The Chief Justice is going
24 to speak, and I don't want to take any of his time. First I
25 want to give you a report on the judge selection process, not

1 the process, but the progress we have made to date. You can
2 take as a figure of the number of vacancies, about 170,
3 because there are always some retirements or deaths above and
4 beyond the 152 omnibus judgeships.

5 If we take 170 as a figure, there are 102 selections
6 in process. When I say, "in process," that means the
7 President has signed off on 102. I have eight accumulated
8 now, and I hope to see him tomorrow with eight additional
9 ones. That will put it up to 110, so that means there are
10 60 judgeships that have not gotten out of my office, most of
11 which have not reached my office. There are some there,
12 about whom there are some problems.

13 In the Fifth Circuit, we are working on all of the
14 -- virtually all of the judgeships except those in Alabama.
15 We have not heard anything out of Alabama, on the District
16 Court level, but we are working on all of the judges except
17 one place in Georgia. The same is true, I think, in Florida,
18 Louisiana, and tomorrow I will get the vacancy in Mississippi
19 signed -- I will get the President to sign off on that, and
20 Texas has got one place yet to go, I believe. So, if we had
21 the Alabama group in, we would pretty well have the Fifth
22 Circuit under way.

23 Now, on the Fifth Circuit Court of Appeals, there
24 are six judgeships pending in the -- six judges' nominations
25 pending in the Senate, and then there will be one other sent

1 over there in the next two or three days. So that will be
2 seven. I believe one of those probably is to fill a vacancy
3 caused by retirement, and six will be of the new judges.

4 In the Senate, as of yesterday, there were 28
5 nominees. Some, according to my record, some were voted out
6 of the Judiciary Committee on April 25, three -- three judges.
7 I don't know why the full Senate has not voted on them yet.
8 Apparently some were voted out of the Senate Judiciary Com-
9 mittee yesterday. I heard that this morning, including five
10 judges from Texas. But there are 28 in the Senate awaiting
11 confirmation at this time.

12 There are six at the White House, en route to the
13 Senate, and there will be two more today, which will be eight.
14 So you can see from that that we are making some progress.

15 Now, the process in the Senate is somewhat slower
16 than it has been, because Senator Kennedy put in a new system.
17 They do some investigating over and above what we do. Well,
18 you can't -- you can hardly have too much investigation, when
19 you are appointing someone to a full time -- to a job, a
20 lifetime appointment, where you have as much power as judges
21 have. So, we have the F.B.I. make an investigation. I have
22 the American Bar screening committee give me a recommendation
23 on ability. And in addition to that, I refer the names to
24 the National Bar Association, which is the black, predominantly
25 black bar association, just to get them to give us any indi-

1 cation of bias, and lately we have begun to give the names to
2 a women's coalition for the same purpose. So there is a lot
3 of checking going on.

4 But -- and I don't find anything wrong with that --
5 the Senate Democrats and the Senate Republicans have an investi-
6 gator, and they are -- we let them go through the F.B.I.
7 files, and perhaps most of the time they are satisfied with
8 that, but sometimes they want to go out and check up on some-
9 thing, get some more information. That's good, but that's
10 the system, and it takes a little longer than it used to
11 take.

12 Now, I think probably in the next three or four
13 months we will begin to see how long it's going to take names
14 of nominees to be confirmed in the Senate. I would guess,
15 right now, it's running about 90 days. Some of these five
16 that were voted out of the Senate yesterday -- I'm looking at
17 my list here -- that's not out of the Senate Judiciary Com-
18 mittee, were sent over there on February 13. Well, I think
19 that's not a fair assessment of the length of time, because
20 they had to get organized, and they are organized there in the
21 Senate now. So, I don't know how long it's going to take, but
22 they are doing a -- they are trying to do a thorough job, and
23 it's in the national interest that they do, just as we try
24 to do a thorough job.

25 Our affirmative action program that we are running,

1 is subjected sometimes to some criticism, but I am keeping up
2 with the A.B.A. ratings, and the affirmative action group's
3 ratings are about the same, running on about the same average
4 as the other -- as the people who were not in the affirmative
5 action program. So that's working out.

6 We have found -- we have selected, I think, some
7 very good people. We are making every effort to carry out
8 an affirmative action program, and at the same time, do it on
9 a basis of excellence. I am now working on a statement --
10 I don't know when I'll have it ready -- on affirmative action,
11 and when -- at what point does affirmative action end and we
12 go back -- then, we resume the system of just putting every-
13 body in the pot and selecting the best person. That's what
14 I'm asked frequently, and I am thinking that out right now.

