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THE WHITE HOUSE

WASHINGTON

Al /
Let's write
Cap "Thank you."

9/18/74



THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON, D. C. 20201

REMARKS BY

THE HONORABLE CASPAR W. WEINBERGER
SECRETARY OF HEALTH, EDUCATION, AND WELFARE

The Prayer Breakfast

State Bar of California and Conference of Judges

Sacramento, California

September 12, 1974

SINCE I HAVE BEEN SECRETARY OF HEW, I SEEM TO HAVE A TENDENCY TOWARD BEING BOOKED INTO APPEARANCES AT TOUCHY TIMES. MAYBE THIS IS UNAVOIDABLE FOR ANY HEW SECRETARY, IN VIEW OF THE CONTROVERSIES THAT SEEM TO ACCOMPANY ALL OUR MAJOR PROGRAMS.

I REMEMBER THE TIME I WAS SCHEDULED TO ADDRESS THE DENVER CHAMBER OF COMMERCE ON THE MATTER OF REVENUE SHARING. THAT TURNED OUT TO BE THE DAY THE WALL STREET JOURNAL HAD A MAJOR IN-DEPTH STORY ON HOW BADLY REVENUE-SHARING WAS WORKING IN COLORADO.

I REMEMBER THE TIME I WAS BOOKED INTO THE ANNUAL MEETING OF THE NATIONAL WELFARE CONFERENCE. THAT FOLLOWED BY TWO DAYS OUR ANNOUNCEMENT OF NEW REGULATIONS FOR FEDERALLY SUPPORTED DAY CARE WHICH SHIFTED SUCH BENEFITS AWAY FROM MANY OF THE CONFERENCE'S MEMBERS.

EVERY UPLIFTING COMMENCEMENT ADDRESS I HAVE DELIVERED HAS BEEN PRECEDED A DAY OR SO BY SOME OF THE MORE DEPRESSING WATERGATE SENSATIONS.

AND LONG TIME AGO I GAVE A TALK IN SAN FRANCISCO ENTITLED "WATER, CALIFORNIA'S GREATEST NEED", TWO DAYS AFTER THE BIGGEST FLOOD IN MARYSVILLE'S HISTORY.

NOTE: This text is the basis of Secretary Weinberger's oral remarks. It should be used with the understanding that some material may be added or omitted during presentation.

AND NOW, A FEW DAYS AFTER WHAT IS BOUND TO BECOME THE MOST CONTROVERSIAL PRESIDENTIAL PARDON IN OUR HISTORY, I AM HERE TO DISCUSS "MORALITY AND THE LAW."

IF I HAD BEEN MAKING SPEECHES IN 1941, I PROBABLY WOULD HAVE BEEN SCHEDULED ON DECEMBER 8 TO DELIVER A TALK PRAISING OUR HAWAIIAN AIR DEFENSE SYSTEM.

SINCE THIS IS AN OPEN ADMINISTRATION, LET'S DISCUSS THAT PARDON FIRST, AND THEN GET ONTO SOME MORE PHILOSOPHICAL POINTS ABOUT THE LAW. DESPITE THE FACT THAT A MAJORITY OF MY FORMER COLLEAGUES IN THE CALIFORNIA BAR VOTED HERE EARLIER THIS WEEK TO CRITICIZE PRESIDENT FORD FOR THE PARDON, THIS IS A MATTER ON WHICH I SUPPORT THE PRESIDENT.

I DO SO WITH THE SENSE THAT I--ALONG WITH ALL THE REST OF US IN THE COUNTRY--DO NOT KNOW AT THIS MOMENT ALL OF THE FACTORS THAT WENT INTO PRESIDENT FORD'S DECISION.

IN THE FIRST PLACE, I THINK IT WAS A VERY COURAGEOUS DECISION BECAUSE THE PRESIDENT KNEW THE PUBLIC OPINION POLLS WERE ABOUT 60 PERCENT - 40 PERCENT AGAINST A PARDON. SECONDLY, IT WAS AN INTENSELY PERSONAL DECISION BY THE ONLY MAN WHO HAD THE POWER AND RESPONSIBILITY FOR SUCH A MATTER.

