



# Department of Justice

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"THE CHANGING ROLE OF ONE TRIAL LAWYER"

REMARKS

OF

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AT

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FLORIDA BAR ASSOCIATION

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It is difficult for me as Attorney General to describe and speak of the Attorney General's office without boring you or without self-aggrandizement. Even the title of my address, "The Changing Role of One Trial Lawyer," suggests those very difficulties. My hope is to convey to you some reflections by a former trial lawyer who is now a manager and decision-maker, presiding over a Department having almost 55,000 employees, of whom only about 4,100 are practicing law.

Originally, I planned in this speech simply to contrast the talents and skills developed as a trial lawyer with those I have tried to acquire as Attorney General. I have concluded that while the contrast is useful, it is difficult to structure a discussion of the job of Attorney General around it.

Therefore I begin the discussion of the role of the Attorney General by reciting three oft-repeated generalizations about the job. Somewhat like a legend, each of them is based in part on historical truth, but with the retelling over time, each is no longer accurate.

Legend number one: Because the Department of Justice is the largest law firm in the world, what it takes to run it is simply a very fine lawyer whose skills are not unlike those of a managing partner of a large law firm. Legend number two: The Department of Justice is so huge, complex, and has so many lawyers, it makes little difference who is the Attorney General; he cannot influence the bureaucracy. Legend number three: If

the division and section chiefs in the Department of Justice simply fulfill their obligations to make careful, honest, and fair decisions, there is rarely a reason for an Attorney General to decide anything.

Each legend has just enough truth to survive, but each misses the mark. Consider legend number one, which says that what it takes to run the Department of Justice are the qualities possessed by a fine trial lawyer in a large firm.

What about the work of the Attorney General on legislation? A trial lawyer coming to this job is required to broaden his understanding and vision on an enormous variety of legislative matters. For example, our national immigration policy. The Attorney General is a member of the President's Select Commission on Immigration and Refugee Policy and also responsible for the Immigration and Naturalization Service. We must be prepared to make a series of immigration policy choices involving highly complex issues of law and economics. All of this is far removed from the skills and operations of a trial lawyer or a managing partner.

By and large, trial lawyers in private practice represent specific clients in specific disputes. They retain and reserve considerable choice in the selection of their clients. That freedom of choice within which the trial lawyer operates does not exist in the Department of Justice nor in the Office of the Attorney General. Representing the citizens of the country as well as the agencies of the government, there is little

choice of disputes and less choice as to clients.

Furthermore less than 10 percent of the Department's personnel are lawyers devoted to litigation. Nineteen of its 26 operating units are devoted to activities other than the trial of cases. Similarly, the vast bulk of the Department's 2.5-billion-dollar budget has little to do with legal representation. The planning duties required of the Attorney General are far beyond the ordinary scope and tasks of the trial attorney. The trial lawyer's attention is on the concrete, it is on this year, and this case. But the Attorney General has to be concerned with the planning and direction of two-, five-, and ten-year programs.

Now consider the policy differences between the duties of a trial lawyer and those of the Attorney General. The head of the Department of Justice must recognize and develop skills in interacting with government agencies with which the Department of Justice must work to be effective. That means not only the Congress, but the Departments of Defense, State, Agriculture, HHS, HUD, Energy, and the rest. It requires a greater depth of patience than I have been able to completely muster to be understanding, tactful and tolerant of some of the people in agencies who are our clients.

The decisions of the trial lawyer, although required sometimes to be split-second decisions, and although they are important in the conduct of litigation, are interim decisions.

The ultimate decisions, to go to trial, to settle, and if the latter, for how much, are the client's decisions, although the client makes the decision on the basis of your advice. In contrast, the decisions the Attorney General makes with regard to litigation as well as the programs totally unrelated to litigation, are final decisions. This has become particularly true in the last five years under Attorneys General Levi and Bell and continuing with myself.

The independence of the Department of Justice has been strengthened tremendously during those five years. It is one of the healthy phenomena of the post-Watergate era, but it places on the Attorney General the responsibility for an enormous variety and range of final decisions as compared with the semi-final or advisory decisions which the trial lawyer exercises in his practice.

In private practice, relationships with the press from time to time became important on a particular matter, but ordinarily both my clients and I were far better off to have as little to do with publicity and the press as possible.

But the Attorney General not only has to make fair, careful, honest, and timely decisions, he has to be able at all times to explain them in a way which is understandable to the press and public. That requires straight talk, a little art, some energy, and a considerable amount of time.

One of the principal duties of the press is to challenge and probe the decisions made by government officials and to set

forth the facts and explain the process to the public so that it may form a judgment on the merits of the decisions made by its public servants. I welcome the challenge created by that process but at times the experience can be frustrating, particularly when it occurs after I and usually other lawyers have spent days or weeks evaluating the facts and the law to come to the fairest and soundest decision.

Let me use as an illustration my trip to Florida during the recent riot. When I went, one segment of the press suggested that I was giving in to rioters. If I had not gone, members of the press would have asked, "Why did the Attorney General of the United States ignore the terrible plight of blacks in Miami?"