15 Now, the next thing I want to mention, just much
16 more briefly, I just want to report that the Chief Justice is
17 just about ready to launch the Foreign Intelligence Surveillance
18 Court. He has selected some judges from over the country to
19 serve on that court. It is service in addition to your
20 regular duties. You come to Washington and sit as a judge
21 there for a period of time, and when you are needed to handle
22 foreign intelligence orders, you will be called on by the
23 Attorney General to do that. And there is also three judges
24 designated as a court of appeals for that court. These are
25 duties in addition to your regular service as judges.

1 This is going to bring in the third branch of the
2 Government, the Judiciary, into the foreign intelligence pro-
3 cess for the first time in the history of the republic. This
4 may be a sign of where we are heading in charters for the
5 C.I.A. and for the counterintelligence division of the FBI,
6 that the public will have a great deal more confidence in the
7 system if the courts are involved in the process. We can't
8 do too much to safeguard the rights of an American citizen,
9 and I am glad that we have someone above the Attorney
10 General, to sign. I am glad for two reasons. One is, I am
11 glad to have my own judgment checked, and my judgment is
12 based on what Director Webster recommends to me, or the head
13 of National Security, the Secretary of State; but then some-
14 one else to check my judgment is good, and also, I am hoping
15 that it gives me some form of immunity.

16 Since judges have absolute immunity, I want to get
17 under that umbrella some way. I report to you that I have
18 been sued over 300 times since I have been Attorney General.

19 Now, the next thing I want to mention, and this
20 will take a little more time, and this is from a Law Day
21 address I gave at the University of Georgia, Saturday a
22 week ago, just a little -- one part of that. And that has
23 to do with the principle of Rule 11, Federal Rules of Civil
24 Procedure, which states, "The signature of an attorney con-
25 stitutes a certificate by him, that he has read the pleading"

1 -- this is important -- "that to the best of his knowledge,
2 information, and belief, there is good ground to support it"
3 -- to support the pleading, what is said in the pleading --
4 "that it is not interposed for delay."

5 In citing this rule to you, I take note, first, of
6 the tremendous power exercised each day by lawyers, over the
7 affairs of their clients. Whether the client is the Govern-
8 ment or a private individual or entity, the client must
9 depend upon the lawyer to file such papers as he or she deems
10 necessary and appropriate.

11 My concern is that in the interests of advocacy,
12 Rule 11 is frequently ignored. How often does a lawyer stop
13 to reflect on the presence or absence of good grounds for the
14 filing? How many motions and discovery proceedings are com-
15 menced, not in the aid of truth-seeking, but merely to put
16 off the ultimate day of reckoning in court.

17 Under another situation, how many appeals are taken
18 by lawyers, who know that there is an absence of good grounds
19 for appeal, or that the appeal is interposed for delay.
20 Abusive filings clog the courts, and enhance the public mis-
21 impression that lawyers foster unnecessary litigation for
22 their own interests. They divert judicial resources from
23 consideration of truly meritorious filings, and they increase
24 the cost of dispute resolutions.

25 It is important to note that there is not even a

1 Rule 11 under the Federal Rules of Criminal Procedure, or in
2 the Federal rules on appeals, not even a mention of a Rule 11.
3 There is a requirement in the A.B.A. Code of Professional
4 Responsibility, that a public prosecutor or a Government
5 lawyer shall not institute or cause to be instituted criminal
6 charges, where he or she knows, or it is obvious, that the
7 charges are not supported by probable cause.

8 As stated in the applicable ethical consideration
9 to this rule, the responsibility of a public prosecutor dif-
10 fers from that of a usual advocate. His duty is to seek
11 justice, not merely to convict. And in one of my first meetings
12 as Attorney General, in the Great Hall where I spoke to the
13 lawyers, I read to them from Justice Southerland's admonition
14 in Berger vs. United States, and I am going to read it to you.

15 I am going into this because I need help. I am
16 going to -- I have announced a new policy at the Department
17 of Justice, that there is a Rule 11 applicable, the concept,
18 in everything that we do as Government lawyers, whether we say
19 something orally, whether we file a pleading, whether it is
20 in a civil case, whether it is in a criminal case, whether
21 it is on appeal. And I hope that you will watch my lawyers,
22 and watch me, but I also hope you'll hold the private bar to
23 the same standard that we have put in for Government lawyers.