HE WAS OBLIGED TO DECIDE THIS CLOSE CALL IN THE WAY IT APPEARED BEST TO HIM AND HIS OWN UNIQUE PERSPECTIVE--AND THAT, OF COURSE, IS PRECISELY WHAT THE PRESIDENT DID. I WOULD NEVER WANT MY PRESIDENT TO APPROACH AND HANDLE SUCH A UNIQUE DECISION IN ANY OTHER WAY, SUCH AS RELYING ON POLLS, COLUMNISTS, EDITORIALS, OR POLITICAL ADVISERS.

MUCH HAS BEEN SAID SINCE SUNDAY ON THE NEED FOR EQUAL JUSTICE--EQUAL JUSTICE TO MY MIND DOES NOT NECESSARILY MEAN THE IDENTICAL PENALTY FOR EVERYONE. IF ONE OF OUR GOALS IS TO HAVE THE PUNISHMENT FIT THE CRIME, WHATEVER CRIME MAY HAVE BEEN COMMITTED, WAS AMPLY PUNISHED ON AUGUST 9. THE PUNISHMENT MR. NIXON HAS ALREADY SUFFERED IS FAR MORE INTENSE, BITTER AND MORE FULL OF PERSONAL ANGUISH THAN ANY TRIAL OR JAIL SENTENCE THAT COULD POSSIBLE BE IMAGINED.

WITH RESPECT TO THE OVERRIDING LONG-RANGE NATIONAL INTEREST, I UNDERSTAND AND AGREE WITH THE PRESIDENT'S DESIRE TO COMPLETE THE DISPOSITION OF THE WATERGATE TRAGEDY, AND THUS PERMIT US TO GIVE OUR FULL ATTENTION TO OTHER UNRESOLVED ISSUES, SUCH AS INFLATION. MAYBE THIS ACTION OF THE PRESIDENT WILL NOT SUCCEED IN CARRYING OUT THAT PURPOSE, BUT IT WAS AN ENTIRELY WORTHY PURPOSE, IN MY OPINION.

IN ONE OF THE FEDERALIST PAPERS, THE AUTHORS SAID THE TASK OF THE PRESIDENT WOULD OFTEN BE TO BALANCE THE NEEDS OF THE REPUBLIC AGAINST THE POSSIBLE DESIRES OF THE PEOPLE. THIS, IN MY JUDGMENT, WAS ONE OF THOSE MOMENTS.

THE PRESIDENT DID WHAT SEEMED TO HIM TO BE RIGHT, AND HE ACTED FROM PERFECTLY PROPER MOTIVES--MORE WE CANNOT ASK OF ANYONE FACED WITH A DRASTICALLY DIFFICULT DECISION WHICH ONLY HE CAN MAKE.

MORE IMPORTANT HOWEVER THAN THOSE TOPICAL MATTERS ARE SOME ISSUES OF TRANSCENDENT AND FUNDAMENTAL URGENCY, AND ONE OF THE MOST URGENT OF THEM IS TO RESTORE CONFIDENCE IN OUR INSTITUTIONS.

A NATIONAL POLL CONDUCTED FOR A UNITED STATES SENATE SUBCOMMITTEE LAST YEAR, SHOWED THAT THE INSTITUTIONS OF THE LAW ARE SUFFERING--ALONG WITH MOST OF THE OTHER MAJOR INSTITUTIONS OF THE NATION--FROM A SHARP DECLINE IN PUBLIC CONFIDENCE.

LAW FIRMS RANKED NEAR THE BOTTOM:- ONLY 24 PERCENT OF THE PEOPLE SAID THEY HAD ANY GREAT AMOUNT OF CONFIDENCE IN THE PEOPLE RUNNING LAW FIRMS. AND, IN ANOTHER SECTION OF THIS 1973 POLL, THE UNITED STATES SUPREME COURT DREW AN EXPRESSION OF GREAT SUPPORT FROM 33 PERCENT OF THE PEOPLE--UP FROM THE HIGH COURT'S LOW POINT OF 28 PERCENT IN 1972 BUT SHARPLY DOWN FROM THE 51 PERCENT APPROVAL IT GARNERED IN 1966.

THE ~~EVENTS~~ OF 1974, I SUSPECT, MAY HAVE CHANGED SOME OF THESE PUBLIC CONFIDENCE RATINGS--BUT THEY STILL SERVE TO ILLUSTRATE THE PUBLIC CONFIDENCE PROBLEMS THE LEGAL PROFESSION AND THE COURTS HAVE. THIS, OF COURSE, STRIKES CLOSE TO THE HEART OF ONE FOUNDATION OF OUR SYSTEM OF GOVERNMENT--IT IS CAUSE FOR GREAT CONCERN--AND THE TITLE OF THIS SESSION, "MORALITY AND THE LAW," NO DOUBT HAS A LOT TO DO WITH THE PROBLEM.

