UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

AN ADDRESS BY

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BEFORE

DEPARTMENT OF JUSTICE LAWYERS

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ATTORNEY GENERAL BELL: We have a special guest this morning that I want to present: the Honorable Peter Durack, Attorney General of Australia. He's a Member of the Senate -- as you know, they have a parliamentary form of government in Australia, so he performs a dual task; he serves in the Senate, and also as Attorney General.

I recently visited him in Australia, and he's been here for several days on a visit, and also carrying on some antitrust negotiations with the Department. It's a great pleasure to have him with us.

Senator Durack.

I also have asked Deputy Attorney General Civiletti and Associate Attorney General Egan to sit with us today; that doesn't mean that they're going to have to answer all the questions, but I wanted them to sit up here, and Judge McCree, the Solicitor General, is out of town. He's delivering a eulogy today at Wayne State University, a special matter, and he's not able to be here, otherwise he'd be sitting up here with us also.

I want to speak to you this morning for a few minutes on something that I might entitle: "Independence of the Department of Justice," something we've been working on almost 20 months, trying to articulate a position for the Justice Department that will constitute the Department into
a neutral zone in the Government, because the law has to be neutral, and in our form of government there are things that are non-partisan, and one is the law and one is foreign intelligence, and I suppose at times, foreign policy is non-partisan.

But certainly, in our area, the two things we deal in -- the foreign intelligence, counterintelligence, and the general administration of the law, we must be neutral, so I have -- I choose to speak from a prepared text, because it's an important subject and something that I hope will be left here for years to come as a good statement of our position.

I've spoken here from time to time on issues of significance to the Department and the administration of justice. Today I would like to discuss our role as lawyers for the Government.

I believe that our primary mission is to serve the Government as professionals, to exercise our independent judgment and to do our duty as we see it. But the partisan activities of some Attorneys General in this century, combined with the unfortunate legacy of Watergate, have given rise to an understandable public concern that some decisions at Justice may be the products of favor, or pressure, or politics.

The residue of recent history is more the perception of improper influence than the reality. Before I became
Attorney General, I believed this concern to be exaggerated. After some 20 months at Justice, I now know it to be unfounded.

I believe that we in the Department are faithful to a high standard of professionalism. I know from personal observation that the lawyers at Justice are fiercely professional, steadfastly independent in their legal judgment, regardless of outside pressures or controversy.

Despite that reality, however, the public concern persists. The President, as a candidate, was deeply troubled by it. As you know, he promised an independent Attorney General and Justice Department. At the time, and even after becoming President, he gave some thought to making the Attorney General independent of the President, since White House influences on the Justice Department -- real and suspected -- had contributed greatly to the public concern.

The President has done all that he can do, given our Constitution, to make the Attorney General independent. In sum, this campaign pledge has been carried out. The President is charged by the Constitution with the duty to, quote:

"...take care that the laws be faithfully executed."

-- close quote. That's his responsibility, and it's his right and his duty.

He and he alone is ultimately accountable to the
people for his performance of this duty, but the President has delegated certain responsibilities to the Attorney General, in the first instance. The Attorney General must discharge his functions with a high sense of public duty and with the customary ethical accountability of any lawyer to the courts.

But in a Constitutional sense, the Attorney General remains responsible to the President, and the President to the public. Although true institutional independence is therefore impossible, the President is best served if the Attorney General and the lawyers who assist him are free to exercise their professional judgments.

Just as important, they must be perceived by the American people as being free to do so.

The President retains the power and the duty to accept or reject the Attorney General's judgments. There will and must always be free access and easy but confidential communications between the President and the Attorney General. That is the case now. The course best calculated, however, to inspire public confidence in the faithful execution of the laws is for the President to allow the Attorney General freedom from undue influence, in the first instance, to accept the Attorney General's judgment in specific cases, and to remove him if his judgments seem wrong.