Press scrutiny of public officials is of course healthy. Moreover, the programs of the Department of Justice can be both sound and good, but they will only work if they are well communicated and understood by the American public in general. Thus, public affairs and public communication are an extremely important and integral part of the duties of the Attorney General.

What I miss most about being a trial lawyer is, of course, appearing in court, the challenge of individuality and the contest that is afforded in trial advocacy: a beginning, an end -- victory or defeat. The Attorney General's role is spent in meetings, in written directives, in orders, in the review of paper ad nauseam, and not much in direct action in court. The Attorney General spends much of his time directing the development of policy and in decision-making and reviewing the systems which are established within the

Department of Justice which from time to time need refurbishing to make sure that the great powers exercised by the Department are being exercised wisely. I spent a year on grand jury revisions, and more than two years on right to privacy acts. I have spent a year and one-half on careful analysis of priorities in the prosecution of white collar crime and the final refinements are just completed.

In private practice I was accustomed to holding meetings for the purpose of reaching decisions. In government, there are occasions when meetings are held to promote good will rather than for any specific operational purpose. I recall one of the first meetings I had in the Department of Justice. It was a meeting with the head of another agency and its general counsel. They had a problem with regard to a backlog of cases. I was prepared for the meeting, and as it opened I said, "Let's attack this backlog. Now, how many cases are there, what categories are they in, what geographic areas do they cover, how long have they been backlogged, and how many persons will it take, lawyers and investigators, to resolve the backlog?" As I was speaking I could see the lawyers in the Department who were present starting to slide under their chairs and couches in embarrassment. When the representatives of the other agency began to speak, they said, "Well, we don't know exactly how long these cases have been pending and we haven't done the geographic review of where they are, and we haven't age-dated them, we don't know the dollar volume of

categories." I was a little perturbed at that point and I began to suggest that maybe we ought not to have had a meeting until the other agency's executives were prepared, whether it took a week, two weeks or a month or whatever. At that, everyone in the room, all the governmental people, turned white, and the meeting ended shortly thereafter. I realized that from then on, I was known in some quarters as "un-civil" Civiletti.

Since then I have come to appreciate that the meeting was a spiritual meeting. It was to perform the function of a laying on of hands so that the heads of the two units, Justice and its counterpart agency, could say, "I'm a good fellow and you're a good fellow and we will work together and have our workers solve these problems." Since it was a spiritual meeting, I had made a bad mistake in trying to make specific action decisions.

On the other hand, some skills and tasks of a trial lawyer are comparable to those needed by the Attorney General. The Attorney General needs to be observant, perceptive, careful and precise. In addition, a certain amount of oratory, though not essential for an Attorney General, is helpful. Preparation for trial of some cases requires the lawyer to become a temporary expert in unfamiliar fields. This aspect of a trial lawyer's skill is also required of an Attorney General. As I have indicated, the Department of Justice has more than a dozen



functions and duties which have little to do with the law and nothing to do with litigation. But, as I have said, a trial lawyer also has to acquire the ability to learn new subjects quickly. I have found that process, since becoming Attorney General, to be an exhilarating one.

Assuming that an Attorney General has integrity and is reasonably intelligent, the quality required above all else is the capacity to be a leader. This quality usually is not required for a trial attorney. That is why legend number two, the Department is so large that the Attorney General cannot influence the bureaucracy, is so wrong. Leadership is important to the role of the Attorney General because his role is essentially to provide vision, set goals, and inspire performance. I have found the men and women of the Department of Justice to be able, dedicated, and anxious to follow sound policies and reasonable directions. They take justifiable pride in the collective and individual achievements of the Department and its programs. When I spent three full days in the Department Library researching and preparing for the oral argument on the Wage-Price case in the Court of Appeals for the District of Columbia, the fact that the Attorney General was personally reading cases and preparing for court spread throughout the Department within hours.

In the exercise of his managerial talents, the Attorney General has to exercise great discretion in selecting the

issues on which he is going to devote his time. If any executive cannot exercise authority with some comfort and cannot discriminate between those matters which are significant and those which are routine, he or she is apt to be overwhelmed in any management position in the Department of Justice. He surely will be overwhelmed if he is Attorney General. The Attorney General must say no.

I agree with that part of legend number three that says that much litigation in the Department could be handled without an Attorney General. The routine, responsive or reactive cases would be brought and defended, they would be litigated, and generally the routine business of the Department would work well. But the Office of the Attorney General, in my view, should not be concerned with very much of that litigation; rather, it should be concerned primarily with development of new, innovative processes and litigation to meet the ever-changing demands made on the Department of Justice by our society. That is why I disagree so profoundly with legend number two, which has it that it really doesn't make much difference who is Attorney General.

Let me illustrate. Attorney General Levi decided that he could best spend most of his time re-establishing the independence and the incorruptibility of the Department which had been sullied as a result of the involvement of Department

officials in the Watergate scandal and the revelations of other excesses. He was particularly concerned to establish guidelines for the lawful, fair, and efficient operation of the FBI. He also planted the seeds for the definition of the relationship between the law and intelligence gathering. The seeds planted by Attorney General Levi resulted in the concept of congressionally approved charters for intelligence operations and for the FBI.