OUR CONSTITUTION AND ITS DERIVATIVE LAWS ARE THE SYSTEM WE HAVE ADOPTED AS THE MEANS OF PRESERVING A CIVILIZED SOCIETY WHICH COMBINES FREEDOM AND ORDER.

SUCH A SYSTEM IS, IN ITSELF, VITAL AND IMPORTANT, OF COURSE.

EQUALLY AS IMPORTANT, HOWEVER, IT SEEMS TO ME, IS WHAT MIGHT BE CALLED OUR "ATTITUDE" TOWARD THE SYSTEM, HOW WE REALLY FEEL ABOUT THE SYSTEM AND ITS IDEALS, AS MANIFESTED IN OUR ACTUAL USE OF THE SYSTEM--OUR ATTITUDE GETS US TO THE "MORALITY."

NO SYSTEM DEvised BY MEN AND WOMEN IS OR CAN BE PERFECT. ANY SYSTEM OPERATED BY MEN CAN AND WILL BE CORRUPTED AND DISTORTED AT TIMES.

THE LAW IS A COMPLICATED SYSTEM THAT HAS BEEN ESTABLISHED TO PROTECT US ALL, WITH MANY ALTERNATIVE ROUTES, POSSIBLE DECISIONS AND ACTIONS, BUT IN THE END A UNIFORM RESULT IS POSTULATED: JUSTICE, AS BEST AS MEN CAN DETERMINE IT, IN A PARTICULAR CASE, FOR THIS PARTICULAR OFFENSE OR DISPUTE, WITH CERTAIN EXTENUATIONS.

THIS SYSTEM IS SUBJECT TO CORRUPTION AND DISTORTION. AN INDICTMENT MIGHT NOT BE SOUGHT. FALSE OR MISLEADING TESTIMONY CAN BE PRODUCED. A JUDGE CAN RULE CAPRICIOUSLY. JURYMEN CAN VOTE THEIR PREJUDICES INSTEAD OF ON THE EVIDENCE.

THE APPELLATE STRUCTURE WAS ESTABLISHED TO GUARD AGAINST SUCH TRANSGRESSIONS--AND BY AND LARGE THIS WORKS AGAINST THESE MORE EASILY DISCERNED CORRUPTIONS OF THE LAW.

IN RECENT YEARS, PARTICULARLY THE PAST TWO YEARS AND PARTICULARLY IN GOVERNMENT SERVICE, HOWEVER, THE DESIRABLE MIXTURE OF MORALITY AND THE LAW HAS BEEN BUFFETED BY MORE SUBTLE TYPES OF POSSIBLE TRANSGRESSIONS.

ALTHOUGH I AM A LAWYER AND I HOLD A POSITION WITH THE FEDERAL GOVERNMENT, I AM NOT A GOVERNMENT LAWYER. PROBABLY THE BEST THAT ONE CAN CALLE ME, IF ONE WANTS TO BE CHARITABLE, IS A PUBLIC ADMINISTRATOR. FOR MY OFFICIAL LEGAL ADVICE, I LOOK TO MY GENERAL COUNSEL AND HIS PROFESSIONAL STAFF, WHICH INCIDENTALLY IS ONE OF THE LARGEST LAW OFFICES IN THE WORLD. NONETHELESS, AS AN "ADMINISTRATOR" WHO HAPPENS INCIDENTALLY TO BE AN ATTORNEY, I HAVE SOME RATHER DEFINITE IDEAS ON WHAT THE ROLE OF THE LAWYER SHOULD BE, AND SOME PERCEPTIONS WHICH I WOULD LIKE TO SHARE WITH YOU ON HOW THAT ROLE IS INCREASINGLY INVOLVED IN THE MORALITY OF THE OFFICIAL DECISION-MAKING PROCESS.