I know that President Carter agrees with that
statement, and both the President and I continue to search for more realistic ways to minimize the chance that improper influence may be brought to bear on the Department, and to reduce the public’s concern.

I have come to believe that the task requires three things. First, we must establish Department procedures and principles that will insure, to the extent possible, that improper considerations will not enter into our legal judgments.

Second: the public must know of and have confidence in these procedures and principles.

Third: we must insure that lawyers in the Department are persons of good judgment and integrity.

Since I believe that this last requirement is already met, I will address the first two. As I speak, I realize that what I say is not novel, in all respects; some of the procedures I will prescribe have been followed in the past, and some of the principles are established. I dwell on them now, however, both to emphasize the Department’s current policy and to let the public know of the steps that have been taken to insure that justice is administered fairly.

I will deal first with the Department’s litigation role, as a prosecutor and as a civil litigant.

The primary responsibility for exercising these functions has been assigned by regulations to the various
Assistant Attorneys General in the Department. I consider it their responsibility to make decisions concerning the prosecution, filing and defense of such cases. In the process of reaching any decision, an Assistant Attorney General may consult with the Deputy Attorney General, or the Associate Attorney General, or with me, but it is the Assistant Attorney General's responsibility to reach a decision in the first instance.

The Assistant Attorneys General must be insulated from influences that should not affect decisions in particular criminal or civil cases.

Thus, all communications about particular cases, from Members of Congress or their staffs, or members of the White House staff, should be referred to my office, or the offices of the Deputy or the Associate Attorney General. It will be our job to screen these communications to insure that any improper attempts to influence a decision do not reach the Assistant Attorney General. Any relevant information or legal argument will, of course, be passed on.

By singling out certain persons whose communications should be screened, I do not mean to suggest that those persons are especially prone to attempt to exercise improper influence. But the problem is that their positions of power create a potential for unintentional influence upon a decision, although often they give rise to the appearance of improper
influence.

In exempting from this screening procedure Cabinet Officers, State officials, political party officials, recognized, quote: "interest groups" close quote, and the like, I do not mean to imply that they may never try to exercise improper influence, but the potential for improper influence or questionable appearances and communications from such persons is not so great as to require that their communications be screened.

I do expect the Assistant Attorneys General to be alert for perceived improper communications from whatever source, and to report them to the Deputy, the Associate, or me.

The most important or sensitive decisions of the Assistant Attorneys General may be reviewed by the Deputy Attorney General, or the Associate Attorney General, or by the Attorney General. If, however, the Deputy or the Associate, or I, reach a decision contrary to that of the Assistant Attorney General, that action and the reasons for it will be reduced to writing.

If law enforcement considerations or the rights of persons or organizations under investigation or prosecution do not prevent it, these differences will be publicly disclosed. The formal statement of my reasons for approving the LTV-Lykes merger is one example of such a public announce-
It should be clear that these procedures reflect certain principles that must govern outside contacts with respect to the Department's cases. It is not at all improper for persons outside the Department, whether or not they are in positions of power, to attempt to influence our general policies concerning the investigation and prosecution of crime and the enforcement of civil statutes.

We welcome criticism and advice. In my judgment, however, it is improper for any Member of Congress, any member of the White House staff, or anyone else, to attempt to influence anyone in the Justice Department with respect to a particular litigation decision, except by legal argument or the provision of relevant facts. This principle is essential to our proper function, because litigation decisions are frequently discretionary.

The ultimate criterion is that they be fair. We at Justice are not infallible, but the awesome responsibility for wielding our power fairly is ours alone. Criticism after the fact is perfectly proper. Criticism before the fact must be channeled so that fairness is not cheated, and Justice is served.

Our notions of fairness must not change from case to case; they must not be influenced by partisanship, or the privileged social, political or interest-group position of
either the individuals involved in particular cases, or those who may seek to intervene against them or on their behalf.

To implement these procedures, I have asked the Assistant Attorneys General to refer to the Associate Attorney General, the Deputy Attorney General or to me any relevant Congressional or White House communications prior to particular litigation decisions. This will include especially any communication whatever that seems even marginally improper.