One common theme expressed by my two most recent predecessors as Attorney General is surprise at the amount of time that the Attorney General must spend on matters related to the national security of this country. The disclosures in the mid-1970s that the foreign intelligence activities of our government had sometimes been conducted with an insufficient regard for legal constraints point out that a vacuum had existed as to the legal oversight and guidance of our intelligence agencies. Congress had barely legislated on the subject, and has only partially filled the gap since that time. It has fallen to the Attorney General to provide advice not only as to whether the policies under which the intelligence agencies operate meet constitutional standards, but also to review and approve specific operations which touch on the rights of American citizens.

The amount of time that I must devote to these matters was less of a surprise to me than to Attorney General Levi or Judge Bell, since I had an opportunity to observe firsthand the difficult issues that Judge Bell was presented with in the first two years of the Carter Administration. In this case, however, forewarned was not necessarily forearmed. I must still personally approve every electronic surveillance application filed with the Foreign Intelligence Surveillance Court, as well as a number of other relatively intrusive investigative techniques. Perhaps more importantly for the long run, the Executive Order that President Carter promulgated in January of 1978 to govern intelligence activities, Executive Order 12036, contains elaborate requirements that the collection of information concerning U.S. citizens be conducted only pursuant to regulations drafted by the heads of the intelligence agencies and approved by the Attorney General. The need to approve these detailed sets of procedures brings the Attorney General, with his legal perspective, into many of the finer details of foreign intelligence collection. The legal issues presented are often novel and complex, but they are now being carefully thought through and resolved.

In this area of secret activity, the Attorney General must, in a sense, substitute his own judgment for the adversarial process under which the legitimacy of government activities is determined publicly in the courts. But in

addition, the FBI, with its responsibility for foreign counterintelligence activities, is an integral part of the Department that I head. My responsibilities as manager of that Department thus combine with the legal needs of the intelligence community as a whole to demand that I devote many hours to the exotic problems of the intelligence agencies -- an experience that has little counterpart in private practice.

Similarly, my immediate predecessor, Judge Bell, emphasized innovation and new directions in his work. He established the Office for Improvements in the Administration of Justice in the Department. From that effort have come the Magistrates Act, the Disputes Resolution Act, and impetus even for the Omnibus Judgeships bill. He also brought to fruition the Foreign Intelligence Surveillance Act and its court.

For the future, I think that you can expect further strong support from the Carter Administration in improvements in the public's access to justice. I believe you can also expect greater emphasis on enforcement of civil rights in voting, employment, housing, and education, and strengthening of civil liberties. You can also expect to see the Department emphasize stronger enforcement of the environmental protection laws so essential to the future well being of all Americans.

The Land and Natural Resources Division, which is the

smallest of the Department's litigating divisions, has been hard-pressed to carry out its mission in the field of environmental protection. Frankly, when the environmental agencies were created eight to ten years ago, the Department did not respond adequately to the emerging challenge.

I determined to correct this situation. Thus, since I have become Attorney General in August of 1979, I have declared environmental protection to be one of our high priorities for new initiatives; a new section was created in October of 1979 to deal with toxic and hazardous waste; the new Hazardous Waste Section has already filed massive litigation against Hooker Chemical and has also filed several lesser suits; a second new section was created last October to strengthen our handling of wildlife matters. Its first priority is the massive illegal import of endangered species and/or diseased wildlife into the United States.

In addition to these steps, I have recently made a number of decisions which will further strengthen our efforts in this area. For example, we have organized a radiation hazards unit in the new toxic and hazardous waste section to deal with the Uranium Mill Tailings problem.

Finally, I think you can expect to see more precision applied in the investigations and prosecutions throughout the

Department, but particularly in enforcement of the criminal law. We have, I believe, already seen a dynamic change. In place of a widely scattered, unprogrammed series of criminal cases, we are now concentrating criminal law enforcement on prosecutions of particular kinds of crimes which are devastating to the country as a whole. I refer to cases involving organized crime, drug trafficking, public corruption, and white collar crime. We have, I believe, improved the effectiveness of the investigative work of the FBI in those areas and we have developed fine teamwork between the lawyers' responsibilities in the Criminal Division and the U.S. Attorneys' offices and that of the Special Agents in the Bureau. Director Webster is an exceptional leader and has done an excellent job of heading the FBI.

Lastly, but, I believe, most importantly, we have institutionalized to a large degree the independence of the Department of Justice from the political process. This change was commenced by my two predecessors, Attorneys General Levi and Bell. In addition, we have now adopted written policies which were developed to maintain the independence and integrity of the decision-making process leading to the commencement of investigations and the filing of indictments. We have done this to guard against unseemly interference and to preserve both the substance and appearance of merit decisions.

President Carter has not received enough credit for his constant strong support of this process. I think both Presidents Ford and Carter deserve great credit for their support in making the Department of Justice as independent as our Constitution permits. Moreover, with this steady development of continuity between different political parties and different Attorneys General, I believe we have now institutionalized these changes to such an extent that no President and no Attorney General, no matter how ill-chosen, could successfully erode that essential independence.