THE GOVERNMENT LAWYER MUST BE CONCERNED INCREASINGLY NOT MERELY WITH THE LAW BUT WITH "MORALITY." WHILE THE LAW IN LARGE MEASURE EMBODIES OUR COMMON MORAL JUDGMENTS, THERE IS, NONETHELESS, A LARGE AREA IN WHICH PUBLIC OFFICIALS AND GOVERNMENT LAWYERS MUST TAKE ACTION OR ADVISE ON ACTION IN WHICH THE LAW DOES NOT GIVE A COMPLETE ANSWER. SOMETIMES SOULD PUBLIC POLICY DOES NOT GIVE THE COMPLETE ANSWER. IN SOME CASES THE "MORAL" FACTOR WILL BE DETERMINATE. BUT IN ANY EVENT THE MORAL FACTOR MUST ALWAYS BE PRESENT.

I AM NOT SUGGESTING THAT LAWYERS SHOULD BECOME MORALISTS. BUT THE SIMPLY FACT IS THAT THE PROCESS OF GOVERNMENT DECISION-MAKING AND GOVERNMENT ACTION IS INCREASINGLY AND PROPERLY EXPOSED TO PUBLIC VIEW, AND IS INCREASINGLY AND PROPERLY SUBJECT TO EXAMINATION, CRITICISM, AND ATTACK IN THE COURTS AND IN OTHER PUBLIC FORUMS. IN LARGE MEASURE THIS SCRUTINY IS TO DETERMINE IF THE ACTION CONFORMS TO LEGAL STANDARDS--HENCE THE VITAL AND INCREASING ROLE OF LAWYERS IN ADVISING UPON AND DEFENDING THE ACTION. THE LAWYER MUST BE SENSITIVE TO THE "MIX" OF LEGAL POLICY AND MORAL CONSIDERATIONS THAT ARE INVOLVED IN HIS CLIENTS' DECISION.

THE GOVERNMENT LAWYER MUST HAVE A CLEAR CONCEPT OF WHEN MORALITY AND LAW CANNOT MIX. A PUBLIC ADMINISTRATOR MAY FEEL A VERY REAL "MORAL" COMMITMENT TO APPROVE A GRANT OF FINANCIAL ASSISTANCE TO AN INELIGIBLE INSTITUTION. THE LAWYER MUST SAY "NO." A PROGRAM ADMINISTRATOR MAY HAVE GIVEN A PLEDGE OF CONFIDENTIALITY TO AN APPLICANT INSTITUTION WHICH OUR LAWS ON THE AVAILABILITY OF PUBLIC INFORMATION DO NOT PERMIT HIM TO KEEP. THE LAWYER MUST SO ADVISE.

OTHER QUESTIONS ILLUMINATING THESE NEW KINDS OF PROBLEMS ARE EASY TO POSE, FAR MORE EASY THAN TO ANSWER.

--DOES A LAWYER, FOR EXAMPLE, EVER SHED HIS STATUS AS "OFFICER OF THE COURT," EVEN THOUGH HE MAY NOT BE PERFORMING A LAWYER'S JOB?

--WHERE DOES LEGAL COUNSEL END, AND PARTICIPATION BY THE LAWYER IN AN ONGOING CRIME BEGIN?

--DOES THE LAW, IN ORDER TO PROCEED EFFICIENTLY, HAVE TO RELY AS MUCH AS IT HAS BEEN DOING ON PLEA BARGAINING AND OTHER KINDS OF DEALS WITH WITNESSES WHOSE OVERWHELMING SELF-INTEREST IS ALL-TOO EVIDENT?

--AND, FINALLY, IS OUR DESIRE TO INFUSE THE LAW WITH MORALITY AND COMPLETE JUSTICE UNDERMINED BY THE ANTIQUATED STRUCTURE OF OUR COURT SYSTEMS? AS THE CHIEF JUSTICE HAS OBSERVED, IF THE FOUNDING FATHERS CAME BACK TO LIFE TODAY AND STARTED PRACTICING LAW AGAIN, ABOUT THE ONLY DIFFERENCE THEY WOULD NOTICE WOULD BE CHANGED CLOTHING AND HAIR STYLES.

I SAY THAT A LAWYER NEVER CEASES TO BE AN "OFFICER OF THE COURT." BECAUSE OF HIS TRAINING, BOTH IN LAW AND IN OUR ETHICAL CANONS, HE HAS GREATER OBLIGATIONS IN WHAT EVER HE DOES THAN A NON-LAWYER.

AND I DO NOT BELIEVE WE NEED ANY NEW ETHICAL RULES--WHAT WE NEED IS A NEW STANDARD OF ADHERENCE TO THE OLD RULES.