And as an additional measure to help spot potential trouble, each Assistant Attorney General should report to the Deputy Attorney General or the Associate Attorney General all communications, press inquiries excluded, about specific cases by persons other than those involved in the litigation.

I acknowledge that this set of procedures will seem unduly restrictive to some of our colleagues in Government. But I believe that these restrictions are a small price, and a necessary one, for restoring and maintaining public confidence in the Department of Justice. Some may argue that we have over-reacted by including even the smallest and least important cases in our procedure for insulation from influence; but to those Americans whose lives and property are involved, these cases are neither small nor unimportant.

This Department can not prescribe one rule for the most notorious defendants and the largest corporations and another less stringent rule for the average American.
That would be neither fair nor just. Nor are we walling ourselves off from legitimate communications. What we are doing is routing these communications so they can be responsibly screened. The only disadvantage involved is that communications may be misdirected.

These costs are substantially outweighed by the benefits of renewed confidence in the integrity of the Department's decisions. We can not quantify benefits, but all of us know, intuitively, that the confidence of our citizens in our Government and its justice system is beyond value.

This brings me to the counseling function centered in the Office of Legal Counsel. In discharging this function, our obligation is to the law as we understand it in the exercise of our best professional judgment. We must, of course, consult with the Department or agency that has requested our opinion, and those agencies directly affected by the opinion, and it is perfectly proper for us to consult with anyone on legal questions.

What must be avoided, in fact and in appearance, is pressure from any source that is intended to influence our legal judgment. The Assistant Attorney General for the Office of Legal Counsel should report directly to me any communication that, in his view, constitute attempts to exert such pressure. And I might say that Mr. Harmon is very good about watching those sorts of things.
Recent events, including the direction of the President that we become independent, have given us an opportunity to strengthen the independence of this Department. I am reminded of the English experience: as you may know, the English Attorney General is independent, by tradition. This tradition was greatly strengthened after an incident in the 1920's.

At that time it was believed by many that the English Attorney General had yielded to pressures brought on him by some of his colleagues in the Cabinet, in deciding not to prosecute a certain case. Whether that was true is still debated. But the mere suspicion precipitated the downfall of the government. Since that time the independence of the English Attorney General and the impropriety of anyone attempting to influence his decisions have assumed the status of a Constitutional rule.

Any violation of that rule in Great Britain today would result either in the dismissal of the Attorney General, or the fall of the government.

What happened in this country during the Watergate period may roughly parallel the fall of the English government in the 1920's. Out of these unfortunate events we, like the English of 50 years ago, may now be in the position to establish firmly the tradition that the Attorney General and the lawyers under him must be free from outside interference.
in reaching professional judgments on legal matters.

We must do everything that we can, in our time, to help establish and reinforce such a tradition. I firmly believe that the procedures and principles I have prescribed are a long, important step toward that crucial goal.

In the ultimate sense, a viable Government must rest on neutral principles. The law is perhaps the best example of such a principle, and the Department of Justice is the acknowledged guardian and keeper of the law. It follows necessarily that the Department must be recognized by all citizens as a neutral zone, in which neither favor nor pressure nor politics is permitted to influence the administration of the law.

This Department is such a neutral zone now, and with the help of all of you, it will remain so.

Thank you.

(General applause)

ATTORNEY GENERAL BELL: We've got another half-hour, so I'll be glad to take questions and see what we can do with the questions.

Last time we met we had a good deal of discussion about the Library. We've had a special study made, and a number of improvements have been made in the short-range, and I've asked the PIO to publish the improvements in the next issue of the Justice News, and I might say that in addi-
tion to that, there are some long-range things going on, and I guess that could be published, too.

Professor Meador and his group have done a good job on that; I announce that so that you want to -- maybe we won't get into too much detail today, although I don't object to taking questions on it.

Yes, sir?