24 This is what the -- but this, what I'm reading to
25 you now from Justice Southerland's opinion, applies only to a

1 prosecutor:

2 "The United States Attorney is the representative,
3 not of an ordinary party to a controversy, but of a sovereignty
4 whose obligation to govern impartially is as compelling as its
5 obligation to govern at all, and whose interest, therefore, in
6 a criminal prosecution, is not that it shall win a case, but
7 that justice shall be done. As such, he is in a peculiar and
8 very definite sense, the servant of the law, the twofold aim
9 of which is that guilt shall not escape or innocence suffer."

10 Now, we are putting out this new policy. It's not
11 a rule; it's not an order in the Justice Department; but it's
12 a policy, that there has to be good grounds for anything said,
13 written or oral, in court. In addition to that, I put -- I
14 am putting out a new policy on prosecutions, that there has
15 to be more than probable cause to indict. There has to be a
16 probable, winnable, case. I have found that most all of the
17 U.S. Attorneys were doing that already, and there is no point
18 in putting the power of the Government against someone just
19 because you have probable cause, and it's rather obvious that
20 you are not going in there with a case, even though you have
21 probable cause.

22 Now, the last thing -- not the last thing -- right
23 here, I want to thank all of you judges who have been asked
24 to come to the Justice Department to work in our Trial
25 Advocacy Institute. It is going in great style now; since

1 March, we have been giving a three week course. We give two
2 weeks in one sitting, and then bring the lawyers back after
3 six months for the third week. I think we have the best Trial
4 Advocacy Institute going in the country today. Many State
5 bar groups are coming there to observe it, and many law
6 schools are observing it. It was my answer to the Chief
7 Justice, who was worried about trial advocacy last year, pro-
8 bably still is worried about it, but we will be training 600
9 lawyers a year there; and as you know, many of them will be
10 leaving the Government later on, and they will join the
11 private sector, where they'll be able to hopefully help some
12 in the private sector.

13 Now, the last thing I want to say is about the
14 Chief Justice. He is the greatest leader in the administration
15 of the law that this country has seen, perhaps ever; certainly
16 there have not been more than one or two that were his equals.
17 He has a wide-ranging interest in law, Federal and State,
18 and law reform, and even in prisons, probation, and parole.

19 I have learned that you can't do everything in a
20 short time in Washington, and I've been there for 27 months, and I've never
21 even gotten around to studying prisons, for example. I regret
22 very much that I haven't gotten into that. I have so many
23 things to try to learn, that I just haven't got to that, but
24 I have been talking some with the Chief about it, and I was
25 telling him the other day that I have come to the firm belief

1 that the Parole Board ought to be transferred to the Admini-
2 strative Office of the United States Courts. As part of the
3 Watergate fever that raged in Washington, and still rages to
4 some degree, the Parole Board was taken out from under the
5 Attorney General, and they are under no one now. They are
6 just there. And they have a very great deal to do with the
7 liberty. They can, in a parole hearing, go into what something
8 -- other crimes a person may have committed, and there is no
9 trial to those other crimes, but it has a great deal to do
10 with whether you are going to get released, because it depends
11 on the gravity of the offense. You have to serve time, before
12 you can be paroled, based on the gravity of the offense, that
13 is assigned to the offense. That is the only thing. It needs
14 to be where the court system can have some influence over it.

15 I have been thinking maybe the prison system ought
16 to be transferred to the Administrative Office of the United
17 States Courts, but I haven't decided that, and I wouldn't
18 want to -- I hope you are not about to faint, Chief, about
19 that, that I even had such a thought.

20 (Laughter.)

21 But I am certain that the Parole Board ought to be
22 moved to the courts. You have the probation service
23 already, so you ought to have the parole system.

24 Now, if we are able to pass the recodification of
25 the criminal law, and the new sentencing procedures that we

1 are advocating, there won't be a whole lot for the Parole
2 Board to do, although I have an idea that other things will
3 be thought of, other service for them to render. But right
4 now, they badly need to be somewhere, and they are nowhere.
5 They are just on their own. Their budget -- I have to submit
6 their budget to the Congress, but I am not allowed to change
7 it, even. And I would like for them to be transferred to the
8 Administrative Office of the Courts. I have already told the
9 Chairman of the Parole Board of my views about that, and I
10 expect we will be hearing some noise before it's over.

11 But, having said that, I think I had best sit down
12 and let the Chief Justice respond to that , and to say whatever
13 else he may have on his mind.

14 (Applause.)

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