I BELIEVE THAT EVERY LAWYER KNOWS WHEN HE IS SLIPPING FROM A POSITION OF COUNSEL TO ONE OF PARTICIPANT. AND IF HE PARTICIPATES KNOWINGLY, IN ACTS HE KNOWS TO BE WRONG FOR SOME CAUSE HE MAY THINK IS HIGHER OR DIFFERENT THAN THE LAW, HE IS HEADING INTO DEEP AND MURKY WATERS INDEED.

I DO NOT BELIEVE WE HAVE TO RELY ON PLEA BARGAINING TO THE EXTENT WE HAVE, INVOLVING AS IT DOES SO MANY WITNESSES WITH OVERWHELMING SELF INTEREST. THIS REFORM IS CLOSELY TIED TO THE NEED TO MODERNIZE OUR ANTIQUATED COURT SYSTEMS.

BY AND LARGE, IN THE END, THE LAW AND MORALITY ARE MUTUALLY REINFORCING. IN LARGE MEASURE, LAW IS THE INSTITUTIONAL EMBODIMENT OF OUR COLLECTIVE MORAL VALUES-- BUT, BY AND LARGE, THE DIFFICULT MORAL DECISIONS WHICH WE MUST MAKE ARE IN AREAS WHERE LAW DOES NOT PURPORT TO DICTATE AN ANSWER.

OUR ULTIMATE GOAL IN THE LAW, IT SEEMS TO ME, IS TO PRACTICE IT--TO THE VERY BEST OF OUR OBVIOUSLY LIMITED ABILITIES--IN WHAT LEARNED HAND ONCE MOVINGLY DESCRIBED AS "THE SPIRIT OF LIBERTY." THE GREAT JUSTICE SAID THIS:

"THE SPIRIT OF LIBERTY IS THE SPIRIT WHICH IS NOT TOO SURE THAT IT IS RIGHT.

"THE SPIRIT OF LIBERTY IS THE SPIRIT WHICH SEEKS TO UNDERSTAND THE MINDS OF OTHER MEN AND WOMEN. THE SPIRIT OF LIBERTY IS THE SPIRIT WHICH WEIGHS THEIR INTERESTS ALONGSIDE ITS OWN BIAS.

"THE SPIRIT OF LIBERTY REMEMBERS THAT NOT EVEN A SPARROW FALLS TO EARTH UNHEEDED.

"THE SPIRIT OF LIBERTY IS THE SPIRIT OF HIM WHO, NEARLY 2,000 YEARS AGO, TAUGHT MANKIND A LESSON THAT IT HAS NEVER LEARNED, BUT HAS NEVER QUITE FORGOTTEN, THAT THERE MAY BE A KINGDOM WHERE THE LEAST SHALL BE HEARD AND CONSIDERED SIDE BY SIDE WITH THE GREATEST."

THE CLOSER WE CAN COME TO THOSE GOALS--THE HIGHER OUR MORTALITY--AND THE GREATER OUR LAW, AND OUR COUNTRY--WILL BE.

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THE WHITE HOUSE

WASHINGTON

September 18, 1974

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: ROLAND ELLIOTT

FROM: JERRY H. JONES

Please prepare a Presidential letter thanking Secretary Weinberger for forwarding the attached for the President's interest.

Thank you.

cc: Al Haig

THE WHITE HOUSE

WASHINGTON

September 20, 1974

Dear Cap:

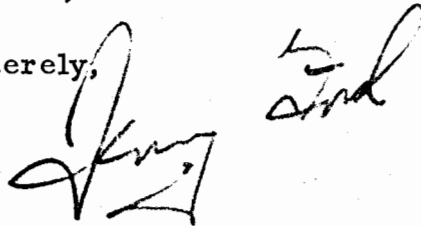
I truly appreciated having a copy of your remarks at the Prayer Breakfast of the State Bar of California and Conference of Judges.

Naturally, I was pleased by your opening comments. Even more, I was pleased by your general thesis: that law and morality, while separate, should be in accord. A very great need in our country today is to reestablish this accord -- and thereby rebuild a national unity.

I believe we can do this, especially if we accept Justice Hand's admonition to seek to understand the minds of other men and women.

Again, my thanks for your thoughtfulness and best regards,

Sincerely,

A handwritten signature in dark ink, appearing to read 'C. Weinberger', written over the word 'Sincerely,'.

The Honorable Caspar W. Weinberger
Secretary of Health, Education
and Welfare
Washington, D.C. 20201