(Inaudible question)

ATTORNEY GENERAL BELL: We live with that every day, and I suppose I'm sued more than anyone else. I've even been sued for damages because I wire tapped a man named Truong, in the Humphrey -Truong case; some of his friends who called him on the phone have sued me for damages, so I'm not a stranger to this.

We worked out a rule that if your activity was in the scope of your employment, we'll defend you. If it happens to be multiple defendants, and we have to get outside lawyers, we'll get outside lawyers for some of the defendants and we'll defend the ones we can. But you'll be defended.

Now, there is no provision that I know of to indemnify you in the event there is an award of damages -- you're cast in damages. But I would have to say that our lawyers are so good that there is very little likelihood of you paying any damages.

(General laughter)
But we'll defend you. And if we can ever get our Federal Tort Claims Act Amendment through the Congress -- if we can get some serious attention to that, we would do for the lawyers of the Department of Justice, and for the agents of DEA and the FBI what we already do for drug manufacturers, who make swine flu serum, and that is, we will substitute the United States as a party defendant, and defend the United States. Some day we'll get that done. I'm sorry we didn't get it done in this Congress; Congress has not adjourned, but the day is near.

I haven't given up altogether, but surely -- surely that's such a just approach that we'll get it done eventually.

(Change tape, side #2)

ATTORNEY GENERAL BELL: I think that's a very good suggestion, and I occasionally get a letter from someone -- I'm glad to get letters -- and I occasionally meet with people who want to meet that want to discuss something privately. I'll be glad to do anything that would assist in bringing problems to the surface.

I've long believed that the greatest basis for good morale is to let people have their say about things that bother them. It would be the finest thing that could happen to the Department of Justice if everyone would feel completely free to voice objections -- about anything, and that's my attitude about it, so I'll be glad to
-- maybe you think if we met by Divisions, we'd do better.

We probably would have the same problems there: people would not want to speak up. But I'd like to emphasize to you that we do have an open Department of Justice, and you can communicate with me without fear of retribution, without fear at all. I want to know what your problems are; that's my job.

You know, I don't make much contribution to the Department; Attorneys General come in and out, most of you stay here forever.

So what can I do to help? That's the only reason I'm here. If I didn't think I was making some contribution, I would have already left, but I don't think I'm making as great a contribution as I could make, because I don't know all the problems. I don't know all the concerns that you have; I don't get all the suggestions that you have to make the Department better, make the law fairer.

So I would like to hear from you. In addition to whatever suggestions you have, just get in touch with me, and you can -- Mike Kelly? Where's Mike? He's Counsel to the Attorney General; you get him and then he'll -- you might be screened; don't get upset about that, because we get a lot of calls and we get a great deal of mail, but Mike is Counsel to the Attorney General.

And the same that I'm saying goes for Mr. Civiletti.
Mr. Egan; they're anxious to talk to you about your problems. They're here for the same reason I am; we're just -- we're passing through and we're trying to make the place better. Make the system work in a more efficient manner.

So get in touch with them also. Judge McCree, and the heads of all the -- all the Assistant Attorneys General have the same attitude. At least I -- well, I know they do. I started to say "I hope so;" I know they do. I don't hope it; I know they do. Okay?

(Inaudible question)

ATTORNEY GENERAL BELL: Well, if you feel -- well, this is too complex to answer just in one answer, but there might be cases that come up where you think the person has done something wrong and ought to respond in damages. I don't know just what you'd do under those circumstances; you can decline to take the case.

Ordinarily, a murderer gets a lawyer in our country, and you wouldn't have this same qualm about defending a murderer if the court appointed you.

Is your problem that you think you're representing the United States rather than this employee? You know, I've never gotten an answer in my lifetime -- 31 years as a lawyer -- to how I can be compelled to defend a -- or, how I have a duty to defend a person who's committed a heinous crime, we'll say murder or rape, yet I do that. I mean, I have done
it; I was appointed to do it and I did it.

(Inaudible question)

ATTORNEY GENERAL BELL: It is. If you come to the point where you think it's not to the person you're representing, you ought to get off the case. And you ought to leave to others the problem of disciplining that employee; whoever the superior is to that employee ought to see that the employee is made to pay for wrongdoing.

But if you're defending him for damages, then you're just a lawyer defending him for damages.

Now, if you think that he owes something, then you ought to take it up with -- in the chain of command, so we can confess judgment, or settle the case. We've had cases I've seen where we should confess judgment; it doesn't mean that we'll be obstinate if we think we're wrong. It's just like if you represented somebody in the private sector, and you know you owe something, then see about paying it.

But the trouble in our law, it's so technical sometimes that you can win a case on a motion, as you say, or on a procedural ground, and maybe you're left with an uncomfortable feeling that you've won a case that you should not have won. That's another ethical quandary that I've never known the answer to.

Are you supposed to lie down and say: "Well, I know I can get this person thrown out of court here, but
should I?" Or "Am I employed to win or just be an Arbiter?

It's an adversary process, and we don't ever know the answers to those sorts of things. It comes up on a case by case basis, but we are going to have to learn more about representing Government employees, particularly where they've done something wrong, maybe, and we're going to have to systematize our method of doing that.

We seem to be in a growth area, a growth time; we are learning how to try foreign intelligence cases, for example, more so than we ever have, and problems that are presented. We are having to learn to live with the rules for discovery in civil suits, where intelligence is involved, and we are learning how to do that.

We are having more and more suits against the Government employees, and we're going to have to learn how to handle those.

But you have asked a very good question, and one that I have spent a lot of time on since I've been here, and one that Barbara Babcock and her staff have spent an infinite amount of time on, and we'll have to be giving more time to it, rather than less.

Well, I'm glad everyone is so happy. Don't have any questions? Here's a question.

(Inaudible question)

ATTORNEY GENERAL BELL: Well, that's a --
ATTORNEY GENERAL BELL: I'm hard-put to answer that question, because as you know, I have a -- from the beginning favored the appointment of U. S. Attorneys by the Attorney General; even then you could say: well, the Attorney General is politically appointed.

And the answer to that is that you can't take politics out of the political system. You have to have somebody to run the shop, somebody's got to be in charge, and that's why we have elections.

But you ought, to the extent possible, take the politics out. And the only thing you can say about the U.S. Attorneys being politically appointed, they are recommended by the Senators in most instances. The Senators could say:

"Well, we are just as non-political as you are."

There's no answer to this. I've told you the story of going in one U.S. Attorney's office and he had a picture of a Senator on the wall; didn't have my picture.

(General laughter)

Didn't have the President's picture; only had the one Senator, who happened to be the only Democratic Senator from the State. It struck me as rather odd.

But I read every word in the FBI's files on these people, before they are appointed, before they are nominated,
and to the best of my belief, and I do believe this, these lawyers that have been appointed U. S. Attorneys over the country during this Administration, and I'm sure this would be true in other Administrations, are good lawyers and they are professionals in their views, and if you're a good lawyer, if you're ethical, I think there's a presumption that you're going to do your duty and that you're going to do it in a professional way, that you're going to follow these same rules that I've just outlined.

Of course, the U. S. Attorneys are under these rules just as much as anyone else. And they will -- this will be distributed to them. But I think they are -- in spite of the looks of the system, it works pretty well, and the reason it does is because lawyers, individually and as a group, are members of an honored profession.

We are professionals; we are ethical, and if we aren't, we ought not to be lawyers. We ought to get out of the profession or we ought to be put out. But so long as we are professionals, and follow the ethics -- canons of ethics that professionalism requires, I don't think there's much danger now or any problem.

But there is a perception problem; that's the main problem. How is it perceived?

I'll be glad not to be Attorney General so I'll never have to answer that question again!
Okay? Have a good fall.

(Whereupon the address was concluded.)